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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1888

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.
SAMUEL FREEMAN MILLER, Associate Justice.
STEPHEN JOHNSON FIELD, Associate Justice.
JOSEPH P. BRADLEY, Associate Justice.
JOHN MARSHALL HARLAN, Associate Justice.
STANLEY MATTHEWS, Associate Justice.[1]
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. Justice Matthews, by reason of illness, took no part in the decision of any of the cases reported in this volume, except *Liverpool and Great Western Steam Co.* v. *Phenix Insurance Co.*, *Same* v. *Insurance Co. of North America*, and *Allen* v. *Smith*, all argued or submitted at the last term.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1888.

McCORMICK *v.* GRAHAM'S ADMINISTRATOR.[1]

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

No. 108. Argued December 5, 6, 1888. — Decided January 7, 1889.

Claims 1 and 2 of letters patent No. 74,342, granted to Alvaro B. Graham, February 11, 1868, for an improvement in harvesters, namely, "1. The combination, as set forth, in a harvester, of the finger-beam with the gearing-carriage, by means of the vibratable link, the draft-rod, and the two swivel-joints, M and M′, so that the finger-beam may both rise and fall at either end, and rock forward and backward. 2. The combination, as set forth, in a harvester, of the finger-beam, gearing-carriage, vibratable link, draft-rod, swivel-joints, and arm, by which the rocking of the finger-beam is controlled," are not infringed by a machine constructed under letters patent No. 193,770, granted July 31, 1877, to Leander J. McCormick, William R. Baker, and Lambert Erpelding, assignors to C. H. & L. J. McCormick.

It is apparent from the proceedings in the Patent Office on the application for Graham's patent, and from the terms of his specification and of claims 1 and 2 as granted, that the intention was to limit the modification which Graham made, to the particular location of the swivel-joint, M′, on which the crosswise rocking movement takes place, and to the rigid arm by which the positive rocking of the finger-beam in both directions is affected and controlled.

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[1] The docket title of this case is *McCormick and others* v. *Whitmer, Administrator of Graham.*

In the defendants' machine there is no such rocking of the finger-beam as in Graham's patent, but only a swinging movement, as in prior patents, on a pivot in the rear of the finger-beam; and there is no arm which can depress the finger-beam, but only a loose connection to it, the same as existed before; and there is no swivel-joint, M′, located and operating as in the Graham patent; and it does not infringe claim 1 or claim 2.

In equity, for an accounting for infringement of letters patent. Decree awarding damages to the complainant.

Respondents appealed. The case is stated in the opinion.

Mr. Robert H. Parkinson, with whom was *Mr. Joseph G. Parkinson* on the brief, for appellants.

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

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Northern District of Illinois, by Hugh Graham against Cyrus H. McCormick, Leander J. McCormick, and Robert H. McCormick, on the 8th of June, 1877, founded on the alleged infringement of letters patent No. 74,342, granted to Alvaro B. Graham, February 11, 1868, for an "improvement in harvesters." In the course of the suit the defendant Cyrus H. McCormick having died, his executor, Cyrus H. McCormick, and his executrix, Nettie Fowler McCormick, were substituted as defendants in his stead.

The defences set up in the answer were want of novelty and non-infringement. After issue joined, proofs were taken on both sides, and on the 24th of April, 1882, the court made an interlocutory decree, holding the patent to be valid as regarded its first and second claims, decreeing that the defendants had infringed those claims, awarding a recovery of profits to the plaintiff from the 12th of August, 1870, the date of the assignment of the entire patent by the patentee to the plaintiff, and referring it to a master to take an account of profits and damages. On the 21st of July, 1884, the master made a report awarding a sum of money in favor of the plaintiff, to

which both parties filed exceptions. On a hearing, the court sustained some of the defendants' exceptions and overruled all others, and rendered a money decree in favor of the plaintiff. Both parties prayed appeals to this court, but the plaintiff did not perfect his appeal. Since the record was filed in this court, the plaintiff has died, and his administrator, Peter Whitmer, has been substituted in his place as appellee.

Only claims 1 and 2 of the patent are involved. The specification states, among other things, that one object of the improvements which constitute the invention set forth in the patent, is to obtain a greater capacity of movement in a floating finger-beam, while retaining its connection with a gearing-carriage that is drawn forward by a stiff tongue; that, to that end, the first of the improvements of the patentee "consists of the combination of the finger-beam with the gearing-carriage by means of a vibratable link extending crosswise to the line of draft, a draft-rod extending parallel with the line of draft, and two swivel-joints, the one for the vibratable link, and the other for the draft-rod, so that the finger-beam can rise and fall at either end, and rock forward or backward independently of the gearing-carriage, while maintaining its connection with it;" and that his "next improvement consists of the combination of the finger-beam, gearing-carriage, vibratable link, draft-rod, and swivel-joints, with an arm connected with the finger-beam, to enable it to be rocked for the purpose of setting its guard-fingers at any desirable inclination to a horizontal line."

The specification further says: "My improvements may be embodied in a machine having the finger-beam arranged in advance of the axial line of the shaft or arbor of the driving-wheel, or arranged in the rear of that axial line. In the former case, the vibratable link that connects the finger-beam with the gearing carriage will be arranged in advance of the driving-wheel, and in the latter case in the rear of the driving-wheel. In the former case, also, the rod, hereinbefore called a 'draft-rod' (because the strain to which it is subjected is a pulling-strain) becomes a pushing or thrust rod, and connects the inner end of the finger-beam with the rear of the gearing-

carriage. In the former case, the radius-bar for the reel and raking-platform connects with the rear end of the gearing-carriage, and in the latter case with its front end. I prefer to construct a harvesting-machine with the finger-beam in the rear of the line of the axle of the driving-wheel, and, as a description of such a machine, perfected by my improvements, will enable them to be fully understood, all of my improvements are embodied in the harvesting-machine of that description which is represented in the accompanying drawings, and which is an illustration of the best mode which I have thus far devised of embodying them in a working-machine."

There are twelve figures of drawings. The specification states that the machine is what is commonly called a "combined machine," and is adapted to reaping and mowing; that, when used for the former purpose, it is arranged as represented in figures 1 to 6; that, when used for the latter purpose, certain of its parts are removed, as thereinafter stated, and a grass-divider is substituted for the grain-divider, at the outer end of the finger-beam; and that the gearing which imparts motion to the sickle and reel is mounted upon a carriage, A, which is supported by two running or ground wheels, and is provided with a tongue to which the horses are hitched.

The parts of the specification which relate particularly to the subject-matter of claims 1 and 2 are as follows: "The finger-beam G of the machine projects at one side of the rear end of the gearing-carriage A, and is fitted with guard-fingers, H, through the slots of which a scalloped cutter, I, is arranged to reciprocate endwise. The end of this cutter that is nearest the gearing-carriage is connected with the crank-wrist g of the crank-shaft D^2, by means of a connecting-rod, J. The finger-beam is connected with the rear end of the gearing-carriage in the following manner: The end of the beam nearer the carriage is provided with a shoe, K, from which lugs a a project upward. These lugs are perforated to admit a joint-bolt, a^1, which connects the shoe with one end of a vibratable forked link, L, whose other end is connected by a swivel-joint, M, with a bracket, N, secured to the rear of the gearing-carriage. This swivel-joint is formed by a cross-head (m, Fig. 1^a), the

centre of which is bored transversely, to permit a journal formed on the end of the forked link L to turn in it. The ends of the cross-head *m* are formed into journals, which turn in bearings upon the bracket N. Hence the finger-beam can both rise and fall freely at either end, and rock forward and backward, without twisting the link that forms its connection with the gearing-carriage. Moreover, the axis of the cross-head *m* of the swivel-joint is arranged in line, or thereabout, with the axis of the crank-shaft D^2, that imparts motion to the cutter, so that such rising or falling, or rocking, does not materially change the distance between the crank-shaft and the cutter. The shoe K of the finger-beam is connected also with the front end of the gearing-carriage by a draft-rod, O, and the connection between the rear end of this draft-rod and the said shoe is a swivel-joint, M′, of which the joint-pin a^1 of the vibratable link L is the longitudinal axis, and its T-head m^1 the horizontal axis. This swivel-joint, therefore, while maintaining a firm connection with the draft-rod, gives free play for both the longitudinal and rocking movements of the finger-beam. Hence, when the machine is used for cutting grass, the said finger-beam may be left free, not only to rise and fall at either end, but also to rock or to be rocked forward and backward, so that the points of its guard-fingers incline toward or from a horizontal plane. In order that the finger-beam may be rocked by the conductor of the machine, the vibratable link L is fitted with an arm, *l*, whose upper end is connected by a rod with the lower end of a lever, P, that is pivoted to the gearing-carriage near its forward end. The upper end of this lever P extends within the reach of the driver, who sits upon the driver's seat, Q, so that he may rock the finger-beam by moving the said lever to and fro. This rocking lever P is fitted with a spring-bolt, whose end can engage in any one of a number of notches formed in a segment, R, which is attached to the gearing-carriage concentrically with the pivot of the rocking lever, so that the finger-beam may be fastened in the desired position by the engagement of the spring-bolt in the appropriate notch. The rocking lever is fitted with a lever-handle, *p*, and rod connect-

ing with the spring-bolt, by which the spring-bolt may be withdrawn from the notched segment and held disengaged therefrom during the movement of the lever. In order that the connection between the cutter on the finger-beam and the crank-shaft on the gearing-carriage may not obstruct the free rocking of the finger-beam, the connecting-rod J is connected with the cutter I by means of a swivel-joint, S, consisting (see Fig. 1^b) of a head, *s*, that is pivoted to the cutter-stock (by a shank that extends lengthwise therewith, and turns in an ear, s^1, secured to the end of the cutter-stock), and of a cross-pivot, s^2, that passes through the said head and through two ears formed upon the connecting-rod J."

There are ten claims in the patent, claims 1 and 2 being as follows: "1. The combination, as set forth, in a harvester, of the finger-beam with the gearing-carriage, by means of the vibratable link, the draft-rod, and the two swivel-joints M and M^1, so that the finger-beam may both rise and fall at either end, and rock forward and backward. 2. The combination, as set forth, in a harvester, of the finger-beam, gearing-carriage, vibratable link, draft-rod, swivel-joints, and arm, by which the rocking of the finger-beam is controlled."

It will conduce to a solution of the questions involved in the case, to give a history of the progress of the application for the patent through the Patent Office, as gathered from certified copies of those proceedings found in the record. On the 4th of December, 1865, the patentee, Alvaro B. Graham, as assignor to himself, William B. Werden, and Cyrus A. Werden, filed in the Patent Office an application for a patent, which was sworn to by him on the 25th of February, 1864. The specification of this application stated that one object of the invention was the free passage of the finger-bar over the ground, and the perfect moving of it to adjust itself to the inequalities of surface over which it might pass; and that another object of the invention was the cutting in a proper manner of lodged grass or grain. It also stated that the machine had a finger-bar, I, the inner end of which was attached, by a joint, *h*, to a bar, J, which was at the rear of the main frame, A, and was connected thereto, at its left-hand side, by a swivel or universal joint,

K, such joint being composed of a rod, *i*, which was allowed to turn in a bearing, *j*, attached to the main frame, the end of the bar J being cylindrical and allowed to turn in the rod *i*; that the joint K admitted of the bar J and finger-bar I being raised vertically, and also admitted of those bars being turned in a more or less inclined position, in their transverse section, to admit of the fingers and sickle being turned more or less down towards the ground, as might be required; that this adjustment of the fingers and sickle was effected through the medium of a lever, M, which was connected by a rod, *l*, with an upright, *m*, on the bar J; that this lever M might be retained in any desired position, within the scope of its movement, by means of a perforated bar, *n*, into the holes of which a pin on the lever caught; that the finger-bar I might be raised separately from the joint *h*, as a centre, through the medium of a lever, N, which, like the lever M, was attached to the main frame A, and had a chain or cord attached to its lower end, said chain or cord passing around a pulley, *q*, on the bar J, and being attached to the upper end of an upright, *r*, attached to the finger-bar at the joint *h*; that both bars, I and J, might be elevated simultaneously by a lever, O, which was also attached to the main frame A, and bore at its lower end on another lever, P, the outer end of which was connected by a chain, *s*, with the bar J; that the lever O might be retained at any desired point, within the scope of its movement, by means of a rack-bar, P′; that, in case an obstruction presented itself to the inner end of the finger-bar I, the lever O was actuated in order to raise such end of the finger-bar, and, if an obstruction presented itself to the outer end of the finger-bar, the lever N was actuated; and that the applicant did not claim the connecting of the finger-bar I to the bar J, by a joint *h*, for that had been previously done.

There were five claims in the specification, the first two of which were as follows: 1. "The attaching of the bar J to the main frame A by means of the swivel or universal joint K, when used in combination with the finger-bar I, attached to it by a joint, *h*, and this I claim irrespective of any peculiar position of the parts or particular application of the same to the

frame of the machine, so long as the desired result is obtained." 2. "The arrangement of the lever N, chain or cord *p*, and upright *r*, substantially as shown, for raising the outer end of the finger-bar I, as set forth." On the 30th of December, 1865, the Patent Office rejected claims 1 and 2 on a reference to prior patents. On the 24th of March, 1866, the applicant erased claims 1, 2 and 3, and substituted for claim 1 the following: 1. "The combination of the finger-bar I and bar J attached to the frame A by means of the universal joint or swivel K, in the manner and for the purpose herein specified." On the 4th of April, 1866, the Patent Office rejected this substituted claim 1, by a reference to a prior rejected application and to a prior patent. On the 1st of October, 1866, it allowed the two remaining claims applied for, which had been numbered 4 and 5 originally. On the 18th of June, 1867, the applicant filed a withdrawal of the amendments filed March 24, 1866, the effect being to limit the invention claimed under the patent to the two claims allowed October 1, 1866, and the patent was granted July 23, 1867, as No. 67,041, with those two claims, which in no manner relate to any question involved in the present suit.

Prior to such withdrawal of June 18, 1867, and on the 11th of February, 1867, Mr. Graham filed an application which resulted in the patent in suit, No. 74,342, issued February 11, 1868. Claims 1 and 2 of the specification of that application originally read as follows: 1. "The combination, in a harvester, of the finger-beam with the gearing-carriage, by means of a vibratable link, draught-rod, and two swivel-joints, so that the finger-beam may both rise and fall at either end, and rock forward and backward, substantially as set forth." 2. "The combination, in a harvester, of the finger-beam, gearing-carriage, link, draught-rod, swivel-joints, and arm, by which the rocking of the finger-beam is controlled, substantially as set forth." There were fifteen claims in all made in the specification. On the 29th of July, 1867, the Patent Office rejected claims 1 and 2, by a reference to prior patents. On the 31st of December, 1867, the applicant amended claims 1 and 2 so as to read as they are in the patent as granted. The changes

thus made in those two claims, and which, under the circumstances, were made to secure the issuing of the patent, the claims having been rejected in the shape in which they were first proposed, were these: In claim 1, "the combination as set forth," was substituted for "the combination;" "the vibratable link," for "a vibratable link;" "the draught-rod," for "draught-rod;" "the two swivel-joints, M and M′," for "two swivel-joints;" and the words "substantially as set forth" were erased. In claim 2, "the combination as set forth," was substituted for "the combination;" "vibratable link," for "link;" and the words "substantially as set forth" were erased. In the second claim the word "the" was always prefixed to the enumerated elements composing the combination claimed.

The principal question for determination, in the view we take of the case, is that of infringement. The Circuit Court, in its opinion, delivered on the making of the interlocutory decree, (10 Bissell, 39, and 11 Fed. Rep. 859,) considered especially two prior patents, one granted to David Zug, October 4, 1859, No. 25,697, and the other granted to F. Ball, October 18, 1859, No. 25,797. In considering those patents, on the question of infringement as well as on the question of novelty, the Circuit Court said: "The two claims of the Graham patent, which are alone in controversy here, are the first and second. The first claim is for a combination of the finger-beam with the gearing-carriage by means of the vibratable link, the draft-rod, and the two swivel-joints, M and M′, so that the finger-beam may both rise and fall at either end and rock backward and forward; and the second claim is the same as the first with this only added, that an arm is attached to the vibratable link by which the rocking of the finger-beam is controlled by the driver. The object of this invention, as set forth in these two claims, seems to be mainly to produce the rocking motion of the finger-beam as described and by the method described. In the Ball patent, while there may be said to be something equivalent to the swivel-joint M of the plaintiff's machine, where it is attached to the frame, and also something similar to the draft-rod and the arm, there is noth-

ing to produce the rocking motion, which is the essential object in the first two claims of the plaintiff's machine; and consequently there is no swivel-joint M′, as in the plaintiff's machine; so that there is nothing in the Ball machine to prevent the validity of the combination in the first two claims of the plaintiff's patent. The Zug machine has, if not a swivel-joint like that of the plaintiff's at M, where connected with the frame, something which seems substantially similar. It has a vibratable link and it has something which is equivalent to the draft-rod, the main difference being that it is attached beneath the shoe instead of above, but there is no swivel-joint M′. There is an arm which is attached to the draft-rod and shoe by which it can be raised and lowered, but Zug claims in his patent that when the machine is in progress over the field, and when the finger-bar strikes any obstacle, there is a device in a box in which the forward part of the draft-rod is fastened, by which the finger-bar yields to the obstacle; and that there is also a mode by which the vibratable rod is attached to the frame, called 'joint 16,' in his patent, and what has been termed an open clevis where the vibratable link is connected with the draft-rod, by which a motion is given to the finger-bar, and thus the finger-bar is relieved from the obstacle. Zug does not claim that the finger-bar in his machine has a rocking motion, but only that the mode by which the draft-rod is fastened and the motion given to the finger-bar, prevents the obstacle which the machine may meet from doing damage to it. These seem to be the main differences between the two machines, and the question is, whether there is anything in the Zug machine to prevent the combination named in the first two claims of the plaintiff's patent from being valid. The defendants' machine has the swivel-joint attached to the frame, the vibratable link in the same form as the plaintiff's, and the draft-rod attached forward in substantially the same way as the plaintiff's, but instead of having a swivel-joint at M′, as stated in plaintiff's machine, forward of the shoe, the draft-rod has a swivel-joint at the rear end of the shoe; and there is an arm attached to a part of the vibratable link substantially like that of the plaintiff's;

and the substantial difference, as it seems, between the plaintiff's device as described in the first and second claims, and that of defendants', is, that the draft-rod is attached to the rear part of the shoe, and not to the forward part, as in the plaintiff's patent. There are also other devices in the defendants' machine which may make it different from the plaintiff's. But as to the swivel-joint, the vibratable link, and the mode in which the motion is produced in the finger-bar, there does not seem to be much difference in substance; and in both machines, and by substantially the same means, there is produced a rocking motion. In this connection it is noticeable that the defendants, in the claim set forth in the specification of their patent, make a rocking motion of the shoe and cutter a feature of their combination. In their second claim they say that they claim the combination of the 'shoe, and the drag-bar extending over and in rear of the shoe, and its swiveled pin connecting it with the rear end of the shoe, whereby the drag-bar sustains the thrust of the shoe while leaving it free to rock on its hinges.' Again, in their fifth claim, they say that they claim the combination 'of the shoe, the forked coupling-arm, the drag-bar extending over and in rear of the shoe, the swivel-pin connecting the two, the rocking lever and the detent mounted on the drag-bar, and the adjustable link connection between the lever and coupling-arm, whereby the shoe readily may be rocked or adjusted.' And again, the motion which seems to be produced in the operation of plaintiff's machine is more distinctly described in the seventh claim made by the defendants in their patent, as follows: The combination 'of the shoe, the drag-bar, the forked coupling-arm,' and the other elements of mechanism before mentioned, 'whereby the shoe is first rocked, and then lifted by one continuous movement of the lever.' It must be confessed that the difference between the Zug machine and the first two claims of plaintiff's patent is not very marked. But in view of the description contained in the specifications of Zug's patent and in those of the plaintiff's patent, we are inclined to think that the plaintiff's patent may be sustained on the ground that there is a difference in the manner in

which the draft-rod is attached to the shoe, and the finger-bar to the shoe and to the vibrating link; and that there is also a difference in the manner in which the combination of the various parts are adjusted; and that there is an effect produced in the plaintiff's machine which does not exist in the Zug machine. In the plaintiff's machine there is a rocking motion, and not a mere vibratory motion, such as exists in the Zug machine in consequence of the open clevis; neither is there in the plaintiff's machine the yielding of the draft-rod, as described in the Zug patent; and it is obvious, too, from the manner in which the parts are constructed in the Zug machine, that there is only a small vibratory action of the finger-bar; so that, on the whole, we think that the combination as described in plaintiff's patent may be sustained. Then, from what we have said, we do not see that there can be any substantial difference between the combination, as described, in the plaintiff's machine, of the swivel-joints, draft-rod, and vibratable link, with the frame and shoe and finger-bar, and that of the defendants' machine. The differences which have been stated between the two machines in this respect do not constitute any difference in principle. The one is substantially the same as the other. The additions which have been made to defendants' machine, such as the device by which the pressure of the cutting apparatus upon the ground is regulated, and other devices which have been made, do not affect the combination as claimed in the plaintiff's machine. The attachment of the draft-rod to the rear part of the shoe instead of to the front part, which is substantially the only difference that there seems to be in the mode of construction, cannot constitute a difference in principle, and cannot prevent the defendants' machine from being an infringement of the plaintiff's patent. It may be said that there are differences also between the defendants' machine and that of the plaintiff, in the manner in which the arm is attached to the vibratable link, and also as to the mode in which the force applied to the arm may operate upon the finger-bar; but these are differences of form and not of substance."

The specification referred to in that opinion as the specifica-

tion of the defendants, and quotations from claims 2, 5 and 7 in which are made, is a patent under which the defendants' machines were constructed, No. 193,770, granted July 31, 1877, to Leander J. McCormick, William R. Baker, and Lambert Erpelding, assignors to C. H. and L. J. McCormick.

The invention of the patentee is carried back to November or December, 1863, at which time he made a model containing his perfected invention, which he shortly afterwards sent to his patent solicitors, and which was sent to the Patent Office with the application sworn to February 25, 1864, and filed December 4, 1865. The delay seems not to have been attributable to the applicant.

The patents introduced in this case as affecting the questions of novelty and infringement, and which were prior to the invention of Graham, and which seem to be relied on by the appellee, were as follows: To George C. Dolph, No. 18,141, issued September 8, 1857; to W. S. Stetson and R. F. Maynard, No. 24,063, issued May 17, 1859; the Zug patent; the Ball patent; and one to Stephen S. Bartlett, No. 34,545, issued February 25, 1862.

We are of opinion that the Circuit Court took an erroneous view of the question of infringement. The capacity of the finger-beam to "rise and fall freely at either end," spoken of in the specification of the plaintiff's patent, was not a new thing with him, but had been used for many years in mowing and reaping machines, the finger-beam moving on a pivot at its inner end; and the plaintiff, in the specification of his patent of July 23, 1867, stated that he did not claim the connecting of the finger-bar, I, to the bar, J, by the joint, *h*, because that had been previously done. It was also old to have a lever connected by a loose connection, by which the driver could tip up the front edge of the finger-bar arbitrarily, and secure it so that it could not fall below the inclination at which he had set it, although it was left free to tip up further automatically.

The arrangement spoken of in the plaintiff's specification, whereby the finger-beam can "rock forward and backward without twisting the link that forms its connection with the

gearing-carriage," was secured by making the pivot on which the crosswise tilt takes place, at a point in front of the beam, so that the pivot rises and falls with the guard-fingers, and an arm is provided by which the movement of the finger-beam in both directions is controlled by the driver, instead of its being independent of his control in its downward movement, as was the case in prior machines. It is apparent, from the proceedings in the Patent Office on his application, and from the terms of his specification and of claims 1 and 2 as granted, that the intention was to limit the modification which he made, to the particular location of the swivel-joint, M', on which the crosswise rocking movement takes place, and to the rigid arm by which the positive rocking of the finger-beam in both directions is effected and controlled.

In a mowing machine for cutting grass, where it is desirable to cut near to the ground in order to cut and use as much of the grass as possible, the front edge of the finger-beam must bear closely on the surface of the ground, with a yielding pressure, so that it will rise freely in order to pass over such irregularities in the surface of the ground as do not require that the finger-beam should be bodily lifted. This yielding pressure is secured by a capacity in it to swing upward on its heel as a pivot, because, if its front edge were held rigidly down upon the ground, the guard-fingers would be driven into every obstruction. This necessity does not exist in machines for harvesting grain, because in them the finger-beam is set several inches above the ground, the grain being the desirable object, rather than the straw, and the carrying of the finger-beam at an elevation prevents its meeting with obstructions; and hence there is no such occasion, as in mowing machines, for its front edge being left free to swing upward.

The capacity, if any, which Graham added to the machines in general use, was one for raising and lowering the pivot of oscillation, which had before been stationary, and a further capacity for a positive downward tilt or forward rocking, which enabled the driver to tip up the heel of the finger-beam and force the fingers under lodged grain or grass. The rocking forward and backward, spoken of in the plaintiff's specifi-

cation, is applied to a tilting backward which rocks the front of the finger-beam upward, and to a tilting forward which rocks the heel of that beam upward and its front downward. In the defendants' machine, there is no such rocking backward and forward, but there is a swinging motion, the same as in the prior Ball patent, the pivot on which the tilting takes place being in the rear of the finger-beam, and there being no means of positively tipping the front of the beam downward or of raising its heel to force its front edge and the finger-guards downwards. In the Ball patent, the draft-rod passes under the finger-beam, and in the defendants' machine the draft-rod passes over the finger-beam, to reach the pivotal point, which is in both cases the same. In both of them, the weight of the finger-beam being in front of the pivot tends to hold its front edge down upon the ground, but, when the finger-guards strike any elevation, the front edge of the beam swings up freely on its rear pivot, the tendency being for its weight to carry it back to its original position as soon as the elevation is passed. In the Ball patent, there is a lever connected with a chain which can raise the finger-beam or hold it up, but cannot affirmatively depress it, its downward movement being dependent solely upon the fact that its weight is in front of the pivot on which it turns. In the defendants' machine, there is a substitute for the Ball chain, namely, a loose sliding link, which permits of the same upward movement that the chain does, and which cannot force or hold the beam down. In both the Ball machine and the defendants' machine, the propelling force from the draft-rod is exerted from the pivot in the rear, and in both the front edge of the finger-beam, where the guards are situated, is left free for the swinging movement above mentioned.

In contradistinction to this, the pivotal connection between the finger-beam and the draft-rod in the plaintiff's machine, instead of being at the heel of the finger-beam, is placed in front of it, at the swivel-joint, M′, and a rigid arm, *l*, is mounted on the vibratable link, so that the beam can thereby be rocked backward and forward by the driver, to tip the heel of the shoe up and the front down, or the front up and

the heel down, the heel of the finger-beam being lifted by the forward rocking of the arm *l*, and its front being lifted by the backward rocking of such arm. By the locking of the lever which works the arm, the finger-beam can be set at any desired inclination. The movement of the finger-beam in each direction is positive. In the defendants' machine, it swings on a pivot at its rear, which is not raised or lowered by the upward or downward tilt of the guard-fingers, while in the plaintiff's machine, as the finger-beam rocks on the swivel-joint M', the heel of the finger-beam is lifted from the ground as the finger-guards are turned downward.

In the Zug patent, of October, 1859, there is a finger-beam attached to the rear end of the machine by a vibratable link, which is itself attached at its rear end loosely to the machine, and is also fitted loosely within the draft-rod, so that there is a considerable rising and falling motion to the front end of the shoe, whereby the guard-fingers can be elevated and depressed to a considerable extent, and in substantially the same manner as in the defendants' machine, the raising and lowering of them being accomplished at a similar point as in the defendants' machine, the difference in the rising and falling motion of the finger-beam in the Zug and in the defendants' machine being a difference only in degree.

In the Ball patent of October, 1859, there is a finger-beam attached by a hinged, vibratable link, and there is a draft-rod, which is hinged at its front end. A shoe is attached to the rear end of the draft-rod, with a free up-and-down hinged joint. The finger-beam of the machine is attached in front of this hinge, and such hinged connection admits of the rising and falling of the front of the shoe and of the finger-beam. This motion is not a rocking motion, as in the plaintiff's patent, but is substantially the same rising and falling motion that is found in the defendants' machine, the only material difference being that, in the Ball patent, the draft-rod extends under the shoe and the finger-beam, and prevents them from falling down lower than a horizontal position; whereas, in the defendants' machine, the draft-rod extends over the shoe and finger-beam to the same point of attachment as in the Ball patent

and thus the finger-beam can fall lower than in the Ball patent, and even to below a horizontal position; but the finger-beam in the Ball patent can rise and fall as freely at either end as in the defendants' or the plaintiff's machine, and the crosswise rising and falling motion in the Ball patent is of the same character as in the defendants' machine, but wholly unlike the rocking motion, or the forward and backward motion, of the finger-beam in the plaintiff's patent.

In the Bartlett patent of February, 1862, there is a finger-beam attached at its rear by a vibratable link, which has a swivel-joint at its outer end and a free joint at its inner end, in connection with a shoe and with a draft-rod which extends from the front end of the machine to the rear end of the shoe; and the finger-beam is attached to the shoe in front of the vibratable link. There is also a lever which rocks forward and backward, and is so arranged that the finger-beam and the draft-rod rise and fall, and the finger-beam rocks forward and backward, substantially in the same manner as in the plaintiff's patent, though with a less perfect motion. But there is considerable forward and backward rocking motion, and the rocking takes place with substantially rigid lever devices, and there is substantially the same rising and falling motion of the finger-beam at either end as in the plaintiff's patent.

In view of this prior state of the art, the question of infringement stands in this way: In the defendants' machine, there is, in combination with the gearing-frame, a vibratable link connection with the finger-beam, not very materially different from the vibratable link connection in the plaintiff's patent; but the draft-rod in the defendants' machine is different from that of the plaintiff's patent, in that its forward connection is not substantially a swivel-joint, but is so hinged as to afford no torsional action, and the draft-rod is connected with the shoe at nearly the extreme rear end of the shoe, while the draft-rod in the plaintiff's patent has swivel-joints at both its forward and rear ends, and such joints have substantially a free torsional capacity. So, too, the draft-rod in the plaintiff's patent is attached to the shoe in front of the finger-beam,

instead of at the extreme rear end of the shoe, as in the defendants' machine. As a consequence of these several arrangements, the finger-beam in the plaintiff's patent rocks freely both forward and backward, in such manner that the rear of the finger-beam may be elevated and the guards be thrown down, or the front of it may be elevated and the guards be thrown up, with an equal rocking motion in either direction; whereas, in the defendants' machine, when the finger-beam is operated upon by the lever, the front part of it merely rises and falls with a swinging motion from its pivoted point in the rear. The defendants' machine differs from the plaintiff's patent, in that its finger-beam cannot be raised at all at its rear by the lifting lever, and cannot be positively moved downward by that lever. Therefore, as the finger-beam in the defendants' machine does not have the motion which results from the combination of the elements specified in the first claim of the plaintiff's patent, and does not "rock forward and backward" in the sense of that claim, or in the sense described in the specification of the plaintiff's patent, it does not infringe such first claim. Nor does it contain the swivel joint M', specified in the first claim, located and operating as in the plaintiff's patent. The first claim of that patent must, in view of the state of the art, and of the special limitations put upon it on the requirement of the Patent Office, be limited to the special construction and arrangement set forth in that claim.

The same views apply to the second claim of the patent, which contains combined all the elements set forth in the first claim, with the addition of the rigid arm, *l*. That arm, in the plaintiff's patent, has a rigid connection with the vibratable link to which it is attached, and through such arm the finger-beam is made to rock backward or forward by positive action, in either direction; while in the defendants' machine there is no such rigid arm, but only a connection by which the front of the finger-beam can be lifted, while it falls by its own weight when released, instead of being positively forced down, as in the plaintiff's patent. This species of lifting device was old.

In regard to the extracts set forth in the opinion of the Cir-

cuit Court from the defendants' patent of July, 1877, we are of opinion that the second, fifth, and seventh claims of that patent, in speaking of the shoe as "rocking," can only refer to its swinging on a hinge at its rear end; and that the term "rocking" is not used in the sense in which it is used in the plaintiff's patent, because, neither in the defendants' patent nor in their machine has their shoe or their finger-beam any such rocking motion as is described in the plaintiff's patent.

It results from these views that, on a proper construction of claims 1 and 2 of the plaintiff's patent, the defendants have not infringed it; and that

The decree of the Circuit Court must be reversed, and the cause be remanded with a direction to dismiss the bill of complaint, with costs.

SARGENT *v.* BURGESS.

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

No. 127. Argued December 12, 13, 1888.— Decided January 7, 1889.

Claim 3 of letters patent No. 223,338, granted to John M. Gorham, January 6th, 1880, for an improvement in wash-board frames, namely, "3. In combination with a wash-board, a protector located below the crown-piece and between the side pieces of the wash-board frame, and constructed to fold down into or upon said wash-board even with or below the general plane of said wash-board frame, substantially as and for the purpose shown," cannot, in view of the state of the art, and of the course of proceeding in the Patent Office on the application for the patent, be so construed as to cover a protector which does not have the yielding, elastic or resilient function described in the specification.

The defendant's protector, constructed in accordance with letters patent No. 255,555, granted to Charles H. Williams, March 28th, 1882, and having no yielding or resilient function, and not being pivoted, or folding down, after the manner of the Gorham protector, does not infringe claim 3.

IN EQUITY for the infringement of letters patent. The case is stated in the opinion.

Mr. George H. Christy, with whom was *Mr. J. Snowden Bell* on the brief, for appellants.

Mr. James Parsons and *Mr. Furman Sheppard*, for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought by the administrators of John H. Gorham, deceased, against Edwin K. Burgess, in the Circuit Court of the United States for the Eastern District of Pennsylvania, to recover for the alleged infringement of letters patent No. 223,338, granted to John M. Gorham, January 6, 1880, for an improvement in wash-board frames.

The following is a copy of the specification and drawings of the patent: "To all whom it may concern: Be it known that I, John M. Gorham, of Cleveland, in the county of Cuyahoga and State of Ohio, have invented certain new and useful improvements in wash-board frames; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it pertains to make and use it, reference being had to the accompanying drawings, which form part of this specification.

"My invention relates to wash-boards, particularly to the combination, with a wash-board, of a protector constructed to bend or yield to pressure and to return to position when said pressure is removed. This protector is to shield the person of the washer from splashing water or suds.

"Protectors have been heretofore employed in connection with wash-boards, and they have been of but two general types — one wherein the protector is rigid and rigidly attached to the wash-board frame. A protector thus constructed and attached is not capable of yielding or moving from its position, when the body of the operator presses against it; and it is on this account frequently objected to. The second type is when the protector is attached to the wash-board frame by a joint or pivot, and is allowed a swinging movement; but it

possesses no elastic or resilient quality or function, and, when moved by pressure, has no power to return again to normal position when said pressure is removed. My invention is designed to overcome the objections and defects presented in these two old types of protectors; and, as said invention broadly comprehends any wash-board protector constructed to bend or yield to pressure and to return to position when said pressure is removed, it is apparent that I am not to be confined to any specific form or mere construction of device, inasmuch as a variety of modified mechanical structures may be adopted in embodying my said invention. I will, however, illustrate and describe one or two effective forms of device according to this invention.

"In the drawings, Fig. 1 illustrates a wash-board and its protector made according to my invention. This figure is in longitudinal vertical section, and it represents the protector as laid down upon the face of the board, as packed for shipment. Fig. 2 is a similar view of the same device, only the protector is shown as freed and sprung out into operative position. Fig. 3 is a front view of the device as shown in Fig. 2. Fig. 4 represents a modified form of my device, wherein the protector, instead of being formed from a rigid piece and elastically pivoted to the frame, as shown in Figs. 1, 2 and 3, is made from a piece of rubber, spring metal, or equivalent material susceptible of itself yielding and returning to position, and this is rigidly fixed to the wash-board frame, as shown. Fig. 5 shows another modified embodiment of my invention, merely illustrating a different spring-coupler, C′, from that shown in Figs. 1, 2 and 3.

"A is the wash-board frame, which may be of any size, description, or material. B is the rubbing-surface, which may also be of any character.

"C is the protector, and C′ a spring, which may be either a coupler between the protector and wash-board frame, as shown in Fig. 5 of the drawings, or the protector may be pivoted to the frame and the spring C′ act to push or pull the protector into the position illustrated in Figs. 2 and 3.

"The construction of the device shown in Fig. 4 I have

Fig.1.

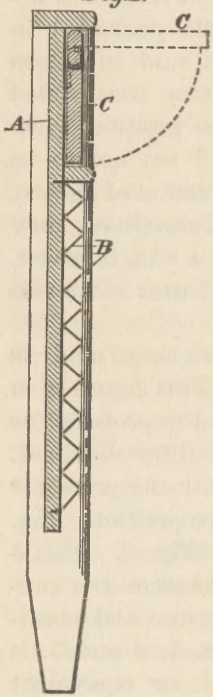


Fig.2.

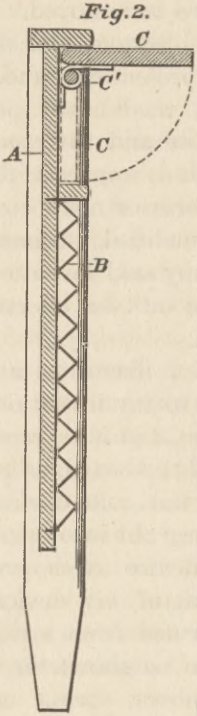


Fig.3.

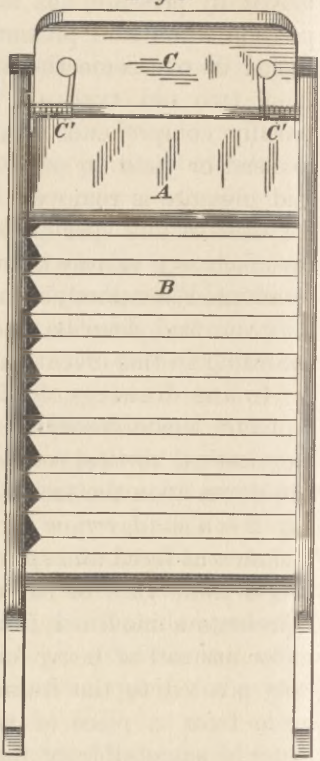


Fig.4.

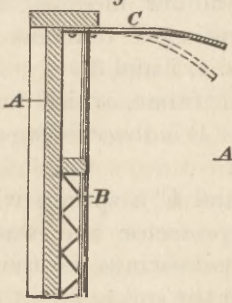
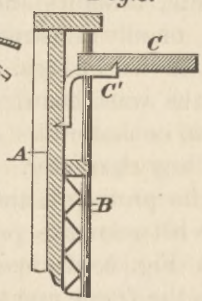


Fig.5.



already sufficiently specified in the preceding explanation of the drawings.

"The operation of my device is readily understood. The spring C', or the elastic character of the thing itself, as shown in Fig. 4, serves always to keep the protector in operative position. (See Figs. 2 and 3.) When the body of the operator presses against it, it yields in such a way as at the same time to press snugly against her person, and also to return at all times to position when said pressure is removed. It thus becomes very effective as a protector, while at the same time it is not wearing to the person or clothes of the operator.

"Another peculiar feature of my wash-board is the flat manner in which it can be packed, as shown in Fig. 1 of the drawings. This is a great convenience and advantage in packing for shipment; and, moreover, when thus packed, the protector is itself protected from injury to which it would otherwise be exposed. This is accomplished by locating the protector, as shown in Figs. 1, 2 and 3 of the drawings, below the crown-piece and between the side pieces of the frame."

The claims of the patent are three in number, as follows: "1. In combination with a wash-board, a protector constructed substantially as described, so as to yield to pressure and to return to position when said pressure is relieved, substantially as and for the purpose shown. 2. The combination, with a wash-board, of a protector and a spring, said spring interposed between the wash-board and protector, and constructed to operate in retaining said protector in its open position and to return it to that position when removed therefrom. 3. In combination with a wash-board, a protector located below the crown-piece and between the side pieces of the wash-board frame, and constructed to fold down into or upon said wash-board even with or below the general plane of said wash-board frame, substantially as and for the purpose shown." Only claim 3 is alleged to have been infringed.

The defences set up were want of novelty and non-infringement. Several prior patents were introduced in evidence, as bearing upon the question of the proper construction of claim 3, and upon the question of infringement. They are No.

8161, to William T. Barnes, June 17, 1851; No. 127,325, to John Epeneter and Bernhardt Grahl, May 28, 1872; No. 146,433, to James A. Cole, January 13, 1874; No. 150,315, to Anna Frike, April 28, 1874; and No. 222,846, to Wyatt M. Stevens, December 23, 1879. The Circuit Court dismissed the bill and the plaintiffs have appealed.

The specification of the Gorham patent clearly shows that the protector whose combination with a wash-board is the subject of the invention, is a protector constructed to bend or yield to pressure, and to return to its position when such pressure is removed, in contradistinction to a protector which is rigid and is rigidly attached to the wash-board frame; and also in contradistinction to a protector which is attached to the wash-board frame by a joint or pivot, and is allowed a swinging movement, but possesses no elastic or resilient function, and, when moved by pressure, has no power to return again to its normal position, when such pressure is removed. The specification states that the invention of Gorham is designed to overcome the defects presented in those two old types of protectors. The invention does not comprehend a protector which is not constructed so as to bend or yield to pressure, and to return to its position when such pressure is removed. The description and drawings of the Gorham protector are limited to such a construction, and do not show or indicate any other.

The operation of the device is stated in the specification to be such, that the spring, or the elastic character of the protector itself, serves always to keep the protector in operative position, because it yields to pressure against it in such a way as always to press snugly against the person, and to return at all times to position when such pressure is removed. This feature of the protector is not claimed to have been infringed by the defendant. The defendant's protector, constructed in accordance with the description contained in letters patent No. 255,555, granted to Charles H. Williams, March 28, 1882, has no spring and no elastic or resilient quality, does not yield to pressure, and has no capacity of returning automatically to its normal position.

Opinion of the Court.

In the defendant's structure, the ordinary cap-piece of the wash-board has a rounded exterior surface, and its inner surface performs the function of a protector. Upon the upper edge of such cap-piece is mounted a supplemental protector, the two parts being locked rigidly together by a tongue-and-groove joint. From the ends of the supplemental protector are extended rigid arms, which are slotted and connected to the side pieces of the frame by means of pins, one of which passes through each slot. By removing the supplemental protector from the cap-piece, it can be placed between the side pieces of the frame, so as to stand edgewise therein, by drawing it slightly backward, by then raising it slightly, by then advancing it to the front, and by then dropping it and placing it edgewise within the frame. In this latter position, the structure is adapted for packing. Not only is the defendant's protector without any yielding or resilient function, but it is not pivoted after the manner of the Gorham protector, nor does it fold down in the manner of the Gorham protector, in the sense of the words "fold down," as used in claim 3 of the Gorham patent.

The contention of the plaintiff is, that claim 3 of the patent does not require, as an element of the combination covered by it, that the protector should have any yielding, elastic, or resilient function, or should be accompanied by a spring; but that it is sufficient if, by any mechanism, it can be so disposed of as to be packed away for convenience in shipment, or for other purposes, in a flat manner, in the vacant space in which it is packed; and that, as the defendant's protector is to a large extent packed away in the same vacant space, claim 3 is infringed. It may be questionable whether, if the claim were to be construed thus broadly, it would not be for merely a new use of a device before used in many things besides wash-boards.

But, in view of the state of the art, as shown by the patents above referred to, and in view of the course of proceeding in the Patent Office on the application for the Gorham patent, we are of opinion that claim 3 of that patent cannot be so construed as to cover a protector which does not have the

yielding, elastic, or resilient function of the Gorham protector, and is not accompanied by a spring or constructed substantially according to the description in the Gorham specification. Gorham evidently had no idea of such a construction as that of the Williams patent, found in the defendant's wash-board; and no person could, by following the description in the Gorham specification, arrive at the defendant's structure.

Claim 3 of the Gorham patent requires that the protector shall be "constructed to fold down," "substantially as" "shown." The defendant's protector is not constructed to fold down in the manner of the Gorham protector, and is not constructed substantially as shown in the Gorham specification.

The decree of the Circuit Court is

Affirmed.

MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY *v.* BECKWITH.

ERROR TO THE CIRCUIT COURT OF KOSSUTH COUNTY, STATE OF IOWA.

No. 100. Argued December 3, 1888. — Decided January 7, 1889.

The provision in the Code of Iowa, § 1289, which authorizes the recovery of "double the value of the stock killed or damages caused thereto" by a railroad, when the injury took place at a point on the road where the corporation had a right to erect a fence and failed to do so, and when it was not "occasioned by the wilful act of the owner or his agent," is not in conflict with the Fourteenth Amendment to the Constitution of the United States, either as depriving the company of property without due process of law, or as denying to it the equal protection of the laws.

Corporations are persons within the meaning of the clauses in the Fourteenth Amendment to the Constitution concerning the deprivation of property, and concerning the equal protection of the laws. *Santa Clara County* v. *Southern Pacific Railroad*, 118 U. S. 394, and *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, followed.

The Fourteenth Amendment to the Constitution does not limit the subjects in relation to which the police power of the State may be exercised for the protection of its citizens. *Barbier* v. *Connolly*, 113 U. S. 27, *Soon*

Hing v. *Crowley*, 113 U. S. 703, and *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512, considered and followed.

The propriety and legality of the imposition of punitive damages for a violation of duty have been recognized by repeated judicial decisions for more than a century.

THE case is stated in the opinion of the court.

Mr. Eppa Hunton for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This case comes before us from the Circuit Court of Kossuth County, Iowa, the highest court of that state in which the controversy between the parties could be determined. Rev. Stat. § 709. It was an action for the value of three hogs, run over and killed by the engine and cars of the Minneapolis and St. Louis Railway Company, a corporation existing under the laws of Minnesota and Iowa, and operating a railroad in the latter state. The killing was at a point where the defendant had the right to fence its road. The action was brought before a justice of the peace of Kossuth County. Proof having been made of the killing of the animals and of their value, and that notice of the fact, with affidavit of the injury, had been served upon an officer of the company in the county where the injury was committed, more than thirty days before the commencement of the action, the justice gave judgment for the plaintiff against the company for twenty-four dollars, double the proved value of the animals. The case was then removed to the Circuit Court of Kossuth County, where the judgment was affirmed. To review this latter judgment the case is brought here on writ of error.

The judgment rendered by the justice was authorized by § 1289 of the Code of Iowa, which is as follows:

"Any corporation operating a railway that fails to fence the same against live stock running at large at all points where such right to fence exists shall be liable to the owner of any such stock injured or killed by reason of the want of such fence

for the value of the property or damage caused, unless the same was occasioned by the wilful act of the owner or his agent. And in order to recover it shall only be necessary for the owner to prove the injury or destruction of his property; and if such corporation neglects to pay the value of or damage done to such stock within thirty days after notice in writing, accompanied by an affidavit of such injury or destruction, has been served on any officer, station or ticket-agent employed in the management of the business of the corporation in the county where the injury complained of was committed, such owner shall be entitled to recover double the value of the stock killed or damages caused thereto."

The validity of this law was assailed in the state court, and is assailed here, as being in conflict with the first section of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the railway company of property without due process of law, so far as it allows a recovery of double the value of the animals killed by its trains; and in that it denies to the company the equal protection of the laws by subjecting it to a different liability for injuries committed by it from that to which all other persons are subjected.

It is contended by counsel as the basis of his argument, and we admit the soundness of his position, that corporations are persons within the meaning of the clause in question. It was so held in *Santa Clara County* v. *Southern Pacific Railroad Co.*, 118 U. S. 394, 396, and the doctrine was reasserted in *Pembina Mining Company* v. *Pennsylvania*, 125 U. S. 181, 189. We admit also, as contended by him, that corporations can invoke the benefits of provisions of the Constitution and laws which guarantee to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation injuriously affecting it.

We will consider the objections of the railway company in the reverse order in which they are stated by counsel. And first, as to the alleged conflict of the law of Iowa with the clause of the Fourteenth Amendment ordaining that no state shall deny to any person within its jurisdiction the equal protection of the laws. That clause does undoubtedly prohibit

discriminating and partial legislation by any State in favor of particular persons as against others in like condition. Equality of protection implies not merely equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind. But the clause does not limit, nor was it designed to limit, the subjects upon which the police power of the State may be exerted. The State can now, as before, prescribe regulations for the health, good order and safety of society, and adopt such measures as will advance its interests and prosperity. And to accomplish this end special legislation must be resorted to in numerous cases, providing against accidents, disease and danger, in the varied forms in which they may come. The nature and extent of such legislation will necessarily depend upon the judgment of the legislature as to the security needed by society. When the calling, profession or business of parties is unattended with danger to others, little legislation will be necessary respecting it. Thus, in the purchase and sale of most articles of general use, persons may be left to exercise their own good sense and judgment; but when the calling or profession or business is attended with danger, or requires a certain degree of scientific knowledge upon which others must rely, then legislation properly steps in to impose conditions upon its exercise. Thus, if one is engaged in the manufacture or sale of explosive or inflammable articles, or in the preparation or sale of medicinal drugs, legislation, for the security of society, may prescribe the terms on which he will be permitted to carry on the business, and the liabilities he will incur from neglect of them. The concluding clause of the first section of the Fourteenth Amendment simply requires that such legislation shall treat alike all persons brought under subjection to it. The equal protection of the law is afforded when this is accomplished. Such has been the ruling of this court in numerous instances where that clause has been invoked against legislation supposed to be in conflict with it. Thus in *Barbier* v. *Connolly*, 113 U. S. 27, 32, it was objected that a municipal ordinance of San Francisco, prohibiting washing and ironing

in public laundries, within certain designated limits of the city, between the hours of ten at night and six in the morning, was in conflict with that amendment, in that it discriminated between laborers engaged in the laundry business and those engaged in other kinds of business, and between laborers employed within the designated limits and those without them. But the court held that the provision was merely a police regulation; that it might be a necessary measure of protection in a city composed largely of wooden buildings like San Francisco, that occupations in which fires are constantly required should cease during certain hours at night, and of the necessity of such a regulation that municipal body was the exclusive judge; that the same authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced, as it does the limits within which wooden buildings must not be constructed; and that restrictions of this kind, though necessarily special in character, do not furnish ground of complaint if they operate alike upon all persons or property under the same circumstances and conditions. "Class legislation," said the court, "discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

In *Soon Hing* v. *Crowley*, 113 U. S. 703, 709, an objection was taken to a similar ordinance of San Francisco, that it made an unwarrantable discrimination against persons engaged in the laundry business, because persons in other kinds of business were not required to cease from labor during the same hours at night. But, the court said, there may be no risks attending the business of others, certainly not as great as where fires are constantly required; and that specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint, because like restrictions are not imposed upon business of a different kind. "The discriminations, which are open to objection," the court added, "are those where persons engaged in the same business are subjected to different restric-

tions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the law."

In *The Missouri Pacific Railway Company* v. *Humes*, 115 U. S. 512, 523, a statute of Missouri requiring every railroad corporation within it to erect and maintain fences and cattle guards on the sides of its roads, where the same passed through, along, or adjoining inclosed or cultivated fields, or uninclosed lands, and, if it did not, making it liable in double the amount of damages to animals, caused thereby, was assailed as in conflict with the Fourteenth Amendment, on the same grounds urged in the present case; namely, that it deprived the defendant of property without due process of law, so far as it allowed a recovery of damages for stock killed or injured in excess of its value, and also that it denied to the defendant the equal protection of the laws, by imposing upon it a liability for injuries committed which was not imposed upon other persons. But the court said that authority for requiring railroads to erect fences on the sides of their roads, so as to keep horses, cattle and other animals from going upon them, was found in the general police power of the State to provide against accidents to life and property in any business or employment, whether under the charge of private persons or of corporations; that in few instances could that power be more wisely or beneficently exercised than in compelling railroad corporations to inclose their roads with fences having gates at crossings, and cattle guards; that they are absolutely essential to give protection against accidents in thickly settled portions of the country; that the omission to erect and maintain them, in the face of the law, would justly be deemed gross negligence, and that if injuries to property are committed something beyond compensatory damages might be awarded in punishment of it. Referring to the rule which prevails of allowing juries to assess exemplary or punitive damages where injuries have resulted from neglect of duties, the court said: "The statutes of nearly every State of the Union provide for the increase of damages where the injury complained of results

from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple the actual damages. And experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries. The decisions of the highest courts have affirmed the validity of such legislation. The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress, if the private interest were not supported by the imposition of punitive damages." And as to the objection that the statute of Missouri denied to the defendant the equal protection of the laws, the court said that it made no discrimination against any railroad company in its requirement; that each company was subject to the same liabilities, and from each the same security was exacted by the erection of fences, gates and cattle guards, when its road passed through, along, or adjoining inclosed or cultivated fields or uninclosed lands; and that there was no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances.

In *Missouri Pacific Railway Co.* v. *Mackey*, 127 U. S. 205, a statute of Kansas providing that "every railroad company organized or doing business in this State shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employés, to any person sustaining such damage," was assailed on the ground that it was in conflict with the Fourteenth Amendment to the Constitution in that it deprived the company of its property without due process of law, and denied to it the equal protection of the laws. In support of the first position the company referred to the rule of law that prevailed previously in Kansas and some other States, exempting from liability an employer for injuries to employés caused by the incompetency or negligence of a fellow-servant, and contended that the law of Kansas in creating on the part of the railroad company a liability in such cases not previously existing, in the enforcement of which

their property might be taken, authorized the taking of property without due process of law, and imposed a special liability upon railway companies that was not imposed upon other persons, and thus denied to the former the equal protection of the laws. But the court answered that the law in question applied only to injuries subsequently committed, and that it would not be contended that the State could not prescribe the liabilities under which corporations created by its laws should conduct their business in the future, where no limitation was placed upon its power in that respect by their charters; that whatever hardship or injustice there might be in any law thus applicable to the future must be remedied by legislative enactment; that the objection, that the railroad company was denied the equal protection of the laws, rested upon the theory that legislation special in its character was within the constitutional inhibition, but that so far from such being the fact the greater part of all legislation was special, either in the objects sought to be attained by it, or in the extent of its application; that when such legislation applied to particular bodies or associations, imposing upon them additional liabilities, it was not open to the objection that it denied to them the equal protection of the laws, if all persons brought under its influence were treated alike under the same conditions; that the hazardous character of the business of operating a railway called for special legislation with respect to railroad corporations, having for its object the protection of their employés as well as the safety of the public, which was not required by the business of other corporations not subject to similar dangers to their employés; and that the legislation in question met a particular necessity, and all railroad corporations without distinction were subject to the same liabilities.

From these adjudications it is evident that the Fourteenth Amendment does not limit the subjects in relation to which the police power of the State may be exercised for the protection of its citizens. That this power should be applied to railroad companies is reasonable and just. The tremendous force brought into action in running railway cars renders it absolutely essential that every precaution should be taken against

accident by collision, not only with other trains, but with animals. A collision with animals may be attended with more serious injury than their destruction; it may derail the cars and cause the death or serious injury of passengers. Where these companies have the right to fence in their tracks, and thus secure their roads from cattle going upon them, it would seem to be a wise precaution on their part to put up such guards against accidents at places where cattle are allowed to roam at large. The statute of Iowa, in fixing an absolute liability upon them for injuries to cattle committed in the operation of their roads by reason of the want of such guards, would seem to treat this precaution as a duty. It is true that, by the common law, the owner of land was not compelled to inclose it, so as to prevent the cattle of others from coming upon it, and it may be that, in the absence of legislation on the subject, a railway corporation is not required to fence its railway, the common law as to inclosing one's land having been established long before railways were known. But the obligation of the defendant railway company to use reasonable means to keep its track clear, so as to insure safety in the movement of its trains, is plainly implied by the statute of Iowa, which also indicates that the putting up of fences would be such reasonable means of safety. If, therefore, the company omits those means, the omission may well be regarded as evidence of such culpable negligence as to justify punitive damages where injury is committed; and if punitive damages in such cases may be given, the legislature may prescribe the extent to which juries may go in awarding them.

The law of Iowa under consideration is less open to objection than that of Missouri, which was sustained in the case cited above. There double damages could be claimed by the owner whenever his cattle had strayed upon the track of the railway company for want of fences on its sides, and had been killed or injured by the railway trains. Here such damages can be claimed for like injuries to cattle only where the company has received notice and affidavit of the injury committed thirty days before the commencement of the action, and has persisted in refusing to pay for the value of the property

destroyed or the damage caused. There must be not merely negligence of the company in not providing guards against accidents of the kind, but also its refusal to respond for the actual damage suffered. Without the additional amount allowed there would be few instances of prosecutions of railroad companies where the value of the animals killed, or injured by them is small, as in this case; the cost of the proceeding would only augment the loss of the injured party. As said in the Missouri case cited: "The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress, if the private interest were not supported by the imposition of punitive damages." 115 U. S. 523.

The legislation in question has been sustained in numerous instances by the Supreme Court of Iowa. In *Welsh* v. *Chicago, Burlington and Quincy Railroad Co.*, 53 Iowa, 632, 634, which was an action to recover double the value of a horse alleged to have been killed by one of the defendant's engines at a point where it had the right to fence the road, the court below instructed the jury that it was the duty of the company to fence its road against live stock running at large at all points where such right to fence existed; and it was objected to this instruction that no such duty existed; upon which the Supreme Court of the State, to which the case was taken, said: "While it is true the statute does not impose an abstract duty or obligation upon railway companies to fence their roads, yet as to live stock running at large a failure to fence fixes an absolute liability for injuries occurring in the operation of the road by reason of the want of such fence. The corporation owes a duty to the owners of live stock running at large either to fence its road or to pay for injuries resulting from the neglect to fence." And in *Bennett* v. *The Wabash, St. Louis and Pacific Railway Co.*, 61 Iowa, 355, 356, the same court said: "We think the only proper construction of the statute is, that in order to escape liability the company must not only fence, but keep the road sufficiently fenced; and this has been more than once ruled." As it is thus the duty of the railway company to keep its track free from animals, its

neglect to do so by adopting the most reasonable means for that purpose, the fencing of its roadway as indicated by the statute of Iowa, justly subjects it, as already stated, to punitive damages, where injuries are committed by reason of such neglect. The imposition of punitive or exemplary damages in such cases cannot be opposed as in conflict with the prohibition against the deprivation of property without due process of law. It is only one mode of imposing a penalty for the violation of duty, and its propriety and legality have been recognized, as stated in *Day* v. *Woodworth*, 13 How. 363, 371, by repeated judicial decisions for more than a century. Its authorization by the law in question to the extent of doubling the value of the property destroyed, or of the damage caused, upon refusal of the railway company, for thirty days after notice of the injury committed, to pay the actual value of the property or actual damage, cannot therefore be justly assailed as infringing upon the Fourteenth Amendment of the Constitution of the United States.

Judgment affirmed.

SHREVEPORT *v.* COLE.

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

No. 106. Argued and submitted December 4, 1888. — Decided January 7, 1889.

Two "residents of Shreveport, Louisiana," sued in the Circuit Court of the United States for the Western District of Louisiana on a contract of that municipality, made in 1871, alleging, as the ground of Federal jurisdiction, that the constitution of Louisiana of 1879 had impaired the obligation of their contract. The municipality answered that it had been held by all the state courts that the provision of the constitution referred to did "not apply to contracts entered into prior to the adoption of the constitution of 1879." The Supreme Court of Louisiana prior to the commencement of this suit had in fact so decided: *Held*, that this suit was an attempt to evade the discrimination between suits between citizens of the same State and citizens of different States, established by the Constitution and laws of the United States, and that the Circuit Court was without jurisdiction.

Statement of the Case.

A constitution, or a statute, is construed to operate prospectively only, unless, on its face, the contrary intention is manifest beyond reasonable question.

JACOBS and Smith filed their petition in the Circuit Court of the United States for the Western District of Louisiana, describing themselves as "residents of Shreveport, Louisiana," on the 11th day of February, 1882, against the city of Shreveport, "a municipal corporation, established by the State of Louisiana, situated in the parish of Caddo, in said State of Louisiana, and within said Western District," alleging it to be "justly indebted to petitioner in the sum of forty-seven thousand four hundred and sixty-six $\frac{31}{100}$ dollars, with five per cent per annum interest from Nov. 19th, 1871, as shown by itemized statement hereto annexed as part hereof," upon a written contract annexed and made part of the petition, for the macadamizing of Commerce Street in said city, whereby the city agreed to pay five $\frac{40}{100}$ dollars for each square yard of macadamizing, and sixty-five cents per cubic yard for grading, which amounted, upon completion of the work, to ninety-eight thousand one hundred and ninety-two $\frac{49}{100}$ dollars, in which amount the city became indebted to petitioners; and that the sum of thirteen thousand four hundred and seventy-six $\frac{32}{100}$ dollars was paid thereon by property owners, and a warrant for three thousand two hundred and thirty-five $\frac{25}{100}$ dollars unpaid tax was also received by petitioners, leaving the indebtedness eighty-one thousand four hundred and eighty-six $\frac{92}{100}$ dollars. That by the terms of the contract the city obligated itself "to pay the amount of its indebtedness arising thereunto out of funds realized from the collection of wharfage dues, to be received by petitioners when paid by or collected from steamboats at the wharves of Shreveport, until the entire amount of such indebtedness under said contract was fully paid," and had collected and paid over such wharfage dues up to December 20th, 1878, to the amount of thirty-four thousand and fourteen $\frac{61}{100}$ dollars, leaving a balance due of forty-seven thousand four hundred and sixty-six $\frac{31}{100}$ dollars. The petition then proceeded as follows:

"Petitioners allege that since the 20th day of December,

A.D. 1878, steamboats have arrived at the port of Shreveport from time to time up to present date, landed at the wharves of said city, and became thereby indebted for wharfage dues, collectible from such steamboats, their masters and owners, amounting in the aggregate to a large sum, say twelve thousand dollars, which should have been collected and paid over to petitioners by said city; but your petitioners aver that since the 20th December, A.D. 1878, said city has failed, neglected, and refused to collect any wharfage dues from steamboats landing at its wharves, and has failed to pay petitioners the amount due them under said contract or any part thereof.

"That on the 15th February, A.D. 1879, and on sundry days before and since said date, petitioners made amicable demand on said city to comply with its obligations under said contract by collecting and paying over to petitioners said wharfage dues, which said demands were by said city utterly disregarded.

"Petitioners allege that in consequence of the neglect and refusal of said city to collect and pay over to them said wharfage, and by its default in complying with the terms of the said contract, the entire balance due thereunder, viz., said sum of forty-seven thousand four hundred and sixty-six 31-100 dollars, with interest, as hereinbefore claimed, became due by and exigible from said city.

"Petitioners allege amicable demand in vain.

"They allege further that the law of the State of Louisiana, so far as same had any bearing on or relation to the said contract between them and said city and to the rights and obligations therefrom resulting, was by operation of law impliedly part of said contract, and there was an implied contract between said city and petitioners that, in event of failure on part of either of the contracting parties to comply with the terms of said contract, the obligations resulting from and under said contract might be judicially enforced, and that under provisions of the law of Louisiana existing at date of said contract, petitioners had adequate remedies for the enforcement of their rights thereunder.

"But petitioners allege that Article 208 of the Constitution

of the State of Louisiana, adopted July 23d, A.D. 1879, and ratified by the people of said State on the first Tuesday of the month of December, A.D. 1879, has impaired the obligation of said contract by depriving your petitioners of all remedies for the enforcement of same, in this, viz., by limiting municipal taxation throughout said State for all purposes whatever to ten mills on the dollar of valuation.

"Petitioners represent that the assessed value of all property subject to tax by said city is one million eight hundred and fifty-three thousand eight hundred and twenty dollars; that the tax thereon, at rate of ten mills on the dollar, amounts to the sum of eighteen thousand five hundred and thirty-eight and 20-100 dollars; that the amount which the city is authorized to levy for license tax on trades, professions, and occupations does not exceed for any one year the sum of seventy-five hundred dollars.

"That said city has no property which can be seized under execution, and no revenues, except such as are derived from taxation; that the entire revenues of said city for any one year do not exceed the sum of thirty-one thousand dollars, an amount not more than sufficient for its alimony, and which must be appropriated for that purpose, and in consequence of said constitutional limitation, if same be valid and operative, no means exist under the law of Louisiana by which said city can raise funds wherewith to pay, or be compelled to pay, its just debts.

"Petitioners allege that Article 208, so far as the same limits municipal taxation, is as to them null and void, because it violates the tenth section of the first Article of the Constitution of the United States, which prohibits the State of Louisiana (with all other States) from passing any law impairing the obligation of contracts.

"That they are entitled to have said Article 208 of the constitution of the State of Louisiana declared null and void, so that they may have some remedy by means of which to compel said city to pay its indebtedness to them; that the case herein presented arises under the Constitution of the United States, and that your honorable court has jurisdiction thereof.

"The premises considered, petitioners pray that the city of Shreveport be cited to answer hereto; that, after all legal notices and delays, they have judgment against said city, declaring said Article 208 of the constitution of the State of Louisiana violative of the Constitution of the United States, null and void, and condemning said city to pay to petitioners said sum of forty-seven thousand four hundred and sixty-six 31-100 dollars, with legal interest from November 19, A.D. 1879, and all costs. They pray for all orders and decrees necessary, and for general relief in the premises."

To this petition the city of Shreveport filed on May 2, 1882, its exceptions and plea to the jurisdiction, stating "that there is no law, ordinance, or constitutional provision in Louisiana which would impair the obligation of the alleged contract between the plaintiffs and defendant, and no probability of the courts of the State throwing any obstacles in the way of the execution of a judgment in their favor if one should be obtained. On the contrary, all the state courts, from the highest to the lowest, in numerous decisions have held that the constitutional limitation of municipal taxation does not apply to contracts entered into prior to the adoption of the constitution of 1879, which this is admitted to be," which were overruled February 26, 1883, and on March 1, 1883, the city filed its answer upon the merits.

Trial being had, the court charged the jury, among other things: "That if the jury find from the evidence the income of the city of Shreveport, which is collected under provision, Art. 208, is insufficient to pay more than the amount necessary for alimony, and that the operation of Art. 208 will prevent city from collecting taxes sufficient to pay its debts, then as to any debt contracted prior to the adoption of state constitution of 1879, said Art. 208 violates the Constitution of the United States, and is null and void."

Verdict was returned March 13th in these words: "We, the jury, find the following judgment, to wit: That the plaintiffs in this case have judgment against the defendant in the sum of $13,249.30, that being the amount of wharfage due the city of Shreveport, as proven on the trial to this date, reserving

all the rights to the plaintiffs for the balance claimed by them."

Whereupon this judgment was rendered: "In this case, by reason of the law and evidence, and the verdict of the jury being in favor of the plaintiffs, Benj. Jacobs and Joseph R. Smith, it is ordered, adjudged, and decreed that the plaintiffs do have and recover of the defendant, the city of Shreveport, the full sum of thirteen thousand two hundred and forty-nine and 30-100 dollars, with 5 per cent per annum interest thereon from the 17th day of February, 1882, and all costs of suit, said amount being wharfage dues which should have been collected by the defendant and paid over to plaintiffs up to March 13th, 1883. It is further ordered, adjudged, and decreed that said amount of $13,249.30 when paid is to be a credit on the amount due by defendant to the plaintiffs as claimed in their petition; and it is further ordered and decreed that the rights of plaintiffs for the balance due them as claimed are reserved to them."

From which judgment the city of Shreveport prosecuted the writ of error herein.

Mr. Charles W. Hornor, for plaintiff in error.

Mr. T. Alexander and *Mr. N. C. Blanchard*, for defendants in error, submitted on their brief.

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

Unless this suit was one "arising under the Constitution or laws of the United States," the Circuit Court had no jurisdiction; and if it did not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or some law, upon the determination of which the recovery depended, then it was not a suit so arising. *Starin* v. *New York*, 115 U. S. 248, 257; *Gold Washing and Water Co.* v. *Keyes*, 96 U. S. 199.

The case at bar was in effect an action at law to recover a balance alleged to be due the petitioners or plaintiffs upon a

contract with the defendant, and the maintenance of the cause of action involved no Federal question whatever, nor is any such indicated in the judgment rendered. But the jurisdiction seems to have been rested upon the averments in plaintiffs' petition, that under article 209 of the state constitution of 1879, providing that "no parish or municipal tax for all purposes whatsoever shall exceed ten mills on the dollar of valuation," the city of Shreveport, being so situated as to need all the revenue from such a tax, cannot raise funds to pay its just debts; that, therefore, plaintiffs are deprived by that article, "if same be valid and operative," of the remedy of enforcing payment by the levy of taxes, although their contract was entered into in 1871; and that so said article impairs the obligation of such contract. This contention, however, required the Circuit Court to assume that the courts of Louisiana would hold that the city could lawfully avail itself of the constitutional limitation in question as a defence to the collection by taxation of the means to liquidate the indebtedness, notwithstanding that would be to apply it retrospectively, to the destruction of an essential remedy existing when the contract was entered into, whereas the presumption in all cases is that the courts of the States will do what the Constitution and laws of the United States require. *Chicago and Alton Railroad* v. *Wiggins Ferry Co.*, 108 U. S. 18; *Neal* v. *Delaware*, 103 U. S. 370, 389. And we find in accordance with that presumption that the Supreme Court of Louisiana holds, and had held prior to the commencement of this suit, that article 209 "must have a rigid enforcement with regard to all creditors whose rights are not protected by the Constitution of the United States, and with regard to all future operations of the city government of every kind whatever. But it is perfectly clear that the rights of antecedent contract creditors are protected by the Constitution of the United States, and they are entitled to have them enforced 'in all respects as if' this provision of the Constitution 'had not been passed.' *Von Hoffman* v. *City of Quincy*, 4 Wall. 535. The fact that the act of the State is a constitutional provision instead of a mere legislative act does not affect the case. *Railroad Co.* v. *McClure*, 10 Wall.

511, 515. It is apparent, therefore, that whatever percentage of taxation may be required to meet the maturing obligations in interest or principal of antecedent contract creditors must, in any and all events, be levied." *Moore* v. *City of New Orleans*, 32 La. Ann. 726, 747.

Constitutions as well as statutes are construed to operate prospectively only, unless, on the face of the instrument or enactment, the contrary intention is manifest beyond reasonable question. There is nothing on the face of article 209 evidencing an intention that it should be applied to antecedent contracts, and the highest tribunal of the State has declared that it cannot be so applied. It is impossible, under these circumstances, to sustain the jurisdiction of the Circuit Court upon the ground, not that the city had been, but that it might perhaps be, allowed to interpose to defeat the enforcement, by the appropriate means, of payment of an alleged indebtedness, a constitutional provision inapplicable by the ordinary rules of law, and so determined to be by the deliberate decision of the state Supreme Court.

Nor can it be held that a dispute or controversy as to the effect of the Constitution of the United States upon article 209 of the constitution of the State was involved in determining in this action whether the defendant was indebted to the plaintiffs, and if so, in what amount.

The prayer of the petition was that judgment might be rendered for the amount claimed, and also that article 209 might be declared null and void; and some considerations supposed to bear upon the latter subject were addressed to the jury by the learned judge who presided upon the trial, to which the verdict made no response in terms; but it does not appear that an order for the assessment of taxes to pay the amount awarded, or for any supplementary proceedings of like nature, to the entry of which said article might in any view be claimed to be an obstruction, was authorized by statute to be made part of the judgment in such a case as this. And the judgment was simply for the recovery of so much money, to be thereafter collected as provided by law.

When, in the instance of a judgment rendered on contract

in a state court, remedies for its collection existing at the time of the making of the contract, are taken away, in substance, by state constitution or statute, and the deprivation enforced by the final judgment of the state courts, a writ of error under § 709 of the Revised Statutes enables this court to vindicate the supremacy of the Constitution and laws of the United States and administer the proper remedy; but had this record in its present shape come before us in that way even, we should have had no alternative save to dismiss the writ.

In cases originally brought in the Circuit Court, or by removal from a state court, it is made the duty of the Circuit Court to dismiss or remand the same whenever it appears that the suit does not really and substantially involve a dispute or controversy properly within its jurisdiction, or that the parties to the suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable.

As remarked in *Bernards Township* v. *Stebbins*, 109 U. S. 341, 353, it has been the constant effort of Congress and of this court to prevent the discrimination in respect to suits between citizens of the same State and suits between citizens of different States, established by the Constitution and laws of the United States, "from being evaded by bringing into Federal courts controversies between citizens of the same State." We regard this suit as an evasion of that character.

The judgment of the Circuit Court is reversed and the cause remanded, with directions to dismiss the petition.

CURRIE, MAYOR, *v.* UNITED STATES *ex rel.* JACOBS. Error to the Circuit Court of the United States for the Western District of Louisiana. No. 107. MR. CHIEF JUSTICE FULLER. In this case a peremptory writ of mandamus was awarded, commanding the levy of a special tax for the payment of the judgment rendered in favor of Jacobs and Smith, and against the city of Shreveport, just reversed in the preceding case, No. 106, for want of jurisdiction.

The judgment must, therefore, be reversed, and the cause remanded, with directions to dismiss the petition.

NEW ORLEANS *v.* LOUISIANA CONSTRUCTION COMPANY.

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

No. 1104. Submitted December 17, 1888. — Decided January 7, 1889.

An intervention by third opposition, under §§ 395 to 400 of the Code of Practice of Louisiana, by a person claiming that property seized on execution is exempt from seizure and sale, is a proceeding at law, and as such, is reviewable upon writ of error.

The objection that third opposition cannot be availed of by a defendant in execution in regard to property situated as is the property in contention cannot be disposed of on a motion to dismiss or affirm.

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

Mr. E. Howard McCaleb for the motion.

Mr. Henry C. Miller and *Mr. Carleton Hunt* opposing.

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

By the writ of error in this case a judgment of the Circuit Court of the United States for the Eastern District of Louisiana is brought up for revision, which was rendered by that court, after a trial by jury and on the verdict found, against the city of New Orleans upon its "petition of intervention and of third opposition," claiming certain property to have been exempt from seizure and sale on execution, which had been advertised for sale by the United States marshal under a writ of *fieri facias* issued upon a certain judgment recovered against said city by the Louisiana Construction Company, one of the defendants in error, and which, as appeared by an amended petition, was sold by said marshal to Isidore Newman, who, with Louis E. Lemaire, attorney in fact of said Construction Company, and R. B. Pleasants, the United States marshal, were made parties to said petition as amended.

By articles 395, 396, 397, 398, 399 and 400 of the Code of Practice of Louisiana, when property not liable is seized on execution, the remedy of the owner is by an intervention called a third opposition, on which, by giving security, an injunction or prohibition may be granted to stop the sale. If no injunction is issued, and the sale takes place, if the opposition is sustained, the seizure and sale are annulled, and the property restored. In the case at bar an order of prohibition was directed to be issued upon the city giving security as prescribed. This it failed to do, and the property was sold to Newman, as before stated.

The Construction Company now moves that the writ of error be dismissed, upon the ground that the cause was in equity, and therefore should have been brought here by appeal, and if that motion is overruled, that the judgment be affirmed.

The rule is thoroughly settled that remedies in the courts of the United States are at common law or in equity, according to the essential character of the case, uncontrolled in that particular by the practice of the state courts. In *Van Norden* v. *Morton*, 99 U. S. 378, where a bill addressed to the Circuit Court of the United States for the District of Louisiana, sitting in chancery, alleged that complainant was the owner of a dredge boat, which had been seized on an execution against another party, and prayed for an injunction, for the quieting of title and possession and for damages, it was held that, under the provisions of the Louisiana Code of Practice pertaining to the subject, the remedy was at law and not in equity, and the bill was for that reason dismissed. But it is urged that there the injunction was sued out by a third person, not originally a party to the cause, claiming ownership of the property seized; that the property was personal; and that it was not burdened with any trust; whereas, it is said that here the city was the defendant in execution; that the property seized was real; that the city claims it as trustee because *locus publicus;* and that the contention of the city involves the elements of trust, injunction and prevention of cloud on title, all exclusively cognizable in a court of equity.

Statement of the Case.

The Circuit Court, however, took jurisdiction of the intervention of the city as "third opponent," and the intervention being answered, proceeded to trial on the merits, and to judgment accordingly.

The objection of the Construction Company that third opposition cannot be availed of by a defendant in execution or in regard to such property, and so situated, as that involved in this case, should have been made in the Circuit Court, and cannot be properly disposed of on this motion.

As the judgment stands, it is a judgment in a short and summary proceeding before the court under whose authority the marshal was acting, analogous to the statutory remedy given in many of the States to try the right of property at the instance of the party whose property is alleged to be wrongfully seized, and as such, as determined in *Van Norden* v. *Morton*, *supra*, is at law, and properly reviewable upon writ of error. The motion to dismiss is therefore denied, and as we do not think there was color for it, the motion to affirm must be denied also.

ROSENWASSER *v.* SPIETH.

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

No. 122. Argued December 11, 12, 1888. — Decided January 14, 1889.

The improvement in percolators, for which letters patent were granted April 18, 1882, to Nathan Rosenwasser, was anticipated by an apparatus described in Geiger's Handbuch der Pharmacie, published at Stuttgart in 1830.

In equity for an alleged infringement of letters patent. The bill prayed for a discovery, and an accounting, and the payment of all gains and profits discovered on the accounting, and for injunctions, both interlocutory and final. The answer denied that the plaintiffs invented the patented improvement or that the alleged invention was patentable. The final decree

dismissed the bill, from which the plaintiffs appealed. The case is stated in the opinion.

Mr. William Henry Clifford for appellants.

Mr. Wilbur F. Lunt for appellee.

Mr. Justice Gray delivered the opinion of the court.

This is a bill in equity for the infringement of letters patent granted April 18, 1882, to Nathan Rosenwasser for improvements in percolators, with the following specification and claim:

"My invention relates to percolating apparatus to be employed for filtering purposes, or for making fluid extracts or decoctions, and it consists in a device constructed and adapted to operate substantially in the manner hereinafter specified.

"In the drawings, figure 1 represents my device in longitudinal section, and Fig. 2 shows the application of said device when used as a filter or in making fluid extracts.

"A is the main body of my percolator. B is a constricted inlet. C is the enlarged open end, which serves the double purpose of a discharge or outlet, and as an opening through which the percolator is charged with filtering substance when the device is to be used as a filter, or with any drug from which an extract is to be made. D is a perforated plate. This plate may, if desired, be replaced by any porous diaphragm or interposing substance, such as filter paper, cloth, pumice, or the like. This is to prevent the drug from escaping from the percolator during its use, and it is to be secured in position by suitable means. E represents the drug from which an extract is to be made, or if the device is to be used as a filter, then E represents charcoal, sand, or any suitable filtering material.

"I will describe my apparatus as employed in making fluid extracts. The container A is charged with any drug or substance, E, from which an extract is to be made. The drug E is charged into the container A through the enlarged mouth C. Now, by the ordinary process and mechanism for making

fluid extracts, it has heretofore been the practice to charge the menstruum into the large mouth C; but this method made it impracticable to obtain any increased or variable pressure upon the menstruum, unless a cap piece were fitted over the enlarged mouth C, and a tube or its equivalent attacned, and connected either to an elevated reservoir containing the menstruum, or else some special pressure apparatus connected with said tube. All this in practice is impracticable; but by the employment of my device and method it is a very easy matter to charge the container A, and by applying the menstruum in exactly an opposite manner from that heretofore adopted, viz., to the end of the container A, opposite the charging mouth C, to exert any desired pressure upon the menstruum. Fig. 2 of the drawings illustrates my method and mechanism, which consists, after the container A is charged in the usual manner through its enlarged mouth C, as already specified, in inverting the percolator, attaching a flexible or other tube, F, to the constricted mouth B, and applying the menstruum through said tube from an elevated reservoir G. When thus used, the enlarged mouth C becomes the ultimate discharge, which has never before, to my knowledge, been true in any method heretofore known or practised. By elevating the reservoir G more or less, a greater or lighter pressure is exerted by the menstruum, and it is therefore driven through the drug more or less forcibly and rapidly. This pressure, as may readily be seen, can be nicely adjusted and varied at pleasure to suit the requirements of any case. A stop-cock, H, may be used to govern the quantity of the menstruum admitted to the percolator A.

"What I claim is: The combination, with a vessel, G, and adjustable tube, F, of a percolator, A, having a large filling and discharge orifice at its lower end, and a restricted opening, B, at its upper end, with which connects the lower end of the adjustable tube or pipe F, substantially as set forth."

The description of the percolator, and of the mode of using it to make fluid extracts or decoctions of drugs, amounts to this: The percolator is a cylinder wholly open at the lower end, and with a cover at the upper end, having a small open-

ing, attached to which is a flexible or adjustable tube leading from a reservoir of the liquid to be used for steeping the drug. The percolator is turned bottom up while the drug is put in, and a perforated or porous diaphragm inserted to hold the drug in place. It is then turned bottom down again. The pressure of the liquid, and consequently the quickness of its passage through the drug, are increased or diminished by elevating or lowering the reservoir, or by turning a stop-cock in the tube; and the extract is discharged through the bottom of the percolator into a vessel placed below.

The novelties suggested consist in having one end of the percolator open, serving both to receive the drug and to discharge the extract; in turning the percolator bottom up to put in the drug, and bottom down to let the extract drip out; in having a perforated or porous diaphragm to hold the drug in place; and in regulating the pressure of the liquid by means of a tube from the reservoir to the small opening in the covered end of the percolator.

But, passing over the difficulty that the diaphragm is not claimed as part of the combination patented, neither the percolator open at one end, the diaphragm, the inversion of the percolator, the insertion of the tube in the small opening in the covered end, nor the making that tube flexible and with a stop-cock, is new. All those elements appear in the Real press, as modified by Beindorf, described in Geiger's Handbuch der Pharmacie, published in 1830 at Stuttgart in Germany, which is an exhibit in the case, and a translation of the material parts of which, (vol. 1, pp. 157–160,) verified by the oath of a witness for the defendant, and included in the record, appears, though not quite grammatical, to be substantially accurate, notwithstanding the opposing testimony introduced by the plaintiff to impugn its correctness.

It will be sufficient to quote from that translation the following passages:[1] "The Real press consists principally of a

[1] "Die *Real'sche Presse* besteht der Hauptsache nach aus einem hohlen Cylinder, in welchem die auszuziehende Substanz im gepulverten Zustande zwischen 2 siebförmig durchlöcherten Platten fest gepackt enthalten ist, so dass sie nach keiner Seite hin weichen kann. Wenn der Cylinder an beiden

hollow cylinder, which contains the powdered substance to be exhausted between two perforated plates, tightly packed, so that the substance cannot move to [in] either direction. If the cylinder is open at both ends, a cover is fitted air-tight at one end, having a hole in the centre, into which a long tube is fitted, also air-tight. Between the cover and the perforated plate mentioned some space must remain. In extracting, the cylinder is placed vertical [upright], so that a vessel for gathering the liquid may be placed underneath." "A very practical change in the construction of the Real press has been introduced by Beindorf. The cylinder is fitted into a chair [frame], the cover or seat of which is movable, so that by turning [inverting] the same the press may be filled and connected with the tube." "The filled cylinder, turned bottom up, is placed upon a chair [frame] having a hole in the

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Enden offen ist, so wird an einem Ende ein Deckel luftdicht aufgepasst, welcher in der Mitte ein Loch hat, worein eine hohe Röhre ebenfalls luftdicht gesteckt wird. Zwischen dem Deckel und der obern siebförmigen Platte muss etwas Raum bleiben. Beim Extrahiren wird der Cylinder aufrecht festgestellt, so dass ein Gefäss zum Aufsammeln der Flüssigkeit untergestellt werden kann." "Eine sehr zweckmässige Abänderung der Real'schen Presse hat *Beindorf* vorgenommen. Der Cylinder wird in einen Stuhl gepasst, dessen Deckel beweglich ist, so dass durch Umdrehen desselben die Presse gefühlt und mit dem Rohr verbunden werden kann." "Der gefühlte, mit dem Boden nach oben gerichtete Cylinder wird auf einen Stuhl gestellt, der in der Mitte ein Loch hat, in welches derselbe passt und mit seinem Wulste aufliegt." "Den obern leeren Raum füllt man mit der auszuziehenden Flüssigkeiten an, und passt in die Oeffnung des Bodens eine Röhre: sie kann von Weissblech, Glas, Holz, oder ein lederner Schlauch u. s. w. seyn." "Neben das obere Ende der Röhre stelle man ein Gefäss mit der Ausziehungsflüssigkeit, so dass der Spiegel der Flüssigkeit etwas niederer als das Ende der Röhre steht. Man senke jetzt einen Heber in die Flüssigkeit und in die Röhre, ziehe durch die Röhre mit dem Munde etwas Luft an indem man mit den Lippen, dem Daumen und Zeigefinger das Eindringen derselben von aussen zu hindern strebt; die Flüssigkeit wird sich heben und durch den Heber in die Röhre auslaufen, diese wird selbst damit angefüllt, und so wirkt die Flüssigkeit drückend und lösend auf die Substanz. Sie durchdringt sie und kommt, mit extractiven Theilen beladen, anfangs oft von Syrupsdicke, vollkommen klar hervor." "Um die Wirkung nach Belieben aufhören zu machen, bringt man einen Hahn an die Röhre, den man schliesst, oder man verschliesst, nach weggenommenem Heber das obere Ende der Röhre."

middle, in which the cylinder fits and around which he [it] rests." "In the opening in the bottom, a tube is fitted, which may be made of tinned iron [tin plate], glass, wood, leather, etc." "Near the upper end of the tube is placed a vessel containing the menstruum [liquid solvent], the surface of which must be somewhat lower than the end of the tube. A syphon is now introduced into the liquid and in the tube, air sucked through the tube, so that the liquid will commence to flow through the syphon into the tube, which is thereby filled. The column of menstruum [liquid] thus obtained acts pressing and dissolving upon the substance to be extracted. It penetrates it, and arrives, laden with the soluble matter contained in the substance, at the lower end of the apparatus, often in a syrupy consistence." "In order to control the apparatus, stop or continue the operation, the tube is provided with a cock which may be closed if necessary, or the upper end of tube may be closed after removing the syphon."

This court concurs in opinion with the Circuit Judge that the plaintiff's contrivance is not new, and, that if it were new, there would be grave doubt whether it involved any invention. 22 Fed. Rep. 841. As the plaintiff's contrivance had been anticipated in the German publication half a century before, it is unnecessary to decide whether, if new, it would have been patentable.

Decree affirmed.

BALDWIN *v.* THE STATE OF KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 1154. Argued December 17, 1888. — Decided January 14, 1889.

The plaintiff in error was convicted of murder in a state court in Kansas. The Supreme Court of that State affirmed the judgment. On a writ of error from this court, it was assigned for error that the jurors were not sworn according to the form of oath prescribed by the statute of Kansas, and that, therefore, the jury was not a legally constituted tribunal, and so the defendant would be deprived of his life without due process of law, and be denied the equal protection of the law. The statute did not

give in words the form of the oath, but required that the jury should be sworn "to well and truly try the matters submitted to them in the case in hearing, and a true verdict give, according to the law and the evidence." The record did not state the form of the oath administered, but the journal entry stated that the jurors were "duly" sworn "well and truly to try the issue joined herein," and the bill of exceptions stated that the jury was sworn "to well and truly try the issues joined herein." The verdict also recited that the jury was "duly sworn" in the action. The record did not show that at the trial before the jury, any title, right, privilege, or immunity under the Constitution of the United States was specially set up or claimed. No objection was taken to the form of the oath at the trial, nor at the making of motions for a new trial and for an arrest of judgment before the trial court. The point was first suggested in the Supreme Court of the State: *Held*,

(1.) The recitals in the record, as to the swearing of the jury, were not to be regarded as an attempt to set out the oath actually administered, but rather as a statement of the fact that the jury had been sworn and acted under oath;

(2.) The objection could not be considered, because it was not taken at the trial.

The question whether the evidence in the case was sufficient to justify the verdict, and the question whether the constitution of Kansas was complied with or not in certain proceedings on the trial, were not Federal questions which this court could review.

The writ of error was dismissed for want of jurisdiction.

THE case which was claimed to raise a Federal question is stated in the opinion.

Mr. B. P. Waggener and *Mr. W. D. Webb* for plaintiff in error.

Mr. S. B. Bradford, Attorney General of the State of Kansas, for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Kansas. William Baldwin was proceeded against, in the District Court of the Second Judicial District of Kansas, sitting in and for Atchison County, by an information charging him with the crime of murder. On a trial before a jury, he was found guilty. A motion for a new trial was denied; and the

judgment of the court was rendered that he be confined at hard labor, in the penitentiary of the State, for one year from January 11, 1886, and until the governor of the State should by order direct his execution, at which time, as specified in such order, not less than one year from that date, he should be hung. He removed the case by appeal to the Supreme Court of the State, and it affirmed the judgment, in December, 1886. An application for a rehearing was denied in July, 1887. The case is brought here by him. The decision of the Supreme Court of Kansas is reported as *State* v. *Baldwin*, 36 Kansas, 1.

The errors assigned here are (1) that the jurors were not sworn according to the form of oath prescribed by the statute of Kansas, and that, therefore, the jury was not a legally constituted tribunal, and so the defendant will, under the judgment of the court, be deprived of his life without due process of law, and be denied the equal protection of the law; (2) that the evidence on which the judgment was founded was so inadequate to show that the defendant was guilty of the crime of murder, that the judgment amounts to a denial to the defendant of the equal protection of the law.

As to the question of the oath administered to the jurors, the journal entry at the trial states that, issue being joined upon a plea of not guilty, there came a jury of twelve good and lawful men, whose names are given, "having the qualifications of jurors, who being duly elected, tried, and sworn well and truly to try the issue joined herein," the trial proceeded. The bill of exceptions states that "a jury was empanelled and sworn to well and truly try the issues joined herein."

The statute of the State of Kansas provides (Compiled Laws of Kansas, c. 82, art. 11, § 208; c. 80, art. 15, § 274,) that "the jury shall be sworn to well and truly try the matters submitted to them in the case in hearing, and a true verdict give, according to the law and the evidence." The statute does not give in words the form of the oath. It is contended that the record affirmatively shows that the oath required by the statute of Kansas was not administered to the jurors, but that

they were only sworn "well and truly to try the issue joined herein," or "to well and truly try the issues joined herein."

The record does not purport to give *ipsissimis verbis* the form of the oath administered to the jurors. The statement of the oath is entirely consistent with the fact that the oath required by the statute of Kansas was administered, especially in view of the statement in the journal entry that the jurors were "duly" sworn. On this subject, the Supreme Court of Kansas says correctly, in its opinion: "It is highly important and necessary that the oath should be administered with due solemnity, in the presence of the prisoner, and before the court, substantially in the manner prescribed by law. It may also be conceded that the record should show that the jury were sworn, and, when the record does purport to set out in full the form of the oath upon which the verdict is based, it must be in substantial compliance with law; otherwise the conviction cannot stand. The assumption by counsel that the oath as actually administered is set out in full in the record, it seems to us, is unwarranted. What is stated in the record is but a recital by the clerk of the fact that the jury were sworn. The swearing was, of course, done orally, in open court, and it is no part of the duty of the clerk to place on the record the exact formulary of words in which the oath was couched. He has performed the duty in that respect when he enters the fact that the jury were duly sworn, and when that is done the presumption will be that the oath was correctly administered. The method of examining the jurors as to their qualifications, or whether the oath was taken by them while standing with uplifted hands, according to the universal practice in the State, or otherwise, is not stated. In making mention of the impanelling and swearing of the jury, there is no description of the parties between whom the jury are to decide; nor, indeed, are there any of the formal parts of an oath stated. The statement made is only a recital of a past occurrence; and it is manifest that there was no intention or attempt of the clerk to give a detailed account of the manner of impanelling the jury, or to set out the oath *in hæc verba*. It may be observed that in the form of the verdict returned, and which was pre-

pared and presented to the jury by the trial judge, it was stated that the jury were duly impanelled and sworn."

The form of the verdict thus referred to was in these words: "We, the jury duly empanelled, charged and sworn, in the above entitled action, do, on our oath, find the defendant, William Baldwin, guilty of murder in the first degree, as charged in the first count of information."

The Supreme Court of Kansas held that the recitals in the record relative to the swearing of the jury were not to be regarded as an attempt to set out the oath actually administered, but rather as a statement of the fact that the jury had been sworn and acted under oath. We concur in this view.

That court went on to say: "A still more conclusive answer on this point is, that no objection was made to the form of the oath when it was administered, or at any other time prior to its presentation in this court. If there was any irregularity in this respect, it should, and probably would, have been objected to at the time it occurred. It is quite unlikely that there was any departure from the form of the oath so well understood, and which is in universal use in all of the courts of the State; but, if the form of the oath was defective, the attention of the court should have been called to it at the time the oath was taken, so that it might have been corrected. A party cannot sit silently by, and take the chances of acquittal, and subsequently, when convicted, make objections to an irregularity in the form of the oath. Not only must the objection be made when the irregularity is committed, but the form in which the oath was taken, as well as the objection, should be incorporated into the bill of exceptions, in order that this court may see whether or not it is sufficient. This was not done."

This statement of the condition of the record shows that no Federal question is presented, in regard to the oath administered to the jurors, of which this court can take jurisdiction. Section 709 of the Revised Statutes provides, that a final judgment in any suit in the highest court of a State, in which a decision in the suit could be had, where any title, right, privilege, or immunity is claimed under the Constitution, and the decision is against the title, right, privilege, or immunity

"specially set up or claimed" by either party, under such Constitution, may be re-examined, and reversed or affirmed, in the Supreme Court, upon a writ of error. In the present case, the record does not show that, at the trial before the jury, any title, right, privilege or immunity under the Constitution of the United States was specially set up or claimed. No objection was taken to the form of the oath at the trial, nor at the making of the motion for a new trial before the trial court, nor at the making of the motion for arrest of judgment in that court. The point was first suggested in the Supreme Court of the State. That court, as it appears, refused to consider the objection, on the ground that it was not taken at the trial. For that reason, we, also, cannot consider it.

In *Spies* v. *Illinois*, 123 U. S. 131, 181, this court said in regard to a question of this kind: "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." Again: "If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive, so far as the right of review here is concerned."

The question whether the evidence in the case was sufficient to justify the verdict of the jury, and the question whether the constitution of the State of Kansas was complied with or not in the proceedings on the trial which are challenged, are not Federal questions which this court can review.

The writ of error is dismissed for want of jurisdiction.

Mr. Justice Harlan dissenting.

I adhere to the opinion expressed by me in *Hurtado* v. *California*, 110 U. S. 539, that a State cannot, consistently with due process of law, require a person to answer for a capital offence, except upon the presentment or indictment of a grand jury. Upon that ground I dissent from the judgment in this case.

Citations for Appellees.

WALLACE *v.* JOHNSTONE.

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

No. 94. Argued November 23, 1888. — Decided January 14, 1889.

A deed of lands, absolute in form, with general warranty of title, and an agreement by the vendee to reconvey the property to the vendor, or to a third person, upon his payment of a fixed sum within a specified time, do not of themselves constitute a mortgage; nor will they be held to operate as a mortgage unless it is clearly shown, either by parol evidence or by the attendant circumstances, such as the condition and relation of the parties, or gross inadequacy of price, to have been intended by the parties as a security for a loan or an existing debt.

The fact of a collateral agreement by the grantee in a deed of real estate to reconvey to the grantor on the payment of a sum of money at a future day is not inconsistent with the idea of a sale.

Whether the transaction in dispute was a sale or a mortgage is a question of fact, to be determined from the proof, and here the proof shows it to have been a sale.

THE case is stated in the opinion of the court.

Mr. George Norris for appellant cited: *Teal* v. *Walker*, 111 U. S. 242; *Nugent* v. *Riley*, 1 Met. 117; *S. C.* 35 Am. Dec. 355; *Wilson* v. *Shoenberger*, 31 Penn. St. 295; *Dow* v. *Chamberlin*, 5 McLean, 281; *Bayley* v. *Bailey*, 5 Gray, 505; *Lane* v. *Shears*, 1 Wend. 433; *Friedley* v. *Hamilton*, 17 S. & R. 70; *S. C.* 17 Am. Dec. 638; *Shaw* v. *Erskine*, 43 Maine, 371; *Peugh* v. *Davis*, 96 U. S. 332; *Russell* v. *Southard*, 12 How. 139; *Shillaber* v. *Robinson*, 97 U. S. 68; *Conway* v. *Alexander*, 7 Cranch, 218; *Morris* v. *Nixon*, 1 How. 126; *Vernon* v. *Bethell*, 2 Eden, 110; *Oldham* v. *Halley*, 2 J. J. Marsh. 113; *Edrington* v. *Harper*, 3 J. J. Marsh. 353; *S. C.* 20 Am. Dec. 145.

Mr. James Hagerman, with whom was *Mr. Joseph G. Anderson* for appellees, cited: *Conway* v. *Alexander*, 7 Cranch, 218; *Snavely* v. *Pickle*, 29 Gratt. 27; *Slutz* v. *Desenburg*, 28 Ohio St. 371; *Flagg* v. *Mann*, 14 Pick. 467; *Glover* v. *Payn*, 19 Wend. 518; *Slowey* v. *McMurray*, 27 Missouri, 113; *S. C.* 72 Am. Dec. 251; *Galt* v. *Jackson*, 9 Georgia, 151;

Opinion of the Court.

Spence v. *Steadman*, 49 Georgia, 133; *West* v. *Hendrix*, 28 Alabama, 226; *Ruffier* v. *Womack*, 30 Texas, 332; *Pitts* v. *Cable*, 44 Illinois, 103; *Magnusson* v. *Johnson*, 73 Illinois, 156; *Hicks* v. *Hicks*, 5 Gill & Johns. 75; *McNamara* v. *Culver*, 22 Kansas, 661; *Budd* v. *Van Orden*, 33 N. J. Eq. 143; *Shaw* v. *Erskine*, 43 Maine, 371; *Treat* v. *Strickland*, 23 Maine, 234; *Hill* v. *Grant*, 46 N. Y. 496; *Penn. Co.* v. *Austin*, 42 Penn. St. 257; *Stevenson* v. *Thompson*, 13 Illinois, 186; *Carr* v. *Rising*, 62 Illinois, 14; *Saxton* v. *Hitchcock*, 47 Barb. 220; *Howland* v. *Blake*, 97 U. S. 624; *Coyle* v. *Davis*, 116 U. S. 108; *Cadman* v. *Peter*, 118 U. S. 73; *Corbit* v. *Smith*, 7 Iowa, 60; *S. C.* 71 Am. Dec. 431; *Cooper* v. *Skeel*, 14 Iowa, 578; *Gardner* v. *Weston*, 18 Iowa, 533; *Hyatt* v. *Cochran*, 37 Iowa, 309; *Sinclair* v. *Walker*, 38 Iowa, 575; *Zuver* v. *Lyons*, 40 Iowa, 510; *Woodworth* v. *Carman*, 43 Iowa, 504; *Kibby* v. *Harsh*, 61 Iowa, 196; *Knight* v. *McCord*, 63 Iowa, 429.

Mr. Justice Lamar delivered the opinion of the court.

This is a suit in equity originally brought in a state court by the appellees against the appellant and one E. R. Ford, to quiet the title to about 3184 acres of land in Sioux and Clay counties in the State of Iowa.

The petition alleged that on February 17, 1875, the defendant, John A. Wallace, who was then the owner in fee of the land in dispute, by a deed of warranty, which was afterwards duly recorded, for a valuable consideration, sold and conveyed the same to the plaintiffs and one William Leighton; that on the same day said grantees executed and delivered to the defendant Ford a contract in writing, giving him the option, for the period of sixty days from that date, of purchasing the land in question, upon the payment by him of the sum of $5876, which contract was on that day assigned by Ford to defendant Wallace, and was afterwards duly recorded; that Leighton afterwards conveyed his undivided one-fourth interest to the plaintiff C. F. Davis, who afterwards conveyed one-half thereof to plaintiff Edward Johnstone; that neither of the defendants ever paid anything on the lands, and neither ever

exercised the option of purchasing within the time specified in the option contract, or at any time thereafter, and that the rights of the defendants under that contract had become forfeited; that the plaintiffs, upon the purchase of the lands, assumed control of them, and had paid the taxes thereon; and that the defendants had no rights under the contract, nor any interest, legal or equitable, in the lands, but the contract, being upon the records of the counties where the lands lie, constituted a cloud upon the title to them.

The prayer of the petition was, that the option contract be declared forfeited, rescinded and cancelled, and the title to the plaintiffs be quieted against all claims of the defendants, or either of them, and for further relief, etc.

Defendant Wallace answered, admitting the execution and delivery of the deed and option contract of February 17, 1875, but alleging that, taken together, they were understood by the parties thereto as constituting a mortgage for the security of the money received by him at that time, which was in reality a loan; alleging, further, that the transaction was to avoid the effect of the usury laws of Iowa, the plaintiffs not being willing to accept simply the legal rate of ten per cent interest on such loan; that the lands were worth at that time fully $20,000, and the money actually received by him was only about $4250; that defendant Ford never had any real interest in the option contract, but actually assigned it to him before it was signed and executed by the plaintiffs and Leighton, all of which was well known to said parties; that the loan was obtained in good faith, and he was willing to bind himself, in the way he did, for said $5876, for the use of the said $4250 for sixty days, because he badly needed money, and believed he could sell the land so as to pay off the loan and leave a large surplus for himself; and that this defendant has considered himself indebted to plaintiffs and Leighton in the sum of $4250, and lawful interest from February 17, 1875, and now asks that he be required to pay only that amount.

He, therefore, prayed that said deed be declared by the court to be a mortgage; that the title to the real estate be decreed to be in the defendant, subject to such claim as the

plaintiffs may legitimately have against it by virtue of that deed, and any taxes they have paid; and that defendant have a legal right to redeem, as provided by law, upon such terms of payment of such amount as the court shall think just and proper, and for other and further relief, etc.

The suit was then removed into the United States Circuit Court for the Southern District of Iowa, upon the ground of diverse citizenship of the parties, where defendant Wallace filed a cross-bill substantially in matter and form the same as his answer, asking to redeem. Plaintiffs replied to the answer of Wallace, and answered his cross-bill denying every material allegation therein not in harmony with the allegations of the petition. Defendant Ford answered, admitting all the allegations of plaintiffs' petition, and disclaiming any interest in the lands. Testimony was taken, and the decree of the Circuit Court was in favor of the plaintiffs; the option contract was cancelled and annulled; the title to the lands in question was quieted in the plaintiffs forever as against any claim thereto on the part of either of the defendants or any one claiming under them through the option contract; and the cross-bill of defendant Wallace was dismissed. From this decree Wallace prayed and perfected an appeal, which brings the case into this court.

The sole question presented in the case is — was the transaction of February 17, 1875, an absolute sale or a mortgage? If this question could be determined by inspection of the written papers alone, the transaction was clearly not a mortgage, but an absolute sale and deed, accompanied by an independent contract between the vendee and a third person, not a party to the sale, to convey the lands to him upon his payment of a fixed sum within a certain time. Upon their face there are none of the *indicia* by which courts are led to construe such instruments to be intended as a mortgage or security for a loan; nothing from which there can be inferred the existence of a debt, or the relation of borrower and lender between the parties to the deeds or between the parties to the contract.

The question whether the extrinsic proof shows that the

$4250 was a loan to Wallace, and that the deed and option contract were made to secure its repayment with large interest, is a question of fact to be determined by the circumstances attending the execution of the instruments in question.

The evidence, as it appears in the record, is much less contradictory than is usual in such cases where it is sought by parol testimony to change an absolute conveyance, with a collateral agreement for a repurchase, into a mortgage.

With the single exception of the appellant, all the witnesses conversant with the negotiations between the parties unite in giving testimony tending to show that the transaction was a purchase of the lands by the appellees for the purpose of acquiring the property, and that they made a collateral agreement with Ford that if he, or his assigns, should, within sixty days, deposit in bank to their credit the sum of $5876, they would convey the lands to them.

It is not necessary to discuss the testimony in detail. There are two points, however, to which we will make reference. Edward Johnstone, one of the appellees, after giving the particulars of the contract, as expressed in the papers, says:

"Upon the purchase of these lands we went into possession of them, and we paid taxes for them, and sold a portion; and I never heard anything of any claim of Mr. Wallace of this being a loan, until I saw it set up in his answer to this case. . . . I never heard from Dr. Ford or Mr. Wallace that he wanted a loan; there was never such a thing as a loan intimated.

"Did you ever hear Mr. Leighton say anything on the subject?

"I talked frequently to Mr. Leighton and Mr. Davis and Mr. Connable, and I never heard a word said that would intimate that a loan was desired by Mr. Wallace; it was all with reference to the purchase of these lands."

Both Davis and Connable testify to the same effect. Each denies, positively, that a loan was proposed, or a debt incurred, or a mortgage at any time contemplated. These statements are strongly corroborated by the other witnesses, and are not contradicted even by the appellant.

Opinion of the Court.

E. R. Ford, the agent of Wallace, who initiated negotiations between the parties, and who was present at the execution and delivery of the papers, the option contract being made with him, being called as a witness for the appellant, testified: "That the deed and option contract expressed the whole transaction. . . . I didn't so understand it as a loan." In response to the question, "In your negotiation you did not understand it in that light as a loan?" he answered: "I did not. From the beginning, in St. Louis I think it was, my own suggestion as to this option of repurchase, knowing that a mortgage or deed of trust would not be accepted for a short loan, as no loan was contemplated, the subject-matter of a loan was left out of the question altogether." And he proceeds afterwards to state, in reference to his suggestion to Mr. Wallace, that he should make a sale and take back the contract of repurchase within a stipulated time and for a stipulated price, that it was the only method he thought of, believing, as he did, "that a sale might be effected, but that a short loan could not be made upon unimproved lands; hence I am quite positive that the subject of loans was not entertained at all." He also states: "That the question of interest was never discussed between the parties, and that whatever compensation the purchasers would consider in the matter would be in the nature of a profit of the land in selling."

W. B. Collins, who was the attorney for the appellees, states that the appellant, his agent, Ford, and Leighton, one of the purchasers, frequently met at his office and conversed about the pending negotiations for the sale of the land; that they always spoke of it as a sale and purchase, and that he did not hear at any time of its being a loan.

There is but one witness, the appellant Wallace, who testifies that the transaction was a loan. His statements as to any particular fact are singularly indefinite, inconsistent, and unsatisfactory. His testimony consists, largely, of his version of certain conversations and arrangements with Leighton, who died before the commencement of the suit.

These arrangements looking to the loan and mortgage he expected, as he alleges, to be carried out by the appellees; but

he admits, after many indirect answers, that he does not remember any conversations with the appellees, or any one of them, in which the transaction was spoken of by himself, or by them, as a loan, or in which the subject of interest was mentioned between them; or in his own language, "it is more than likely that I did not have such conversation." If there was no other testimony in the case than that of the appellant, we do not think the proof sufficient to overcome the effect due to the clear and distinct terms of the written instruments.

But it is urged by appellant's counsel that the disparity between the price paid for the lands and their actual value shows the transaction to be a loan, and not a purchase. The evidence on this subject is at first view contradictory; some of the witnesses putting a market value per acre of such lands in large lots at the price paid for them by the appellees; others stating their value to be from $2.50 to $3.00 per acre. The real fact, taking all the testimony together, seems to be that those lands, when sold in small areas to actual settlers for the purposes of habitation, would bring the higher prices, whilst in large quantities they could be sold to speculators, for profit, only at the lower prices.

Nothing presented by the assignment of errors calls for correction. The legal questions which they raise have been settled beyond doubt or controversy by repeated decisions of this court.

A deed of lands, absolute in form with general warranty of title, and an agreement by the vendee to reconvey the property to the vendor or a third person, upon his payment of a fixed sum within a specified time, do not of themselves constitute a mortgage; nor will they be held to operate as a mortgage, unless it is clearly shown, either by parol evidence or by the attendant circumstances, such as the condition and relation of the parties, or gross inadequacy of price, to have been intended by the parties as a security for a loan or an existing debt. *Cadman* v. *Peter*, 118 U. S. 73, 80; *Coyle* v. *Davis*, 116 U. S. 108; *Howland* v. *Blake*, 97 U. S. 624; *Horbach* v. *Hill*, 112 U. S. 144.

The fact of such a collateral agreement to reconvey is not inconsistent with the idea of a sale.

Statement of the Case.

When the time fixed for the payment elapsed, Wallace's right to repurchase became extinct, and appellees held the lands discharged from any claim upon his part.

The decree of the court below is

Affirmed.

NOBLE *v.* HAMMOND.

ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

No. 101. Argued December 3, 1888. — Decided January 14, 1889.

A for his own accommodation asked B to collect money for him, without compensation, and to keep it until A called for it. B collected the money, and, without actual fraud or fraudulent intent, deposited the proceeds to his own credit with his own funds. By an unexpected revulsion he was forced into bankruptcy before he had paid it over, and made a composition with his creditors: *Held*, that the debt thus incurred by B to A was not a debt created by fraud or embezzlement of the bankrupt, or while he was acting in a fiduciary capacity within the exception provided for in Rev. Stat. § 5117.

The word "fraud" as used in Rev. Stat. § 5117 means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not merely implied fraud, or fraud in law.

THE court stated the case as follows:

This is an action of general assumpsit originally brought in the county court of Franklin County, Vermont, by the late firm of Hammond & Burt, of which the defendant in error, DeForest Hammond, is the survivor, against the plaintiff in error, Sylvester C. Noble, to recover the sum of $1000 in money alleged to have been received by him of and from them. The defendant pleaded the general issue, and also gave notice under the statute, as a special defence, of his discharge by composition in bankruptcy, as provided for by the United States statutes. The case was tried by a jury, resulting in a verdict in favor of plaintiffs for $1149.83, for which, with costs, judgment was rendered. The Supreme Court of the

State affirmed this judgment, and the defendant thereupon sued out the writ of error which brings the case here.

The material facts in the case are as follows: In October, 1877, the Central Vermont Railroad Company, having its principal office in St. Albans, Vermont, where the plaintiff in error also resided, was indebted to the firm of Hammond & Burt, residents of Franklin, in that State, in about the sum of $3600. It was the custom of that company to pay its debts of the character of this one in instalments, and at its own convenience. Hammond & Burt, having experienced considerable difficulty in collecting prior debts from the company, requested the plaintiff in error, as a matter of accommodation to them, to collect said indebtedness for them, and he consented to do so. In pursuance of this arrangement they called at his office on the 2d of October, 1877, he at the time being out, and left for him an order of which the following is a copy :

"St. Albans, Vt., Oct. 2, 1877.

"Central Vermont Railroad will please pay to S. C. Noble or order the whole amount due to us.

"Hammond & Burt."

Immediately after they had left his office the plaintiff in error came in, and, the order being handed to him, he stepped to the door of the office, called to them as they were crossing the street on their way to the depot, and asked them what he should do with the money when collected. They testified that they then told him "to keep the money until they called for it." He testified that they told him "to keep and use the money until they called for it," or words to that effect.

On this order the plaintiff in error collected $1000 from the railroad company — $500 on October 3 and $500 on October 12, 1877 — and deposited these sums as collected in bank, to his own credit, as he deposited his own funds. On the 26th of the same month he failed, and on the 6th of November, 1877, on the petition of his creditors, was adjudged a bankrupt. Subsequently, an offer of composition to his creditors was duly accepted and confirmed by a majority of them, but was not accepted by these plaintiffs.

Opinion of the Court.

It appears from the bill of exceptions that "there was no evidence tending to show any actual fraud or any fraudulent intent in the defendant's mingling the money with his own and using it." The jury returned a verdict for the defendants in error, under instructions from the court which authorized such a verdict only if the instructions given by the defendant in error to the plaintiff in error were to keep the money until they demanded it.

Mr. Guy C. Noble, (with whom was *Mr. A. P. Cross* and *Mr. E. Curtis Smith* on the brief,) for plaintiff in error, cited: *Chapman* v. *Forsyth*, 2 How. 202; *Neal* v. *Clark*, 95 U. S. 704; *Hennequin* v. *Clews*, 111 U. S. 676; *Hammond* v. *Noble*, 57 Vermont, 193; *Johnson* v. *Worden*, 47 Vermont, 457; *Darling* v. *Woodward*, 54 Vermont, 101; *Woolsey* v. *Cade*, 54 Alabama, 378; *McAdoo* v. *Lummis*, 43 Texas, 227; *Green* v. *Chilton*, 57 Mississippi, 598; *Upshur* v. *Briscoe*, 37 La. Ann. 138; *Hennequin* v. *Clews*, 77 N. Y. 427; *Phillips* v. *Russell*, 42 Maine, 360; *Gibson* v. *Gorman*, 44 N. J. Law, 325; *Chipley* v. *Frierson*, 18 Florida, 639; *Pierce* v. *Shippee*, 90 Illinois, 371; *Palmer* v. *Hussey*, 59 N. Y. 647; *S. C.* 87 N. Y. 303; *Stratford* v. *Jones*, 97 N. Y. 586; *Hayes* v. *Nash*, 129 Mass. 62; *Grover & Baker* v. *Clinton*, 8 Nat. Bank. Reg. 312; *Owsley* v. *Cobin*, 15 Nat. Bank. Reg. 489; *Wells* v. *Lamprey*, 16 Nat. Bank. Reg. 205; *In re Shafer*, 17 Nat. Bank. Reg. 116; *In re Rodger*, 18 Nat. Bank. Reg. 252; *In re Smith*, 18 Nat. Bank. Reg. 24.

Mr. Henry R. Start, for defendant in error, cited: *People* v. *Hennessey*, 15 Wend. 147; *Commonwealth* v. *Foster*, 107 Mass. 221; *Strang* v. *Bradner*, 114 U. S. 555; *Mackay* v. *Dillon*, 4 How. 421; *Hammond* v. *Noble*, 57 Vermont, 193.

Mr. Justice Lamar delivered the opinion of the court.

The case presented upon the record, as found by the jury, is that of a produce dealer who, having been requested by parties to collect money for them as an accommodation, and without compensation, and to keep it until they called for it,

proceeded to make such collection, and, without actual fraud or fraudulent intent, deposited the proceeds to his own credit with his own funds; and who, before he paid it over was, by an unexpected revulsion, forced into bankruptcy, and made a composition with his creditors. The question involved is, whether the debt thus incurred was within the exception provided for in § 5117 Rev. Stat., which is as follows:

"No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy. . . ."

The judge on the trial charged the jury that the money under such circumstances was received in a fiduciary character, and that the plaintiffs must recover. The Supreme Court of Vermont affirmed the judgment of that court on the ground that, though the above charge was technically erroneous, it was harmless, because the act of the defendant, in mingling the money with his own and using it, was, in the face of the plaintiffs' instruction to keep it until they called for it, a wrongful and fraudulent act, a betrayal by the defendant of the trust reposed in him, and, therefore, a fraud which created a debt that was not discharged by the defendant's composition with his creditors under the provisions of the bankrupt law.

The effect to be given to the phrases "while acting in a fiduciary character" and "created by the fraud of the bankrupt," has been considered and fully settled by this court in the following cases: *Chapman* v. *Forsyth*, 2 How. 202; *Neal* v. *Clark*, 95 U. S. 704; *Wolf* v. *Stix*, 99 U. S. 1; *Hennequin* v. *Clews*, 111 U. S. 676; *Strang* v. *Bradner*, 114 U. S. 555; and *Palmer* v. *Hussey*, 119 U. S. 96. The class of debts held by the decisions in those cases to be excepted from the operation of bankrupt proceedings has been stated and illustrated with a clearness and fulness, which leaves but little opening for any controversy with regard to the application of the clause under consideration to particular cases.

Under the bankrupt act of 1841, which excepted from discharge debts of the bankrupt, created in consequence of a defalcation as a public officer, or as executor, administrator,

guardian, or trustee, or while acting in any other fiduciary capacity, this court, in *Chapman* v. *Forsyth*, held that the cases enumerated in the act are cases not of implied but special trusts; that the phrase, "in any other fiduciary capacity," referred, not to those trusts which the law implies from the contract, and which form an element in every agency, and in nearly all the commercial transactions in the country, but to technical trusts; and hence that a factor who had sold the property of his principal, and had failed to pay over to him the proceeds, did not owe to him a debt created in a fiduciary capacity within the meaning of the act.

That decision is stated by Mr. Justice Bradley, in the opinion in *Hennequin* v. *Clews*, to have been "not only followed but approved by the highest courts of several of the States."

Under § 5117, which is substantially a re-enactment of the provision of the act of 1841, in this regard, with the single additional provision that "no debt created by fraud shall be discharged," etc., this court, on the line of the same reasoning, has construed the word "fraud," as used in that section, to mean positive fraud, or fraud in fact — involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud or fraud in law; and hence it does not apply to a debt created by purchasing in good faith, from an executor, bonds belonging to his decedent's estate at a discount, although such an act was held to be a constructive fraud. *Neal* v. *Clark*, (*supra*). Nor does it include such fraud as the law implies from the purchase of property from a debtor with intent thereby to hinder and delay creditors in the collection of their debts. *Wolf* v. *Stix*, (*supra*). Nor does it refer to a debt arising from the conversion by a party to his own use of bonds held by him merely as a collateral security for the payment of a debt, or the performance of a duty, and which he fails to restore, after the payment of the debt or performance of the duty, to the person who entrusted them to his keeping. *Hennequin* v. *Clews*, (*supra*). In all these cases the defendant was held to be released by the subsequent discharge in bankruptcy.

The decisions of the state courts in a great number and

variety of cases, as shown by the citations in the brief of counsel for plaintiff in error, are in accord with the construction, by this court, of these clauses of the section in question, and have applied it to cases of agents, factors, commission merchants, and bailees, who have failed to account for proceeds of the sale of property committed to them for that purpose or moneys received upon collections entrusted to them.

The finding of the jury, that the agreement of the plaintiff in error was to collect the money and keep it until the defendants in error called for it, cannot be taken to imply an obligation to keep and deliver to them the identical bills or coins. Even if the agreement between the parties might be construed as creating a trust in some sense, it was clearly not such a trust as comes within the provisions of the bankrupt act. Nor can the subsequent mingling, by the plaintiff in error, of the money collected with his own, constitute the *actual, positive* fraud contemplated by that act, but only such an *implied* fraud as is involved in most, or all, cases of conversion of property or of breach of contract.

The judgment of the Supreme Court of Vermont is in conflict with the principles laid down by the decisions of this court, as well as the general drift of those of the several state courts, and is, therefore, reversed, and

The case is remanded to the court below, with an instruction to grant a new trial and to take such further proceedings as may not be inconsistent with this opinion.

ANDERSON *v.* MILLER.

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

No. 135. Argued December 19, 1888. — Decided January 14, 1889.

On the proofs the court holds that there has been no infringement of the appellant's patent by the appellees.

Opinion of the Court.

THE case is stated in the opinion.

Mr. Charles S. Whitman for appellant.

Mr. John S. Wise for appellees.

MR. JUSTICE LAMAR delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Eastern District of Virginia, by the appellant against the appellees, founded on an alleged infringement by them of letters patent No. 265,733, granted to appellant, October 10, 1882, upon an application filed June 24, 1882, for an improvement in drawers.

The alleged infringement consisted in appellees' placing on drawers manufactured by them a patch extending down the front and lapping the seam of the crotch by at least half an inch, which process of reënforcing the garment, it was alleged, was the invention of the appellant.

The bill avers that "the defendants, Henry T. Miller and William Mitchell, both of the city of Richmond, in the county of Henrico and State of Virginia, and citizens of the said State of Virginia, constituting the firm of Henry T. Miller & Co., doing business at Richmond, in the county, State, and district aforesaid, . . . are now using said patented improvements, or improvements in some parts thereof substantially the same in construction and operation as in the letters patent mentioned, and, in violation of his rights, have made, used and vended within the Eastern District of Virginia . . . large quantities of drawers described and claimed in the letters patent aforesaid," etc.

The answer of the defendants, in their own separate names, with the firm name, precisely as they are stated by the bill, in response to complainant's interrogatories, admits that they are residents of Richmond, Virginia, and engaged in the business of the manufacture and vending of drawers for the clothing trade in that city.

The averments of the answer, material to this inquiry, are,

"that drawers, as reënforced as described in letters patent of plaintiff, had been made and in public use and on sale by sundry and divers persons for many years prior to plaintiff's application;" that they, the defendants, "have been manufacturing one particular kind, and only one particular kind, of reenforced drawers for more than five years hitherto continuously, a specimen of which drawers, manufactured by them, is filed as 'Exhibit A,' etc., and that these are the only kind of reënforced drawers that have been manufactured by them, or either of them, during the last five years;" and that, "even if the drawers manufactured by them are either identically or substantially the same as those manufactured by the complainant, he is entitled to no relief whatever against them, because these respondents are prepared to prove that Henry T. Miller & Co. and Henry T. Miller have hitherto continuously for over five years manufactured the identical reënforced drawers filed as 'Exhibit A,' and that for over four years prior to the application for said patent they used and sold reenforced drawers of the pattern and design of those now filed as 'Exhibit A,' and none other."

The Circuit Court dismissed the bill, and an appeal from that decree of dismissal brings the case here.

It is contended by the appellant that the answer of the defendants below did not contain a sufficient notice, under the statute, of the defence of want of novelty and two years' public use, in that it did not state the names and places of residence of the persons by whom and where it was used. The object of this statutory requirement is, to apprise the plaintiff of the nature of the evidence which he must be ready to meet at the trial. This object is substantially and fully accomplished by the pleadings in this case, and we decline to disturb the action of the court below overruling the motion made at the hearing to strike out the testimony of the witnesses for the defence, who testified to the prior use of the patented article.

We do not deem it necessary to consider the question whether the patent of the appellant is for a new and useful invention within the meaning of § 4886 *et seq.*, Rev. Stat.,

inasmuch as it is the opinion of this court that there has been no infringement of it in this case by the appellees. It is satisfactorily shown by the evidence in the record that for more than two years prior to the application for the patent in question the appellees had been manufacturing, at their place of business at Richmond, Virginia, garments identical in pattern with those that are now alleged to infringe appellant's patent.

The decree of the Circuit Court is

Affirmed.

CAMDEN *v.* MAYHEW.

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

No. 80. Argued November 14, 15, 1888. — Decided January 14, 1889.

When the decree of a court of equity, for the sale of a tract of land, requires the sale to be made "upon the terms, cash in hand upon the day of sale," and a person bidding for it at the sale is the highest bidder, and as such is duly declared to be the purchaser, no confirmation of the sale by the court is necessary in order to fix liability upon him for the deficiency arising upon a resale, in case he refuses, without cause, to fulfil his contract; and, if the purchaser refuses to pay the amount bid, the court, without confirming the sale, may order the tract to be resold, and that the purchaser shall pay the expenses arising from the non-completion of the purchase, the application and the resale, and also any deficiency in price in the resale.

When a purchaser at a sale of real estate, under a decree of a court of equity, refuses, without cause, to make his bid good, he may be compelled to do so by rule or attachment issuing out of the court under whose decree the sale was had; or he may be proceeded against in the same suit by rule, (or in any other mode devised by the court, which will enable him to meet the issue as to his liability,) in order to make him liable for a deficiency resulting from a resale caused by his refusal to make his bid good.

THE court stated the case as follows:

This is an appeal from a final order in the suit, in the court below, of *Mayhew, &c.* v. *West Virginia Oil and Oil Land*

Statement of the Case.

Company, &c., requiring the appellant Camden to pay the difference between the amount bid by him for certain real estate offered for sale, at public auction, under the decree in that suit, and the amount the same property brought on a resale had because of his refusal to comply with the terms of his bid. In the order of resale the court reserved, for future determination, the question as to his liability for any deficiency in the amount the property might bring.

The history of the proceedings out of which the present appeal arises, so far as it is necessary to be stated, is as follows:

By a decree rendered, November 17, 1883, in the above suit, it was adjudged that the West Virginia Oil and Oil Land Company was indebted, in specified amounts, to various creditors, who were entitled to be paid out of the property in question, according to certain priorities, and that upon its failure to pay them, within a prescribed time, the property should be sold at public auction, "upon the terms *cash in hand on the day of sale.*" The decree shows that William D. Thompson, Richard A. Storrs, and Heman Loomis held debts that were to be first paid, equally and ratably, out of the proceeds of sale. The other debts, made liens upon the property by the decree, were held by James H. Carrington, A. C. Worth, W. H. Beach, the Toledo National Bank, R. S. Blair, Benjamin B. Valentine and Heman Loomis.

Before the property was offered for sale, a writing was prepared purporting in its caption to be an "agreement made this —— day of November, 1883, between J. N. Camden, J. H. Carrington, W. H. Beach, A. C. Worth, Toledo National Bank, R. S. Blair, B. B. Valentine and Heman Loomis." It provided, among other things, that Camden should purchase the property, when sold under the decree, for the mutual benefit of "the parties hereto," if it sold for a sum not exceeding the aggregate amount of the claims against it, including interest and costs; that if he bought, he should, as agent and trustee of the parties, apply their claims in payment of the purchase money required at the sale, and place on record a declaration of trust showing that the property was held by him in trust

for the payment of said debts, but that it should belong to him, in fee simple, when he paid them off; the rents, issues, and profits thereof, after deducting necessary expenses, to be applied by the trustee as follows:

"1. The balance, if any, due to J. N. Camden, assignee of W. D. Thompson, shall be fully paid. 2. Then forty per cent of the proceeds of said property shall be paid to Heman Loomis and sixty per cent thereof to the said Carrington, Worth, Beach, Toledo National Bank, Blair and Valentine, according to their rights and priorities, as fixed by the said decree, as between the six parties last named, until they and each of them are fully paid. 3. Then sixty per cent of said proceeds shall be paid to said Carrington, so far as to reimburse and indemnify him such sums of money, if any, as he may be held liable for as maker, acceptor, or indorser of two certain bills of exchange, for the payment of which the said West Virginia Oil and Oil Land Company is primarily liable, one of which bills is supposed to be held by Marietta Arnold, of Michigan, and is for the sum of $1500, and the other is held by the National Bank of Commerce in New York, and is for the sum of $2431.39. 4. After the payment of the foregoing amounts the said property shall be held in trust for the payment of any balance due the said Heman Loomis until the same is fully paid."

This writing was signed by all the parties named in its caption, except Beach and the Toledo National Bank.

It should be here stated that before any sale took place several judgment creditors of the West Virginia Oil and Oil Land Company were allowed to intervene in the cause by petition, each asserting a right to have his demand paid out of the proceeds; some of them claiming priority over any creditor whose debt had been specifically provided for by the decree.

On the 1st of May, 1884, the property was offered by commissioners for sale at public auction, and Charles H. Shattuck became the purchaser at the price of $163,000, although he was at the time special receiver of the rents, profits and product arising therefrom. He was personally interested in his bid to the extent of about $20,000. Who his associates were is

not disclosed by the record. The sale was duly reported, the commissioners receiving from Shattuck on the day of sale the entire amount bid by him.

William P. Thompson and Oliver H. Payne, with William N. Chancellor as their surety, having executed a bond conditioned that if the property was resold they would bid the sum of $173,000, and having deposited the sum of $10,000, as additional security, the court directed a resale, and required the commissioners to return to the purchaser (which they did) the moneys theretofore received from him.

The next sale occurred on the 1st day of October, 1884, when Thompson and Payne, by Camden, acting as their agent, bid the sum of $173,000. But Camden bid, in his own name, the sum of $173,050, and, being the highest bidder, was declared the purchaser. In their report of sale the commissioners state:

"The said Camden did not, and has not as yet, paid to your commissioners the sum of money so bid and offered by him for said property as aforesaid, or any part thereof; but when your commissioners required the cash from said Camden, pursuant to the terms of said sale, he tendered to us a paper purporting to be a copy of a contract in writing made between several of the creditors mentioned in said decree of the 17th of November, 1883, authorizing the said Camden, as the agent or trustee of the said creditors who signed said contract, to purchase the said property at any sale thereof that might be made under said decree, and assigning to him the amounts decreed in favor of each of said several creditors, for the purpose of his using and applying the same in payment of the sums so bid by him for said property. Said copy of the contract, with the paper thereto attached, signed by Heman Loomis, by B. M. Ambler, his attorney, bearing date September 30, 1884, is herewith filed. Said Camden also exhibited to your commissioners the original of the said contract from which the copy hereto attached was made. Your commissioners declined to receive the said contract in payment, in whole or in part, of the purchase money so bid by said Camden for said property, or to accept anything in payment thereof except lawful and

current money of the United States, and this the said Camden has not as yet paid."

The "paper" here referred to was a letter from Loomis, in which he notified Camden that the latter would be held liable if he did not buy the property pursuant to the terms and conditions of the writing of November, 1883.

On the 6th of October, 1884, Camden filed his petition in said suit, in which he states that it was distinctly agreed by all whose names are mentioned in its caption, that he should, as their agent, purchase the property, and that each of them did, in person, or by their representatives, assent to that contract and its terms. He alleges: "Your petitioner now discovers that the paper was not actually signed by W. H. Beach or by said bank. He believes and charges that both are bound by said agreement, though they did not sign the same; but to avoid any vexatious litigation your petitioner is willing to pay, if required by the court, the full amount of the claims of said Beach and of said bank in cash. Your petitioner prays that, the premises being considered, he may be allowed to apply the claims and debts adjudged by said decree in discharge of his liability for the purchase money; that his compliance with the terms of said contract may be considered and decreed a compliance with the terms of said sale; that the said contract may be received in discharge of his bid; that the sale be confirmed, and that a deed be made to your petitioner for the said property, and that the court will make such further order or decree, and grant such other and general and further relief in the premises as your honors may deem right, as in equity may be proper."

Exceptions were filed by Carrington, Worth, Beach, the Toledo National Bank, Valentine and Blair to the report of sale; and, on their motion, a rule was awarded against Camden to show cause why he should not pay the sum of $173,050 bid by him for the property, or why the sale should not be set aside, and a resale had at his risk and cost. His petition above referred to was accepted as his answer to that rule. After answers filed by various creditors to Camden's petition, the court, upon application of Thompson and Payne, made an

order cancelling their bond, and ordering that the ten thousand dollars, deposited in the registry of the court, be returned to them, which was done. Subsequently a motion was made by several creditors to set aside that order as having been improperly procured and made, without notice to them.

The exceptions to the report of sale were sustained, the sale set aside, and the commissioners directed to resell the property at the cost of Camden for cash in accordance with the original decree; and "if the said property shall be sold for a less sum than one hundred and seventy-three thousand and fifty dollars, the said bid of the said Camden, the court reserves for future determination in this cause the question whether the said Camden will be required to pay the deficiency."

The third sale occurred March 17, 1885, and the property then brought only $119,100, Shattuck becoming the purchaser, and paying that amount in cash to the commissioners. To this sale certain creditors filed exceptions on the ground, among others, that the amount bid was grossly inadequate. In addition some of them filed petitions which Camden answered, whereby an issue was made as to the confirmation of the last sale, and as to his liability for the deficiency. Upon these matters the parties took proof. The cause was heard before Chief Justice Waite, when a final order was made June 6, 1885, reciting, among other things, that the court was of opinion that, if the last sale was confirmed, Camden, by virtue of his bid, was liable to pay the difference between the sum of one hundred and seventy-three thousand and fifty dollars and the amount, one hundred and nineteen thousand and one hundred dollars, bid by Shattuck, and all costs rendered necessary by his failure to comply with the terms of sale, and that the last sale to Shattuck should be confirmed, unless either Camden or Thompson and Payne would take the property at the amounts of their respective bids.

The record shows that after announcing this opinion the court offered Camden, who was then present, with his counsel, the privilege of taking the property at the sum bid by him, and of having his purchase confirmed, if he would pay in cash the amount bid by him. This offer was refused, Camden

declaring in open court that he would not take the property unless the sale was confirmed on the basis of the alleged contract of November, 1883, between him and others. The court then called on him, as the agent of Thompson and Payne, to elect for them whether they would take the property at the sum he had bid for them, and pay the cash therefor; and he thereupon declared that, while he had authority to make the bid originally, he had not authority to make an election for them under the offer now made. An order was, thereupon, May 15, 1885, entered, vacating the order of the 3d day of November, 1884, cancelling the bond of Thompson, Payne, and Chancellor, confirming the last sale to Shattuck, and directing the commissioners, by proper deed, to convey the property to him.

It was further decreed that Camden pay into the registry of the court, for the benefit of such of the parties to the suit or other persons as might be entitled thereto, the sum of fifty-three thousand nine hundred and fifty (53,950) dollars, with interest, and the costs rendered necessary by his failure to comply with the terms of his bid in cash. *Mayhew* v. *West Virginia Oil and Oil Land Co.*, 24 Fed. Rep. 205. This is the decree which is here for review upon Camden's appeal.

Mr. Attorney General (with whom was *Mr. J. B. Jackson* on the brief) for appellant.

I. There can be no liability upon Camden for any deficiency upon a resale of the property, because his bid for the property at the sale made October 1, 1884, was only an offer to take the property at the price bid, should the court receive his bid, and *confirm the sale*. *Kable* v. *Mitchell*, 9 West Virginia, 517. It is true, a rule was issued against Camden to show cause why he should not pay the amount of his bid, and further, to show cause why the sale should not be set aside. But it fully appears by the Record that, upon the hearing of the rule, no order or decree was entered accepting his bid. On the contrary, it does appear that the sale so made to him was set aside, and as a consequence thereof his bid was rejected.

II. It is further submitted that it was error in the court to issue the rule until the court had first confirmed the sale. In *Anonymous*, 2 Ves. Jr. 335, decided 17th June, 1794, Mr. Richards moved that a person reported best purchaser should complete his purchase and pay in his money on or before the 5th of July. The report had been confirmed *nisi*, and the motion was occasioned by a doubt as to the practice whether a purchaser can be quickened before the report is confirmed absolutely. The Lord Chancellor said he felt a difficulty, because, till confirmation, the purchaser is always liable to have the biddings opened; till that, *non-constat*, that he is the purchaser. In the case under consideration the court did that which the Lord Chancellor in the case cited said could not be done. It was an endeavor to quicken the purchaser; to compel him to pay his money into court before confirmation. This, we submit, was error. Confirmation is the judicial sanction of the court. Until it takes place the bargain is incomplete, and the sale confers no right. *Busey* v. *Hardin*, 2 B. Mon. 407; *Blair* v. *Core*, 20 West Virginia, 265; *Core* v. *Strickler*, 24 West Virginia, 696; *Richardson* v. *Jones*, 3 G. & J. 163; *S. C.* 22 Am. Dec. 393.

The rule that the Master's report of a purchase must be confirmed before the contract can be considered as binding applies equally to cases in which it is sought to compel a purchaser to complete his purchase, as where it is sought to enforce the contract against the vendor. As a preliminary step, therefore, towards enforcing the completion of the contract, it is necessary to have the report confirmed. 2 Daniell Ch. Pr. (5th Am. Ed.) *1281; *Cooper* v. *Hepburn et al.*, 15 Grattan, 566.

The bidder, not being considered the purchaser until the report is confirmed, is not liable to any loss by fire or otherwise, which may happen to the estate in the interim; nor is he, until the confirmation of the report, compellable to complete his purchase. 1 Sugden Vendors & Purchasers, bottom pp. 70–71 (7th Am. Ed.); *Ex parte Minor*, 11 Ves. 559; *Twigg* v. *Fifield*, 13 Ves. 577.

The bid made by the purchaser at the sale must be con-

sidered as his offer to the court through its commissioners, and in making it he agrees to be bound thereby if it is accepted and approved by the court; it is discretionary with the court whether it will accept the bid and confirm the sale, or set it aside. *Marling* v. *Robrecht*, 13 West Va. 440, 474; *Long* v. *Willer*, 29 Grattan, 347, 355.

In this proceeding Camden occupies an anomalous and trying position. He is required to pay nearly fifty-four thousand dollars and gets nothing to show for it. He has no title to the property, and has no option to take it, as the title is in another, and yet he must pay this large sum. This is not regular by any means, but it quite reverses the well-recognized rule in orderly and consistent judicial proceedings. It is directly at war with the doctrine as laid down in the somewhat noted case of *Williamson* v. *Berry*, 8 How. 495, 545–546, and it ignores the views expressed in *Blossom* v. *Railroad Co.*, 3 Wall. 196, 207.

This court, in *Stuart* v. *Gay*, 127 U. S. 518, 527, gives full sanction to the proposition here contended for in citing with approbation authorities sustaining this position. See, also, *Campbell* v. *Gardner*, 3 Stock. (11 N. J. Eq.) 423–425; *S. C.* 69 Am. Dec. 598; *Conover* v. *Walling*, 2 McCarter (15 N. J. Eq.) 173. The case from 3 Stockton, with citations, would seem conclusive on the point.

After the report of sale by a Master *is confirmed* there are, according to the English practice, three means of remedying the failure of the purchaser to comply with the terms of sale. 1st. If it appears that the purchase has been made by a person unable to perform his contract, the parties interested in the sale may, upon motion, obtain an order simply discharging him from his purchase, and directing the estate to be resold. 2d. If the purchaser is responsible the court will, if required, make an order that he shall within a given time pay the money into court, and if the purchaser, on being served with the order, fails to obey it, his submission to it may be enforced by attachment. 3d. Or an order will be made for the estate to be resold, and for the purchaser to pay the expenses arising from the non-completion of the purchase and

resale, and any deficiency in price arising under the second sale. *Lansdown* v. *Elderton*, 14 Ves. 512; *Harding* v. *Harding*, 4 Myln. & Cr. 514; *Anderson* v. *Foulke*, 2 Har. & Gill, 346; *Brasher* v. *Cortlandt*, 2 Johns. Ch. 505; 2 Daniell Ch. Pr. *ubi supra*; *Clarkson* v. *Read*, 15 Grattan, 288, 291; *Hill* v. *Hill*, 58 Illinois, 239.

III. The decree directing the sale gave no day to the purchaser to redeem. It is the invariable rule to give such day in suits by mortgagee against mortgagor to foreclose mortgage. *Long* v. *Weller*, 29 Grattan; *Clark* v. *Reyburn*, 8 Wall. pp. 318, 322–324. The same rule applies in judicial sales. The contract is treated substantially as a contract between the purchaser, on one side, and the court, as vendor, on the other.

For these reasons, the decree appealed from should be reversed.

Mr. C. C. Cole and *Mr. George Wadsworth* for appellee. *Mr. W. L. Cole* was with them on the brief.

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

It is undoubtedly true that Camden's bid of one hundred and seventy-three thousand and fifty dollars was, in legal effect, only an offer to take property at that price; and that the acceptance or rejection of that offer was within the sound equitable discretion of the court, to be exercised with due regard to the special circumstances of the case and to the stability of judicial sales. *Milwaukee Railroad Co.* v. *Soutter*, 5 Wall. 662; *Williamson* v. *Dale*, 3 Johns. Ch. 290, 292; *Kable* v. *Mitchell*, 9 West Va. 492, 509; *Core* v. *Strickler*, 24 West Va. 689, 696; *Busey* v. *Hardin*, 2 B. Mon. 407, 411; *Hay's Appeal*, 51 Penn. St. 58, 61; *Childress* v. *Hurt*, 2 Swan, 487, 489; *Duncan* v. *Dodd*, 2 Paige, 99, 100, 101. It is further contended that an acceptance of that offer could only have been manifested by an order confirming the sale; and as no such order was in fact made, that Camden could not be held

liable for a deficiency arising upon a resale of the property. In support of this position his counsel cite 2 Daniell's Chancery Practice and Pleading, *1281, Cooper's 5th Am. ed., in which it is said: "The rule that the Master's report of a purchase must be absolutely confirmed before the contract can be considered as binding, applies equally to cases in which it is sought to compel a purchaser to complete his purchase, as where it is sought to enforce the contract against the vendor. As a preliminary step, therefore, towards enforcing the completion of the contract, it is necessary to have the report confirmed." The present case, however, is not one in which it is sought to compel the purchaser to complete his purchase. It may be that if the court below had determined to hold Camden to his bid for the property, a necessary preliminary step to that end would have been the formal confirmation of the sale, and, perhaps, the tender of a deed, to be followed by an order compelling him to pay the whole amount that he offered. But it was not restricted to that particular mode of securing the rights of the parties for whose benefit the property was sold; for, upon appellant refusing to pay the amount bid, the court, without confirming the sale by a formal order, could have held him to his offer, and ordered a resale in the meantime at his risk, both in respect to the expenses of the resale and any deficiency resulting therefrom. The latter course was approved by Lord Cottenham in *Harding* v. *Hcrding*, 4 Myln. & Cr. 514, and was in accordance with previous decisions. *Saunders* v. *Gray*, 4 Myln. & Cr. 515; *S. C.*, *Gray* v. *Gray*, 1 Beavan, 199; *Tanner* v. *Radford*, 4 Myln. & Cr. 519. So in Daniell's Chancery Pr. & Pl. (vol. 2, *1282): "According, however, to the present practice, a more complete remedy is afforded against the purchaser refusing, without cause, to fulfil his contract; for the plaintiff may obtain an order for the estate to be resold, and for the purchaser to pay as well the expenses arising from the non-completion of the purchase, the application, and the resale, as also any deficiency in price arising upon the second sale."

In view of the terms of the decree of November 17, 1883, there is no ground for the contention that the confirmation of

the sale to Camden was necessary in order to fix liability on him for the deficiency arising upon the resale. The decree expressly required that the sale should be made "upon the terms cash in hand on the day of sale;" thus practically making the payment in cash on the day of sale of the sum bid a condition precedent to the right of the purchaser to demand a confirmation of the sale. The commissioners appointed had no authority to accept from the purchaser anything but cash, nor could they postpone payment of the sum offered beyond the day of sale. They conformed in all respects to the terms of the decree, and Camden bid in his own name, without any previous notice to them that he represented others in so bidding, or that he desired or intended to use the debts of particular creditors in making payment in whole or in part. His application to the court, after the report of sale, that he be permitted to complete his purchase by using the alleged "contract" of November, 1883, was properly denied, for several reasons: *First*, the writing of that date could not become a contract binding upon those signing it until it was executed by all whose names appear in its caption; *Second*, after the original decree was passed, and before the first sale took place, judgment creditors, for whom the decree made no provision, intervened in the cause, claiming a lien upon the proceeds of any sale that might be made, some of them asserting priority even over the creditors named in the decree; *Third*, the court was not bound, in deference merely to the wishes of a part of the creditors, to depart from the terms of sale, especially as the creditors whose names appear in the alleged contract of November, 1883, did not, prior to the sale, ask such modification of those terms as would enable them to use their claims in purchasing and paying for the property.

But if there was any ground to insist that a confirmation of the sale was necessary before Camden could be made liable for the deficiency resulting from the resale, all difficulty upon that point was removed by the distinct offer made in open court, to confirm the sale to him, upon his complying with the terms thereof, by paying, in cash, the amount of his bid. This offer having been refused, and the court having been thereby in-

formed that he did not wish to complete the purchase according to the terms of the decree and of his bid, there was no necessity to go through the form of confirming the sale to him, and then, immediately, ordering a resale, at his risk and cost; but, as we have seen, the court was at liberty, without such formal confirmation, to order a resale, holding him responsible for any deficiency resulting therefrom.

The only question that remains to be considered is whether the liability of Camden for the deficiency in the price of the property on the last sale ought to have been ascertained and enforced by an original, independent suit. We are of opinion that the mode adopted in the present case was entirely regular.

Where a purchaser refuses, without cause, to make his bid good, he may be compelled to do so by rule or attachment issuing out of the court under whose decree the sale is had. It was so held in *Blossom* v. *Railroad Co.*, 1 Wall. 655, 656, where it was said that a purchaser or bidder at a Master's sale in chancery subjects himself *quoad hoc* to the jurisdiction of the court, and can be compelled to perform his agreement specifically. In *Lansdown* v. *Elderton*, 14 Ves. 512, a motion that the person reported to be the best bidder before the Master pay within a given time the purchase money or stand committed, was sustained by Lord Chancellor Eldon, who observed that the purchaser could not be permitted to disobey an order, more than any other person. That case was followed in *Brasher* v. *Van Cortlandt*, 2 Johns. Ch. 505, 506, where Chancellor Kent, after observing that the purchaser ought to be compelled to complete the purchase, said: "If no order of this kind could be made, in this case, it would follow that not only the purchaser, but the committee of the lunatic, would be permitted to baffle the court, and sport with its decree. . . . I have no doubt the court may, in its discretion, do it in every case where the previous conditions of the sale have not given the purchaser an alternative." See also *Blossom* v. *Railroad Co.*, 3 Wall. 196, 207; *Smith* v. *Arnold*, 5 Mason, 414, 420; *Requa* v. *Rea*, 2 Paige, 339, 341; *Cassamajor* v. *Strode*, 1 Sim. & St. 381; *Anderson* v. *Foulke*, 2 Har. & Gill, 346, 362, 373. If, as is

clear, the purchaser can be required, by rule or attachment, to pay into court the entire sum bid by him and thus complete his purchase, it is difficult to see why a bidder, sought to be made liable for a deficiency resulting from a resale caused by his refusal to make his bid good, may not be proceeded against in the same suit by rule, or in any other mode devised by the court that will enable him to meet the issue as to his liability. That issue in the present case was tried upon pleadings and proof, and there is no pretence that the appellant had not full opportunity to present his defence before the final order now under review was made.

It is suggested by the learned counsel for the appellant that his client occupies an anomalous position, being required to pay a very large sum, without getting anything in return therefor. It is only necessary to say that, even if the late Chief Justice was mistaken in supposing that the appellant was directly or indirectly interested in the last purchase by Shattuck, his failure to obtain a conveyance of the property was due entirely to his persistent refusal to comply with the terms of his own bid, made with full knowledge of the terms of sale.

Decree affirmed.

ARROWSMITH *v.* GLEASON.

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

No. 133. Argued December 18, 1888. — Decided January 14, 1889.

In the State of Ohio one freehold surety to a guardian's bond for the faithful discharge of his duties is sufficient, if he has enough property to make the bond required by the statute good.

Arrowsmith v. *Harmening*, 42 Ohio St. 259, followed as to the validity of the sales attacked in these proceedings.

A guardian's bond executed by a surety upon condition that another surety should be obtained is valid against third parties, in a collateral proceeding, although no such surety was obtained.

The other conditions of jurisdiction being satisfied, a Circuit Court of the United States has jurisdiction in equity to set aside a sale of an infant's

lands, fraudulently made by his guardian, under authority derived from a Probate Court, and may give such relief therein as is consistent with equity.

THE case was stated by the court as follows:

This suit involves the title to certain lands inherited by the plaintiff, and sold some years ago by his statutory guardian, the defendant Gleason, under authority conferred by proceedings instituted by him in the Probate Court of Defiance County, in the State of Ohio. The plaintiff attacks the order of sale as invalid, prays that the deeds executed to the purchaser be declared void, that an accounting in respect to rents and profits be had, and that such other relief be granted as may be proper. The court below sustained demurrers to the bill, and dismissed the suit. We are, therefore, to inquire, upon this appeal, whether the bill discloses a cause of action entitling the appellant to relief in a court of equity.

The case made by the bill is substantially as follows: The lands in controversy formerly belonged to John C. Arrowsmith, who died in 1869; his wife, and the plaintiff, his only child and heir-at-law, surviving him. On the 15th of July, 1869, Gleason petitioned said Probate Court to be appointed guardian of the estate of the plaintiff, then but six years of age. He applied to one Henry Hardy, a freeholder, to become surety upon his bond as guardian, in the penalty of $5000, which Hardy did, upon the express agreement that, before the bond was delivered, Gleason would procure another surety of equal responsibility. Gleason filed the bond in the Probate Court, without obtaining the signature of an additional surety. The bond contained no condition except that if Gleason "shall faithfully discharge all his duties as guardian, then the above obligation is to be void; otherwise, to remain in full force." Upon its being filed, an order was made appointing Gleason guardian of the plaintiff's estate, and letters of guardianship were issued to him.

On the 22d of July, 1869, Gleason filed a petition in the Probate Court of Defiance County, representing that no personal estate of the ward had ever come to his possession or

knowledge, and that there was no such estate dependent upon the settlement of the father's estate, or upon the execution of any trust; that his ward was the owner of the fee simple of certain tracts of lands in Defiance County, one being section thirty-six in that county, containing 640 acres, less a small strip containing $6\frac{25}{100}$ acres used and occupied by the Wabash, St. Louis and Pacific Railroad Company as way-ground, and others, aggregating 400 acres; and, in addition, a tract of about seven acres in Paulding County; that the ward was, also, the owner of the fee simple, by virtue of tax titles, of certain other described tracts of lands in Defiance County, aggregating nearly one thousand acres, all of which, the petition alleged, were wild lands, yielding no income; that he had received no rents whatever from any of the ward's real estate; that its sale was necessary for the maintenance and education of the ward, who was indebted for boarding and lodging in the sum of $210; that there were no liens upon it, to his knowledge, and that the widow had a dower interest in said lands. The prayer of the petition was that the infant and widow be made defendants; that dower be set off to the latter; that the guardian be ordered to sell the real estate for the purposes above set forth; and that petitioner have such other relief as was proper. The court ordered notice to be served upon the widow and infant of the hearing of the petition on the 10th day of August, 1869. Personal notice was given to the former, and the latter was notified by a written copy being left at the residence of his mother.

The widow filed an answer in the Probate Court, waiving a formal assignment of dower by metes and bounds, and asking such sum out of the proceeds of sale, in lieu of dower, as was just and reasonable.

On the 10th of August, 1869, the cause was heard, the Probate Court deciding that the real estate named therein should be sold. Thereupon appraisers were appointed to report its fair cash value. On the 17th of August, 1869, the Probate Court, without having taken any bond from the guardian, except the one above referred to, which was conditioned simply for the faithful discharge of his duties, made

this order: "It is, therefore, ordered by the court that the same [the report] be, and it is hereby, approved and confirmed; and the said Edward H. Gleason having upon his appointment as such guardian given bond with reference to the value and sale of the said real estate of his said ward, which bond is now adjudged to be sufficient for the purposes hereof, therefore, the giving of additional bond is hereby dispensed with." And on the 10th day of November, 1869, the following order of sale was entered in said cause: "Said guardian is ordered to proceed to sell said lands, or any parcel thereof, at private sale, but at not less than the appraised value thereof, and upon the following terms: One-third cash in hand on the day of sale, one-third in one year, and one-third in two years, with interest, payable annually, and the deferred payments to be secured by mortgage on the premises sold."

Within a few days after this order was made, Gleason reported to the Probate Court that he had sold to John Frederick Harmening, at private sale, and for the sum of $1537.50, "that being the full amount of the appraised value thereof," the southeast quarter of said section thirty-six, excluding the small strip occupied by the railway company. The sale was approved, and the guardian directed to make a conveyance to the purchaser, reserving for the widow, in lieu of dower, the sum of $400 out of the proceeds.

The bill charges that on the 15th of February, 1873, more than three years after the said order of sale was entered, and without any new or further appraisement of plaintiff's lands, though their value, as he was informed, had greatly advanced, and without any additional bond having been executed, Gleason, "for the purpose of getting money into his hands for his own private gain, and without reference to the true interest of his ward," and "willing to allow the said Harmening to get at a low and under-price the lands" of the plaintiff, and "though there was no necessity whatever for said sale, as he, the said Gleason, and the said Harmening well knew," sold to the latter at private sale, for the sum of $872.10, the east half of the southwest quarter of section thirty-six in Defiance County, containing eighty acres, and the

tract of $7\frac{21}{100}$ acres in Paulding County; which sale, being reported to the Probate Court, was by it wrongfully approved and a deed directed to be made and was made to the purchaser, the sum of $200 being reserved out of the proceeds, pursuant to the order of the court, for the dower interest of the widow.

The plaintiff also alleges that notwithstanding there was no necessity for any further sale or sacrifice of his estate of inheritance, Gleason, on the 4th day of December, 1874, although having in his hands, unexpended, large sums derived from the sale of the above premises, as well as considerable sums received from the release of tax titles, all of which was known to Harmening, and without any new appraisement of the plaintiff's lands, (though they had risen greatly in value,) and without giving an additional bond or obtaining a new order of sale, ("for the purpose of getting money into his hands for his own private gain, without reference to the true interest of your orator in the premises, and willing that the said Harmening should get the lands bought at a low and under-price, connived and colluded with him, the said Harmening, to sell the said lands hereinafter described in violation of his duties and the trust imposed on him, claiming to act on the said order of sale long since entered in said court, sold, Dec. 4, 1874, to Harmening the following described lands, situated in Defiance County aforesaid, viz.: the north half of section thirty-six, in township four north of range three east, and the west half of the same section in the same township and range, containing together four hundred acres, for the sum of six thousand dollars, and reported the sale to the said court on the same day, and the same was, without proper examination, or opportunity for the friends of the said ward, your orator, or his relatives, to examine the same and advise the said court or the said Gleason in the premises, improperly, — illegally confirmed the said sale, and ordered the said guardian to make, execute, and deliver a deed for the same to the said Harmening on his compliance with the terms of sale, and further ordered the said guardian to pay out of the proceeds of said sale the sum of fifteen hundred dollars as and for the dower interest therein held by the said Mary Arrowsmith").

Argument for Appellees.

The bill further charges that the order authorizing said sales to be made as well as the orders confirming them were illegal; that the sales made by Gleason were in violation of his trust and in fraud of his rights, "as the said Harmening and the said Gleason well knew;" that he has never received from said Gleason or from any source, to his knowledge, any of the proceeds of such sales, nor to his knowledge, belief, or information, have any part thereof been applied for his benefit; and that the deeds, placed upon record by Harmening, so cloud his title to said lands that he cannot sell them or otherwise enjoy the beneficial use of them.

After averring that he has been a non-resident of Ohio since 1869; that Harmening enjoyed, up to his death, all the rents and profits of said lands; that his heirs at law, who are infants, and defendants herein, are in possession of them, claiming to hold them under said pretended sales and deeds; and that Gleason has been for a long time hopelessly insolvent, so that an action at law against him would be unavailing; he prayed that a decree be rendered setting aside and vacating the order of sale in the Probate Court, and all proceedings therein affecting his title to the lands, and declaring the same, as well as the deeds executed by his pretended guardian, to be void and of no effect. He also prayed for the additional relief, specific and general, indicated in the beginning of this opinion.

Mr. Henry Newbegin and *Mr. Benjamin B. Kingsbury* for appellant.

Mr. Henry B. Harris and *Mr. William C. Cochran* for appellees. *Mr. John P. Cameron* was with them on the brief.

I. The appellant's title, if he has any, is a legal title, for which he has a plain, adequate and complete remedy at law, — an action for possession, with which, under the laws of Ohio, he may couple an action for mesne profits. Rev. Stat. Ohio, § 5019; *McKinney* v. *McKinney*, 8 Ohio St. 423.

If the proceedings in the Probate Court were such as to divest the legal title of appellant, and vest it in Harmening, he has no remedy, unless the proceedings were void for want of jurisdiction, or unless the orders were obtained by fraud, to which Harmening was a party. If the sales were *void* for want of jurisdiction, or for fraud in obtaining the orders, the remedy is equally adequate at law. *Hipp* v. *Babin*, 19 How. 271; *Miles* v. *Caldwell*, 2 Wall. 35; *Blanchard* v. *Brown*, 3 Wall. 245; *Grand Chute* v. *Winegar*, 15 Wall. 373; *Lewis* v. *Cocks*, 23 Wall. 466; *Ellis* v. *Davis*, 109 U. S. 485; *Killian* v. *Ebbinghaus*, 110 U. S. 568; *Fussell* v. *Gregg*, 113 U. S. 550; *United States* v. *Wilson*, 118 U. S. 86; *Frost* v. *Spitley*, 121 U. S. 552.

Instead of this complete remedy at law, he seeks inadequate relief in equity. Although he alleges that such order and deeds and entries "*cloud the title*" to the said lands so that he cannot effectually dispose of them, or otherwise make any beneficial use of them, he disclaims any intention to make this a bill to quiet title, for he would be met by the objection that a Court of Equity cannot sustain such a bill, because the complainant, by his own admission, is *out of possession*. 2 Story's Eq. Jur. § 859; Bispham's Principles of Equity, § 575; *Orton* v. *Smith*, 18 How. 263; *Stark* v. *Starrs*, 6 Wall. 402; *United States* v. *Wilson*, 118 U. S. 86; *Frost* v. *Spitley*, 121 U. S. 552; *Clark* v. *Hubbard*, 8 Ohio, 382; *Rhea* v. *Dick*, 34 Ohio St. 420.

Section 5779 of Ohio Revised Statutes provides, "That an action may be brought by a *person in possession*, by himself or tenant of real property, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest." By necessary implication a person *out of possession* cannot maintain such an action.

II. The Circuit Court of the United States has no power to grant the specific prayer of the bill, and set aside and vacate the orders of the Probate Court of Defiance County, and declare the same to be void and of no effect. *Fouvergne* v. *New Orleans*, 18 How. 470; *Tarver* v. *Tarver*, 9 Pet. 174;

Adams v. *Preston*, 22 How. 473; *Case of Broderick's Will*, 21 Wall. 503; *Ellis* v. *Davis*, 109 U. S. 485; *Fussell* v. *Gregg*, 113 U. S. 550; *Amory* v. *Amory*, 3 Bissell, 266. The cases of *Gaines* v. *Fuentes*, 92 U. S. 10, as limited and explained in *Ellis* v. *Davis*, *supra*, and of *Johnson* v. *Waters*, 111 U. S. 640, are not in conflict with these authorities.

We do not deny the right of courts of general jurisdiction to set aside *their own* judgments and decrees on bills of review, for errors apparent on the record, or original bills in the nature of bills of review for fraud in obtaining the judgments or decrees, where such bills are part of the recognized practice of the courts.

Most of the cases cited by counsel for appellant are of this nature, and do not at all support the theory that one court can entertain a bill to set aside the decree of another. *Taylor* v. *Walker*, 1 Heiskell, 734: *Newcomb* v. *Dewey*, 27 Iowa, 381; *Lloyd* v. *Kirkwood*, 112 Illinois, 329; *Kuchenbeiser* v. *Beckert*, 41 Illinois, 172; *Lloyd* v. *Malone*, 23 Illinois, 43; *Wright* v. *Miller*, 1 Sandf. Ch. 103; *Reynolds* v. *McCurry*, 100 Illinois, 356; *McKeever* v. *Ball*, 71 Indiana, 398; *Sheldon* v. *Tiffin*, 6 How. 163; *Long* v. *Mulford*, 17 Ohio, 484; *S. C.* 93 Am. Dec. 638; *Bank of United States* v. *Ritchie*, 8 Pet. 128.

Assuming, for the sake of argument, that the Circuit Court has the right to entertain a bill for setting aside the orders and sales of a Probate Court on the ground of *fraud* in obtaining such orders, are the allegations of the bill in this case, taken in connection with the record which is annexed to and forms a part of it, sufficient to bring the case within such jurisdiction? Where there is a discrepancy between the allegations of the bill as to what the record discloses and the record itself, the latter must be taken as conclusive. 1 Daniell's Ch. Pl. and Pr. (5th ed.), * 546.

As to the allegations concerning Hardy's agreement with Gleason, and his want of knowledge and consent to the filing of his bond without another surety, it is enough to say that the fraud, if there was any, was upon Hardy; that Harmening was in no way connected with it; that the validity of the bond when filed in court was not affected thereby, and

that Hardy could not escape his liability upon it. *Bigelow* v. *Comegys*, 5 Ohio St. 256; *Dangler* v. *Baker*, 35 Ohio St. 673–677; *Elliott* v. *Stevens*, 10 Iowa, 418; *Bloom* v. *Burdick*, 1 Hill, 130; *S. C.* 37 Am. Dec. 299; *Glezen* v. *Rood*, 2 Met. 490, 492; *Dair* v. *United States*, 16 Wall. 1; *Keys* v. *Williamson*, 31 Ohio St. 562, 563. It is nowhere alleged in the bill that Hardy is insolvent, or that the money could not be made out of him.

There is absolutely nothing in the allegations of the bill, thus far, that points to fraud upon the part of Gleason, Harmening, or the court, in obtaining these orders or making this sale, and, on the contrary, everything is consistent with the utmost good faith on the part of all concerned. When examined closely, the allegations amount to little more than a charge that said orders, sales, confirmations, etc., were irregular in some respects and, in the opinion of counsel for appellant, erroneous.

The necessity for the sales, and the sufficiency of the price were matters of fact which the court must pass upon before confirmation, and unless there is some specific allegation of corrupt action on his part, or fraudulent misrepresentations or concealement on the part of Gleason and Harmening, by which the court was imposed upon and induced to make unjust decisions in ignorance of what he ought to have known, his action must be held as final. *United States* v. *Throckmorton*, 98 U. S. 61.

If this court should consider that it is its province to examine the proceedings of the Probate Court of Defiance County with a view to determining whether the same were erroneous or not, we submit that in such investigation they would be governed by the rules applicable to a similar proceeding on a bill of review, and would be limited in the investigations to errors of law apparent on the face of the record. *Griggs* v. *Greer*, 3 Gilman (Illinois), 2; *Whiting* v. *Bank of the United States*, 13 Pet. 6.

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

Opinion of the Court.

One of the grounds of demurrer was that the plaintiff had, upon his own showing, a plain, adequate and complete remedy at law, namely, an action of ejectment for the recovery of the lands in controversy. The statutes of Ohio, in force at the time Gleason was appointed guardian, as well as when these lands were sold by him, provides that: "Before any person shall be appointed guardian of the estate of any minor, he . . . shall give bond, with freehold sureties, payable to the State of Ohio, . . . which bond shall be conditioned for the faithful discharge of the duties of said person as such guardian, and shall be approved by the court making such appointment." Rev. Stat. Ohio, p. 671, Swan & Critchfield, 1860. The same statutes prescribe the mode in which, and the purposes for which, the real estate of a minor may be sold. They give power to the Probate Court, by which the guardian of the person and estate, or of the estate only, was appointed, upon the application by petition of such guardian, to order the sale of the minor's real estate, whenever necessary for his education or support, or for the payment of his just debts, or for the discharge of any liens on his real estate, or when such estate is suffering unavoidable waste, or a better investment of the value thereof can be made; and, if it is satisfied that his real estate ought to be sold, then three freeholders must be appointed to appraise, under oath, its fair cash value. It is further provided:

"Sec. 27. Upon the appraisement of said real estate being filed, signed by said appraisers, the court shall require such guardian to execute a bond, with sufficient freehold sureties, payable to the State of Ohio, in double the appraised value of such real estate, with condition for the faithful discharge of his duties, and the faithful payment and accounting for of all moneys arising from such sale according to law.

"Sec. 28 [as amended by the act of February 15, 1867]. Upon such bond being filed and approved by the court, it shall order the sale of such real estate, . . . *Provided, however*, That if it is made to appear to such Probate Court that it will be more for the interest of said ward to sell such real estate at private sale, it may authorize said guardian to sell,

either in whole or in parcels, and upon such terms of payment as may be prescribed by the court; and in no case shall such real estate be sold at private sale for less than the appraised value thereof." Rev. Stat. Ohio, 1 Swan & Critchfield (1860), 671, 672, 675; §§ 6, 22 to 28 inclusive; 1 S. & S. 383.

It is evident that the bill was framed upon the theory: 1. That the bond given by the guardian at the time of his appointment was void, because filed in violation of Gleason's agreement with Hardy, and because it contained the name of but one surety; 2. The Probate Court was without jurisdiction, and its proceedings were absolutely void, because the guardian did not execute the additional bond required by the two sections last above quoted. If these propositions were sound it might be, as contended, that the plaintiff has a plain, adequate, and complete remedy at law. But we are of opinion that they cannot be sustained. As to the first one, it is clear that the delivery of the bond that Hardy signed, without procuring an additional surety, was a thing of which he, but not the plaintiff, may complain. Besides, the statute, upon any reasonable interpretation, does not require a bond with more than one freehold surety. The words "with freehold sureties" are not to be taken literally, so as to forbid the acceptance of a guardian's bond, with one surety, having sufficient property to make it good for the entire amount prescribed by the statute.

As to the suggestion that the proceedings in the Probate Court were void, because of its failure, upon the return of the appraisement, to require from the guardian an additional bond conditioned "for the faithful discharge of his duties, and the faithful payment and accounting for of all moneys arising from such sale according to law," we are of opinion that it is fully met by the decision of the Supreme Court of Ohio in *Arrowsmith* v. *Harmening*, 42 Ohio St. 254, 259. That was an action at law by the present appellant against Harmening to recover possession of the real estate now in controversy. The question was there distinctly made by him that the order of sale by the Probate Court was void, by reason of its

neglecting to take this additional bond. Adhering to its prior decision in *Mauarr* v. *Parrish*, 26 Ohio St. 636, the court held that, although the order of sale and the confirmation of the sales may have been erroneous, the Probate Court had jurisdiction of the subject matter, and of the parties, and its action, therefore, was not void. It further said that the decision in *Mauarr* v. *Parrish* had become a rule of property in Ohio, and could not be disturbed without consequences of a mischievous character. It is thus seen that the question now presented, as to the jurisdiction of the Probate Court to make the order for the sale of the lands now in controversy, and to confirm the several sales reported by the guardian, has been determined adversely to the appellant in an action brought by him against the present appellees. As this construction of the local statute should, under the circumstances stated by the Supreme Court of Ohio, be followed by the Circuit Court, we cannot approve the suggestion that the appellant has an adequate remedy by an action of ejectment for the recovery of these lands.

But is the appellant without remedy for the wrong alleged to have been done him? We think not. If all the substantial averments of his bill are true — and, upon demurrer, they must be so regarded — he makes a case of actual fraud, upon the part of his guardian, in which Harmening to some extent participated, or of which, at the time, he either had knowledge or such notice as put him upon inquiry. According to these averments, there was no necessity whatever for these sales, at least for the sale of the east half of the southwest quarter of section thirty-six, township four north, range three east, in Defiance County, containing eighty acres, or of the smaller tract in Paulding County, or of the four hundred acres in Defiance County that were sold in December, 1874. It is alleged, and by the demurrer it is admitted, that when the last sale was made, Gleason had in his hands unexpended, as Harmening well knew, large sums derived from the previous sales, as well as considerable amounts received from releases of tax titles on lands held by appellant; and yet, by collusion with Harmening, and in order that the latter might get the

lands for less than their value, he made the sale of the four hundred acres.

But it is insisted that the Circuit Court of the United States, sitting in Ohio, is without jurisdiction to make such a decree as is specifically prayed for, namely, a decree setting aside and vacating the orders of the Probate Court of Defiance County. If by this is meant only that the Circuit Court cannot by its orders act directly upon the Probate Court, or that the Circuit Court cannot compel or require the Probate Court to set aside or vacate its own orders, the position of the defendants could not be disputed. But it does not follow that the right of Harmening, in his lifetime, or of his heirs since his death, to hold these lands, as against the plaintiff, cannot be questioned in a court of general equitable jurisdiction upon the ground of fraud. If the case made by the bill is clearly established by proof, it may be assumed that some state court, of superior jurisdiction and equity powers, and having before it all the parties interested, might afford the plaintiff relief of a substantial character. But whether that be so or not, it is difficult to perceive why the Circuit Court is not bound to give relief according to the recognized rules of equity, as administered in the courts of the United States, the plaintiff being a citizen of Nevada, the defendants citizens of Ohio, and the value of the matter in dispute, exclusive of interest and costs, being in excess of the amount required for the original jurisdiction of such courts.

A leading case upon this point is *Payne* v. *Hook*, 7 Wall. 425, 430. That was a suit, in the Circuit Court of the United States for Missouri, by a citizen of Virginia, against a public administrator, to obtain a distributive share of an estate then under administration in a court of Missouri. It was objected that the complainant, if a citizen of Missouri, could obtain redress only through the local Probate Court, and that she had no better or different rights by reason of being a citizen of Virginia. But this court, observing that the constitutional right of the citizen of one State to sue a citizen of another State in the courts of the United States, instead of resorting to a state tribunal, would be worth nothing, if the court in

which the suit is instituted could not proceed to judgment and afford a suitable measure of redress, said: "We have repeatedly held 'that the jurisdiction of the courts of the United States, over controversies between citizens of different States, cannot be impaired by the laws of the States which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of the States and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the Federal courts is the same as that the High Court of Chancery in England possesses; is subject to neither limitation or restraint by state legislation, and is uniform throughout the different States of the Union. The Circuit Court of the United States for the District of Missouri, therefore, had jurisdiction to hear and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system, and was bound to exercise it, if the bill, according to the received principles of equity, states a case for equitable relief. The absence of a complete and adequate remedy at law is the only test of equity jurisdiction, and the application of this principle to a particular case must depend on the character of the case as disclosed in the pleadings."

While there are general expressions in some cases apparently asserting a contrary doctrine, the later decisions of this court show that the proper Circuit Court of the United States may, without controlling, supervising, or annulling the proceedings of state courts, give such relief, in a case like the one before us, as is consistent with the principles of equity. As said in *Barrow* v. *Hunton*, 99 U. S. 80, 85, the character of the case "is always open to examination, for the purpose of determining whether, *ratione materiae*, the courts of the United States are incompetent to take jurisdiction thereof. State rules on the subject cannot deprive them of it."

This whole subject was fully considered in *Johnson* v. *Waters*, 111 U. S. 640, 667. That was an original suit in the Circuit Court of the United States for the District of Louisiana. It was brought by a citizen of Kentucky against citizens of

Louisiana. Its main object was to set aside as fraudulent and void certain sales made by a testamentary executor under the orders of a Probate Court in the latter State. It was contended that the plaintiff was concluded by the proceedings in the Probate Court, which was alleged to have exclusive jurisdiction of the subject matter, and that its decision was conclusive against the world, especially against the plaintiff, a party to the proceedings. This court, while conceding that the administration of the estate there in question properly belonged to the Probate Court, and that, in a general sense, the decisions of that court were conclusive and binding, especially upon parties, said: "But this is not universally true. The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of fraud. The Court of Chancery is always open to hear complaints against it, whether committed *in pais* or in or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it"—citing Story's Eq. Jur. §§ 1570–1573; Kerr on Fraud and Mistake, 352–353; *Gaines* v. *Fuentes*, 92 U. S. 10; and *Barrow* v. *Hunton*, 99 U. S. 80.

So, in *Reigal* v. *Wood*, 1 Johns. Ch. 402, 406: "Relief is to be obtained not only against writings, deeds, and the most solemn assurances, but against judgments and decrees, if obtained by fraud and imposition.' To the same effect is *Bowen* v. *Evans*, 2 H. L. Cas. 257, 281: "If a case of fraud be established equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivances by which it may have been attempted to protect them. It is immaterial, therefore, whether such machinery and contrivances consisted of a decree

of equity, and a purchase under it, or of a judgment at law, or of other transactions between the actors in the fraud." See also *Colclough* v. *Bolger*, 4 Dow, 54, 64; *Barnesly* v. *Powel*, 1 Ves. Sen. 120, 284, 289; *Richmond* v. *Tayleur*, 1 P. Wms. 734, 736; *Niles* v. *Anderson*, 5 How. (Miss.) 365, 386.

These principles control the present case, which, although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief between the parties; such relief being grounded upon a new state of facts, disclosing not only imposition upon a court of justice in procuring from it authority to sell an infant's lands when there was no necessity therefor, but actual fraud in the exercise, from time to time, of the authority so obtained. As this case is within the equity jurisdiction of the Circuit Court, as defined by the Constitution and laws of the United States, that court may, by its decree, lay hold of the parties, and compel them to do what according to the principles of equity they ought to do, thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion.

The decree is reversed and the cause remanded, with directions to overrule the demurrers, to require the defendants to answer, and for further proceedings consistent with law.

TILLSON *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 227. Submitted December 19, 1888. — Decided January 14, 1889.

In a contract by which the owner of a quarry on an island on the coast agrees to furnish and deliver at a public building in the interior the granite required for its construction, at specified prices by the cubic foot, and to furnish all the labor, tools and materials necessary to cut, dress and box the granite at the quarry, the United States, under a stipulation to pay "the full cost of the said labor, tools and materials, and insurance on the same," are not bound to pay anything for insurance, unless effected by the other party; nor are they, under a stipulation to

"assume the risk of damage to cutting on said stone while being transported to the site of said building," bound to pay any part of the expense of raising granite sunk by a peril of the sea with its cutting uninjured.

THE case is stated in the opinion.

Mr. Halbert E. Paine for appellant.

Mr. Assistant Attorney General Howard (with whom was *Mr. W. I. Hill*) for appellees.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a suit to recover money under contracts made in 1873 and 1877 between the supervising architect of the Treasury, in behalf of the United States, and the petitioners. The Court of Claims dismissed the petition. 20 C. Cl. 213. The petitioners appealed, and at the argument in this court have insisted upon two claims only.

By the contract of 1873, the petitioners agreed to cut and furnish from their quarry at Hurricane Island in the State of Maine, and to deliver at St. Louis in the State of Missouri, as much granite as might be required for the construction of a custom-house at St. Louis; the United States agreed to pay them specified prices by the cubic foot for the granite upon its delivery and acceptance at the site of the custom-house; the petitioners agreed "to furnish all the labor, tools and materials necessary to cut, dress and box at the quarry all the granite aforesaid;" and the United States agreed to pay them "in lawful money of the United States, the full cost of the said labor, tools and materials, and insurance on the same, increased by fifteen per centum thereof."

The Court of Claims found as facts that in performance of this contract the petitioners delivered at St. Louis a large quantity of dressed granite, which was transported by sea from Hurricane Island to Baltimore, and thence by railway to St. Louis. It also found the reasonable price and value of marine insurance on the granite from Hurricane Island to Baltimore, as compared with the value of the granite, and

with the cost of cutting it; that no part of such insurance or of fifteen per cent thereon had been paid to the petitioners; and that no insurance on the granite was actually effected or paid for by them.

The first claim is based upon the clause in this contract by which the United States agreed to pay to the petitioners "the full cost of the said labor, tools and materials, and insurance on the same." The petitioners contend that the insurance thus agreed to be paid for is insurance on the cost of the labor, tools and materials used, that is to say, on that part of the value of the cut granite which was represented by the cost of the labor, tools and materials used in cutting and boxing it.

We have not found it necessary to consider whether the words "insurance on the same" mean insurance on the granite, or insurance on the cost of the labor, tools and materials used in cutting and boxing it, or only insurance on the materials so used; because, it being found as a fact that the petitioners never did effect or pay for any insurance whatever, we are clearly of opinion that they are not entitled to recover anything for insurance. The United States have not agreed to obtain insurance, or to become insurers themselves, but only to pay to the petitioners the "cost of insurance," which is as much as to say, reasonable premiums of insurance paid by the petitioners. By the terms of the contract, the United States are no more bound to pay for insurance which has not been effected, than for tools or materials which have not been used, or for labor which has not been performed.

The second claim arises under the contract of 1877, in which the contract of 1873 was modified; the clause as to insurance omitted; the petitioners agreed to furnish, cut, dress and box and deliver at St. Louis the granite required for the exterior walls of the building; and the United States "assume all risk of damage to cutting on said stone while being transported to the site of said building, provided such damage does not result from the carelessness or negligence of" the petitioners.

A vessel laden with granite cut and dressed under this con-

Statement of the Case.

tract was sunk at sea by collision, and her cargo was raised by wreckers employed by the master, and was taken to Baltimore in another vessel. The petitioners seek to recover from the United States such a proportion of the expense of raising the cargo as the value of the cutting bore to the whole value of the granite.

But the only risk assumed by the United States under this contract was of "damage to cutting on said stone while being transported," which evidently looks only to injuries to the smooth surface or the sharp edges of the cut granite in the course of transportation, and not to a loss, by a peril of the sea, of the granite with its cutting uninjured. Such a loss, as well as any expenses incurred by the petitioners in recovering the granite, fell upon them by virtue of their agreement to deliver the granite at St. Louis.

Judgment affirmed.

FARNSWORTH *v.* TERRITORY OF MONTANA.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

No. 93. Argued November 23, 1888. — Decided January 14, 1889.

A writ of error does not lie from this court to the Supreme Court of the Territory of Montana to review a judgment of that court, affirming the judgment of a District Court in that Territory, finding the plaintiff in error guilty of the crime of misdemeanor, and sentencing him to pay a fine.

The act of March 3, 1885, (23 Stat. 443,) held not to apply to a criminal case.

THIS was a writ of error to the Supreme Court of the Territory of Montana, in a criminal case, brought by George W. Farnsworth, who was proceeded against by an information in the Probate Court in and for Gallatin County, in that Territory, for the crime of misdemeanor, in having, in violation of a statute, as a commercial traveller, offered for sale in that Territory merchandise to be delivered at a future time, without first having obtained a license. He was arrested, and pleaded

Argument for Plaintiff in Error.

not guilty, and was tried by the court, no jury having been asked for or demanded.

The court found him guilty, and its judgment was that he pay a fine of $50, and costs of the prosecution, $17.70, and stand committed until such fine and costs should be paid. He took an appeal to the District Court for the county of Gallatin, and the case was tried by that court, a jury being expressly waived, and it found him guilty and sentenced him to pay a fine of $50 and all costs of prosecution. He then took an appeal to the Supreme Court of the Territory. That court affirmed the judgment of the District Court, in January, 1885. *Territory* v. *Farnsworth*, 5 Montana, 303, 324. To review that judgment the defendant brought the case to this court by a writ of error.

Mr. James Lowndes, for plaintiff in error, argued the case when it was reached on the docket, November 23. Subsequently, on the 15th December, at the request of the court, he filed an additional brief on the subject of jurisdiction, as follows:

Congress clearly has constitutional power to give such jurisdiction to the Supreme Court, and the only question is whether it has in fact given it.

The following are the statutory provisions regulating the appellate jurisdiction of this court over the judgments and decrees of territorial courts: "The final judgments and decrees of the Supreme Court of any Territory, except the Territory of Washington, in cases where the value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or other competent witnesses, exceeds one thousand dollars, may be reviewed and reversed or affirmed in the Supreme Court, upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a Circuit Court. In the Territory of Washington the value of the matter in dispute must exceed two thousand dollars, exclusive of costs. And any final judgment or decree of the Supreme Court of said Territory in any cause [when] the Constitution or a statute or a treaty of the

United States is brought in question, may be reviewed in like manner." Rev. Stat. § 702.

The last two clauses of this section apply exclusively to the Territory of Washington. *Snow* v. *United States*, 118 U. S. 346. By the act of March 3, 1885, 23 Stat. 442, c. 355, it was enacted that:

"SEC. 1. No appeal or writ of error shall hereafter be allowed from any judgment or decree in the Supreme Court of any of the Territories of the United States unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.

"SEC. 2. The preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

The larger part of the appellate jurisdiction of this court over the decisions of the territorial courts is derived from the first clause of Rev. Stat. § 702.

There is nothing in the language of this clause to restrict its operation to civil cases. In this respect it differs from the 22d section of the Judiciary Act of 1789, and its substitute, Rev. Stat. § 691, giving jurisdiction over the decisions of the Circuit Courts. That jurisdiction is expressly confined to *civil* actions by the terms of those enactments.

In the case of *Watts* v. *The Territory of Washington*, 91 U. S. 580, this court decided that the first clause of Rev. Stat. § 702, did not confer jurisdiction in criminal cases. The grounds of the opinion are not stated.

The eighth section of the act of 1801, giving the court jurisdiction over the decisions of the courts of the District of Columbia is as broad in its language as Rev. Stat. § 702. In *United States* v. *More*, 3 Cranch, 159, it was held that the last-mentioned act did not embrace criminal cases. This construction was rested on the ground that the words "value of the matter in dispute" (which were contained in the act of 1801) are appropriate to civil cases.

Argument for Plaintiff in Error.

The first clause of Rev. Stat. § 702, was considered in *Smith* v. *Whitney*, 116 U. S. 167, and was there held to embrace a writ of error to the final judgment of the Supreme Court of the District of Columbia refusing a writ of prohibition to a court-martial.

The latter case establishes the principle that a criminal case is within § 702 if the judgment is attended with pecuniary loss. It seems, in effect, to overrule *United States* v. *More*.

But the construction of the first clause of Rev. Stat. § 702, is important only as throwing light on the policy of Congress in regard to the appellate jurisdiction over the decisions of the territorial court.

The jurisdiction in the present case is derived from the second clause of the act of 1885. The first clause of the act does not confer jurisdiction, but merely narrows that which had been given by Rev. Stat. § 702.

The second clause of the act, on the other hand, contains an affirmative grant of jurisdiction in addition to that given by Rev. Stat. § 702. It may be paraphrased thus:

"Appeals or writs of error may be brought without regard to the sum or value in dispute in cases in which the validity of a treaty or statute of, or authority exercised under, the United States is drawn in question."

Does this enactment embrace criminal cases?

The words of the act are plain, and certainly broad enough to include criminal cases. "In all such cases," etc., is its language.

If the act is to be restricted to civil cases, this must be on some principle of construction by which the natural import of the words is to be narrowed.

The reasoning in *More* v. *United States*, 3 Cranch, 159, on the construction of the act of 1801, does not apply to the act, because the jurisdiction is given without reference to the value of the matter in dispute. The ground of the restrictive construction given to that act is absent from the act of 1885.

Words substantially the same as those of the act of 1885 have received from this court the construction here contended for.

Argument for Plaintiff in Error.

The act of 1867, amending the twenty-fifth section of the Judiciary Act provides: "That a final judgment or decree in any suit in the highest court of a State . . . where is drawn in question the validity of a treaty or a statute of, or an authority exercised under, the United States . . . or under . . . any State, may be re-examined," etc.

A writ of error was applied for, under this act, to the judgment of a state court in a criminal case. The court said: "Neither the act of 1789 nor the act of 1867, which, in some particulars supersedes and replaces the act of 1789, makes any distinction between civil and criminal cases, in respect to the revision of the judgments of state courts by this court; nor are we aware that it has ever been contended that any such distinction exists. Certainly none has been recognized here. No objection, therefore, to the allowance of the writ of error asked for by the petition can arise from the circumstance that the judgment which we are asked to review was rendered in a criminal case." *Twitchell* v. *Pennsylvania*, 7 Wall. 321, 324.

The language of the act of 1867 cannot, in effect, be distinguished from that of the act of 1885.

In *Spies* v. *Illinois*, 123 U. S. 131, no question was made of the applicability of the act of 1867 to criminal cases. Nor in *Brooks* v. *Missouri*, 124 U. S. 394.

The last clause of § 702, Revised Statutes, provides that the final judgment or decree of the Supreme Court of the said Territory (Washington) in any cause (when) the Constitution or a statute or treaty of the United States is brought in question may be reviewed in like manner (*i.e.*, by the Supreme Court). This language is similar to that used in the act of 1885.

In the case of *Watts* v. *The Territory of Washington*, 91 U. S. 580, this court said: "This court can only review the final judgments of the Supreme Court of the Territory of Washington in *criminal* cases when the Constitution or a statute or treaty of the United States is drawn in question. Rev. Stat. § 702."

Appellate jurisdiction without regard to the amount in dispute is given in cases involving constitutional questions in the Circuit Courts, Rev. Stat. § 699; in the District of Columbia,

23 Stat. 442; in the state courts; and in the territorial courts. It is fairly to be inferred that Congress intended to restrict the appellate jurisdiction, where only questions of municipal law were involved, to civil cases, and to give appellate jurisdiction to cases, both civil and criminal, whenever the Constitution or the national authority were in question.

It thus appears that this court has, in several instances, construed words similar to those used in the act of 1885 as including criminal cases. It is submitted, therefore, that the terms of the act of 1885 were intended to embrace criminal cases, and that the present case is within the jurisdiction of the court.

No appearance for defendant in error.

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

It is very clear that this is a criminal case; and the question arises whether there is any authority for the review by this court of the decision of the Supreme Court of the Territory of Montana, in a criminal case. We have been furnished with a brief on this subject by the counsel for the plaintiff in error; but we are unable to find any statutory authority for the jurisdiction of this court in this case.

Section 702 of the Revised Statutes provides as follows: "The final judgments and decrees of the Supreme Court of any Territory, except the Territory of Washington, in cases where the value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party, or of other competent witnesses, exceeds one thousand dollars, may be reviewed and reversed or affirmed in the Supreme Court, upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a Circuit Court. In the Territory of Washington, the value of the matter in dispute must exceed two thousand dollars, exclusive of costs. And any final judgment or decree of the Supreme Court of said Territory in any cause [when] the Constitution or a statute or

treaty of the United States is brought in question may be reviewed in like manner."

Section 1909 of the Revised Statutes provides, that writs of error and appeals from the final decisions of the Supreme Court of any one of eight named Territories, of which Montana is one, "shall be allowed to the Supreme Court of the United States, in the same manner and under the same regulations as from the Circuit Courts of the United States, where the value of the property or the amount in controversy, to be ascertained by the oath of either party, or of other competent witnesses, exceeds one thousand dollars, except that a writ of error or appeal shall be allowed to the Supreme Court of the United States upon writs of habeas corpus involving the question of personal freedom."

Section 1911 of the Revised Statutes relates exclusively to writs of error and appeals from Washington Territory. Section 709 applies only to a writ of error to review a final judgment or decree in a suit in the highest court of a State.

In *Snow* v. *United States*, 118 U. S. 346, these sections, 702, 709, 1909, and 1911, were considered in reference to their application to a criminal case from the Territory of Utah, other than a capital case or a case of bigamy or polygamy, writs of error in which were provided for by § 3 of the act of June 23, 1874, 18 Stat. 253; and the reasons there given why they did not apply to or cover such a criminal case, show that they do not apply to or cover a criminal case from the Territory of Montana.

Reference is made by the plaintiff in error to the case of *Watts* v. *Territory of Washington*, 91 U. S. 580, which was a criminal case from the Territory of Washington, in which it did not appear that the Constitution or any statute or treaty of the United States had been brought in question. The jurisdiction of this court in the case was questioned, as not being embraced by the last clause of § 702 of the Revised Statutes, before quoted. This court dismissed the case for want of jurisdiction, saying that it could only review the final judgments of the Supreme Court of the Territory of Washington in criminal cases, when the Constitution or a statute or treaty

of the United States was drawn in question. The decision in the case did not uphold the jurisdiction of this court in a criminal case where the Constitution or a statute or treaty of the United States was drawn in question, and the language of the court in that respect was *obiter dictum*.

It is sought, however, to uphold the jurisdiction in this case under the provisions of the act of March 3d, 1885, 23 Stat. 443, which reads as follows: "No appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, or in the Supreme Court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.

"SEC. 2. That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

In *Snow* v. *United States*, *supra*, at p. 351, it was held that the first section of that statute applied solely to judgments or decrees in suits at law or in equity measured by a pecuniary value. But it is contended in the present case, that the operation of such first section is not restricted to civil cases. It is, however, restricted to cases where the matter in dispute is measured by a pecuniary value; and it was said by this court, in *Kurtz* v. *Moffitt*, 115 U. S. 487, 498, that "a jurisdiction, conferred by Congress upon any court of the United States, of suits at law or in equity in which the matter in dispute exceeds the sum or value of a certain number of dollars, includes no case in which the right of neither party is capable of being valued in money." It was further said in *Snow* v. *United States*, *supra*, at p. 354: "As to the deprivation of liberty, whether as a punishment for crime or otherwise, it is settled by a long course of decisions, cited and commented on in *Kurtz* v. *Moffitt*, *ubi supra*, that no test of money value can be applied to it to confer jurisdiction."

In the present case, the information was for the commission

of a crime. The punishment inflicted by the Probate Court was a fine of $50 and $17.70 costs, and a judgment that the defendant stand committed until such fine and costs should be paid. The judgment of the District Court was that the defendant pay a fine of $50 and all costs of prosecution. The Supreme Court affirmed, with costs, the judgment of the District Court. The judgment of the Probate Court was imprisonment until the payment of the fine and costs, and, if the fine covered by the judgment of any one of the courts could be called a "matter in dispute," within the first section of the act of 1885, the pecuniary value involved did not exceed $5000. So it is plain that the first section of the act of 1885 does not cover the case.

It is claimed, however, that jurisdiction in the present case is derived from the second section of the act of 1885, and that, under that section, jurisdiction exists in a criminal case from the Supreme Court of a Territory, wherein is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States. The view urged is, that, in the present case, there is drawn in question the validity of an authority exercised under the United States, on the ground that the statute of Montana, under which the conviction was had, is invalid, and that, as the legislature of Montana, which enacted it, exists under the authority of the United States, the question of the validity of the statute raises the question of the validity of an authority exercised under the United States. But we do not find it necessary to consider this question, for we are of opinion that the second section of the act of 1885 does not apply to any criminal case. That section contains an exception or limitation carved out of the first section. It declares that the first section "shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States," and then enacts that, "in all such cases, an appeal or writ of error may be brought without regard to the sum or value in dispute." This clearly implies that the cases to which the second section is to apply are to be cases where there is a

pecuniary matter in dispute, and where that pecuniary matter is measurable by some sum or value, and where the case is also one of the kind mentioned in the second section.

There is another consideration strengthening these views. The act of 1885 relates to appeals and writs of error from the judgments and decrees of the Supreme Court of the District of Columbia and those of the Supreme Court of any of the Territories of the United States. It was not independent legislation, but its main purpose was merely to increase to over $5000 the jurisdictional amount, which, by §§ 702 and 1911 of the Revised Statutes, was required to be over $2000 for the Territory of Washington; and, by §§ 702 and 1909, over $1000 for every other Territory; and, by § 705, as amended by § 4 of the act of February 25th, 1879, 20 Stat. 321, over $2500 for the District of Columbia. In all these prior statutes — §§ 702, 705, 1909, 1911, and the act of 1879 — it was said that this court was to review the judgments and decrees "in the same manner and under the same regulations" provided as to the final judgments and decrees of a Circuit Court. These prior provisions are not repealed; and no jurisdiction ever existed in this court to review by writ of error or appeal the judgment of a Circuit Court in a criminal case.

In *Smith* v. *Whitney*, 116 U. S. 167, cited for the plaintiff in error, the jurisdiction of this court was maintained, under the first section of the act of 1885, of an appeal from, and a writ of error to, the Supreme Court of the District of Columbia, in a case where that court, by its judgment, had dismissed a petition for a writ of prohibition to a court-martial, convened to try an officer for an offence punishable by dismissal from the service and the deprivation of a salary which, during the term of his office, would exceed the sum of $5000. A writ of prohibition is a civil remedy, given in a civil action, as much so as a writ of *habeas corpus*, which this court has held to be a civil and not a criminal proceeding, even when instituted to arrest a criminal prosecution. *Ex parte Tom Tong*, 108 U. S. 556.

It would have been easy for Congress to confer upon this

court jurisdiction in criminal cases from the Territories, by plain and explicit language; and for the reason that no such jurisdiction exists by statute in the present case,

The writ of error is dismissed.

DENT *v.* WEST VIRGINIA.

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

No. 119. Submitted December 11, 1888. — Decided January 14, 1889.

The statute of West Virginia (§§ 9 and 15, chapter 93, 1882) which requires every practitioner of medicine in the State to obtain a certificate from the State Board of Health that he is a graduate of a reputable medical college in the school of medicine to which he belongs; or that he has practised medicine in the State continuously for ten years prior to March 8, 1881; or that he has been found upon examination to be qualified to practise medicine in all its departments, and which subjects a person practising without such certificate to prosecution and punishment for a misdemeanor, does not, when enforced against a person who had been a practising physician in the State for a period of five years before 1881, without a diploma of a reputable medical college in the school of medicine to which he belonged, deprive him of his estate or interest in the profession without due process of law.

The State, in the exercise of its power to provide for the general welfare of its people, may exact from parties before they can practise medicine a degree of skill and learning in that profession upon which the community employing their services may confidently rely; and, to ascertain whether they have such qualifications, require them to obtain a certificate or license from a Board or other authority competent to judge in that respect. If the qualifications required are appropriate to the profession, and attainable by reasonable study or application, their validity is not subject to objection because of their stringency or difficulty.

Legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the nature of the case, and such is the legislation of West Virginia in question. *Cummings* v. *Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333, examined and shown to differ materially from this case.

Statement of the Case.

THE court stated the case as follows:

This case comes from the Supreme Court of Appeals of West Virginia. It involves the validity of the statute of that State which requires every practitioner of medicine in it to obtain a certificate from the State Board of Health that he is a graduate of a reputable medical college in the school of medicine to which he belongs; or that he has practised medicine in the State continuously for the period of ten years prior to the eighth day of March, 1881; or that he has been found, upon examination by the Board, to be qualified to practise medicine in all its departments; and makes the practice of, or the attempt by any person to practise, medicine, surgery, or obstetrics in the State without such certificate, unless called from another State to treat a particular case, a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. The statute in question is found in §§ 9 and 15 of an act of the State, chapter 93, passed March 15, 1882, amending a chapter of its code concerning the public health. Statutes of 1882, 245, 246, 248. These sections are as follows:

"SEC. 9. The following persons, and no others, shall hereafter be permitted to practise medicine in this State, viz.:

"First. All persons who are graduates of a reputable medical college in the school of medicine to which the person desiring to practise belongs. Every such person shall, if he has not already done so and obtained the certificate hereinafter mentioned, present his diploma to the State Board of Health, or to the two members thereof in his Congressional district, and if the same is found to be genuine, and was issued by such medical college, as is hereinafter mentioned, and the person presenting the same be the graduate named therein, the said Board, or said two members thereof, (as the case may be,) shall issue and deliver to him a certificate to that effect, and such diploma and certificate shall entitle the person named in such diploma to practise medicine in all its departments in this State.

"Second. All persons who have practised medicine in this State continuously for the period of ten years prior to the

eighth day of March, one thousand eight hundred and eighty-one. Every such person shall make and file with the two members of the State Board of Health in the Congressional district in which he resides, or if he resides out of the State in the district nearest his residence, an affidavit of the number of years he has continuously practised in this State, and if the number of years therein stated be ten or more, the said Board or said two members thereof, shall, unless they ascertain such affidavit to be false, give him a certificate to that fact, and authorizing him to practise medicine in all its departments in this State.

"Third. A person who is not such graduate and who has not so practised in this State for a period of ten years, desiring to practise medicine in this State, shall, if he has not already done so, present himself for examination before the State Board of Health or before the said two members thereof in the Congressional district in which he resides, or, if he resides out of the State, to the said two members of the State Board of Health in the Congressional district nearest his place of residence, who, together with a member of the local board of health, who is a physician (if there be such member of the local board) of the county in which the examination is held, shall examine him as herein provided, and if, upon full examination, they find him qualified to practise medicine in all its departments, they, or a majority of them, shall grant him a certificate to that effect, and thereafter he shall have the right to practise medicine in this State to the same extent as if he had the diploma and certificate hereinbefore mentioned. The members of the State Board of Health in each Congressional district shall, by publication in some newspaper, printed in the county in which their meeting is to be held, or if no such paper is printed therein, in some newspaper of general circulation in such district, give at least twenty-one days' notice of the time and place at which they will meet for the examination of applicants for permission to practise medicine, which notice shall be published at least once in each week for three successive weeks before the day of such meeting; but this section shall not apply to a physician or surgeon who is called

from another State to treat a particular case or to perform a particular surgical operation in this State, and who does not otherwise practise in this State."

"SEC. 15. If any person shall practise, or attempt to practise, medicine, surgery or obstetrics in this State, without having complied with the provisions of § 9 of this chapter, except as therein provided, he shall be guilty of a misdemeanor, and fined for every such offence not less than fifty nor more than five hundred dollars, or imprisoned in the county jail not less than one month nor more than twelve months, or be punished by both such fine and imprisonment, at the discretion of the court. And if any person shall file, or attempt to file, as his own, the diploma or certificate of another, or shall file, or attempt to file, a false or forged affidavit of his identity, or shall wilfully swear falsely to any question which may be propounded to him on his examination, as herein provided for, or to any affidavit herein required to be made or filed by him, he shall, upon conviction thereof, be confined in the penitentiary not less than one nor more than three years, or imprisoned in the county jail not less than six nor more than twelve months, and fined not less than one hundred nor more than five hundred dollars, at the discretion of the court."

Under this statute the plaintiff in error was indicted in the State Circuit Court of Preston County, West Virginia, for unlawfully engaging in the practice of medicine in that State in June, 1882, without a diploma, certificate, or license therefor as there required, not being a physician or surgeon called from another State to treat a particular case or to perform a particular surgical operation. To this indictment the defendant pleaded not guilty, and a jury having been called, the State by its prosecuting attorney and the defendant by his attorney, agreed upon the following statement of facts, namely:

"That the defendant was engaged in the practice of medicine in the town of Newburg, Preston County, West Virginia, at the time charged in the indictment, and had been so engaged since the year 1876 continuously to the present time, and has during all said time enjoyed a lucrative practice,

publicly professing to be a physician, prescribing for the sick, and appending to his name the letters M. D.; that he was not then and there a physician and surgeon called from another State to treat a particular case or to perform a particular surgical operation, nor was he then and there a commissioned officer of the United States army and navy and hospital service; that he has no certificate, as required by § 9, chapter 93, acts of the Legislature of West Virginia, passed March 15, 1882, but has a diploma from the 'American Medical Eclectic College of Cincinnati, Ohio;' that he presented said diploma to the members of the Board of Health, who reside in his Congressional district, and asked for the certificate as required by law, but they, after retaining said diploma for some time, returned it to defendant with their refusal to grant him a certificate asked, because, as they claimed, said college did not come under the word reputable as defined by said Board of Health; that if the defendant had been or should be prevented from practising medicine it would be a great injury to him, as it would deprive him of his only means of supporting himself and family; that at the time of the passage of the act of 1882 he had not been practising medicine ten years, but had only been practising six, as aforesaid, from the year 1876."

These were all the facts in the case. Upon them the jury found the defendant guilty and thereupon he moved an arrest of judgment on the ground that the act of the legislature was unconstitutional and void so far as it interfered with his vested right in relation to the practice of medicine, which motion was overruled, and to the ruling an exception was taken. The court thereupon sentenced the defendant to pay a fine of fifty dollars and the costs of the proceedings. The case being taken on writ of error to the Supreme Court of Appeals of the State the judgment was affirmed, and to review this judgment the case is brought here.

Mr. M. H. Dent for plaintiff in error.

Plaintiff insists that this statute by forfeiting his right to continue in the practice of his profession: (1) destroys his

vested rights and deprives him of the estate he had acquired in his profession by years of study, practice, diligence and attention: (2) deprives him of the benefit of an established reputation as a practitioner: (3) depreciates, destroys, and hence deprives him of the value of his invested capital in books, medicines and instruments.

In *Cummings* v. *State of Missouri*, 4 Wall. 277, 320, Judge Field in delivering the opinion of the court says: "The learned counsel does not use these terms — life, liberty and property — as comprehending every right known to the law. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors."

And in *Ex parte Garland*, 4 Wall. 333, 379, the same Justice, speaking for the court, says: "The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency."

Mr. Blackstone in commenting on the terms life, liberty and property says: "In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen; liberties more generally talked of than thoroughly understood, and yet highly necessary to be perfectly known and considered by every man of rank and property lest his ignorance of the points whereon they are founded should hurry him into faction and licentiousness, on the one hand, or a pusillanimous indifference and criminal submission on the other, and we have seen that these rights consist primarily in the free enjoyment of personal security, personal liberty and of private property. So long as these remain inviolate the subject is perfectly free; for every oppression must act in opposition to one or the other of these rights, having no other object on which it can possibly be employed." Also, further:

"The third absolute right inherent in every Englishman is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions without any control or diminution save only by the law of the land."

From these authorities the conclusion is inevitable that the terms life, liberty and property, as used in the Constitution, were intended to comprehend *every right* known to the law, which might in any manner become the object of state oppression, and that a man's estate in his profession and the right to the enjoyment of his acquired reputation are as certainly included in the meaning of these terms as his lands and chattels. For the State to enact a law forbidding a man the enjoyment of his own house without the consent of an arbitrary board of examiners is no more unjust than to provide that a man shall not enjoy the benefits of an established practice without a like consent. In either case he is deprived of his vested rights and property by a process rather ministerial than judicial and wholly different from that which is meant by due process of law, the judgment of his peers, or the law of the land. His land cannot be taken from him except by the intervention of an impartial jury of his countrymen; his hard-earned reputation and professional practice should not be less secure.

It was no crime for him to engage in the practice, and having become established in it, the State ought to have no authority to deprive him of the right to continue in it, except for moral or professional delinquency, ascertained by the verdict of an impartial jury of his peers.

In this case the State finds the plaintiff in the full enjoyment of a lucrative practice, the fruits of six years of attention to his profession, with his means invested in necessary medical works, instruments and remedies, forfeits his right to continue in the enjoyment thereof and proceeds to enforce the forfeiture by fine and imprisonment.

It is true it is further provided that if the injured man will gain the consent of an arbitrary board, armed with authority to end his professional career, he can resume his forfeited rights. This is a presumption of guilt, and a requirement that

he must prove his innocence before a tribunal authorized to disregard the proof.

Mr. Alfred Caldwell, Attorney General of West Virginia, for defendant in error.

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

Whether the indictment upon which the plaintiff in error was tried and found guilty is open to objection for want of sufficient certainty in its averments, is a question which does not appear to have been raised either on the trial or before the Supreme Court of the State. The presiding justice of the latter court in its opinion states that the counsel for the defendant expressly waived all objections to defects in form or substance of the indictment, and based his claim for a review of the judgment on the ground that the statute of West Virginia is unconstitutional and void. The unconstitutionality asserted consists in its alleged conflict with the clause of the Fourteenth Amendment, which declares that no State shall deprive any person of life, liberty, or property without due process of law; the denial to the defendant of the right to practise his profession without the certificate required constituting the deprivation of his vested right and estate in his profession, which he had previously acquired.

It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more

than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.

Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assur-

ance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society may well induce the State to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practise in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected. It would not be deemed a matter for serious discussion that a knowledge of the new acquisitions of the profession, as it from time to time advances in its attainments for the relief of the sick and suffering, should be required for continuance in its practice, but for the earnestness with which the plaintiff in error insists that, by being compelled to obtain the certificate required, and prevented from continuing in his practice without it, he is deprived of his right and estate in his profession without due process of law. We perceive nothing in the statute which indicates an intention of the legislature to deprive one of any of his rights. No one has a right to practise medicine without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the State as competent to judge of his qualifications.

As we have said on more than one occasion, it may be difficult, if not impossible, to give to the terms "due process of law" a definition which will embrace every permissible exertion of power affecting private rights and exclude such as are forbidden. They come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law. They were deemed to be

equivalent to "the law of the land." In this country, the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters: that is, by process or proceedings adapted to the nature of the case. The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen. As said by this court in *Yick Wo* v. *Hopkins*, speaking by Mr. Justice Matthews: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." 118 U. S. 356, 369. See, also, *Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Davidson* v. *New Orleans*, 96 U. S. 97, 104, 107; *Hurtado* v. *California*, 110 U. S. 516; *Missouri Pacific Railway Co.* v. *Humes*, 115 U. S. 512, 519.

There is nothing of an arbitrary character in the provisions of the statute in question; it applies to all physicians, except those who may be called for a special case from another State; it imposes no conditions which cannot be readily met; and it is made enforceable in the mode usual in kindred matters, that is, by regular proceedings adapted to the case. It authorizes an examination of the applicant by the Board of Health as to his qualifications when he has no evidence of them in the diploma of a reputable medical college in the school of medicine to which he belongs, or has not practised in the State a designated period before March, 1881. If, in the proceedings under the statute, there should be any unfair

or unjust action on the part of the Board in refusing him a certificate, we doubt not that a remedy would be found in the courts of the State. But no such imputation can be made, for the plaintiff in error did not submit himself to the examination of the Board after it had decided that the diploma he presented was insufficient.

The cases of *Cummings* v. *The State of Missouri*, 4 Wall. 277, and of *Ex parte Garland*, 4 Wall. 333, upon which much reliance is placed, do not, in our judgment support the contention of the plaintiff in error. In the first of these cases it appeared that the constitution of Missouri, adopted in 1865, prescribed an oath to be taken by persons holding certain offices and trusts and following certain pursuits within its limits. They were required to deny that they had done certain things, or had manifested by act or word certain desires or sympathies. The oath which they were to take embraced thirty distinct affirmations respecting their past conduct, extending even to their words, desires and sympathies. Every person unable to take this oath was declared incapable of holding in the State "any office of honor, trust, or profit under its authority, or of being an officer, councilman, director, trustee, or other manager of any corporation, public or private," then existing or thereafter established by its authority; or "of acting as a professor or teacher in any educational institution, or in any common or other school, or of holding any real estate or other property in trust for the use of any church, religious society, or congregation." And every person holding, at the time the constitution took effect, any of the offices, trusts, or positions mentioned, was required, within sixty days thereafter, to take the oath, and if he failed to comply with this requirement it was declared that his office, trust, or position should, *ipso facto*, become vacant.

No person after the expiration of the sixty days was allowed, without taking the oath, "to practise as an attorney or counsellor at law," nor after that period could "any person be competent as a bishop, priest, deacon, minister, elder, or other clergyman of any religious persuasion, sect, or denomination to teach or preach, or solemnize marriages." Fine and im-

prisonment were prescribed as a punishment for holding or exercising any of the "offices, positions, trusts, professions, or functions" specified, without taking the oath, and false swearing or affirmation in taking it was declared to be perjury punishable by imprisonment in the penitentiary.

A priest of the Roman Catholic Church was indicted in a Circuit Court of Missouri, and convicted of the crime of teaching and preaching as a priest and minister of that religious denomination, without having first taken the oath, and was sentenced to pay a fine of five hundred dollars, and to be committed to jail until the same was paid. On appeal to the Supreme Court of the State the judgment was affirmed, and the case was brought on error to this court.

As many of the acts from which the parties were obliged to purge themselves by the oath had no relation to their fitness for the pursuits and professions designated, the court held that the oath was not required as a means of ascertaining whether the parties were qualified for those pursuits and professions, but was exacted because it was thought that the acts deserved punishment, and that for many of them there was no way of inflicting punishment except by depriving the parties of their offices and trusts. A large portion of the people of Missouri were unable to take the oath, and as to them the court held that the requirements of its constitution amounted to a legislative deprivation of their rights. Many of the acts which parties were bound to deny that they had ever done were innocent at the time they were committed, and the deprivation of a right to continue in their offices if the oath were not taken was held to be a penalty for a past act, which was violative of the constitution. The doctrine of this case was affirmed in *Pierce* v. *Carskadon*, 16 Wall. 234.

In the second case mentioned, that of *Ex parte Garland*, it appeared that, on the 2d of July, 1862, Congress had passed an act prescribing an oath to be taken by every person elected or appointed to any office of honor or profit under the United States, either in the civil, military, or naval departments of the government, except the President, before entering upon the duties of his office, and before being entitled to his

salary or other emoluments. On the 24th of January, 1865, Congress, by a supplemental act, extended its provisions so as to embrace attorneys and counsellors of the courts of the United States. This latter act, among other things, provided that after its passage no person should be admitted as an attorney and counsellor to the bar of the Supreme Court, and, after the 4th of March, 1865, to the bar of any Circuit or District Court of the United States, or of the Court of Claims, or be allowed to appear and be heard by virtue of any previous admission, until he had taken and subscribed the oath prescribed by the act of July 2, 1862. The oath related to past acts, and its object was to exclude from practice in the courts parties who were unable to affirm that they had not done the acts specified; and, as it could not be taken by large classes of persons, it was held to operate against them as a legislative decree of perpetual exclusion.

Mr. Garland had been admitted to the bar of the Supreme Court of the United States previous to the passage of the act. He was a citizen of Arkansas, and when that State passed an ordinance of secession which purported to withdraw her from the Union, and by another ordinance attached herself to the so-called Confederate States, he followed the State and was one of her Representatives, first in the lower House and afterwards in the Senate of the Congress of the Confederacy, and was a member of that Senate at the time of the surrender of the Confederate forces to the armies of the United States. Subsequently, in 1865, he received from the President of the United States a full pardon for all offences committed by his participation, direct or implied, in the rebellion. He produced this pardon and asked permission to continue as an attorney and counsellor of this court without taking the oath required by the act of January 24, 1865, and the rule of the court which had adopted the clause requiring its administration in conformity with the act of Congress. The court held that the law in exacting the oath as to his past conduct as a condition of his continuing in the practice of his profession, imposed a penalty for a past act, and in that respect was subject to the same objection as that made to the clauses of the constitution of Missouri, and was therefore invalid.

There is nothing in these decisions which supports the positions for which the plaintiff in error contends. They only determine, that one who is in the enjoyment of a right to preach and teach the Christian religion as a priest of a regular church, and one who has been admitted to practise the profession of the law, cannot be deprived of the right to continue in the exercise of their respective professions by the exaction from them of an oath as to their past conduct, respecting matters which have no connection with such professions. Between this doctrine and that for which the plaintiff in error contends there is no analogy or resemblance. The constitution of Missouri and the act of Congress in question in those cases were designed to deprive parties of their right to continue in their professions for past acts or past expressions of desires and sympathies, many of which had no bearing upon their fitness to continue in their professions. The law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under authority of the State.

Judgment affirmed.

INMAN *v.* SOUTH CAROLINA RAILWAY COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 86. Argued November 15, 16, 1888. — Decided January 14, 1889.

A railway company received cotton for transportation as a common carrier giving the owner a bill of lading received and accepted by him which contained a "stipulation and agreement" that the carrier "should have the benefit of any insurance which may have been effected upon or on account of said cotton." While in the carrier's custody the cotton was destroyed by fire. The owner had open policies against loss by fire which covered this loss. These policies all provided for the transfer of the owner's claim against the carrier to the insurer on payment of the loss, and some of them contained further provisions forfeiting the insurance in case any agreement was made by the insured whereby the insurer's right to recover of the carrier was released or lost. In case of loss

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these open policies were to be kept good for their full amount by the insured paying to the insurers four per cent of the insured loss, on receiving the amount of it from the insurer. In the present case, instead of making these mutual payments, the insurers adjusted the loss and reinstated the policies, charging the four per cent premium, and the parties agreed that the owner should proceed against the carrier without prejudicing his claim against the insurers, and that the insurers should allow him interest on the claim until collected. The owner brought suit against the carrier. Negligence on the carrier's part, although denied in the pleadings, was not contested at the trial, but the defence rested on the failure to give the carrier the benefit of insurance. *Held:*

(1) That as the defendant's right to the benefit of the insurance depended upon the maintenance of the plaintiff's cause of action, it could not be set up in denial of the truth of the complaint.

(2) That it could not be set up as a counterclaim, because no unconditional payment of insurance had been made to the plaintiff.

(3) That as recovery could not be had against the insurers except upon condition of resort over against the carrier, any act to defeat which was to operate to cancel the insurers' liability, the policies could not be made available for the benefit of the carrier.

(4) That the agreement made with the insurers subsequent to the loss did not amount to a payment.

(5) That the insurers were entitled under their contract to require the insured to proceed first against the carrier, and to decline to indemnify him until the question and the measure of the carrier's liability were determined.

William H. Inman, John H. Inman, James Swann, Bernard S. Clark and Robert W. Inman, copartners in business under the firm name of Inman, Swann & Company, brought suit against the South Carolina Railway Company, in the Circuit Court of the United States for the District of South Carolina, on the 18th of July, 1884, to recover damages for the loss of two hundred and forty-eight bales of cotton, (out of 809 bales,) which the defendant, as a common carrier, had received at Columbia, South Carolina, to be safely carried for certain freight money to Charleston in that State, and there delivered to a connecting carrier to be transported to New York, and which, the plaintiffs averred, the defendant did not safely carry and deliver, but which were, while in the defendant's possession, custody and control as a common carrier, "by the carelessness and negligence of the defendant, its officers, agents and servants, destroyed by fire."

In its answer the defendant admitted the shipment, names of shippers, place of shipment and number of bales shipped; and averred "that at the date of the receipt and shipment of said cotton, bills of lading were given therefor, in which were stated the conditions, stipulations and agreements upon which said cotton should be carried by the railroad company receiving it, and by the connecting roads, which bills of lading and the conditions, stipulations and agreements thereof, were received and accepted by the plaintiffs, and constitute the contract between them and the defendant;" that the cotton was received "subject to the conditions, stipulations and agreements of said bills of lading," and that the two hundred and forty-eight bales were destroyed by fire; but denied, as a first defence, the allegations in respect to negligence; and, as a second defence, stated "that among other stipulations and agreements in said bills of lading under which said cotton so destroyed by fire was carried is the following, to wit: 'And it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation, whereby any legal liability may be incurred by the terms of this contract, that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton;' that the plaintiffs had fully insured said cotton so destroyed by fire, in solvent companies, from risks, among which fire was one, and that at the time of the occurrence of said fire said cotton was fully covered by insurance; but that this defendant has not had the benefit of such insurance; nor have the plaintiffs given or offered to give it the benefit of such insurance."

The bill of exceptions states that the plaintiffs, to maintain the issue on their part, examined Bernard S. Clark, (one of the plaintiffs,) who proved the delivery of the cotton to the Greenville and Columbia Railroad, to be carried to the plaintiffs at New York, the receipt of the cotton by the defendant as a connecting carrier, its destruction by fire at Charleston,

on the 29th day of October, A.D. 1883, while in the custody of the defendant, awaiting delivery to the next connecting carrier, and that the value of the cotton, less freight, was $10,717.21; that the form of the bills of lading given to the agent of the plaintiffs by the Greenville and Columbia Railroad Company, the first carrier, was as set out, and contained the clause above quoted.

Upon examination by defendant, the witness testified that plaintiffs had open policies of insurance in the Phœnix, Mechanics' and Traders' and Greenwich Insurance Companies, but had not received any money for the loss occasioned by the burning of the cotton in question; that the insurance companies had signed certain memoranda which witness produced; that witness instructed Mr. Gallagher, an insurance adjuster at Charleston, to bring suit if defendant did not pay; that witness did not know that Gallagher represented the above-named insurance companies, but he had said there would be no expense to plaintiffs; that "by our policies, in case of loss, we have to pay four per cent on that loss, to keep our policy good for twenty thousand dollars all the time. My object is to get this money from the railroad companies and save this four per cent; and $150 average comes in there, and in case I don't get it from them to fall back on my insurers — the insurance companies — and make them pay it. That is the exact reason, and if I don't get it from them the idea is that I will fall back on the insurance company." On re-direct examination the witness testified that the plaintiffs were the owners of the cotton, and did not authorize their agent to take bill of lading with insurance clause, but plaintiffs had received the balance of the cotton and settled for the freight on it under the same bill of lading; that the agent "had authority to take bills of lading for the cotton, but had to accept what the company would give him or no bill of lading."

The policy issued to plaintiffs by the Mechanics' and Traders' Insurance Company on cotton burned bears date 7th September, 1883, and contains the following provisions:

"It is also agreed and understood, that, in case of loss or damage under this policy, the assured, in accepting payment

therefor, hereby and by that act assigns and transfers to the said insurance company all his or their right to claim for loss or damage as against the carrier or other person or persons, to inure to their benefit, however, to the extent only of the amount of the loss or damage and attendant expenses of recovery paid or incurred by the said insurance company; and any act of the insured waiving or transferring or tending to defeat or decrease any such claim against the carrier or such other person or persons, whether before or after the insurance was made under this policy, shall be a cancellation of the liability of the said insurance company for or on account of the risk insured for which loss is claimed. . . . In event of loss the assured agrees to subrogate to the insurers all their claims against the transporters of said cotton, not exceeding the amount paid by said insurers."

Similar provisions are contained in the policy issued by the Greenwich Company to the plaintiffs on cotton destroyed. The policy issued by the Phœnix Insurance Company on said cotton contained the following provision: "In case of any agreement or act, past or future, by the insured, whereby any right of recovery of the insured against any persons or corporations is released or lost, which would, on acceptance of abandonment or payment of loss by this company, belong to this company but for such agreement or act, or, in case this insurance is made for the benefit of any carrier or bailee of the property insured other than the person named as insured, the company shall not be bound to pay any loss, but its right to retain or recover the premium shall not be affected;" also the further provision "that in event of loss the insured agrees to subrogate to the insurers all their claims against the transporters of said cotton, not exceeding the amount paid by said insurers."

The memoranda referred to as signed by the insurance companies on the dates named are as follows:

"New York, *Nov.* 17, 1883.

"To Inman, Swann & Co.:

"In accordance with the provision of this policy the estimated loss sustained by this company of $3667 in consequence

of fire at Charleston, S. C., about Oct. 29th, '83, is hereby reinstated and $114.90 additional premium is charged by this company therefor, it being fully understood and agreed that when the above loss is finally adjusted the amount reinstated and the premium charged shall be made correct.

"Attached to this policy, 21,773."

"NEW YORK, *Dec.* 1*st*, 1883.

"It is hereby understood and agreed by the undersigned companies insuring Messrs. Inman, Swann & Co., that proofs of loss by fire at Charleston, S. C., of Oct. 29th, 1883, presented this day, are to be considered as filed on November 17th, as all papers and vouchers to prove such loss were forwarded by Messrs. Inman, Swann & Co., with their consent, to the South Carolina R. R. Co. to collect loss from them as common carriers, which, however, is not to prejudice Messrs. Inman, Swann & Co.'s claim against the undersigned insurance companies."

"NEW YORK, *Jan.* 18*th*, 1884.

"The undersigned companies having been notified by Messrs. Inman, Swann & Co. of loss by fire at Charleston, S. C., on or about Oct. 29th, '83, and proofs of loss having been presented to the South Carolina R. R. Co. direct, on Nov. 17th, '83, with consent of said insurance companies, which, however, it was agreed upon should not prejudice the assurer's claim against them, the claims having been agreed upon as filed with insurance companies on said Nov. 17th, in case the railroad should refuse to pay, and the claim being due on Jan. 17th, 1884, Messrs. Inman, Swann & Co. will still use every effort to collect the claim direct, and the undersigned insurance companies hereby agree to pay them (six) 6 per cent interest from January 17th, '84, to the time when claim is collected. This agreement, however, is not to prejudice their claim against the undersigned insurance companies."

It was conceded upon the argument that the bills of lading were dated October 18th, October 24th, October 25th and October 27th, 1883, and were signed for the Columbia and

Greenville Railroad Company and the companies constituting the through line, of which defendant was one, "separately but not jointly;" and that the policies of insurance were dated August 29th, September 6th and September 7th, 1883, and expired August 29th, 1884, and contained these clauses: "The total amount of each and every loss, less $150 to be deducted in lieu of average, shall be paid within thirty days after receipt of proofs of loss;" and "that, in the event of loss, the assured agree to pay the insurers additional premium or premiums at the rate of four per cent on the amount of such loss or losses, and this policy is thereby to be reinstated and in force to the full amount of $20,000, unless either party desire the cancelment of same."

At the request of the defendant and subject to plaintiffs' exceptions the court gave to the jury the following instructions:

"First. That the bill or bills of lading under which the cotton of plaintiffs in this case was transported by the defendant constituted the contract of the parties, and the plaintiffs are bound by the stipulation that the defendant company 'shall have the benefit of any insurance that may have been effected upon or on account of said cotton.'

"Second. That the plaintiffs, before they can recover against defendant here, must show that they have performed their part of this contract by proving that they have given to the South Carolina Railway Company the benefit of the insurance, or that they have been ready to perform their contract by tendering such benefit, and that the same has been refused.

"Third. That if the jury find that an agreement was made between plaintiffs and their insurers by which the insurers waived proofs of loss and admitted the claim of plaintiffs to be due by them on the 1st of January, 1884, and plaintiffs agreed to give time upon said claim to the insurers and meantime to press the claim for the cotton against the South Carolina Railway Company, defendant, in consideration of the payment to plaintiffs by their insurers of 6 per cent interest per annum on said admitted claim from 1st January, 1884, then plaintiffs cannot recover, and verdict must be for defendant."

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The plaintiffs requested the following instructions, which the court refused, and plaintiffs excepted.

"First. That the stipulations in the bills of lading giving the defendant the benefit of insurance effected by the plaintiffs is unreasonable, contrary to public policy, and the duties and obligations imposed by law upon carriers, and therefore void.

"Second. That if the stipulation in the bills of lading under which the cotton of the plaintiffs was to be transported by the defendant giving to the carrier the benefit of insurance, is valid, then such stipulation only entitles the defendant to such insurance upon payment by it of plaintiffs' loss, unless the plaintiffs have already been paid by the insurer.

"Third. That if the stipulation in the bills of lading under which plaintiffs' cotton was to be transported by the defendant giving to the carrier the benefit of plaintiffs' insurance is valid, then such stipulation only entitles the defendant to such insurance as it is in the hands of the plaintiffs, and if the policy is void or unproductive this is no defence, and the plaintiffs are entitled to recover in this action.

"Fourth. That if the stipulation in the bills of lading under which plaintiffs' cotton was to be transported by the defendant giving the carrier benefit of insurance effected by plaintiffs is valid, then no legal obligation arose therefrom that the plaintiffs should effect valid insurance, and if such insurance is invalid this is no defence to plaintiffs' action.

"Fifth. That as the plaintiffs, under the stipulation in the bills of lading giving the carrier benefit of the insurance, may or may not have insured as they please, the defendant takes such insurance, if effected, subject to all infirmities, and the same constitutes no defence to plaintiffs' action.

"Sixth. That the carrier does not lose his character as carrier by reason of a stipulation giving him the benefit of insurance by the shipper or owner, and that as carrier he is primarily liable for loss or damage, if not arising from causes exempted by law or his contract, and if the defendant desires the benefit of plaintiffs' insurance it must first pay the loss sustained by them.

Argument for Defendant in Error.

"Seventh. That the defendants, under the bills of lading in question, are not exempt from loss by fire, as such exemption, under said bills of lading, only applies to the carrier by water."

Mr. George A. Black for plaintiffs in error.

Mr. William Allen Butler and *Mr. Theodore G. Barker* for defendant in error.

I. In South Carolina, the State, as it happens, in which the contract in this case was made, and where, so far as defendant was concerned, it was to be performed, it has been always held, that the bill of lading, given by a railroad company to a shipper, constitutes the contract between the parties, and recently thus: "The bill of lading is the contract between the shipper and the company, by which the company agrees to transport and deliver beyond its own lines and the terms and conditions of the contract regulate and determine the duties and obligations of the contracting parties. The signature of the shipper is not necessary to establish his assent to the terms of a bill of lading." *Piedmont Manufacturing Co.* v. *Columbia and Greenville Railroad Co.*, 19 So. Car. 353. In New York it is held that, "On contract for through transportation exemptions inure to connecting carriers although not so expressly provided." *Manhattan Oil Co.* v. *Camden and Amboy Railroad and Transportation Co.*, 54 N. Y. 197. "The acceptance of the carrier's receipt creates a contract according to its terms between him and the shipper." Hutchinson on Carriers, 240; *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174.

II. The consideration of the contract, upon which the liability of defendant to pay in case of loss of the cotton by fire depended, was the giving by plaintiffs to the defendant the benefit of the insurance, which had been effected upon, or on account of the cotton shipped.

It is a case of a "promise for a promise" "or of mutual promises, where the plaintiffs' promise is executed, but the thing they had agreed to perform was executory." "If the

consideration be executory, the plaintiff cannot bring his action till the consideration be performed." 1 Tidd Pr. 435. Here the plaintiffs had promised, that "in case of any loss or damage done to or sustained by any cotton whereby any legal liability may be incurred by the terms of the contract, the company incurring such liability shall have the benefit of any insurance, which may have been effected upon or on account of the said cotton."

By the terms of the contract, then, the defendant company incurred such "legal liability" the moment when the loss occurred to the cotton. According to the plaintiffs' promise, defendant then became, *eo instanti*, entitled to have from the plaintiffs the benefit of the insurance, which had been effected. The plaintiffs were, then, under the executed promise to give to defendant the benefit of such insurance, and the thing to be done — the giving the benefit — was executory; and according to the established principle of law above stated, the plaintiffs cannot bring their action till the consideration be performed. See also *Pordage* v. *Cole*, 1 Wms. Saunders, 319. This is what the French law calls "a *commutative* contract, involving mutual and reciprocal obligations, where the acts to be done on one side form the consideration for those to be done on the other," and "it would seem to follow," says Judge Story, "upon principles of natural justice, that, if they are to be done, at the same time, neither party could claim a fulfilment thereof, unless he had first performed, or was ready to perform, all the acts required on his own part." *Hyde* v. *Booraem*, 16 Pet. 169.

III. The stipulations in the bills of lading giving the defendant the benefit of insurance effected by the plaintiffs are "not unreasonable, contrary to public policy and the duties and obligations imposed by law upon carriers, and therefore void," as is claimed in plaintiffs' first exception.

These exceptions to the like stipulations, in similar bills of lading to those proven in this case, were met and answered, in the recent decision of this court in *Phœnix Insurance Company* v. *Erie Transportation Company*, 117 U. S. 312.

IV. The plaintiffs have, by their own proof, shown that

they have been virtually paid, or have been so absolutely secured to be paid, by the insurance companies as actually to occupy the position of lenders of the insurance money to their insurers, upon an investment, bearing six per cent interest, from the date, when the insurance money was, in an account stated in writing, acknowledged to be due and promised to be paid, unconditionally, by the insurance companies to the plaintiffs. The only condition of the agreement of settlement is, that the plaintiffs shall sue the carrier, and use every effort to collect the claim from the defendant. This, however, it is stipulated between them, is not to prejudice the plaintiffs' claim against the insurance companies. They are, therefore, estopped from saying that they have not been, in effect, paid by the insurers. The stipulation of the bills of lading that the defendant (carrier) shall have the benefit of that insurance, in the language of the decision of this court, above quoted, "does prevent either the owner himself" (the plaintiffs here) "or the insurer from maintaining an action against the carrier upon any terms inconsistent with the stipulation."

V. Even if the policy could be shown to be void or unproductive the plaintiffs are not entitled to pronounce judgment to that effect upon it. The courts alone, upon an issue legally framed between proper parties, could so declare; until such judgment, it must be presumed to be valid and productive.

But, by the proof in this case, these plaintiffs are absolutely estopped from saying, that these policies, which the insurers, since the loss, have recognized as valid, under which they have accepted proofs of loss, and have agreed to pay the loss, are void. So, by the same proof, they are conclusively estopped from saying that they are unproductive.

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

The defendant, a corporation of South Carolina, received the cotton in question for safe carriage from the point of connection with the Columbia and Greenville Railroad Company to Charleston, S. C., and delivery to the steamship company at

that port. The loss occurred by fire, in Charleston, before the obligation was discharged, and this is an action as on the case, based on defendant's breach of duty, as a common carrier, in failing to safely carry and deliver.

To secure care, diligence and fidelity in the discharge of his important public functions, the common law charged the common carrier as an insurer; but the rigor of the rule has been relaxed so as to allow reasonable limitations upon responsibility at all events, to be imposed by contract. We have, however, uniformly held, that this concession to changed conditions of business cannot be extended so far as to permit the carrier to exempt himself, by a contract with the owner of the goods, from liability for his own negligence. And as in case of loss the presumption is against the carrier, and no attempt was made here to rebut that presumption, the defendant's liability because in fault must be assumed upon the evidence before us.

The cause went to judgment, however, in favor of the defendant upon its second defence, which was sustained by the rulings of the Circuit Court brought under review upon this writ of error.

That defence set up the clause in the bills of lading providing that "the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton;" and it was averred that the plaintiffs had fully insured the cotton against the risk of fire, but that defendant had not had the benefit of such insurance, nor had the plaintiffs given or offered to give to it such benefit.

If this bill of lading had contained a provision that the railroad company would not be liable unless the owners should insure for its benefit, such provision could not be sustained; for that would be to allow the carrier to decline the discharge of its duties and obligations as such, unless furnished with indemnity against the consequences of failure in such discharge. Refusal by the owners to enter into a contract so worded would furnish no defence to an action to compel the company to carry, and submission to such a requisition would be presumed to be the result of duress of circumstances, and not

binding. But the clause in question bears no such construction, and obviously cannot be relied on as in itself absolving the company from liability, for by its terms the benefit of insurance was only to be had when a legal liability had been incurred, and in favor of "the company incurring such liability." Since the right to the benefit of insurance at all depended upon the maintenance of plaintiffs' cause of action, the fact of not receiving such benefit could not be put forward in denial of the truth or validity of their complaint.

If, on the other hand, the contention of the defendant may be regarded as in the nature of a counterclaim by way of recoupment or set-off, then the question arises as to the extent of the stipulation, assuming it to be otherwise valid, and what would amount to a breach of it.

By its terms the plaintiffs were not compelled to insure for the benefit of the railroad company ; but if they had insurance at the time of the loss, which they could make available to the carrier, or which, before bringing suit against the company, they had collected, without condition, then, if they had wrongfully refused to allow the carrier the benefit of the insurance, such a counterclaim might be sustained, but otherwise not.

The policies here were all taken out some weeks before the shipments were made, although, of course, they did not attach until then, and recovery upon neither of them could have been had, except upon condition of resort over against the carrier, any act of the owners to defeat which operated to cancel the liability of the insurers. They could not, therefore, be made available for the benefit of the carrier. Nor have the insurance companies paid the owners. It is true that after the loss had been incurred, the companies signed certain memoranda, by which the face of the insurance was reinstated, proofs of loss waived, and provision made for postponing the question of indemnity until the owners, if the carrier refused to pay, had used effort to collect, without prejudice to the owners' claims against the insurance companies. But this falls far short of the equivalent of payment, and, indeed, under the terms of these policies, payment itself would have been subject to such conditions as the companies chose to impose. Although in

the order of ultimate liability, that of the carrier is in legal effect primary and that of the insurer secondary, yet the insured can, in the absence of provisions otherwise controlling the subject, insist upon proceeding, under his contract, first, against the party secondarily liable, and when he does so is bound in conscience to give to the latter the benefit of the remedy against the party principal; but these insurers could, under their contracts, require the owners to pursue the carrier in the first instance and decline to indemnify them until the question and the measure of the latter's liability were determined. This they did, and to their action in that regard the defendant is not so situated as to be entitled to object.

In our judgment the second defence, in any aspect in which it may be considered upon this record, cannot be maintained, and it follows that the action of the Circuit Court was erroneous.

The judgment will be reversed, and the cause remanded, with directions to the Circuit Court to award a new trial.

STOUTENBURGH *v.* HENNICK.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 722. Submitted December 18, 1888. — Decided January 14, 1889.

Under the authority conferred upon Congress by § 8, Article I, of the Constitution, "to make all laws which shall be necessary or proper for carrying into execution" the power "to exercise exclusive legislation in all cases whatsoever over" the District of Columbia, Congress may constitute the District "a body corporate for municipal purposes," but can only authorize it to exercise municipal powers.

The Act of the Legislative Assembly of the District of Columbia of August 23, 1871, as amended June 20, 1872, relating to license taxes on persons engaging in trade, business or profession within the District, was intended to be a regulation of a purely municipal character; but nevertheless the provision in clause 3, of § 21, which required commercial agents, engaged in offering merchandise for sale by sample, to take out and pay for such a license, is a regulation of interstate commerce, so far as applicable to persons soliciting the sale of goods on behalf of individuals or firms doing business outside of the District, and it was not within the

constitutional power of Congress to delegate to that legislature authority to enact a clause with such a provision, nor did it in fact do so in a grant of power for municipal purposes.

Robbins v. *Shelby County Taxing District*, 120 U. S. 489, and *Asher* v. *Texas*, 128 U. S. 129, affirmed.

The repeal or modification by Congress of clauses in a legislative act of the District of Columbia, which are separable and separably operative, is no ratification of another clause in it, equally separable and separably operative, which it was beyond the delegated or constitutional power of the Legislature of the District to enact.

Hennick, the defendant in error, was convicted in the Police Court of the District of Columbia, upon an information stating that he, in April, 1887, "did engage in the business of a commercial agent, to wit, the business of offering for sale, as agent of Lyons, Conklin & Co., a firm doing business in the city of Baltimore, State of Maryland, certain goods, wares, and merchandise by sample, catalogue, and otherwise, without having first obtained a license to do so, contrary to and in violation of an act of the late Legislative Assembly of the District of Columbia, entitled 'An act imposing a license on trades, business, and professions practised or carried on in the District of Columbia,' and providing for the enforcement and collection of fines and penalties for carrying on business in the said District without license, approved August 23, A.D. 1871, and the amendments to the said act, approved June 20, A.D. 1872," and sentenced "to pay a fine of five dollars, in addition to the license tax of two hundred dollars, and in default to be committed to the workhouse for the term of sixty days," and being in default was so committed. He applied to one of the Justices of the Supreme Court of the District for, and obtained, a writ of *habeas corpus*, which was certified to be heard in the first instance in the general term of that court, and, upon hearing, it was held "that the law for the violation of which the petitioner is held is not a valid law," and his discharge from custody was ordered accordingly; whereupon this writ of error was sued out.

The act in question was passed by the then Legislative Assembly of the District, August 23, 1871, and amended June 20, 1872 (Laws District Columbia, Acts First Session, p. 87;

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Acts Second Session, p. 60), and by its first section it was provided: "That no person shall be engaged in any trade, business, or profession hereinafter mentioned, until he shall have obtained a license therefor as hereinafter provided."

Then followed twenty-three sections of which the twenty-first is subdivided into forty-eight clauses. Clause 3 was so amended as to read: "Commercial agents shall pay two hundred dollars annually. Every person whose business it is, as agent, to offer for sale goods, wares or merchandise by sample, catalogue or otherwise, shall be regarded as a commercial agent."

Section 4 of the act is in these words, "That every person liable for license tax, who, failing to pay the same within thirty days after the same has become due and payable, for such neglect shall, in addition to the license tax imposed, pay a fine or penalty of not less than five nor more than fifty dollars, and a like fine or penalty for every subsequent offence."

And then follows a proviso not material here.

A part of the act was repealed by Congress, February 17, 1873, 17 Stat. 464; the 23d section and clauses 20 and 35 of the 21st section, and clause 16 of the 21st section as amended, were repealed and modified July 12, 1876, 19 Stat. 88, as were also, on January 26, 1887, parts of clause 38 of § 21 as amended, and of § 15.

Sections 1 and 18 of the act of Congress of February 21, 1871, entitled "An act to provide a government for the District of Columbia," 16 Stat. 419, are as follows:

"Sec. 1. That all that part of the territory of the United States included within the limits of the District of Columbia be, and the same is hereby, created into a government by the name of the District of Columbia, by which name it is hereby constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this act."

"Sec. 18. That the legislative power of the District shall

extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act, subject, nevertheless, to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States; but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District in as ample manner as if this law had not been enacted."

These sections are carried forward into the act of Congress of June 22, 1874, entitled "An act to revise and consolidate the statutes of the United States, general and permanent in their nature, relating to the District of Columbia, in force on the first day of December, in the year of our Lord one thousand eight hundred and seventy-three," as sections 2, 49 and 50.

Mr. Henry E. Davis for plaintiff in error.

I. The power of the Legislative Assembly, which emanated from Congress, extended "to all rightful subjects of legislation within the District consistent with the Constitution of the United States . . . subject to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States," and all acts of the Assembly were "subject to repeal or modification by the Congress of the United States." Rev. Stat. Dist. Col. §§ 49, 50.

The extent of the power thus conferred upon the Legislative Assembly was considered by the Supreme Court of the District of Columbia in *Roach* v. *Van Riswick*, McArthur & Mackay, 171; *Cooper* v. *District of Columbia*, McArthur & Mackay, 250; and *District of Columbia* v. *Waggaman*, 4 Mackay, 328; and in the last-mentioned case the very license act under consideration was held as within the power; and in *District of Columbia* v. *Oyster*, 4 Mackay, 285, the act was administered by the same court without any question or expression of doubt as to its being properly within the

power granted and properly grantable by Congress to the Assembly.

The effect of this is that this legislation, being that of a duly authorized agent of Congress, is that of Congress itself. And even if that were not so, Congress has adopted it in the several acts of February 17, 1873, c. 148, 17 Stat. 464; July 12, 1876, c. 180, § 19, 19 Stat. 83; and January 26, 1887, c. 48, 24 Stat. 368; in part amending and in part repealing the act of the Assembly, whereby, by the clearest implication, the rest of the act is adopted.

II. The question raised by the petition is supposed to find support in Art. 1, § 8, of the Constitution of the United States, clauses 1 and 3, and in § 9 of the same article, clause 6.

As to the first of these provisions, it is enough to say that the license tax in question is not a duty, an impost, or an excise, and is not, therefore, within that provision requiring uniformity throughout the United States. As to the last, the license law for the District of Columbia gives no preference to the ports of any State, or even of the District, over those of any other State, and it is not easily conceived how that clause can be thought to have any relevancy to the subject in hand.

A question seems, however, to be presented by the remaining of the three clauses above enumerated, viz., whether, as a regulation of commerce, the license law for the District is invalid, as obnoxious to the Constitution of the United States.

a. Whether the law regulates commerce, in the sense of the Constitution, is immaterial. Whether it does so regulate commerce may be determined by the following cases: *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Corson* v. *Maryland*, 120 U. S. 502; *Fargo* v. *Michigan*, 121 U. S. 230; *Ouachita Packet Co.* v. *Aiken*, 121 U. S. 444; *Philadelphia &c. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347; *Bowman* v. *Chicago &c. Railway Co.*, 125 U. S. 465; *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411; *Leloup* v. *Port of Mobile*, 127 U. S. 640.

b. In any event it is certain that, as above pointed out, the law is, in effect, an enactment of Congress.

c. The question, then, becomes: has Congress power under the Constitution to pass such a law? As to the extent of its power to legislate over the District of Columbia, it is sufficient to refer to Chief Justice Marshall's opinion in *Loughborough* v. *Blake*, 5 Wheat. 317, 324; and, touching the power to regulate commerce, to what is said in *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 197.

What limitations then exist on the power of Congress in regulating commerce? Seemingly none, except those distinctly prescribed by the Constitution, none of which apply to this case. And this legislation both emanated from Congress, and has been adopted by it, and has the same validity as if its provisions had been specifically made by it.

d. The recent decisions of the Supreme Court of the United States in *Robbins* v. *Taxing District, etc., ubi supra*, in reality do not affect the question under consideration.

In those cases it was held only that given laws of the States concerned were invalid, as dealing with the subject of commerce, which, by the Constitution, was committed to Congress. The power of Congress, its extent and its limitations in the premises, were not under consideration.

e. The petitioner has no right to complain of the District license law. He is not a member of a foreign nation or an Indian tribe, and the law does not affect commerce "among the several States."

The District of Columbia is not a State, in the meaning of the Constitution. *Hepburn* v. *Ellzey*, 2 Cranch, 445; *New Orleans* v. *Winter*, 1 Wheat. 91; *Scott* v. *Jones*, 5 How. 342, 377; *Barney* v. *Baltimore*, 6 Wall. 280, 287; *Railroad Co.* v. *Harris*, 12 Wall. 65, 86.

And in respect of regulating commerce there is in the Constitution no prohibition upon either Congress or any State to discriminate for or against the District, as between it and such or any State. "The sole restraints" against abuse in this respect are those mentioned by Chief Justice Marshall in *Gibbons* v. *Ogden;* and disregard of those restraints can only be reached by counter-legislation; they cannot be affected by any action of the judiciary.

Opinion of the Court.

Mr. Francis M. Darby, *Mr. Skipwith Wilmer*, *Mr. John Henry Keene*, *Jr.*, *Mr. Archibald Stirling*, *Mr. Henry Wise Garnett*, and *Mr. Guion Miller* for defendant in error.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court:

It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority, and hence, while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity.

Congress has express power "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia, thus possessing the combined powers of a general and of a State government in all cases where legislation is possible. But as the repository of the legislative power of the United States, Congress in creating the District of Columbia "a body corporate for municipal purposes" could only authorize it to exercise municipal powers, and this is all that Congress attempted to do.

The act of the Legislative Assembly under which Hennick was convicted, imposed, as stated in its title, "a license on trades, business, and professions practiced or carried on in the District of Columbia," and required by clause three of section twenty-one, among other persons in trade, commercial agents, whose business it was to offer merchandise for sale by sample, to take out and pay for such license. This provision was manifestly regarded as a regulation of a purely municipal character, as is perfectly obvious, upon the principle of *noscitur a sociis*, if the clause be taken as it should be, in connection with the other clauses and parts of the act. But

it is indistinguishable from that held void in *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, and *Asher* v. *Texas*, 128 U. S. 129, as being a regulation of interstate commerce, so far as applicable to persons soliciting, as Hennick was, the sale of goods on behalf of individuals or firms doing business outside the District.

The conclusions announced in the case of Robbins were that the power granted to Congress to regulate commerce is necessarily exclusive whenever the subjects of it are national or admit only of one uniform system or plan of regulation throughout the country, and in such case the failure of Congress to make express regulations is equivalent to indicating its will that the subject shall be left free; that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems; and that a State statute requiring persons soliciting the sale of goods on behalf of individuals or firms doing business in another State to pay license fees for permission to do so, is, in the absence of congressional action, a regulation of commerce in violation of the Constitution. The business referred to is thus definitively assigned to that class of subjects which calls for uniform rules and national legislation, and is excluded from that class which can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. *Cooley* v. *Board of Wardens*, 12 How. 299; *Gilman* v. *Philadelphia*, 3 Wall. 713. It falls, therefore, within the domain of the great, distinct, substantive power to regulate commerce, the exercise of which cannot be treated as a mere matter of local concern, and committed to those immediately interested in the affairs of a particular locality.

It is forcibly argued that it is beyond the power of Congress to pass a law of the character in question solely for the District of Columbia, because whenever Congress acts upon the subject, the regulations it establishes must constitute a system applicable to the whole country; but the disposition of this case calls for no expression of opinion upon that point.

Dissenting Opinion: Miller, J.

In our judgment Congress, for the reasons given, could not have delegated the power to enact the 3d clause of the 21st section of the act of assembly, construed to include business agents such as Hennick, and there is nothing in this record to justify the assumption that it endeavored to do so, for the powers granted to the District were municipal merely, and although by several acts, Congress repealed or modified parts of this particular by-law, these parts were separably operative and such as were within the scope of municipal action, so that this congressional legislation cannot be resorted to as ratifying the objectionable clause, irrespective of the inability to ratify that which could not originally have been authorized.

The judgment of the Supreme Court of the District is

Affirmed.

Mr. Justice Miller dissenting.

I do not find myself able to agree with the court in its judgment in this case.

The act of Congress creating a territorial government for the District of Columbia declared that the legislative power of the District should "extend to all rightful subjects of legislation within said District;" which undoubtedly was intended to authorize the District to exercise the usual municipal powers. The act of the Legislative Assembly of the District, under which Hennick was convicted, imposed "a license on trades, business, and professions practised or carried on in the District of Columbia," and a penalty on all persons engaging in such trades, business, or profession without obtaining that license. As the court says in its opinion, this was "manifestly regarded as a regulation of a purely municipal character."

The taxing of persons engaged in the business of selling by sample, commonly called drummers, is one of this class, and the only thing urged against the validity of this law is that it is a regulation of interstate commerce, and, therefore, an exercise of a power which rests exclusively in Congress. I pass the question, which is a very important one, whether this act of the Legislature of the District of Columbia, being one exercised under the power conferred on it by Congress, and

coming, as I think, strictly within the limit of the power thus conferred, is not so far as this question is concerned, sustained by the authority of Congress itself, and is substantially the action of that body.

The cases of *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, and *Asher* v. *Texas*, 128 U. S. 129, hold the regulations requiring drummers to be licensed to be regulations of commerce, and invasions of the power conferred upon Congress on that subject by the Constitution of the United States. In those cases I concurred in the judgment, because, as applied to commerce between citizens of one State and those of another State, it was a regulation of interstate commerce; or, in the language of the Constitution, of commerce "among the several States," being a prosecution of a citizen of a State other than Tennessee, in the first case, for selling goods without a license to citizens of Tennessee, and in the other case to citizens of Texas.

But the constitutional provision is not that Congress shall have power to regulate *all* commerce. It has been repeatedly held that there is a commerce entirely within a State, and among its own citizens, which Congress has no power to regulate. The language of the constitutional provision points out three distinct classes of cases in which Congress may regulate commerce, and no others. The language is that "Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Unless the act for which Hennick was prosecuted in this case was commerce with a foreign nation, among the several States, or with an Indian tribe, it is not an act over which the Congress of the United States had any exclusive power of regulation. Commerce among the several States, as was early held by this court in *Gibbons* v. *Ogden*, 6 Wheat. 448, means commerce between citizens of the several States, and had no reference to transactions by a State, as such, with another State, in their corporate or public capacities. Indeed, it would be of very little value if that was the limitation or the meaning to be placed upon it. I take it for granted, therefore,

that its practical utility is in the power to regulate commerce between the citizens of the different States.

Commerce between a citizen of Baltimore, which Hennick is alleged to be in the prosecution in this case, and citizens of Washington, or of the District of Columbia, is not commerce "among the several States," and is not commerce between citizens of different States, in any sense. Commerce by a citizen of one State, in order to come within the constitutional provision, must be commerce with a citizen of another *State;* and where one of the parties is a citizen of a Territory, or of the District of Columbia, or of any other place out of a State of the Union, it is not commerce among the citizens of the several States.

As the license law under which Hennick was prosecuted made it necessary for him to take out a license to do his business in the city of Washington, or the District of Columbia, which was not a State, nor a foreign nation, nor within the domain of an Indian tribe, the act upon the subject does not infringe the Constitution of the United States.

For these reasons I dissent from the judgment of the court.

BATE REFRIGERATING COMPANY *v.* HAMMOND.

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

No. 862. Argued January 2, 3, 4, 1889. — Decided January 21, 1889.

A United States patent was granted November 20, 1877, for seventeen years, on an application filed December 1, 1876. A patent for the same invention had been granted in Canada, January 9, 1877, to the same patentee, for five years from that day, on an application made December 19, 1876. On a petition filed in Canada by the patentee, December 5, 1881, the Canada patent was, on December 12, 1881, extended for five years from January 9, 1882, and, on December 13, 1881, for five years from January 9, 1887, under § 17 of the Canada act assented to June 14, 1872 (35 Victoria, c. 26): *Held*, under § 4887 of the Rev. Stat., that, as the Canada act was in force when the United States patent was applied for and issued,

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and the Canada extension was a matter of right, at the option of the patentee, on his payment of a required fee, and the fifteen years' term of the Canada patent had been continuous and without interruption, the United States patent did not expire before the end of the fifteen years' duration of the Canada patent.

It was not necessary to the validity of the United States patent that it should have been limited in duration, on its face, to the duration of the Canada patent, but it is to be so limited by the courts, on evidence *in pais*, as to expire at the same time with the Canada patent, not running more than the seventeen years.

This was a suit in equity, brought in the Circuit Court of the United States for the District of Massachusetts, December 16, 1886, by the Bate Refrigerating Company, a New York corporation, against George H. Hammond and Company, a Michigan corporation, founded on the alleged infringement of letters patent No. 197,314, granted to John J. Bate, November 20, 1877, for the term of seventeen years from that day, on an application filed December 1, 1876, for an "improvement in processes for preserving meats during transportation and storage."

The plaintiff was the assignee of the patent. The bill alleged infringement, within the District of Massachusetts and elsewhere in the United States, by the making, using, and vending of the patented process, and alleged that the defendant had been engaged in the business of shipping fresh meat from the port of Boston to ports in Great Britain, by means of the process claimed in the patent. The claim was as follows: "The herein-described process of preserving meat during transportation and storage, by enveloping the same in a covering of fibrous or woven material, and subjecting it when thus enveloped to the continuous action of a current of air of suitably low and regulated temperature, substantially as and for the purpose set forth."

The defendant filed a plea, setting up, among other things, that, on the 9th of January, 1877, letters patent of the Dominion of Canada, No. 6938, for the same invention as that described and claimed in No. 197,314, were granted to the same John J. Bate, for the term of five years from the 9th of January, 1877; that, after No. 197,314 had expired,

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at the end of the term of five years for which such Canadian patent was granted, the Circuit Court of the United States for the District of New Jersey, upon being advised of the grant of such Canadian patent, vacated and set aside an injunction which it had theretofore granted, by an interlocutory decree made in a suit in equity founded on No. 197,314, brought by the Bate Refrigerating Company against Benjamin W. Gillett and others; that thereafter Bate and the Bate Refrigerating Company procured the rendition of a judgment by the Superior Court for Lower Canada, declaring the Canadian patent to have been void *ab initio* and vacating it and setting it aside; that such judgment of the Superior Court for Lower Canada being brought to the attention of the Circuit Court of the United States for the District of New Jersey, that court reinstated said injunction; and that afterwards the Superior Court for Lower Canada, in a suit brought by Sir Alexander Campbell, minister of justice and attorney general for the Dominion of Canada, against Bate and the Bate Refrigerating Company and others, adjudged that its said prior judgment had been "arrived at through the fraud to the law and collusion" of Bate, the Bate Refrigerating Company, and another person, "deceiving the attorney general, the advocates, and the court, employing and paying counsel on both sides, as well, seemingly, against themselves as on their apparent behalf," and revoked and annulled its said prior judgment. The plea concluded by averring that No. 197,314 expired on the 9th of January, 1882, and that the Circuit Court, sitting as a court of equity, had no jurisdiction to hear and determine an action in equity for the infringement of the patent.

The bill was then amended by averring that the application for the Canadian patent was not made until December 19, 1876, while the application for No. 197,314 was made December 1, 1876; and that the Canadian patent was not actually or legally issued until on or about June 26, 1878, on or about which date a model of the invention, as required by law, was filed in the Canadian Patent Office. The amendment to the bill also set forth the two judgments of the Superior Court for Lower Canada, and averred that, by virtue of an act of the

parliament of the Dominion of Canada, assented to May 25, 1883, 46 Victoria, c. 19, the original term of the Canadian patent was actually fifteen years, instead of five years, and it would not terminate before the 9th of January, 1892.

Subsequently the defendant filed an answer to the bill, setting up, among other defences, want of novelty in the patented invention, but not denying that it had used the invention subsequently to the granting of the patent; and also setting up the granting of the Canadian patent for five years from January 9, 1877; that No. 197,314 was void, because it was issued for seventeen years, and its term was not limited by the Commissioner of Patents to five years from January 9, 1877; that the Canadian application was not made until after the application for No. 197,314 was filed; that Bate did not file a model in the Canadian Patent Office until after the grant of the Canadian patent; and that the Canadian patent was actually patented to Bate on the 9th of January, 1877, and took effect on that date, although not actually delivered to the patentee until after the filing of the model. It also set forth the two Canadian judgments, and averred that, on the 30th of November, 1881, Bate made a petition to the Commissioner of Patents for Canada, for the extension of No. 6938, in which he averred that on the 9th of January, 1877, he "obtained a patent for the period of five years from the said date, for new and useful improvements on apparatus and process for ventilation, refrigeration, &c.," and that he was the holder of that patent in trust for the Bate Refrigerating Company, and prayed that it might be extended "for another period of ten years;" that, on the filing of that petition, an extension of the patent was granted, on December 12, 1881, "for a second period of five years" from January 9, 1882; that a further extension of the patent was granted, December 13, 1881, "for a third period of five years" from January 9, 1887; that the plaintiff was thereby estopped from denying the fact that No. 6938 was legally granted, January 9, 1877, for a period of five years; that by virtue of the act of 46 Victoria, c. 19, the original term for which No. 6938 was granted, was not fifteen years instead of five years; that said act can have no effect on the

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duration of No. 197,314; that, by reason of the prior patenting of the invention by Bate in Canada for five years from January 9, 1877, No. 197,314, if valid at all, expired on January 9, 1882; and that, therefore, the court, sitting in equity, had no jurisdiction to hear and determine an action for its infringement.

Without the filing of any replication to this answer, the parties entered into a written stipulation, setting forth as follows: "Whereas the answer of the defendant corporation in this cause sets up, in addition to other defences, that the patent on which this suit is brought, being number 197,314, granted to John J. Bate complainant's assignor and president, on the twentieth day of November, A.D. 1877, expired on the ninth day of January, A.D. 1882, by reason of the prior grant to said John J. Bate of a patent in the Dominion of Canada for the same invention, and prays the same benefit of said defence as if the same had been pleaded to the bill of complaint; and whereas both parties desire to have said matter of defence argued and decided without incurring the great expense of taking testimony necessary to present for final hearing all the defences raised in said answer: It is, therefore, stipulated and agreed by and between the parties, that the defence above named shall be submitted to the court, as on plea set down for argument, upon the following agreed state of facts." The facts so agreed to were substantially as follows:

1. The patent in suit, No. 197,314, was granted to John J. Bate on November 20, 1877, and the application therefor was filed in the United States Patent Office, December 1, 1876; and said patent was assigned to complainant before this suit was brought, the said Bate being a citizen of the United States at the time of said application, and the said invention having been made and reduced to practice by him therein.

2. On December 19, 1876, said John J. Bate filed in the Patent Office of the Dominion of Canada an application for a patent for improvements in apparatus and processes for ventilation, refrigeration, &c., including therein, as one feature, the process described and claimed in said patent, No. 197,314.

3. In pursuance of said application the Commissioner of

Patents for the Dominion of Canada caused letters patent of the Dominion of Canada, No. 6938, for the invention set forth in said application, and granting to said John J. Bate, his executors, administrators, and assigns, the exclusive right, privilege, and liberty of making, constructing, using, and vending to others to be used, the said invention, to be signed and sealed with the seal of the Patent Office on January 9, 1877, and to be registered on January 11, 1877, and that the period of said grant expressed in said patent was five years from and after January 9, 1877.

4. On January 12, 1877, said Commissioner of Patents called upon said John J. Bate to furnish to the Patent Office a model of his said invention, and such model was furnished by said Bate on June 26, 1878, on which day said patent No. 6938 was mailed to said John J. Bate.

5. On December 5, 1881, said John J. Bate filed a petition in the Canada Patent Office, setting forth, "that on the 9th day of January, A.D. 1877, your petitioner obtained a patent for the period of five years from the said date, for new and useful improvements on apparatus and process for ventilation, refrigeration, &c.; that he is the holder of the said patent in trust for the 'Bate Refrigerating Company,' and therefore prays that it may be extended for another period of ten years."

6. On December 12, 1881, said patent No. 6938 was extended for five years from January 9, 1882, under renewal No. 13,812, and, on December 13, 1881, said patent was further extended for five years from January 9, 1887, under renewal No. 13,813, in pursuance of the above-named petition.

7. On or about July 9, 1883, and June 30, 1886, the Superior Court for Lower Canada rendered two judgments affecting said Canada patent, to the purport set forth in the plea and the answer.

The stipulation further provided, that, if the decision of the Circuit Court should be in favor of the plaintiff, it should have a reasonable time thereafter to file a replication to the answer, and the cause should proceed in the ordinary manner; that, if the Circuit Court should decide the cause in favor of

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the defendant, a decree should be entered dismissing the bill, so that the plaintiff might take an appeal therefrom to the Supreme Court of the United States; and that, if the Circuit Court should decide the cause in favor of the defendant, and the Supreme Court of the United States should, on appeal, reverse that decision, the defendant should have a right to proceed in the Circuit Court, under its answer, as to all defences set up therein, except the one mentioned in the stipulation, as it might have proceeded if the stipulation had not been made.

The cause was heard on the pleadings and stipulation, and the Circuit Court entered a decree dismissing the bill, from which decree the plaintiff has appealed to this court. The Circuit Court gave no opinion on the merits of the case, but in deciding it followed, as it stated, the decision of the Circuit Court of the United States for the District of New Jersey, held by Mr. Justice Bradley, in August, 1887, made in the case of *Bate Refrigerating Co.* v. *Gillett*, 31 Fed. Rep. 809.

Mr. Clarence A. Seward, with whom was *Mr. John Lowell* and *Mr. Richard N. Dyer* on the brief, opened for appellant.

Mr. Noah Davis, by leave of court, filed a brief on behalf of the Edison Electric Light Company, in support of appellant.

Mr. Benjamin F. Thurston and *Mr. George H. Lothrop* for appellee.

I. The fact that the Bate Canadian Patent was extended prior to its expiration in Canada for two further terms of five years respectively, has no effect to extend the life of the United States Bate Patent.

The "foreign patent" referred to in § 4887, the expiration of which is to affect the life of the American patent granted for the same invention, is, in contemplation of law, the *then existing* foreign patent, and not any subsequent patent to be granted to such holder of a foreign patent for such invention, either by royal favor or by the effect of acts which the

patentee may elect to do or omit to do under the provisions of the general law.

In considering the effect of a foreign patent under § 4887, reference must be had to the statutory authority under which such patent is granted. If the statute be after the form of the British Patent Act, then the patent is a grant *ab origine* for fourteen years, although its life may be shortened by the non-performance on the part of the patentee of conditions subsequent imposed by the act. In such case the American patent is not limited by the failure on the part of the holder of a foreign patent to perform such conditions, and for the plain reason that the foreign patent in existence at the time when the American patent was granted was in law an existing grant for fourteen years.

Under the 17th[1] section of the Canadian Patent Act of 1872, it is not provided that patents shall issue in all cases for a term of fifteen years, with a liability to be shortened as to their duration in the event that certain conditions subsequent are not performed, but by express terms they are issued for a period of "five, ten or fifteen years, at the option of applicant," with a privilege to the patentee, before the expiration of such period, to obtain an extension for a second period, and before the expiration of such second period, to obtain an extension for a third period. The section requires that "the instrument delivered by the Patent Office for such extension of time shall be in the form which may be from time to time adopted to be attached, with reference to the patent."

Now the construction that was given to this act by the

[1] 17. Patents of invention issued by the patent office shall be valid for a period of five, ten, or fifteen years, at the option of the applicant, but at or before the expiration of the said five or ten years the holder thereof may obtain an extension of the patent for another period of five years, and after those second five years may again obtain a further extension for another period of five years, not in any case to exceed a total period of fifteen years in all; and the instrument delivered by the patent office for such extension of time shall be in the form which may be from time to time adopted, to be attached, with reference to the patent and under the signature of the commissioner or of any other member of the privy council in the case of absence of the commissioner.

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Canadian authorities has always been, up to the passage of the act, 46 Vict. c. 19,[1] May 25, 1883, that if the patentee elected to take a patent for five years, a grant should be made to him for that term only. On the other hand, if he elected to take a patent for fifteen years, the grant was for such period. In the present case the Bate patent, No. 6938, was expressly limited for the period of five years from its date, accompanied with the proviso that the patent should cease within that time, and at the end of two years, unless the patentee or his assignee should have commenced and carried on the practice of the invention within the Dominion, and with the further proviso that it should cease at expiration of one year in case the patentee or his representatives should

[1] 1. Section 17 of "the Patent Act of 1872" is hereby repealed, and the following is substituted therefor:

"17. The term limited for the duration of every patent of invention issued by the patent office shall be fifteen years; but at the time of the application therefor it shall be at the option of the applicant to pay the full fee required for the term of fifteen years, or the partial fee required for the term of five years, or the partial fee required for the term of ten years. In case a partial fee only is paid the proportion of the fee paid shall be stated in the patent, and the patent shall, notwithstanding anything therein or in this act contained, cease at the end of the term for which the partial fee has been paid, unless at or before the expiration of the said term the holder of the patent pays the fee required for the further term of five or ten years, and takes out from the patent office a certificate of such payment (in the form which may be from time to time adopted), to be attached to and to refer to the patent, and under the signature of the commissioner, or, in case of his absence, another member of the privy council; and in case such second payment, together with the first payment, makes up only the fee required for ten years, then the patent shall, notwithstanding anything therein or in this act contained, cease at the end of the term of ten years, unless at or before the expiration of such term the holder thereof pays the further fee required for the remaining five years, making up the full term of fifteen years, and takes out a like certificate in respect thereof. Every patent heretofore issued by the patent office in respect of which the fee required for the whole or for any unexpired portion of the term of fifteen years has been duly paid, according to the provisions of the now existing law in that behalf, has been and shall be deemed to have been issued for the term of fifteen years, subject, in case a partial fee only has been paid, to cease on the same conditions on which patents hereafter issued are to cease under the operation of this section."

import or cause to be imported into the Dominion the subject for which the patent was granted.

The question whether the words "foreign patent" occurring in § 4887 could refer to any other patent for the same invention than the foreign patent then existing, was first raised in the case of *Henry* v. *The Providence Tool Co.*, 3 Ban. & Ard. Pat. Cas. 501. Mr. Justice Clifford held that the patent referred to in § 4887, which would affect the life of a subsequently obtained United States patent, was the then existing grant in Great Britain for a term of fourteen years; and that no prolongation of the patented protection for a further term would operate to extend the period of duration of the United States patent.

The next case which arose was that of *Reissner* v. *Sharp*, 16 Blatchford, 383. In that case the previous patent was one granted in Canada for a period of five years, and such Canadian patent had been duly extended for two further periods of five years each. Mr. Justice Blatchford held that the patent in this country expired with the expiration of the first term of five years, notwithstanding the fact that the patent was still alive in Canada in virtue of the procurement of two extensions for five years each.

The same doctrine has been applied in dealing with the Bate patent by Judge Nixon, in *Bate Refrigerating Co.* v. *Gillett*, 13 Fed. Rep. 553, and by Mr. Justice Bradley in his discussion of the question in the same suit, 31 Fed. Rep. 809.

We therefore submit that the fact that the Bate patent has been extended in Canada for an entirely new term, beyond the original term for which the letters patent were granted, cannot relieve the Bate patent in this country from the operation of § 4887.

II. The Bate United States patent is not relieved from the operation of § 4887 in consequence of the Canadian Statute 46 Vict. c. 19, May 25, 1883.

This act on its face purports to be "An act to amend the Patent Act of 1872," and it proceeds to execute its purpose by repealing in terms the 17th section of the former act, and substituting a new section in its place. This new law became opera-

tive when it received royal assent May 25, 1883, and the necessary implication is that prior to that date the duration of all patents previously issued in the Dominion were limited as to their duration to the periods specifically named in the grants.

We submit, however, that, upon its face, the act in question does not profess to be a declaratory act, or one which is intended to make intelligible and clear an existing ambiguous statute. So far as the defendants are advised, this act has never been declared by any Canadian tribunal to be a proper declaratory act. If the act can be so construed as to be intelligible, and furnish a remedy for the future, without the necessity of holding that it is retroactive, even in Canada, to the extent of changing the grant of a patent from five years to fifteen years, this rule of construction should be employed. It is a fundamental rule of construction of statutes wherever the English law prevails. In this case there is no necessity for resorting to any other rule. The statute is intelligible, and it can be made to apply to existing patents without holding that the Canadian Parliament had committed the solecism of declaring that an expired term of five years was in truth an unexpired term of fifteen years.

It is unnecessary, however, to pursue the argument upon the character of the legislation as regarded from a Canadian standpoint. The pertinent inquiry is — one which must not be lost sight of — what is the effect of the act, no matter how it may be interpreted in Canada, upon § 4887 of the Revised Statutes of the United States, in the application of that statute in determining the rights of the public under it.

The case of *Liverpool Insurance Co.* v. *Massachusetts*, 10 Wall. 566, is directly in point; where this court held that the company was a corporation within the meaning of the statute of Massachusetts, notwithstanding that upon the highest possible judicial authority the company in England, where it was created, was declared not to be a corporation.

The contention now made by the appellant is precisely the same contention that was made before Mr. Justice Clifford in *Henry* v. *The Providence Tool Co.*, *ubi supra*. And further, Mr. Justice Bradley, in *Bate Refrigerating Co.* v. *Gillett*, 31

Fed. Rep. 813, says: "I may say at once that I attach no importance to the last-mentioned act. The American patent received its operative force and effect on the day it was issued, and no subsequent legislation in Canada or elsewhere could change it, whatever might be the effect of such legislation where made. The force and effect of the American patent could only be affected by the Canadian patent as the latter stood when granted, and not as it was afterwards modified by legislation."

We ask now, what is the effect of the act of 46 Vict. c. 19, upon § 4887, and assume that in the event that the act in question had not been passed, the courts would have held, without question, under the authority of the cases *supra*, as determined by three independent tribunals, that the American patent to Bate expired January 9, 1882.

We are instructed by the late Mr. Justice Clifford in *Henry* v. *Providence Tool Co.*, that § 4887 contemplates the then existing patent grant of a foreign country. It is too plain for argument that under the statute of Canada, in force at the time when the Bate United States patent was granted, the term of the Canadian patent was expressly limited on its face to five years. The statutes of every civilized people are intended for the guidance of the people of the country under the jurisdiction of its laws. Such laws cannot be enlarged, modified, or affected by the legislation of any foreign power. The statutes are intended to be intelligible and certain on their face, for the guidance of the people subject to them, or as the same shall be made certain by the judicial interpretation of the courts within the country enacting them.

It may be pertinent to ask, what was the condition of the Bate patent in this country between January 9, 1882, and May 20, 1883, when the act of 46 Vict. c. 19, received royal assent. Beyond doubt it was not in force as a legal instrument in this country. The complainants say: "True, such was the fact according to the legal lights that existed at that time both in Canada and in this country, but it now turns out that the Canadian patent was contrary to the act of 1872, and contrary to the limitation expressed upon its face — a patent in

Argument for Appellee.

law for fifteen years. The reply is: This fact, or legal intendment, whichever it may be, had no existence until May, 1883, because the supposed fact was made such by a new statute in derogation of a former statute. Otherwise put, there was nothing to support the American patent between January 9, 1882, and May 20, 1883. The condition of things is exactly parallel with that which existed in the case of *Henry* v. *Tool Co.* In the last named case there was an actual interval of thirteen days which occurred between the expiration of the patent and the decision of the Queen to prolong it. Now it cannot be said that the Bate patent, within the interval between January, 1882, and May, 1883, was in a state of suspended animation. It was in force in this country, or inoperative, for that period. The legislation under the effect of which it is now claimed it was in force, is *ex post facto*, so far at least as its effect upon § 4887 is concerned, and nothing can give vitality to the patent, except some special legislation of Congress which shall revivify it from the time when such special legislation is had.

III. The fact that the Bate patent was applied for in the United States prior to the application for a patent for the same invention in Canada does not relieve the patent granted in the United States subsequent to the grant of the Canadian patent from the operation of § 4887. As the court expressly declined to pass upon this point, it is only necessary to state it.

IV. As to the argument that it is the policy of our Patent System to discriminate in favor of American citizens against foreigners, we submit that it is plain that whatever may have been a former policy, since the act of 1870 there is no distinction whatsoever made between citizens of the United States and foreigners as to their rights in acquiring and holding letters patent for inventions which are to promote the progress of the useful arts in this country.

Other points were argued, which, in view of the opinion of the court, it is not necessary to state.

Mr. Edmund Wetmore, *Mr. Samuel A. Duncan* and *Mr. Leonard E. Curtis*, on behalf of the United States Electric

Lighting Company; *Mr. William Bakewell* and *Mr. Thomas B. Kerr*, on behalf of the Westinghouse Electric Company; *Mr. Amos Broadnax*, on behalf of the Consolidated Electric Light Company; *Mr. Chauncey Smith*, *Mr. Thomas L. Livermore* and *Mr. Frederick P. Fish*, on behalf of the Thomson-Houston Electric Company; and *Mr. R. S. Taylor*, on behalf of the Fort Wayne Electric Light Company filed a brief by leave of court in support of the contention of the appellees.

Mr. John R. Bennett, on behalf of Gillett and Eastman, by leave of court, filed an argument in support of the position taken by the appellees.

Mr. Chauncey Smith also, by leave of court and by consent of appellees, argued on behalf of appellees.

Mr. William M. Evarts closed on behalf of appellant.

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

The questions discussed at the bar arise under § 4887 of the Revised Statutes, which is as follows: "No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case, shall it be in force for more than seventeen years."

Two propositions as to the construction of this section are contended for by the appellant: (1) that the words "first patented or cause to be patented in a foreign country" do not mean "first patented or caused to be patented" before the issuing, or granting, or date, of the United States patent, but

mean "first patented or caused to be patented" before the date of the application for the United States patent; (2) that the declaration of the section, that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term," does not mean that the patent so granted shall expire at the same time with the term to which the foreign patent was in fact limited at the time the United States patent was granted; but that it means that it shall expire when the foreign patent expires, without reference to the limitation of the term of such foreign patent in actual force at the time the United States patent was granted.

We do not find it necessary to consider the first of these questions, because we are of opinion that the proper construction of § 4887, upon the second question, is, that the patent in the present case does not expire before January 9, 1892, the time when the Canadian patent, No. 6938, will expire.

The Canadian patent was extended for the two periods of five years each, under the provisions of § 17 of the Canadian act assented to June 14, 1872, 35 Victoria, c. 26, which was in force when the United States patent, No. 197,314, was applied for and granted, and which read as follows: "17. Patents of invention issued by the Patent Office shall be valid for a period of five, ten, or fifteen years, at the option of the applicant, but at or before the expiration of the said five or ten years the holder thereof may obtain an extension of the patent for another period of five years, and after those second five years may again obtain a further extension for another period of five years, not in any case to exceed a total period of fifteen years in all; and the instrument delivered by the Patent Office for such extension of time shall be in the form which may be from time to time adopted, to be attached, with reference to the patent and under the signature of the Commissioner or of any other member of the Privy Council in the case of absence of the Commissioner."

This statute appears to have been strictly complied with in

the present case. The Canadian patent, No. 6938, ran, on its face, for five years from January 9, 1877; and, prior to the expiration of that time, and on the 5th of December, 1881, Bate applied for its extension for ten years; and it was, before the five years expired, and on the 12th of December, 1881, extended for five years from January 9, 1882, and, on December 13, 1881, for five years from January 9, 1887. The Canadian patent, therefore, has never ceased to exist, but has been in force continuously from January 9, 1877. It was in force when No. 197,314 was issued; and it has, by virtue of a Canadian statute, in force when the application for No. 197,314 was filed, continued to be in force at all times since the latter patent was granted. This is true, although the Canadian patent, No. 6938, as originally granted, stated on its face that it was granted "for the period of five years" from January 9, 1877; and although the instrument granting the first extension of five years states that it is granted "for another period of five years, to commence and be computed on and from the ninth day of January, which will be in the year one thousand eight hundred and eighty-two;" and although the instrument granting the second extension of five years states that it is granted "for another period of five years, to commence and be computed on and from the ninth day of January, which will be in the year one thousand eight hundred and eighty-seven." By the language of § 17 of the Canadian act of 1872, what was granted under it was "an extension of the patent" — of the same patent — for a further term. Therefore the Canadian patent does not expire, and it never could have been properly said that it would expire, before January 9, 1892; and hence No. 197,314, if so limited as to expire at the same time with the Canadian patent, cannot expire before January 9, 1892.

Section 6 of the act of March 3, 1839, 5 Stat. 354, provided that a United States patent for an invention patented in a foreign country more than six months prior to the application of the inventor for the United States patent, should be limited to the term of fourteen years from the date or publication of the foreign patent. Section 25 of the act of July 8, 1870, 16

Stat. 201, provided that the United States patent for an invention "first patented or caused to be patented in a foreign country" should "expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term; but in no case shall it be in force more than seventeen years." Section 4887 of the Revised Statutes provides, that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

These provisions of the act of 1870 and of the Revised Statutes mean that the United States patent shall not expire so long as the foreign patent continues to exist, not extending beyond seventeen years from the date of the United States patent, but shall continue in force, though not longer than seventeen years from its date, so long as the foreign patent continues to exist. Under § 4887, although, in the case provided for by it, the United States patent may on its face run for seventeen years from its date, it is to be so limited by the courts, as a matter to be adjudicated on evidence *in pais*, as to expire at the same time with the foreign patent, not running in any case more than the seventeen years; but, subject to the latter limitation, it is to be in force as long as the foreign patent is in force.

A contrary view to this has been expressed by several Circuit Courts of the United States.

In October, 1878, in the Circuit Court for the District of Rhode Island, in *Henry* v. *Providence Tool Co.*, 3 Ban. & Ard. Pat. Cas. 501, it was held that the 25th section of the act of July 8, 1870, meant that the United States patent should expire at the same time with the original term of a foreign patent for the same invention, without regard to any prolongation of the foreign patent which the patentee might procure from the foreign government. In that case, the United States patent was granted October 10, 1871. A British patent for the same invention had been granted to the patentee on the 15th of

November, 1860, for fourteen years, and expired November 15, 1874. Thirteen days after the latter date an order was made for the extension of the British patent for four years, the extension bearing date as of the day after the expiration of the original term; but the court held that the United States patent expired on the 15th of November, 1874.

That decision was followed by the Circuit Court for the Southern District of New York, in *Reissner* v. *Sharp*, 16 Blatchford, 383, in June, 1879, which case arose under § 4887 of the Revised Statutes. In that case, the United States patent, granted October 20, 1874, for 17 years, was held to have expired on the 15th of May, 1878, because a patent was granted in Canada, under the authority of the patentee, for the same invention, on the 15th of May, 1873, for five years from that day, although in March, 1878, the Canada patent was extended for five years from the 15th of May, 1878, and also for five years from the 15th of May, 1883.

In *Bate Refrigerating Co.* v. *Gillett*, 13 Fed. Rep. 553, in the Circuit Court for the District of New Jersey, in August, 1882, and in the same suit, in the same court, in August, 1887, 31 Fed. Rep. 809, in regard to the patent in question in the present suit, and on the same facts here presented, it was held, on the strength of the two Circuit Court cases above referred to, that the United States patent expired when the original term of the Canadian patent expired.

But we are of opinion that, in the present case, where the Canadian statute under which the extensions of the Canadian patent were granted, was in force when the United States patent was issued, and also when that patent was applied for, and where, by the Canadian statute, the extension of the patent for Canada was a matter entirely of right, at the option of the patentee, on his payment of a required fee, and where the fifteen years term of the Canadian patent has been continuous and without interruption, the United States patent does not expire before the end of the fifteen years' duration of the Canadian patent. This is true although the United States patent runs, on its face, for seventeen years from its date, and is not, on its face, so limited as to expire at the same time with

the foreign patent; it not being necessary that the United States patent should, on its face, be limited in duration to the duration of the foreign patent.

In *O'Reilly* v. *Morse*, 15 How. 62, the patent to Morse was issued June 20, 1840, for fourteen years from that day, while § 6 of the act of March 3, 1839, 5 Stat. 354, was in force, which required that every United States patent for an invention patented in a foreign country should be "limited to the term of fourteen years from the date or publication of such foreign letters patent." Morse applied for his United States patent April 7, 1838. He obtained a patent in France for his invention October 30, 1838. The objection was taken in the answer that the United States patent was void on its face because not limited to the term of the French patent. The Circuit Court held that the patent was not void, but that the exclusive right granted by it must be limited to fourteen years from October 30, 1838. The same objection was urged in this court, and the same ruling was made. In *Smith* v. *Ely*, 15 How. 137, which was a suit on the same patent under the same facts, the same question arose and was decided in the same way. A full and interesting discussion of the question is to be found in *Canan* v. *The Pound Mfg. Co.*, 23 Blatchford, 173, in regard to § 4887, which contains the same word "limited" found in § 6 of the act of 1839, which word is not found in § 25 of the act of July 8, 1870, from which § 4887 was taken.

Under this view, the time of the expiration of the foreign patent may be shown by evidence *in pais*, either the record of the foreign patent itself, showing its duration, or other proper evidence; and it is no more objectionable to show the time of the expiration of the foreign patent, by giving evidence of extensions such as those in the present case, and thus to show the time when, by virtue of such extensions, the United States patent will expire.

We find in the record in this case, among the papers which it states were submitted to the court under the stipulation above referred to, a certificate of the Commissioner of Patents, dated July 3, 1883, appended to a certified copy of the United States patent, stating that the term thereof is limited so that

it shall expire with the patent obtained by the patentee in Canada, No. 6938, dated January 9, 1877, for the same invention; that the proper entries and corrections have been made in the files and records of the Patent Office; that it had been shown that the original patent had been lost; and that the certificate is made because that patent was issued without limitation, as required by § 4887 of the Revised Statutes. While it may be proper, in a case where the date of a foreign patent issued prior to the granting of a United States patent to the same patentee for the same invention is made known to the Patent Office prior to the granting of the United States patent, to insert in that patent a statement of the limitation of its duration, in accordance with the duration of the foreign patent, it does not affect the validity of the United States patent, if such limitation is not contained on its face.

It results from these views, that

The decree of the Circuit Court must be reversed, and the case be remanded to that court, with a direction to take such further proceedings as shall be in accordance with law and with the stipulation between the parties, above referred to, and not inconsistent with this opinion.

HILL *v.* CHICAGO AND EVANSTON RAILROAD COMPANY.

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

No. 866. Submitted December 20, 1888. — Decided January 21, 1889.

This court has no jurisdiction of an appeal unless the transcript of the record is filed here at the next term after the taking of the appeal.

It is not proper, on a motion to dismiss an appeal from a decree, to decide whether a prior decree was a final decree, or what orders and decrees made by the court below in the cause prior to the making of the decree appealed from can be reviewed here on the appeal.

Where the decree appealed from awarded a money decree against one defendant, and the plaintiff appealed, and the obligees named in the appeal

bond included that defendant and other defendants, and that defendant and some of the others moved to dismiss the appeal, on the ground that that defendant should be the sole obligee, and that the only matter for review was as to the amount awarded against that defendant: *Held,* that the bond was in proper form, and that the motion must be denied.

MOTIONS TO DISMISS. The case is stated in the opinion.

Mr. E. Walker and *Mr. W. C. Goudy* for the motions.

Mr. Gordon E. Cole opposing.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

In this case, on the 8th of June, 1885, a decree was made by the court below in the following language:

"This cause coming on for final hearing upon the pleadings, depositions, and documentary evidence produced before the court, and the cause having been argued by counsel, and the court being sufficiently advised in the premises, It is ordered and decreed, that the complainant's bill be dismissed for want of equity as against the defendants William C. Goudy, Volney C. Turner, George Chandler, Samuel B. Chase, Ebenezer Buckingham, John DeKoven, John J. Johnson, S. S. Merrill, The North Chicago City Railway Company, and the Chicago, Milwaukee and St. Paul Railway Company, with their costs to be taxed by the clerk. It is further ordered and decreed, that so much of the complainant's bill as relates to the certificate of one hundred and ten and two-thirds shares of the capital stock, issued to A. B. Stickney & Company, dated September thirtieth, 1881, be dismissed for want of equity.

"It is further ordered and decreed, that all relief be denied to the complainant upon all matters and things in controversy herein, except as to the amount of money paid by the defendant William C. Goudy for right of way, in execution of the contract between him and A. B. Stickney & Company, of May twenty-eighth, 1880; and, for the purpose of ascertaining said amount of money, it is ordered, that this cause be retained as to the other defendants, and that it be and is hereby referred to Henry W. Bishop, one of the masters in chancery of this

court, to take additional testimony as to such amount, and that he make report of the amount so paid, and that, on the making of such report, such further decree will be rendered as may be equitable.

"It is further ordered, that, for the better discovery of the matters aforesaid, the parties are to produce before the said master, upon oath, all deeds or books, papers and writings in their custody or power relating thereto, and are to be examined on oath as the said master shall direct.

"And thereupon the complainant prays an appeal to the Supreme Court, which is allowed upon his filing a bond in the penal sum of five hundred dollars, with provisions required by law, and with security to be approved by the Court."

The bond thus referred to was not given, nor was the appeal perfected, nor was the record filed in this court at its October term, 1885.

On the 14th of July, 1887, the master in chancery having made a report in pursuance of the directions of the decree of June 8, 1885, and exceptions having been taken thereto by both parties, the court made the following decree:

"It is ordered, adjudged, and decreed as follows, viz.: That the exceptions of both the complainant and the defendant the Chicago and Evanston Railroad Company, to the report of the master in chancery filed herein on the thirty-first day of January, 1887, be and the same are hereby overruled, and the said report approved and affirmed; that said Chicago and Evanston Railroad Company do forthwith pay unto said complainant the sum of sixty-five hundred and thirteen dollars, ($6513,) together with interest upon the same from the thirtieth day of January, 1887, at the rate of six per cent per annum, and also costs of said reference to the master, to be taxed by the clerk of this court, and also the costs of this suit, for which plaintiff may have execution.

"It is further ordered and decreed, that all other relief prayed in the complainant's bill be denied as against said defendant the Chicago and Evanston Railroad Company, and that the complainant's bill be dismissed out of court for want of equity as against the remaining defendants, T. W. Wads-

worth, Edwin Walker, Elijah K. Hubbard, J. C. Easton, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, E. L. Frank, William Rockefeller, Selah Chamberlain, and George Smith, with their reasonable costs, to be taxed by the clerk, and that they have execution therefor against the said complaint.

"And thereupon the complainant prays an appeal to the Supreme Court of the United States, which is allowed upon his filing a bond in the penal sum of five hundred dollars, with provisions required by law, and with security to be approved by the court."

This appeal was perfected, an appeal bond was given, and the record was filed in this court on the 17th of October, 1887. The obligors in that appeal bond are James J. Hill, W. P. Clough, and E. Sawyer; the obligees are the Chicago and Evanston Railroad Company, the Chicago, Milwaukee and St. Paul Railway Company, the North Chicago City Railway Company, William C. Goudy, Volney C. Turner, John DeKoven, George Chandler, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, Samuel B. Chase, Ebenezer Buckingham, John J. Johnson, J. C. Easton, S. S. Merrill, Julius Wadsworth, Hugh T. Dickey, J. Millbank, James Stillman, James T. Woodward, E. L. Frank, William Rockefeller, Selah Chamberlain, and George Smith. The condition of the bond is as follows:

"Whereas, lately, at the July, 1887, term of the United States Circuit Court for the Northern District of Illinois, in a suit depending in said court, wherein said James J. Hill was complainant and the Chicago and Evanston Railroad Company and the other above-named obligees of this bond were defendants, a decree was rendered from which the said James J. Hill has taken an appeal to the Supreme Court of the United States; now, the condition of the above obligation is such, that if the said James J. Hill shall prosecute his appeal with effect, and answer all costs if he fails to make his plea good, then the above obligation to be void, otherwise to remain in full force and virtue."

Four motions are now made. One is a motion by the Chi-

cago and Evanston Railroad Company, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, and J. C. Easton, to dismiss, as to each of them, the appeal from the decree of June 8, 1885, on the ground, among others, that the transcript of the record was not filed in this court at October term, 1885.

This motion must prevail. It is well settled, by repeated decisions of this court, that it has no jurisdiction of an appeal unless the transcript of the record is filed here at the next term after the taking of the appeal. The appeal in the present case was prayed in open court on the 8th of June, 1885. *Credit Co.* v. *Arkansas Central Railway Company*, 128 U. S. 258, and cases there cited.

The second motion is by the North Chicago City Railway Company, the Chicago, Milwaukee and St. Paul Railway Company, William C. Goudy, Volney C. Turner, George Chandler, Samuel B. Chase, Ebenezer Buckingham, John DeKoven, John J. Johnson, and S. S. Merrill, to dismiss as to each of them, the appeal from the decree of June 8, 1885, on the ground, among others, that the transcript of the record was not filed here at October term, 1885. This motion is granted, for the reason before stated.

The third motion is by the North Chicago City Railway Company, the Chicago, Milwaukee and St. Paul Railway Company, William C. Goudy, Volney C. Turner, George Chandler, Samuel B. Chase, Ebenezer Buckingham, John DeKoven, John J. Johnson, and S. S. Merrill, to dismiss, as to each of them, the appeal from the decree of July 14, 1887, on the following grounds: (1) that the decree of June 8, 1885, was a final decree as to them; and (2) that the bond filed on the appeal from the decree of July 14, 1887, does not show that it was filed in pursuance of the decree of June 8, 1885, but recites only an appeal from the decree of July 14, 1887.

It is not proper, on a motion to dismiss the appeal from the decree of July 14, 1887, to decide whether the decree of June 8, 1885, was a final decree, or what orders and decrees made by the Circuit Court prior to the making of the decree of July 14, 1887, can be reviewed here on the appeal from the latter decree. Those questions can only be considered when that appeal shall come up for hearing on its merits.

Opinion of the Court.

The fourth motion is by the Chicago and Evanston Railroad Company, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, and J. C. Easton, to dismiss the appeal as to the decree of July 14, 1887, on the ground that the Chicago and Evanston Railroad Company, being the sole party against whom the decree of July 14, 1887, was rendered, ought to be the sole obligee in the appeal bond, the other persons named in the bond as obligees not being parties to the appeal; that the only matter which can be brought before this court for review is as to the amount fixed by the decree of July 14, 1887, and which the Chicago and Evanston Railroad Company was adjudged to pay; that the decree of June 8, 1885, was final as to the other questions; and that the appeal from the decree of July 14, 1887, should be limited to that decree, and proper orders, as to bond and otherwise, to that end, should be made.

We see no objection to the terms of the appeal bond, in respect of the parties named in it as obligees. It may very well be that the appellant will seek, on the hearing of the appeal from the decree of July 14, 1887, to obtain a decree against the persons making this motion; and it cannot affect the validity of the bond or the integrity of the appeal, either as respects the Chicago and Evanston Railroad Company or the other parties making the motion, that the bond runs to the obligees named in it. The motion must, therefore, be denied in that respect, as it must, also, in regard to the other grounds alleged for the motion, for the reason before stated, that it is not proper, on a motion to dismiss the appeal from the decree of July 14, 1887, to decide what questions may properly be involved on the hearing of that appeal.

Ordered accordingly.

HANOVER FIRE INSURANCE COMPANY *v.* KINNEARD.

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

No. 1152. Submitted January 7, 1889. — Decided January 21, 1889.

This writ of error is dismissed, the value of the matter in dispute being insufficient to give jurisdiction, and the case not being one brought on account of the deprivation or a 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.

MOTION TO DISMISS for want of jurisdiction. The case is stated in the opinion.

Mr. A. J. Bentley, *Mr. John W. Deford* and *Mr. W. Littlefield* for the motion.

Mr. G. W. Cotterill, *Mr. Samuel Shellabarger* and *Mr. J. M. Wilson* opposing.

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

John Kinneard, Lucia M. Laird, W. H. Williams, G. H. Embry and Susan M. Phillips brought suit in the District Court of Franklin County, Kansas, against the Phœnix Insurance Company of Brooklyn, N. Y., against the Western Insurance Company of Toronto, Canada, and against the Hanover Fire Insurance Company and the Citizens' Fire Insurance Company of New York, upon three several policies of insurance, for $2500 each, which three cases were transferred, in October, 1886, on the ground of diverse citizenship, to the Circuit Court of the United States for the District of Kansas, where they discontinued as to Lucia M. Laird and G. H. Embry, leaving as plaintiffs the defendants in error here. Upon the 12th of December, 1887, the court ordered, the defendants severally

objecting and excepting, that the cases be consolidated for trial, and they were accordingly tried together, separate verdicts being returned in favor of the Phœnix Insurance Company; against the Western Insurance Company for $1847.88; and against the Hanover and Citizens' Companies for $2067.32; and judgments were severally rendered thereon. To reverse the judgment against the latter this writ of error was prosecuted, which defendants in error now move to dismiss.

It is contended on behalf of plaintiffs in error that the three cases were independent and different from each other, both as to the grounds of action and as to the defences, the plaintiffs only being the same and the losses occasioned by the same fire; that the Circuit Court, in consolidating them, abused the discretion reposed in it under § 921 of the Revised Statutes, which provides that "when causes of a like nature or relative to the same question are pending before a court of the United States or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so," and that thereby the plaintiffs in error were deprived of due process of law, that is, of a trial by jury according to the settled course of judicial proceedings in like cases.

But the action of the court in refusing plaintiffs in error a separate trial is not open to review upon this writ of error, since it appears that the value of the matter in dispute is insufficient to give this court jurisdiction; nor can the writ be maintained, as argued, under subdivision 4 of § 699, of the Revised Statutes, because this judgment was not rendered in 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." *Cogswell* v. *Fordyce*, 128 U. S. 391.

The motion must be granted and the writ of error dismissed.

MARROW *v.* BRINKLEY.

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

No. 1262. Submitted January 7, 1889. — Decided January 21, 1889.

It being plain that the decision in the court below, adverse to the plaintiffs in error, was made upon the principles of laches and estoppel, and that there was no decision against a right, title, privilege or immunity, claimed under the Constitution, or any statute of, or authority exercised under, the United States, no Federal question is involved, and this court is without jurisdiction.

If the highest court of a State, proceeding upon the principles of general law only, errs in the rendition of a judgment or decree affecting property, this does not deprive the party to the suit of his property without due process of law.

MOTION TO DISMISS. The case is stated in the opinion.

Mr. Alfred P. Thom, *Mr. Thomas Tabb* and *Mr. Richard Walke* for the motion.

Mr. W. H. Burrows opposing.

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

In 1870 certain suits were pending in the Circuit Court of the county of Elizabeth City, Virginia, brought by judgment creditors of one Parker West to subject his lands to the satisfaction of their judgments, under the provisions of c. 182 of the code of 1873, authorizing a sale of the judgment debtor's lands when it appeared that the rents and profits for five years would be insufficient to discharge the liens against them. These causes were consolidated, and proceeded to decree in September, 1870, for an account of all the real estate of said West, its annual value, and the liens thereon, under which a report was made by a commissioner showing the judgments against West and the lands belonging to him and their annual and fee-simple

value, and that the rents and profits would not satisfy the liens in five years, which report was confirmed by decree entered May 4, 1871, which also appointed special commissioners to sell said lands, including "all the interest of Parker West in that certain tract of land known as 'Newport News,' containing 300 acres," etc. This land had been sold June 30, 1864, upon proceedings against West under the confiscation act of July 17, 1862, and a deed had been executed and delivered to the purchasers February 15, 1865. No such proceedings had taken place in reference to other lands of West involved in the litigation, and one of the judgments counted on had been recovered as early as 1861. West died in December, 1871, and on the 4th of May, 1872, the following decree was entered in said consolidated cause:

"The death of Parker West being suggested, on the motion of William P. Marrow and Mary E. his wife, Elizabeth R. West, George B. West, and M. Smith and Missouri, his wife, the said Mary E. Marrow, Elizabeth R. West, G. B. West and Missouri Smith being the heirs at law of the said Parker West, to be made parties defendant to these causes, the said William P. Marrow and M. E. his wife, E. R. West, G. B. West, and M. Smith and Missouri, his wife, are hereby made parties defendant to these causes, with leave to file their answers. This cause then, this day, again came on to be heard on the papers formerly read and on the report of Special Commissioners C. K. Mallory, Thomas Tabb and G. M. Peek of the sales made by them under a former decree in these causes, to which report no exceptions have been filed, and was argued by counsel. On consideration whereof the court doth adjudge, order and decree that the said report and the sales reported therein be, and the same are hereby, confirmed."

The sale of a portion of the Newport News land in controversy here was confirmed by that decree, and the sale of the remainder was made thereafter, and reported to the court, and the sale confirmed in October, 1872.

In January, 1886, W. P. Marrow and Mary E. his wife, George B. West, and Missouri Smith filed their bill of complaint in the state Circuit Court, seeking to set aside the

decrees of May 4, 1871, and May 4, 1872, and the deeds which had been made to purchasers of lands thereunder; insisting that West's title had been divested by the confiscation proceedings, and alleging that they never appeared in said consolidated causes in person, or employed any attorney at law to represent them, and that no process was ever served upon them, and charging fraud in the entry of their appearance.

Upon the final hearing their bill was dismissed, and they prosecuted an appeal to the Supreme Court of Appeals of Virginia, which court affirmed the decree of the court below, holding that, as between the heirs and the purchasers, the former were bound by the recitals of the decree of May 4, 1872; and that upon the evidence *aliunde* the record, the heirs were estopped by laches and by conduct, to claim title as against the purchasers who were such in good faith for value and without notice. The complainants filed a petition for rehearing in the Court of Appeals, in which they stated "that on the 17th day of May, 1888, in the above-entitled cause a decree was entered simply affirming the decree of the lower court entered on the 26th day of October, 1886, dismissing the bill of the plaintiffs below for reasons stated in the opinion of the court. The reasons stated are based upon the equitable doctrine of estoppel *in pais* and innocent purchaser for value, without notice, the language of the opinion upon these points being as follows: (*a*) 'Having kept a sinister silence when they should have spoken with candor and courage, equity now closes her door and leaves them to obtain from a court of law what they can.' (*b*) 'That as against an innocent purchaser for value, without notice, a court of equity is without jurisdiction, and will refuse to give any assistance whatever, leaving the party to enforce his technical rights at law.'" The rehearing was denied, and the writ of error sued out of this court, a motion to dismiss which is now before us. In the petition for the allowance of this writ it is said that the final judgment of the Court of Appeals against plaintiffs in error was rendered in a suit "wherein was drawn in question a right, title, privilege and immunity to real estate arising upon the construction of the act of Congress of the United States approved July 17,

1862, entitled 'An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes,' and the joint resolution passed concurrently therewith, and the decision is against the right, title, privilege and immunity claimed under the said statute."

We do not so understand this record. Conceding that West's title to the particular lands had been divested by the sale under the confiscation proceedings, and that the interest of the heirs remained unaffected thereby, yet, if they were concluded under the circumstances by the decree of May, 1872, or upon the principles of estoppel and laches, that disposed of their case adversely to them; and it was upon these grounds that the Virginia courts proceeded, and not upon any decision against a right, title, privilege and immunity claimed under the Constitution or any statute of, or authority exercised under, the United States. It was only if the decision had been otherwise upon these points that any question could have arisen as to the validity of the confiscation act and resolution and the proceedings thereunder.

Unless it appears affirmatively that the decision of a Federal question was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it, this court has no jurisdiction of a writ of error to a state court. In this case the judgment as rendered involved the decision of no such question, and none such was actually decided.

Nor can jurisdiction be retained upon the suggestion, made for the first time in this court, that if the Court of Appeals, proceeding upon the principles of general law only, were found to have erred in the rendition of its decree, the State of Virginia had thereby deprived the plaintiffs in error of their property without due process.

The writ of error is dismissed.

PROBST *v.* TRUSTEES OF THE BOARD OF DOMESTIC MISSIONS OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 113. Argued and submitted December 7, 1888. — Decided January 21, 1889.

A ruling, in the trial court, that the showing that an original deed of a tract of land to a party in a suit pending in New Mexico is in the office of that party in New York lays a foundation for the admission of a copy, by that party, under § 2768 of the Compiled Laws of that Territory, is not good practice, nor an exercise of the discretion of the court to be commended; though it is possible that if there were no other objection to the proceedings at the trial, the judgment would not be reversed on that account.

An entry into land without right or title, followed by continuous uninterrupted possession under claim of right for the period of time named in a statute of limitations, constitutes a statutory bar, in an action of ejectment, against one who otherwise has the better right of possession.

EJECTMENT. Plea, the general issue and the statute of limitations. Verdict for plaintiff and judgment on the verdict. Defendant sued out this writ of error. The case is stated in the opinion.

Mr. F. W. Clancy and *Mr. O. D. Barrett* for plaintiff in error.

Mr. John E. Parsons, for defendant in error, submitted on his brief.

Mr. Parsons' brief on the points considered in the opinion of the court, to which reference has been made for a statement of the case, was as follows:

I. It was not error for the court to permit the Board to prove that deeds purporting to convey the *locus in quo* to its predecessors in title appeared on record in the Recorder's Office of Santa Fé County. (1) It having been proved that the Board was in possession that entitled it to judgment, un-

less Probst showed either earlier possession or title. Ejectment is a possessory action. All that is required of the plaintiff to enable him to recover is, that he shall show possession and a subsequent entry by the defendant. *Smith* v. *Lorillard*, 10 Johns. 338, 356; *Burt* v. *Panjaud*, 99 U. S. 180; *Christy* v. *Scott*, 14 How. 282, 292. The evidence of record title in the Board was unnecessary therefore to enable it to recover. *Jackson* v. *Wheat*, 18 Johns. 40; *Jackson* v. *Newton*, 18 Johns. 355. It was entitled to recover unless Probst made good his plea of ten years' adverse possession. If, therefore, there had been error in receiving this evidence, it was immaterial. *Greenleaf* v. *Birth*, 5 Pet. 132; *First Unitarian Society* v. *Faulkner*, 91 U. S. 415; *Decatur Bank* v. *St. Louis Bank*, 21 Wall. 294.

(2) The evidence was, however, competent as showing acts by the parties from time to time proved to be in possession, characterizing their possession. Verbal declarations are competent for this purpose — *a fortiori* acts of the parties. *Pillow* v. *Roberts*, 13 How. 472, 477; *Jackson* v. *Van Dusen*, 5 Johns. 144; *S. C.* 4 Am. Dec. 330: *Dodge* v. *Freedman's Bank*, 93 U. S. 379.

(3) The New Mexico statute is as follows (act of January 12, 1852, § 21): "When said writing is certified and registered in the manner hereinbefore prescribed, and it be proven to the court that said writing is lost; or that it is not *in the hands of the party wishing to use it*, then the record, etc." (*a*) It was proven that the deeds were *not* "in the hands of the party wishing to use" them, viz.: Dr. Eastman, the agent of the Board in New Mexico. (*b*) It was also shown that, if in existence, they were not within the State, but in New York city. This justified *any* secondary evidence of their contents. *Burton* v. *Driggs*, 20 Wall. 125, 134; *Bronson* v. *Tuthill*, 1 Abb. Ct. App. Dec. (N. Y.) 206. And the general rule is, that the sufficiency of preliminary proof "to authorize the admission of parol evidence of the contents of a written instrument, is very much in the discretion of the trial court, and the case must be *quite without proof* to authorize an appellate court to find error." *McCulloch* v. *Hoffman*, 73 N. Y. 615.

(4) So far as concerns all the deeds except that from McFarland to the Board, a sufficient foundation was laid for the introduction of record (secondary) evidence. There is no presumption that these deeds were in the possession of the Board. *Eaton* v. *Campbell*, 7 Pick. 10. Very slight foundation is sufficient to justify a trial court, in the exercise of a sound discretion, in receiving records as primary evidence. *McCulloch* v. *Hoffman*, 73 N. Y. 615.

(5) The old deeds offered to fix the *locus in quo* and characterize possession were made prior to the statute respecting conveyances, Prince's General Laws of New Mexico, 234; contained in effect a proper acknowledgment; were recorded under the act of 1859, Id. 426; and were upwards of thirty years old.

II. As to the errors alleged to have been made by the trial judge in his instructions to the jury, there was only a general exception. Such an exception will not be entertained by appellate tribunals. This especially ought to be so where, as here, the case for the plaintiff in error is without any show of merit.

The New Mexico statute, act of 1880, c. 6, § 28, Gen. Laws, 127, itself provides: "Either party may take and file exceptions to the charge or instructions given; or to the refusal to give any instructions offered, etc.; but in either case the exceptions shall specify the part of the charge or instruction objected to, *and the ground of the objection.* And the general rule requires almost as much precision." *Cooper* v. *Schlesinger*, 111 U. S. 148; *Hoyt* v. *Long Island R. R. Co.*, 57 N. Y. 678; *Ayrault* v. *Pacific Bank*, 47 N. Y. 570.

But whether the plaintiff in error can or cannot argue these exceptions, there is nothing in them. They all relate to Probst's plea that for more than ten years before suit brought he had been in adverse possession of the *locus in quo.* He did not pretend to have title. His defence limited itself to the assertion that he had had ten years' adverse possession; or, what comes to the same thing, that by ten years' adverse possession the Board had become barred by the statute of limitations. The testimony of Probst himself showed that

he had no right to require this question to be submitted to the jury.

(1) Mere possession does not start the statute; or, if continued, constitute title. There must be some claim of title. *Harvey* v. *Tyler*, 2 Wall. 328, 343. A mere trespass not amounting to a disseisin does not set the statute in motion. The entry must be hostile, clearly defined, exclusive, uninterrupted and under claim of title real or pretended. 3 Washburn on Real Property, 146 (5th ed.).

(2) Probst himself proved that any claim that he had was under the deeds to Guttmann, and from Guttmann to him and Kirchner of November 24th, 1871. This was less than ten years before the commencement of the suit. Furthermore, these instruments related to other property. A deed of one parcel of land is no foundation for a claim of title upon which to support adverse possession of another. *Pope* v. *Hanmer*, 74 N. Y. 240; *Woods* v. *Banks*, 14 N. H. 101; *Jackson* v. *Lloyd*, cited in *Jackson* v. *Woodruff*, 1 Cow. 276, 386; *S. C.* 13 Am. Dec. 525; 3 Washburn on Real Property, 167 (5th ed.).

(3) There was not sufficient evidence of possession in Probst at any time. Possession is a conclusion of fact. To prove it the facts must appear. There was no evidence that Probst or any predecessor ever did anything to the land, except, perhaps, raising one or two crops from a part of it. This was before November 24th, 1881, when first Probst, according to his own testimony, was in a position to make a claim of title. It was not continued. Of itself it did not tend to establish adverse possession. For that purpose there must be some contemporary claim of title. It was not sufficient that upon the trial Probst should say that he claimed to own the property. *Hodges* v. *Eddy*, 41 Vermont, 485; *S. C.* 98 Am. Dec. 612.

(4) So far as concerns any attempt by Probst to patch up his case by claiming that he was in possession prior to the instruments of November 24th, 1871, there are in addition to what has been previously said the following answers: (*a*) On Probst's own testimony there was no such possession as the law requires. (*b*) There was no claim of title. Probst says that his claim of title was under the Guttmann purchase and

the Bell and Edgar mortgage which preceded it. The Guttmann purchase was on November 24th, 1871. A mortgage is a mere security, it does not assume to give title to anything. 2 Washburn's Real Property, 110 (5th ed.). And the mortgage as well as the Guttmann deed was of other property. (*c*) Probst's testimony that his claim depended on the mortgage and the Guttmann deed in effect amounted to an assertion that he had never claimed title to the *locus in quo.* He never did. If his conduct was honest, any use by him of the *locus in quo* arose from a mistake of boundary. That does not constitute a claim of title. Such a claim to make out adverse possession must be hostile, etc. (*d*) And even where there is adverse possession, it must be uninterrupted. 3 Washburn, Real Property, 148 (5th ed.). So far as concerns any earlier claim, the Guttmann deed was an express interruption.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Supreme Court of the Territory of New Mexico.

The action was in ejectment, brought by the defendants in error, the trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America, against Charles Probst, to recover the possession of certain land. The plaintiffs below recovered a judgment against the defendant, which was affirmed in the Supreme Court of the Territory, and this writ of error is brought by the defendant, Probst, to reverse that judgment.

The case was tried before a jury. The plaintiff failed to introduce any evidence of transfer of title from the government to any person, but relied upon the possession of the property by certain parties from about the year 1846 up to the bringing of this suit, and upon conveyances by those parties in such a manner that their right is thereby vested in the plaintiffs in the action. The defendant, Probst, relied mainly upon the statute of limitations as his affirmative defence.

Two questions are presented in this court for considera-

tion. The first of these arises upon the introduction by the plaintiffs of copies of certain deeds, duly recorded, from the parties under whom they claim title, down to plaintiffs. These copies were objected to, because no sufficient reason was shown why the originals should not have been produced, and none was shown, except that the last deed, which was claimed to vest the title in the plaintiffs, made by one McFarland, was probably in the possession of the officers of the corporation at its offices in the city of New York.

The statute of New Mexico on this subject is as follows:

"SEC. 2768. When said writing is certified and registered in the manner hereinbefore prescribed, and it be proven to the court that said writing is lost, or that it is not in the hands of the party wishing to use it, then the record of the same, or a transcript of said record, certified to by the recorder under his seal of office, may be read as evidence without further proof." Chap. II. Title XL. Compiled Laws [1884].

There was no attempt to prove that any of these deeds were lost, nor that any search had been made for them, nor any effort made to procure them. As regards those which were prior to the deed from McFarland to the Board of Trustees it may be conceded that the presumption was that they were in the control and possession of the parties to whom they belonged, and the introduction of copies from the record might be sustained on this presumption. But as regards the deed from McFarland to the Board, who were the plaintiffs, no such presumption can be made. All that was proved about that deed, its custody, possession or location, was that it was not in the hands of the agent of the Board in New Mexico. Naturally it would be in the possession of the New York office. No attempt was made to show that the trustees had made any search for it, or that any effort had been made to have it sent to the place of trial in this case, and it seemed to be supposed to be quite sufficient to authorize the introduction of the copy of the record to show that the deed, though in the possession of the plaintiff corporation at its proper place at its office, was not in the Territory of New Mexico, and not in possession of the agent of the Board there.

No member of this court sitting on the trial of a case would admit this to be a sufficient showing under the statute of New Mexico that the writing was lost, or was not in the hands of the party offering it in evidence. But it may be conceded that a very large amount of discretion must be reposed in the trial court to whom such copy of a record is presented, in ruling upon the circumstances which shall determine its admission or rejection; and it is possible that, if there were no other objection to the proceedings at the trial than this one, this court would not reverse the judgment on that account; but it is certainly not good practice, nor an exercise of the discretion of the court to be commended.

The other objection, we think, is fatal; and that is, to the instruction of the court in regard to the statute of limitations.

An examination of the testimony shows that there was evidence tending to prove that the defendant, Probst, was in the exclusive possession of the land in controversy from a period variously stated to be from 1869, 1870 and 1871, onward up to the time of the trial. The action was commenced on the 16th day of July, 1881. The statute of New Mexico on the subject of limitations is found in the following section of the Compiled Laws [1884]:

"SEC. 1881. No person or persons, nor their children or heirs, shall have, sue, or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments but within ten years next after his, her or their right to commence, have, or maintain such suit shall have come, fallen or accrued, and that all suits either in law or equity for the recovery of lands, tenements or hereditaments shall be had and sued within ten years next after the title or cause of action or suit accrued or fallen, and at no time after the ten years shall have passed."

If, therefore, Probst was in possession on the day this suit was brought, and had been for ten years prior thereto, no reason can be seen why that fact did not constitute a statutory bar to the action. It may be conceded that there is contradictory testimony on this subject, but it is very certain that several witnesses swear that he was in possession of the property prior to the year 1871, and that he had remained in such

possession up to the time of the trial. The court, in its treatment of that subject, seem to have gone upon the ground that Probst's possession did him no good, and could constitute no defence, unless he had some kind of a title to the land connected with it, and manifestly left upon the jury the impression that this must be a title evidenced by writing. Among other things, the court instructed the jury as follows:

"The plaintiff claims title by purchase, evidenced by deeds, and not by simple possession, and I instruct you that if you believe from the evidence in this case that plaintiff did purchase this ground from persons who were legally entitled to sell the same and took proper deeds therefor, and recorded said deeds in the proper office in the county where such lands were situated, that such record was notice to all the world of legal ownership, and that such land could not thereafter be taken up as vacant or abandoned lands; that even actual possession of such lands by the defendant for a period of ten years, if taken after such deeds were recorded, would not give him any legal title to them, but he would be as much a trespasser at the end of ten years as he was upon the day of his entry. If his entry was wrong no length of time could make it right, but if you also find that plaintiff, by its agents, demanded possession and asserted its title, and brought its claim to the land distinctly to defendant's knowledge, it destroys all claims which he sets up to continuous and uninterrupted possession, and if you also find that plaintiff resided upon and actually cultivated and possessed a portion of the land purchased by it you are instructed that such possession extends to the boundaries described in such deeds of purchase.

"The defendant has informed you by his counsel that he claims this land not by purchase, but because he has been in possession of it for over ten years. I instruct you that unless he had a right to the possession of such lands when he took possession of them he has no right now; time never makes a wrong right.

"If you find from the evidence that this plaintiff, by its agents, was actually residing upon the land purchased by it, and held by recorded deeds when this defendant entered upon

said lands and wrongfully took possession of a portion of said lands, you must find for plaintiff, although you also find that defendant has held said lands for more than ten years adversely to plaintiff."

Obviously the proposition here set out by the court is, that if plaintiff had the real title to the land, and the evidence of it was on record, nobody could, by taking possession and holding it adversely for the period allowed by the statute, defeat such a title. The language used by the court is: "Unless the defendant had a *right* to the possession of such lands when he took possession of them he has no right now; time never makes a wrong right."

It is the essence of the statute of limitations that whether the party had a right to the possession or not, if he entered under the claim of such right and remained in the possession for the period of ten years, or other period prescribed by the statute, the right of action of the plaintiff who had the better right is barred by that adverse possession. This right given by the statute of limitations does not depend upon, and has no necessary connection with the validity of the claim under which that possession is held. Otherwise there could be no use for adverse possession as a defence to an action, for if the decision is made to depend upon the validity of the respective titles set up by the plaintiff and the defendant, there can be no place for the consideration of the question of possession. It is because the plaintiff has the better title that the defendant is permitted to rely upon such uninterrupted possession adverse to the plaintiff's title as the statute prescribes, it being well understood, and an element in such cases, that the plaintiff does have the better title, but though he has it, that he has lost his right by delay in asserting it.

Nor is it necessary that the defendant shall have a paper title under which he claims possession. It is sufficient that he asserts ownership of the land, and that this assertion is accompanied by an uninterrupted possession. It is this which constitutes adverse possession, claiming himself to be the owner of the land. This is a claim adverse to everybody else, and the possession is adverse when it is held under this claim of owner-

ship, whether that ownership depends upon a written instrument, inheritance, a deed, or even an instrument which may not convey all the lands in controversy. If defendant asserts his right to own the land in dispute, asserts his right to the possession, and his possession is adverse and uninterrupted, it constitutes a bar which the statute intended to give to the defendant.

The instructions of the court are utterly at variance with this doctrine. They do away with the value of adverse possession as a defence to an action of ejectment. They say in effect that unless the defendant was in the right when he took possession, the length of its continuance does not afford him any ground for a defence; whereas it is obviously the nature and purport of the defence established by the statute of limitations that the defendant may not have been in the right, but this long actual possession estops the plaintiff from putting the defendant to the proof of the right.

The court not only erred upon this subject in the positive instructions which it gave to the jury, but also in refusing to charge as follows, at the request of the defendant:

"That an uninterrupted occupancy of land by a person who has in fact no title thereto, for the period of ten years adversely to the true owner, operates to extinguish the title of the true owner thereto and vests the right to the premises absolutely in the occupier."

In *Ewing* v. *Burnet*, 11 Pet. 41, 52, this court said upon this subject:

"An entry by one man on the land of another is an ouster of the legal possession arising from the title, or not, according to the intention with which it is done; if made under claim and color of right, it is an ouster; otherwise it is a mere trespass; in legal language the intention guides the entry and fixes its character."

We think this is a correct statement of the doctrine of adverse possession. It is implied by the language of the court in *Harvey* v. *Tyler*, 2 Wall. 328, 349, that "any one in possession, with no claim to the land whatever, must in presumption of law be in possession in amity with and in subservience to

that title." And the instruction of the court below in that case was approved, that if "any of the defendants entered upon and took possession of the land, without title or claim, or color of title, such occupancy was not adverse to the title of plaintiffs, but subservient thereto."

The fair implication in both of these cases is that where possession is taken under claim of title it sufficiently shows the intention of the party to hold adversely within the meaning of the law upon that subject. There is no case to be found which holds that this adverse claim of title must be found in some written instrument.

In the case of *Bradstreet* v. *Huntington*, 5 Pet. 402, 439, this court said:

"The whole of this doctrine is summed up in very few words as laid down by Lord Coke (1 Inst. 153) and recognized in terms in the case of *Blunden* v. *Baugh*, 3 Cro. [Car.] 302, in which it underwent very great consideration. Lord Coke says: 'A disseisin is when one enters *intending* to usurp the possession, and to oust another of his freehold; and therefore *querendum est à judice quo animo hoc fecerit*, why he entered and intruded.' So the whole enquiry is reduced to the fact of entering, and the intention to usurp *possession*."

The judgment is reversed and the cause remanded, with a direction to award a new trial.

SEIBERT *v.* UNITED STATES *ex rel.* HARSHMAN.

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

No. 130. Submitted December 18, 1888. — Decided January 21, 1889.

Seibert v. *Lewis*, 122 U. S. 284, was very carefully and elaborately considered, and is adhered to.

THE case is stated in the opinion.

Syllabus.

Mr. E. John Ellis, *Mr. John Johns* and *Mr. D. A. McKnight* for plaintiff in error.

Mr. Clinton Rowell for defendant in error.

Mr. Justice Field delivered the opinion of the court.

The facts of this case are similar to those in *Seibert* v. *Lewis*, before the court at its October term, 1886, 122 U. S. 284, and it is admitted by the counsel for the plaintiff in error that the decision there, if adhered to, will control here. He, however, asks us to reconsider our rulings and reverse our former judgment. We see no reason to justify such reconsideration and change of position. The very elaborate argument of counsel is but a re-presentation of the reasons originally offered against the decision in that and analogous cases. *Seibert* v. *Lewis* was very carefully and elaborately considered, and to the doctrines there announced we adhere. Upon its authority

The judgment of the court below must be affirmed.

GALIGHER *v.* JONES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 75. Submitted November 14, 1888. — Decided January 21, 1889.

A stock-broker received orders by telegraph from his principal to sell certain securities belonging to the principal in his hands and invest the proceeds in certain other securities, named in the order, at a fixed limit. When the telegram arrived the order might have been executed that day, and the securities ordered could have been bought within the limit. The principal was in the habit of dealing with the agent in that way, the agent executing the orders, making advances when necessary and charging the principal with commissions and interest. At the time when this order was received the principal was indebted to the agent for advances, commissions and interest about $4000 more than the value of the securities in his hands: The broker did not execute the order, did not notify the principal by telegraph that he declined to do so, and made no demand for further advances; but notified him of his refusal by a letter written on the day when the order was received, but received by the principal

two days later. The securities which had been ordered sold depreciated below the prices at which they could have been sold on that day, and those which had been ordered bought advanced, so that they could have been sold at a large profit. The broker sued the principal for advances on an open account current and interest and commissions. The principal set up as a counterclaim the losses from these sources: *Held*,

(1) That the broker was bound to follow the directions of his principal or give notice that he declined to continue the agency;

(2) That this notice should have been given by telegraph, and that the delay caused by using the mail alone was inexcusable under the circumstances;

(3) That in the absence of a special agreement to the contrary, it was the principal's judgment, and not the broker's, that was to control;

(4) That the broker was liable for all the damages which the principal sustained by the refusal to change the stock, both on the stocks ordered sold, and those ordered purchased.

The measure of damages in stock transactions between a stock-broker and his principal, in which the principal suffers from the neglect of the broker to execute orders, either for the sale of stock which he holds for the principal, or for the purchase of stock which the principal orders, is — not the highest intermediate value up to the time of trial — but the highest intermediate value between the time of the conversion and a reasonable time after the owner has received notice of it: in this respect disregarding the rule adopted in England and in several of the States in this country, and following the more recent rulings in the Court of Appeals of the State of New York.

THE case is stated in the opinion.

Mr. John R. McBride for appellant.

Mr. C. W. Bennett for appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is a suit brought by Jones, a stock-broker, against his customer, for the balance of account alleged to be due to the plaintiff arising out of advances of money and purchases and sales made, and commissions. The complaint, or declaration, states "that between the 15th day of January, 1877, and 15th day of January, 1879, the plaintiff, as a stock-broker, at the special instance and request of the defendant, paid and advanced on an open account current, to and for the use of the defendant, divers sums of money, and also earned

at the defendant's request, and became entitled to, divers commissions as a broker, for all of which monthly accounts were rendered and balances struck, and, by agreement, interest charged monthly on balances; and that on the first day of March, 1879, there was due and unpaid from defendant to plaintiff the sum of $6232.30 no part of which has been paid." Judgment is demanded for this sum, with interest and costs.

Galigher, the defendant below, in his answer, after denying any indebtedness to the plaintiff, states that the plaintiff is a banker at Salt Lake City, and that the defendant has had for two years past an account with him as such, and that "the plaintiff, at the defendant's request, and as his agent, bought or caused to be bought at the Mining Stock Exchange Board, in San Francisco, California, certain mining stocks, for and on account of this defendant, and at various times thereafter in the years 1877 and 1878, on the order and at the direction of this defendant, and as his agent aforesaid, bought and sold mining and other stocks up to about the date of the complaint; that at divers times during and between the dates above specified this defendant paid into said plaintiff's bank sums of money on account of said purchases, and to the credit thereof, and which was so applied by plaintiff on defendant's order.

"And defendant denies that at the date of the complaint the sum of five thousand dollars, or any sum, was due the plaintiff on said account, or on any account, for loans or advances from plaintiff to defendant. Defendant further alleges that it was distinctly agreed between the plaintiff and this defendant in the business that said purchases of stock by the plaintiff were made on defendant's credit, and that said stocks were bought and were to be held subject to defendant's order at all times, this defendant agreeing to pay said plaintiff commissions for his services as agent and an agreed rate of interest on any advances he might make, and at no time had the plaintiff any authority to either buy or sell stocks on defendant's account, except by his order."

The defendant then set up the following counterclaims, to wit: 1. That on the 13th day of November, 1878, being at

Virginia City, he ordered the plaintiff (at Salt Lake City), by telegraphic despatch, to sell certain mining stocks then in his hands as defendant's agent, to wit: 320 shares of "Justice" stock, worth $9 per share; 50 shares of "Alta" stock, worth $8 per share; 200 shares of "Tip Top" stock, worth $1.60 per share, and to invest the proceeds in "North Bonanza" stock, another mining stock on the same board which the defendant had been investigating; that the plaintiff received this despatch in ample time to make the transaction, as directed, on that day, but refused and neglected to do so; and that the defendant relied on its being done, and agreed with another party to sell the stock he had ordered purchased; that the plaintiff did not give notice to the defendant of his refusal to comply with said order until several days afterwards, and then by letter; that afterwards, and without any orders so to do, the plaintiff sold the "Alta" stock at $7.75 per share; the "Justice" at $4.40 per share; and the "Tip Top" at $1.25 per share, making a net loss to defendant of $1200; and that the "North Bonanza" stock was not worth more than $2 per share on that day, and within five days thereafter it advanced to $5.60 per share, which the defendant would have realized if the plaintiff had complied with his order, — whereby the defendant lost the sum of $6125.

2. The defendant further alleged, that in the same month of November, 1878, the plaintiff, as defendant's agent, held for him 600 shares of mining stock known as "Challenge" stock; and without his consent, on the 27th and 29th of said November, sold the same for his, the plaintiff's, own use, to the damage of the defendant of $2850.

3. That on the 22d day of November, 1877, the plaintiff held for the defendant, as his agent, as aforesaid, fifty shares of mining stock known as "Ophir" stock, worth at that date $37.50 per share, and on that day pretended to defendant that he had sold said stock for defendant, and so reported to him, when in fact he had not sold said stock, but continued to hold the same, and afterwards sold it for $100 per share, the advance amounting to $3125, which is justly due from the plaintiff to the defendant.

Opinion of the Court.

The case being at issue, was tried by a jury and resulted in a verdict of $5412.50 for the defendant. This verdict was set aside, and a new trial awarded, and the case was next tried by a referee appointed by the court. He duly reported his findings of fact and law, upon which the court gave judgment for the plaintiff for the sum of $7028. The substance of the findings of fact was: That the plaintiff was a banker in Salt Lake City; that during the years 1878 and 1879 he bought and sold mining stocks for the defendant upon defendant's order and request, and made the advances necessary for the purchases, and was to receive commissions on the purchases and sales, and interest on the advances; and to hold the stocks purchased for defendant in his own name as collateral security for any balance due to him. With regard to the first defence set up by the defendant, the referee found, that on the 13th of November, 1878, the plaintiff held of stocks purchased for defendant, amongst others, 320 shares of "Justice," then worth $9 per share; 50 of "Alta," worth $18 per share; and 200 of "Tip Top," worth $1.60 per share; and that on that day the defendant, being at Virginia City, ordered plaintiff by telegram to turn his said stocks without limit into "North Bonanza" at limit of $2.75; that the plaintiff received said telegram at Salt Lake City on the same day in time to have sold the stocks ordered sold, and to have purchased the "North Bonanza," which was then selling for $2 and $2.50 per share; that the plaintiff failed and refused to obey the directions given in the telegram, and failed to notify the defendant of his refusal until the 15th of November, when he notified him by letter written on the 13th and received by defendant on the 15th; that within a few days the price of "North Bonanza" advanced to $5 and $5.50 per share, having reached $3.50 on the 16th of November, and before the 23d receded to a point below what it was on the 13th. The defendant at the time of sending his telegram to the plaintiff was owing him more than $4000 for advances, commissions and interest, over and above the market value of the stocks then held by him for the defendant. As a conclusion of law, and under the decision of the Supreme Court of the Territory, given upon setting

aside the verdict rendered on the first trial, the referee disallowed this counterclaim, holding, in conformity with the view of the court, that the plaintiff was not bound to comply with the defendant's directions about the stock, and not bound to give him any prompter notice than he did give. The court, in its opinion, as quoted by the referee in his report, had said: "Was the plaintiff under obligation to sell the stock and invest the proceeds of such sale as directed by the defendant? . . . This order in effect directed the plaintiff to dispose of certain securities held by him and to take another in place of them. . . . I do not, in the examination of the record and testimony, find any contract or understanding between the parties requiring the plaintiff to do it. The order to sell and reinvest being one, the plaintiff was not obliged to comply with it. The difference between the values of the stocks at the time the order was made and at the time they were afterwards sold is immaterial in this action. The right of the plaintiff to sell at the time of sale and the good faith and sound discretion in which it was made are not in issue. I am, therefore, of the opinion that the verdict allowing damages for the failure of plaintiff to sell the Justice, Alta, and Tip-Top mining stocks, as directed by the defendant on November 13th, 1878, is not supported by evidence rightly before the jury, and that there was error in admitting evidence as to the value of the stock of the North Bonanza in support of the item of counterclaim, based upon the failure of the plaintiff to comply with the order to purchase."

In this we think the court was in error. A broker is but an agent, and is bound to follow the directions of his principal, or give notice that he declines to continue the agency. In the absence of a special agreement to the contrary it is the principal's judgment, and not his, that is to control in the purchase and sale of stocks. The latter did not ask for any further advances by the order in question; he only directed a conversion, or change of one stock into another. The plaintiff should have given prompt notice that he objected and declined to make the change. Telegraphic communication was used by the defendant, and no reason appears why the plaintiff could

not have used the same. The delay caused by using the mail alone was inexcusable under the circumstances. The plaintiff charged ample compensation for his services, and was bound to act faithfully, fairly and promptly. We think that he was liable for all the damages which the defendant sustained by his refusal to change the stocks, both for the loss on the sales of the "Justice," "Alta" and "Tip-Top" and the loss occasioned by not purchasing the "North Bonanza." The report of the referee, being made in conformity with the decision of the Supreme Court, does not show sufficient facts to determine the amount of loss in these respects. If the answer states the facts truly, the loss on the failure to sell the old stocks was over $2000; and it appears from the report that the "North Bonanza" could have been purchased at $2 to $2.50 per share on the 13th of November, and sold for $5 to $5.50 within a few days, — showing a loss of $3 per share; and as the proceeds of the other stocks, if they had been sold, as directed, would have been sufficient to purchase 1600 to 2000 shares of "North Bonanza," the loss on this account must have been more than $5000. But the want of a sufficient finding of facts necessitates a new trial.

As to the second item of counterclaim set up in the answer, namely, the alleged wrongful sale by the plaintiff of 600 shares of "Challenge" stock, the referee found that the plaintiff held such stock for the defendant, and on the 27th and 29th of November, 1878, of his own motion, and without notice to the defendant, sold it for $1.25 per share; that in December the stock sold as high as $2 per share; in January the highest price was $3.10; in February, the highest price was $5.50. The referee allowed the defendant the highest price in January, namely, $3.10 per share, being an advance of $1.85 above what the plaintiff sold the stock for, which, for the whole 600 shares, amounted to $1110. The reason assigned by the referee for not allowing the defendant the highest price in February, (namely, $5.50 per share,) was that before that time the defendant had reasonable time, after receiving notice of the sale of his stock by the plaintiff, to replace it by the purchase of new stock, if he desired so to do; and he allowed him the

highest price which the stock reached within that reasonable time. In this conclusion we think the referee was correct, and as to this item we see no error in the result.

With respect to the third counterclaim set up in the answer, the referee found that the plaintiff did sell the fifty shares of "Ophir" stock mentioned therein, on the 22d day of November, 1877, as reported by him to the defendant. Consequently, the referee correctly found that the defendant was not entitled to any damages on that account, as no dissatisfaction with the sale was expressed by the defendant at the time. We see no error in this conclusion.

It has been assumed, in the consideration of the case, that the measure of damages in stock transactions of this kind is the highest intermediate value reached by the stock between the time of the wrongful act complained of and a reasonable time thereafter, to be allowed to the party injured to place himself in the position he would have been in had not his rights been violated. This rule is most frequently exemplified in the wrongful conversion by one person of stocks belonging to another. To allow merely their value at the time of conversion would, in most cases, afford a very inadequate remedy, and, in the case of a broker, holding the stocks of his principal, it would afford no remedy at all. The effect would be to give to the broker the control of the stock, subject only to nominal damages. The real injury sustained by the principal consists not merely in the assumption of control over the stock, but in the sale of it at an unfavorable time, and for an unfavorable price. Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any time; and hence, with regard to them, the ordinary measure of damages is their value at the time of conversion, or, in case of sale and purchase, at the time fixed for their delivery. But the application of this rule to stocks would, as before said, be very inadequate and unjust.

The rule of highest intermediate value as applied to stock transactions has been adopted in England and in several of the States in this country; whilst in some others it has not obtained. The form and extent of the rule have been the sub-

ject of much discussion and conflict of opinion. The cases will be found collected in Sedgwick on the Measure of Damages, [479,] vol. 2, 7th ed. 379, note (b); Bayne on Damages, 83, (92 Law Lib.); 1 Smith's Lead. Cas. (7 Amer. ed.) 367. The English cases usually referred to are *Cud* v. *Rutter*, 1 P. Wms. 572, 4th ed. [London, 1777] note (3); *Owen* v. *Routh*, 14 C. B. 327; *Loder* v. *Kekulé*, 3 C. B. (N. S.) 128; *France* v. *Gaudet*, L. R. 6 Q. B. 199. It is laid down in these cases that where there has been a loan of stock and a breach of the agreement to replace it, the measure of damages will be the value of the stock at its highest price on or before the day of trial.

The same rule was approved by the Supreme Court of Pennsylvania in *Bank of Montgomery* v. *Reese*, 26 Penn. St. (2 Casey,) 143, and *Musgrave* v. *Beckendorff*, 53 Penn. St. (3 P. F. Smith) 310. But it has been restricted in that State to cases in which a trust relation exists between the parties, — a relation which would probably be deemed to exist between a stock-broker and his client. See *Wilson* v. *Whitaker*, 49 Penn. St. (13 Wright) 114; *Huntingdon R. R. Co.* v. *English*, 86 Penn. St. 247.

Perhaps more transactions of this kind arise in the State of New York than in all other parts of the country. The rule of highest intermediate value up to the time of trial formerly prevailed in that State, and may be found laid down in *Romaine* v. *Van Allen*, 26 N. Y. 309, and *Markham* v. *Jaudon*, 41 N. Y. 235, and other cases, — although the rigid application of the rule was deprecated by the New York Superior Court in an able opinion by Judge Duer, in *Suydam* v. *Jenkins*, 3 Sandford (N. Y.) 614. The hardship which arose from estimating the damages by the highest price up to the time of trial, which might be years after the transaction occurred, was often so great, that the Court of Appeals of New York was constrained to introduce a material modification in the form of the rule, and to hold the true and just measure of damages in these cases to be, the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace the stock. This modification of the rule was

very ably enforced in an opinion of the Court of Appeals delivered by Judge Rapallo, in the case of *Baker* v. *Drake*, 53 N. Y. 211, which was subsequently followed in the same case in 66 N. Y. 518, and in *Gruman* v. *Smith*, 81 N. Y. 25; *Colt* v. *Owens*, 90 N. Y. 368; and *Wright* v. *Bank of Metropolis*, 110 N. Y. 237.

It would be a herculean task to review all the various and conflicting opinions that have been delivered on this subject. On the whole it seems to us that the New York rule, as finally settled by the Court of Appeals, has the most reasons in its favor, and we adopt it as a correct view of the law.

The judgment is reversed, and the cause remanded to the Supreme Court of Utah, with instructions to enter judgment in conformity with this opinion.

WADE *v.* METCALF.

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

No. 163. Argued January 10, 1889. — Decided January 21, 1889.

Under Rev. Stat. § 4899, a specific patentable machine, constructed with the knowledge and consent of the inventor, before his application for a patent, is set free from the monopoly of the patent in the hands of every one; and therefore, if constructed with the inventor's knowledge and consent, before his application for a patent, by a partnership of which he is a member, may be used by his copartners after the dissolution of the partnership, although the agreement of dissolution provides that nothing therein contained shall operate as an assent to such use, or shall lessen or impair any rights which they may have to such use.

This was a bill in equity, filed December 4, 1880, by William W. Wade, a citizen of Massachusetts, against Henry B. Metcalf, a citizen of Rhode Island, and William McCleery, a citizen of Massachusetts, alleging that letters patent, numbered 228,233, granted to the plaintiff June 1, 1880, upon his application filed July 26, 1879, for improvements in machines

Statement of the Case.

for making buttons, had been infringed by the defendants' use of forty-eight machines embodying such improvements. At the hearing upon pleadings and proofs, the case, so far as it is material to be stated, appeared to be as follows:

The parties to this suit, owning earlier patents for improvements in buttons, were in partnership in the business of making and selling buttons, under the name of the Boston Button Company, from January, 1875, until the dissolution of the partnership in October, 1880. By the copartnership agreement, certain salaries were to be paid to the plaintiff for improving and developing the machinery, to the defendant Metcalf for assistance in financial matters, and to the defendant McCleery for general superintendence; and the profits of the business were to belong one half to Metcalf and one fourth each to the plaintiff and McCleery. The forty-eight machines, with the improvements in question, were constructed by the partnership, with the knowledge and consent of the plaintiff, before the application for the patent sued on, and were used by the partnership during its continuance, and by the defendants after its dissolution. The partnership was dissolved October 30, 1880, by an agreement in writing executed by the three partners, the terms of which were as follows:

"First. It is agreed that the firm composed of said Metcalf, McCleery and Wade, and doing business under the style of the Boston Button Company, shall be this day dissolved.

"Second. The said William W. Wade, in consideration of the payment to him of the sum of twelve thousand dollars by the said Metcalf and McCleery, receipt of which is hereby acknowledged, hereby sells and conveys to the said Metcalf and McCleery all his interest in the property and assets of every name and nature of said firm of the Boston Button Company, together with the good will of the same, with authority to use his name if necessary in the premises, saving him harmless from all cost in the same.

"And whereas certain machines, forty-eight in number, with a certain improvement thereon, manufactured by said firm, have been and are now in use by said firm, and the same Metcalf and McCleery claim the right as members of said

firm, by virtue of the manufacture and use by said firm of said machines with said improvements, to continue such use, and the said Wade reserves the right to deny such claim:

"Therefore nothing in this sale and conveyance shall operate as an assent on the part of said Wade to the right to use said improvements upon said machines, or as granting any rights for such use, other than said Metcalf and McCleery now have, whatever they may be; and nothing in this reservation shall be construed to lessen or impair any rights which the said Metcalf and McCleery may have to such use.

"It being further understood that each party shall have the right to manufacture and use machines under patents for improvements in buttons, one dated March 23, 1869, and numbered 88,099, and one dated April 27, 1869, and numbered 89,450; but neither party shall vend to others the right to use or manufacture under said patents without mutual consent, except as the same may be necessary in the reorganization or liquidation of their own business.

"The said Metcalf and McCleery hereby assume the payment of the debts of said Boston Button Company, and agree to indemnify and save harmless the said Wade therefrom."

The Circuit Court dismissed the bill. 16 Fed. Rep. 130. The plaintiff appealed to this court.

Mr. George F. Betts for appellant.

Mr. Edward W Hutchins (with whom was *Mr. Henry Wheeler* on the brief) for appellees.

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

The decision of this case turns upon § 4899 of the Revised Statutes, by which it is enacted that "every person who purchases of the inventor or discoverer, or with his knowledge and consent constructs any newly invented or discovered machine or other patentable article, prior to the application by the inventor or discoverer for a patent, or who sells or uses one so constructed, shall have the right to use and vend to

others to be used the specific thing so made or purchased, without liability therefor."

This section clearly defines four classes of persons who shall have the right to use, and to vend to others to be used, a specific patentable machine:

First. Every person "who purchases of the inventor" the machine before his application for a patent.

Second. Every person who "with his knowledge and consent constructs" the machine before the application.

Third. Every person "who sells" a machine "so constructed," that is to say, which has been constructed with the knowledge and consent of the inventor by another person.

Fourth. Every person who "uses one so constructed," that is to say, constructed with the inventor's knowledge and consent by another person.

In order to entitle a person of any of these four classes to use and vend the machine, under this section, the machine must originally have been either purchased from the inventor, or else constructed with his knowledge and consent, before his application for a patent; and it may well be that a fraudulent or surreptitious purchase or construction is insufficient. *Kendall* v. *Winsor*, 21 How. 322; *Andrews* v. *Hovey*, 124 U. S. 694, 708.

But after a machine has been constructed by any person with the inventor's knowledge and consent before the application for a patent, every other person who either sells or uses that machine is within the protection of the section, and needs no new consent or permission of the inventor.

If the first two clauses of the section, taken by themselves, leave the matter in any doubt, the succeeding clause, including every person "who sells or uses one so constructed," makes it perfectly clear that the implied license conferred by the section sets the specific machine free from the monopoly of the patent in the hands of any person, just as if that person were the lawful assignee of one holding the machine under a purchase or an express and unrestricted license from the inventor. *McClurg* v. *Kingsland*, 1 How. 202; *Bloomer* v. *McQuewan*, 14 How. 539, 549; *Bloomer* v. *Millinger*, 1 Wall. 340; *Adams* v. *Burke*, 17 Wall. 453; *Birdsell* v. *Shaliol*, 112 U. S. 485, 487.

Statement of the Case.

In the case at bar, the machines of the plaintiff's invention were not purchased from him by the defendants. But they were constructed with his knowledge and consent by a partnership of which he and the defendants were the members. It was strongly argued for the defendants, that a sale or a license from the inventor to two or more partners or tenants in common confers upon each a right to use and to sell the subject of the sale or license, and that the defendants, therefore, come within the second class of persons defined in the statute. But it is unnecessary to determine whether that is so or not, because, if it is not, the defendants clearly come within the fourth class, being persons who use machines which have been constructed with the knowledge and consent of the inventor before his application for a patent.

The peculiar provisions of the agreement by which the partnership between the plaintiff and the defendants was dissolved did not, in terms or in legal effect, enlarge or diminish the rights of either party, independently of that agreement, in the machines in question.

Decree affirmed.

THE FARMERS' LOAN AND TRUST COMPANY, PETITIONER.

ORIGINAL.

No. 4. Original. Argued December 17, 18, 1888. — Decided January 21, 1889.

An order of a Circuit Court of the United States, in a suit in equity for the foreclosure of a mortgage upon the property of a railroad company, that the receiver of the mortgaged property may borrow money and issue certificates therefor to be a first lien upon it, made after final decree of foreclosure, and after appeal therefrom to this court, and after the filing of a supersedeas bond, establishes, if unreversed, the right of the holders of the certificates to priority of payment over the mortgage bondholders, and is a final decree from which an appeal may be taken to this court.

This was a petition for a writ of mandamus. The motion for leave to file the petition was presented October 22, 1888,

and was granted that day and a rule to show cause issued, returnable on the 3d Monday of the next November. The return was filed on the 26th of November, and argument was had on the 17th and 18th December. The case is stated as follows by the court in its opinion.

At the request of the Farmers' Loan and Trust Company, a rule was granted, in the early part of the present term of this court, on the judges of the Circuit Court of the United States for the Northern District of Texas, to show cause why a mandamus should not issue requiring them to allow an appeal, and to approve a bond upon such appeal, from an order of that court made in the case of that company against the Texas Central Railway Company.

The litigation to which this matter relates was commenced in that court by a bill filed by Morgan's Louisiana and Texas Railroad and Steamship Company, against the Texas Central Railway Company, for the appointment of a receiver and for the sale of the property of the railway company, to enforce an alleged lien. The Farmers' Loan and Trust Company afterwards became a party also, and set up, by cross-bill and otherwise, a mortgage against the railway company prior to the lien of the Morgan company. Receivers were appointed in the progress of that suit, and a final decree rendered by the court in 1887, ordering a sale of the property and recognizing the paramount lien of the Trust Company to the extent of four millions of dollars and over, and holding that the claim of the original complainant was subordinate to that. Appeals were taken accompanied by supersedeas, from the decree of foreclosure, both by the original complainant, the Morgan company, and the railway company, which appeals are now pending in this court on the docket.

A motion was filed here at the last term to advance the cause, but it was denied. On February 15, 1888, and after said decree of foreclosure and sale was made, and after the appeal in the case from that decree was taken to this court, and a supersedeas bond filed, the receivers of the railway company presented their petition to the Circuit Court for an order

authorizing them to borrow the sum of $120,000 on certificates, the same to be a first lien on the property. The making of this order was opposed by the Trust Company. The matter was referred to a master to report, and on the coming in of his report, which was in favor of the petition of the receivers, their request was granted, and an order was made authorizing them to expend that sum on the railway, and to borrow money for this purpose, for which they were to issue certificates that should be a first lien on the entire property of the railway company, except as to $20,000 of certificates which had already been issued under another order.

The Trust Company, believing that this order would work a great injustice to the bondholders whom they represented, and who had the first lien on the property of the railway company, applied successively to the circuit judge and the circuit justice for the allowance of an appeal, and the approval of a bond to operate as a supersedeas, which they offered, and the sufficiency of which has not been controverted.

After argument on the subject before both of these judges, they declined to either allow the appeal or approve the bond. Application was then made to this court for a rule upon them to show cause why this appeal should not be allowed and the bond approved. The rule was granted, and the return thereto made by the circuit judge is now before us, giving the reasons why he does not think the appeal should be allowed. The question now before us is on the sufficiency of this return.

Mr. Herbert B. Turner for the petitioner.

Mr. J. Hubley Ashton opposing.

I. The burden is upon the petitioner to show that it has a clear right to an appeal which has been refused by the Circuit Court.

(1) Power to issue writs of mandamus to the courts appointed under the authority of the United States is conferred upon this court by the 13th section of the Judiciary Act, now § 688 of the Revised Statutes, "in cases warranted by the

principles and usages of law." *Ex parte Cutting*, 94 U. S. 14, 19.

(2) The writ will not be granted in favor of a party, asking the allowance of an appeal, unless he shows that he took the steps necessary to entitle him to an appeal, and that the amount in dispute is sufficient to give this court jurisdiction. *Mussina* v. *Cavazos*, 20 How. 280; *Ex parte Baltimore & Ohio Railroad*, 106 U. S. 5; *In re Burdett*, 127 U. S. 771.

II. The petitioner is not entitled to a mandamus, in this case, unless the order of May 26, 1888, standing alone, as it does, is a final decree, in the suit, within the meaning of § 692 of the Revised Statutes, by which the rights of the petitioner are injuriously affected, and it appears that the amount in dispute exceeds the sum or value of five thousand dollars, exclusive of costs.

(1) Congress intended that a case should not be divided up into a plurality of appeals. *The Palmyra*, 10 Wheat. 502; *Forgay* v. *Conrad*, 6 How. 201; *Beebe* v. *Russell*, 19 How. 283; *Humiston* v. *Stainthorp*, 2 Wall. 106. Interlocutory orders, made in the progress of a suit, can come here only through, and upon, an appeal from a final decree. *Railroad Co.* v. *Soutter*, 2 Wall. 510, 521; *Ex parte Jordan*, 94 U. S. 248. Where a matter distinct from the general subject of litigation arises in the progress of a suit in equity, the jurisdiction of this court can be invoked only after a final decision and settlement of the right or claim involved, and the proceedings in relation thereto are ended. Thus, a purchaser at a foreclosure sale may appeal from a decree affecting his interest, but only after the proceedings for the sale, under the original decree, are ended, and from the last decree which the court can make in the case, and which dismisses the parties from further attendance upon the court for any purpose connected with the action. *Blossom* v. *Milwaukee &c. Railroad Co.*, 1 Wall. 655. See also *Butterfield* v. *Usher*, 91 U. S. 246; *Trustees* v. *Greenough*, 105 U. S. 527, 531; *Williams* v. *Morgan*, 111 U. S. 684; *Ex parte Jordan*, 94 U. S. 248, 251; *Wallace* v. *Loomis*, 97 U. S. 146; *Miltenberger* v. *Logansport Railway Co.*, 106

U. S. 286; *Union Trust Co.* v. *Illinois Midland Railway*, 117 U. S. 434; *Chicago & Vincennes Railroad* v. *Fosdick*, 106 U. S. 47, 84.

(2) The limitation of the right of appeal to cases where the matter in dispute exceeds the sum or value of $5000, "draws the boundary line of *jurisdiction*, and is to be construed with strictness and rigor." *Elgin* v. *Marshall*, 106 U. S. 578; *Farmers' Loan and Trust Co.* v. *Waterman*, 106 U. S. 265.

III. It doth not appear that the order of May 26th, 1888, affects, or will affect, the rights or interests of the petitioner, or those whom, in equity, it represents, to an amount sufficient to give this court jurisdiction, or to any amount, and no appeal therefrom is, therefore, allowable.

(1) The order is an administrative order for the preservation of the property as a trust fund for those entitled to it, and the maintenance of the railroad, and its structures, in a safe and proper condition to serve the public. *Wallace* v. *Loomis*, 97 U. S. 146; *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434, 456.

(2) If receivers' certificates had been issued, under the order in controversy, it would be impossible, we suppose, to tell whether the mortgage creditors would be injuriously affected, and, if so, to what sum or amount, by reason of the order, and the action of the receivers under it, until the fund for distribution should be ascertained, the amount of the claims of the respective holders of such certificates to priority of lien upon the fund determined, and the results of a final decree of distribution known.

IV. The order of May 26th, 1888, as it stands is an administrative order, relating to a matter within the domain of the discretion of the Circuit Court, with which this court will not interfere, and it is not, therefore, the subject of an appeal to this court.

(1) The question presented is as to the legal nature and character of the order, standing *alone*, as it does, and before and without confirmation by any adjudication of the Circuit Court, recognizing loans made under it, and giving them

priority of lien in the distribution of the trust funds. That the order, in its present situation and relation, is to be deemed an administrative order, not involving the exercise of what this court has called "*judicial judgment*," and not impugnable for what has been termed "*judicial error*," appears to follow from the juridical character of the protective powers of courts of Chancery in the case of trust funds, the nature and objects of such orders, as well as from what this court has said, on several occasions, touching the power of courts of Equity, by such orders, to preserve such property when in its hands as a trust fund.

The protective and administrative functions of courts of Chancery are as old as those courts themselves. 1 Spence's Equitable Jurisdiction of the Court of Chancery, 377–381; additional note to chapter 6. This order relates only to the business which the court is obliged to carry on, through its officers, in the performance of its duty to take care of and manage the property pending the litigation. The property is not brought into the Appellate Court by the appeal, and the Circuit Court must still use its powers to preserve it. *Bronson* v. *La Crosse Railroad*, 1 Wall. 405. In a foreclosure suit, until the litigation is ended, it does not appear that there must be a sale. *Kountze* v. *Omaha Hotel Co.*, 107 U. S. 378, 393; and meanwhile the court must keep the road in safe condition. *Union Trust Co.* v. *Illinois Midland Co.*, *ubi supra.* See also *Wallace* v. *Loomis*, *ubi supra.*

(2) But when the order has been executed, and claims arising under the receivers' certificates are presented for allowance against the property, with priority of lien over the mortgage bonds, the adjudication of the court upon the respective priorities is a judicial decree, and when final, a final decree, the lawful subject of appeal when a sufficient amount is involved. *Forgay* v. *Conrad*, 6 How. 200.

V. The order of May 26th, 1888, is not final in the sense of that word in its relation to appeals, and is strictly an interlocutory order in the cause, and not a final decree therein, from which an appeal lies to this court.

No decree can amount to a "final" decree upon which an

appeal lies to this court, unless it is a final judicial determination of the merits of the case, or of the matter embraced by the decree, terminating the litigation between the parties, and leaving nothing to be done but to carry what has been decreed into execution. This is the principle of the earlier, as well as the late, decisions of this court upon the subject. *Humiston* v. *Stainthorp*, 2 Wall. 106, and cases there cited; *Barnard* v. *Gibson*, 7 How. 650; *Railroad Co.* v. *Swasey*, 23 Wall. 405; *Butterfield* v. *Usher*, 91 U. S. 246; *Blossom* v. *Milwaukee &c. Railroad Co.*, 1 Wall. 655; *S. C.* 3 Wall. 196; *Grant* v. *Phœnix Ins. Co.*, 106 U. S. 429; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Green* v. *Fisk*, 103 U. S. 518; *Parsons* v. *Robinson*, 122 U. S. 112; *Burlington &c. Railway Co.* v. *Simmons*, 123 U. S. 52.

Where the trustee of the bondholders, in a foreclosure suit, consents to or acquiesces in an order of the court making the receivers' certificates a first lien on the property, the bondholders may not be able afterwards to deny the power of the court to act in making the order, so far as the interests of third parties acting on the faith of the order might be affected. *Wallace* v. *Loomis*, *ubi supra*; *Union Trust Co.* v. *Ill. Midland Co.*, *ubi supra*; *Humphreys* v. *Allen*, 101 Illinois, 490, 500.

But where the mortgage trustee has not consented to the order, and has formally denied, as in this case, the power of the court to act in making it, we apprehend, the bondholders are not precluded from afterwards contesting the validity and effect of the receivers' certificates as a charge upon the property, superior to the lien created by the first mortgages, and the court must adjudicate those questions, when presented for determination, before making its final decree of distribution.

It is well settled that receivers' certificates are not negotiable instruments, and that purchasers of such securities are bound to take notice of the orders under which they were issued, and the records of the court with regard to them, which are always accessible to lenders and subsequent holders. *Stanton* v. *Alabama & Chattanooga Railroad Co.*, 2 Woods, 506, 512; approved, *Union Trust Co.* v. *Ill. Midland Co.*, 117 U. S. 456, 461; *Swann* v. *Wright's Executor*, 110 U. S. 590,

599; *Turner* v. *Peoria & Springfield Railroad Co.*, 95 Illinois, 134; Beach on Receivers, § 396 *et seq.*

VI. It would appear to be settled by adjudication and practice that an order, in a foreclosure suit, for the issuing of receivers' certificates, the same to be a first lien on the property, is an interlocutory order, which can be brought here only by an appeal from a final decree of distribution. *Ex parte Jordan, ubi supra; Union Trust Co.* v. *Illinois Midland Railway Co., ubi supra.*

Mr. Justice Miller delivered the opinion of the court.

The reasons why the judges declined to allow this appeal may be substantially divided into two. The first and most important of these is, that the order from which the appeal is asked is not a final decree, within the meaning of the act of Congress on that subject, but is a mere ancillary proceeding for the protection of the property pending an appeal from the principal decree now before this court. But the doctrine that, after a decree which disposes of a principal subject of litigation and settles the rights of the parties in regard to that matter, there may subsequently arise important matters requiring the judicial action of the court in relation to the same property and some of the same rights litigated in the main suit, making necessary substantive and important orders and decrees in which the most material rights of the parties may be passed upon by the court, and which, when they partake of the nature of final decisions of those rights, may be appealed from, is well established by the decisions of this court. *Blossom* v. *Milwaukee &c. Railroad Co.*, 1 Wall. 655; *Forgay* v. *Conrad*, 6 How. 201; *Fosdick* v. *Schall*, 99 U. S. 235; *Williams* v. *Morgan*, 111 U. S. 684; *Burnham* v. *Bowen*, 111 U. S. 776.

The question in such cases is not whether the order complained of is of a character decisive of questions that the parties are entitled to have reviewed in the appellate court, but whether the order or decree is of that final nature which alone can be brought to this court on appeal. It is upon this ground mainly that the right of appeal is resisted in the pres-

ent case; but we are of opinion that, within the true principles which establish the finality of a decree of the Circuit Court in reference to the allowance of an appeal, this order is a final decree.

If the order is executed, the first thing to be done under it will be to borrow money to the extent authorized therein, and then the receivers will issue the certificates contemplated in it. It is not necessary to hold here what the position of the holders of such certificates would be, if the order contained no provision that they should be the first lien upon the property of the company. It might be, but it is not necessary to decide that question here, that such an order would not be conclusive of the right of the holders of such certificates to priority of payment out of the proceeds of the sale of the railway. It is one of the arguments used before us, that upon a final sale, and an order by the court for the distribution of its proceeds, such certificates would not necessarily be held to have such priority; but that, issued under this order, and containing on their face the provision authorized by it, they would constitute a first lien upon the property of the railway company to be sold under the final decree, is, we think, very clear. Such order standing unrepealed, we do not think that the court in a subsequent stage of the same litigation, in the same case and in regard to the same subject matter, could be permitted to say that the holders of these certificates must establish their right to priority of payment; but we are of opinion that such holders, under the decree of this court that they should have priority standing unreversed, would be entitled to such first lien.

These views we do not propose to elaborate, further than to say that if this order does not give the lender of the money such prior lien upon the proceeds of the property of the company it is because the court had no authority to make it, and as it would be a fraud upon such lender justice could only be done by enforcing it. If this view of the subject be correct, of which we entertain no doubt, the order is a final one. It is a decree fixing upon the property, on which the trust company now has a first lien, another lien of $120,000, and making

it paramount to that. It changes the relation of that company to this property, displaces its rights as settled by a decree now pending in this court, and if that decree is affirmed, it in effect modifies it, although this court may say that it should stand and be enforced. This order comes within all the elements of finality which we can imagine to belong to a decree of the Circuit Court. It establishes certain rights of the parties, to the injury, as petitioners believe, of their interests in the property.

We need not refer to cases on the subject of finality, for they are numerous, and the principles on which they have been decided apply to widely varying circumstances. But while we are not aware of any case precisely in point to the one before us, we are satisfied that it is within the purpose of the statute and the principles by which it is to be construed.

The other reason given why the appeal should not be granted is that the action of the Circuit Court in the case is one within its discretion. All we have to say upon this subject is, that if it be an authority vested in the judges of the Circuit Court, it must be exercised and governed by the principles of a judicial discretion, and the very point to be decided upon an appeal here is, whether they had such discretion, and whether they exercised it in a manner that cannot be reviewed in this court.

The question is one which in its nature must be a subject of appeal. Whether the court below can exercise any such power at all, after the case has been removed from its jurisdiction into this court by an appeal accompanied by a supersedeas, is itself a proper matter of review; and still more, whether, in the exercise of what the court asserts to be its discretionary power, it has invaded established rights of the petitioners in this case, contrary to law, in such a manner that they can have no relief except by an appeal to this court. This is a matter eminently proper to be inquired into upon an appeal from such an order. Upon the hearing of that appeal this court may be of opinion that the order was one proper to be made, in which case it will be affirmed. If, however, it believes that it was an improper one, and will seriously prejudice the rights of the petitioners, it will be reversed and set aside,

as it should be. In granting the appeal this court, of course, does not undertake to decide whether the order was rightfully made, if the court had the requisite power, but can only do that upon the hearing of the appeal.

For the same reasons this court cannot consider, on this motion, the urgent appeals made to it in regard to the necessity of this order for the preservation of the railway from destruction during the pendency of the appeal on the main case. That is a matter only fit to be considered on the hearing of the appeal, which we think should be granted.

The writ of mandamus, directing the judges of the Circuit Court to allow the appeal and to approve a sufficient bond, is granted.

Mr. Justice Bradley said: I concur in the judgment of the court, but for a different reason from that given in the opinion. I think that after appeal from a final decree in a foreclosure suit, and after the case comes here, a supersedeas bond having been given, the control of the fund in dispute belongs to this court, subject to the management of the property by the court below. In such management that court is the agent of this court, and all its acts in that respect are subject to review and supervision here when properly brought before us. In the present case the order complained of being final in the matter to which it relates, and being made since the final decree in the cause, and not reviewable on the appeal from that decree, it may be as well reviewed here by appeal as in any other way. For that reason I concur in the decision made by the court.

KIMMISH *v.* BALL.

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

No. 1254. Submitted January 2, 1889. — Decided January 28, 1889.

Section 4059 of the Code of Iowa, which provides that a person having in his possession "Texas cattle" shall be liable for any damages which may accrue from allowing them to run at large and thereby spread the disease known as the "Texas fever," is not in conflict with the commerce-clause of the Constitution of the United States; nor is it a denial to citizens of other States of any rights and privileges which are accorded to citizens of Iowa, and thus in conflict with Subdivision 1 of Section 2 of Article 4 of the Constitution, relating to the privileges and immunities of the citizens of the several States.

THE court stated the case as follows:

This case comes from the Circuit Court of the United States for the Southern District of Iowa. It involves the validity of a statute of that State, making a person having in his possession within it any Texas cattle, which have not been wintered north of the southern boundary of Missouri and Kansas, liable for any damages that may accrue from allowing them to run at large, and thereby spread the disease known as Texas fever. The statute is found in § 4059 of the Code of Ohio, which refers to the preceding § 4058. The two sections are as follows:

"SEC. 4058. If any person bring into this State any Texas cattle, he shall be fined not exceeding one thousand dollars or imprisoned in the county jail not exceeding thirty days, unless they have been wintered at least one winter north of the southern boundary of the State of Missouri or Kansas: *Provided*, That nothing herein contained shall be construed to prevent or make unlawful the transportation of such cattle through this State on railways, or to prohibit the driving

through any part of this State, or having in possession, any Texas cattle, between the first day of November and the first day of April following.

"SEC. 4059. If any person now or hereafter has in his possession, in this State, any such Texas cattle, he shall be liable for any damages that may accrue from allowing said cattle to run at large, and thereby spreading the disease among other cattle known as the Texas fever, and shall be punished as is prescribed in the preceding section."

The action is based upon this latter section. The petition of the plaintiff alleges that in June, 1885, the defendants were the owners of and had in their possession and under their control a herd of Texas cattle, which had not been wintered north of the southern boundary of Missouri or Kansas, and which were purchased at or near Fort Smith, in Arkansas; that said cattle, while in the possession and under the control of the defendants, were allowed by them to run at large in Union Township, Harrison County, Iowa, contrary to the provisions of § 4059 of its code; and that the said cattle were infected by a disease known as "Texas cattle fever," which was spread and disseminated by them among the cattle of the plaintiff, whereby they sickened and died, to his damage of five thousand dollars, for which he prays judgment.

To this petition the defendants demurred on the grounds, first, that §§ 4058 and 4059 are in conflict with Section 8, Article 1 of the Constitution of the United States, in that the legislature of Iowa undertakes to regulate and interfere with interstate commerce; and second, that the sections are in conflict with Section 2 of Article 4 of the Constitution of the United States relative to the privileges and immunities of citizens of the several States.

The demurrer was heard at March term, 1888, of the Circuit Court, the court being held by two judges who were opposed in opinion upon the constitutionality of § 4059, on the grounds mentioned. The plaintiff electing to stand upon his petition, judgment was entered for the defendants sustaining the demurrer, according to the opinion of the presiding judge. Thereupon, on motion of the plaintiff, it was ordered that the

points of disagreement be certified to this court; and upon this certificate [1] the case has been heard.

Mr. I. N. Flickinger for plaintiff in error.

Mr. W. F. Sapp for defendants in error.

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

In order to understand § 4059 of the Code of Iowa, it must be read in connection with the preceding § 4058, to which it refers. It must also be known what is meant by "Texas cattle," and what influence a winter north has upon the disease called "Texas fever," with which such cattle are liable to be infected. Section 4058 is levelled against the importation of Texas cattle which have not been wintered north of the southern boundary of Missouri or Kansas. Any person bringing into the State Texas cattle, unless they have been thus wintered, is subject to be fined or imprisoned. When, therefore, § 4059 refers to the possession in the State of any "such Texas cattle" it means cattle which have not been wintered North, as mentioned in the preceding section. It is only when they have not been thus wintered that apprehension is felt that they may be infected with the disease and spread it among other cattle.

The term "Texas cattle" is not defined in the Code of Iowa; and whether used there to designate cattle from the State of Texas alone, or, as averred by the plaintiff in error, a particular breed or variety called Mexican or Spanish cattle, which are also found in Arkansas and the Indian Territory, is

[1] The questions certified were as follows:

1st. Is § 4059 of the Code of Iowa repugnant to and in conflict with the provisions of Sec. 8 of Article 1 of the Constitution of the United States relative to the regulation of commerce among the several States and by reason thereof unconstitutional?

2nd. Is § 4059 of the Code of Iowa repugnant to or in conflict with Sec. 2 of Article 4 of the Constitution of the United States relative to the privileges and immunities of citizens in the several States and by reason thereof unconstitutional?

not material for the disposition of this case. Cattle coming from both of those States and from that Territory during the spring and summer months are often infected with what is known as Texas fever. It is supposed that they become infected with the germs of this distemper while feeding, during those months, on the low and moist grounds of those States and Territory, constituting what are called their malarial districts, which are largely covered with a thick vegetable growth. These germs are communicated to domestic cattle by contact, or by feeding in the same range or pasture. Scientists are not agreed as to the causes of the malady; and it is not important for our decision which of the many theories advanced by them is correct. That cattle coming from those sections of the country during the spring and summer months are often infected with a contagious and dangerous fever is a notorious fact; as is also the fact that cold weather, such as is usual in the winter north of the southern boundary of Missouri and Kansas, destroys the virus of the disease, and thus removes all danger of infection. It is upon these notorious facts that the legislation of Iowa for the exclusion from their limits of these cattle, unless they have passed a winter north, is based. See *Missouri Pacific Railway Company* v. *Finley*, 38 Kansas, 550, 556; also, First Annual Report to the Commissioner of Agriculture of the Bureau of Animal Industry for 1884, 426; and Second Annual Report of the same bureau for 1885, 310.

Section 4059, with which we are concerned, provides that any person who has in his possession in the State of Iowa any Texas cattle which have not been wintered north shall be liable for any damages that may accrue from allowing such cattle to run at large and thereby spread the disease. We are unable to appreciate the force of the objection that such legislation is in conflict with the paramount authority of Congress to regulate interstate commerce. We do not see that it has anything to do with that commerce; it is only levelled against allowing diseased Texas cattle held within the State to run at large. The defendants labor under the impression that the validity of § 4058, which is directed against the importation

into the State of such cattle unless they have been wintered North, is before us, and that a consideration of its validity is necessary in passing upon § 4059; but this is a mistake. Section 4058 is before us only that we may ascertain from it the meaning intended by certain terms used in the subsequent section referring to it, and not upon any question of its constitutionality.

Nor does the case of *Railroad Company* v. *Husen*, 95 U. S. 465, upon which the defendant relies with apparent confidence, have any bearing upon the questions presented. The decision in that case rested upon the ground that no discrimination was made by the law of Missouri in the transportation forbidden between sound cattle and diseased cattle; and this circumstance is prominently put forth in the opinion. "It is noticeable," said the court, "that the statute interposes a direct prohibition against the introduction into the State, of all Texas, Mexican, or Indian cattle during eight months of each year, without any distinction between such as may be diseased and such as are not." (p. 469.) It interpreted the law of Missouri as saying to all transportation companies, "You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle between March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities." (p. 473.) Such a statute, the court held, was not a quarantine law, nor an inspection law, but a law which interfered with interstate commerce, and therefore invalid. At the same time the court admitted unhesitatingly that a State may pass laws to prevent animals suffering from contagious or infectious diseases from entering within it. (p. 472.) No attempt was made to show that all Texas, Mexican, or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased. Had such proof been given, a different

question would have been presented for the consideration of the court. Certainly all animals thus infected may be excluded from the State by its laws until they are cured of the disease, or at least until some mode of transporting them without danger of spreading it is devised.

Railroad Company v. *Husen* gives no support to the contention of the defendant. There is no necessary dependence of the provisions of § 4059, imposing a civil liability, upon those of § 4058, so that the one may not stand without the other. If the criminal liability created by § 4058 is open to doubt, which we do not affirm, the civil liability may remain for the damages caused by the wilful conduct designated in § 4059. *Packet Company* v. *Keokuk*, 95 U. S. 80; *Allen* v. *Louisiana*, 103 U. S. 80.

The case is, therefore, reduced to this, whether the State may not provide that whoever permits diseased cattle in his possession to run at large within its limits shall be liable for any damages caused by the spread of the disease occasioned thereby; and upon that we do not entertain the slightest doubt. Our answer, therefore, to the first question upon which the judges below differed is in the negative, that the section in question is not unconstitutional by reason of any conflict with the commercial clause of the Constitution.

As to the second question, our answer is also in the negative. There is no denial of any rights and privileges to citizens of other States which are accorded to citizens of Iowa. No one can allow diseased cattle to run at large in Iowa without being held responsible for the damages caused by the spread of disease thereby; and the clause of the Constitution declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States does not give non-resident citizens of Iowa any greater privileges and immunities in that State than her own citizens there enjoy. So far as liability is concerned for the act mentioned, citizens of other States and citizens of Iowa stand upon the same footing. *Paul* v. *Virginia*, 8 Wall. 168.

It follows that the judgment below must be

Reversed, and the cause remanded for a new trial.

NATIONAL SECURITY BANK *v.* BUTLER.

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

No. 166. Argued January 14, 1889. — Decided January 28, 1889.

From the facts of this case, it was held, that the intent of a national bank, after it was insolvent, to prefer a creditor, by a transfer of assets, in violation of § 5242 of the Revised Statutes, was a necessary conclusion; that, if any other verdict than one for the plaintiff, in a suit at law by the receiver of the bank to recover the value of the assets from the creditor, had been rendered by the jury, it would have been the duty of the court to set it aside; and that it was proper to direct a verdict for the plaintiff.

The meaning of § 5242 is not different from the meaning of § 52 of the act of June 3, 1864, c. 106, 13 Stat. 115.

It is sufficient, under § 5242, to invalidate such a transfer, that it is made in contemplation of insolvency, and either with a view on the part of the bank to prevent the application of its assets in the manner prescribed by chapter 4 of title 62 of the Revised Statutes, or with a view on its part to the preference of one creditor to another; and it is not necessary to such invalidity that there should be such view on the part of the creditor in receiving the transfer, or any knowledge or suspicion on his part at the time, that the debtor is insolvent or contemplates insolvency.

THE case is stated in the opinion.

Mr. Russell Gray and *Mr. J. C. Coombs* for plaintiff in error.

Mr. A. A. Ranney for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law, brought in the District Court of the United States for the District of Massachusetts, in November, 1882, by the receiver of the Pacific National Bank, a corporation duly organized under the banking laws of the United States, against the National Security Bank, another corporation so organized.

The declaration contains three counts. The first count

alleges that the Pacific National Bank became insolvent and failed; that the Comptroller of the Currency, on the 22d of May, 1882, appointed the plaintiff, Linus M. Price, receiver of the same; that the bank stopped business and closed its doors on the 20th of May, 1882, being insolvent and unable to pay its debts; that steps were, on that day, taken to represent it to said comptroller as insolvent, and to have a receiver appointed to close it up; that it was determined, on the 20th of May, 1882, not to open its doors or carry on business longer; that, on that day, the Security Bank was owing to the Pacific Bank, in account, as balance on book, $40.25, and the former bank also held against the latter a certificate of deposit for $10,000; that, on the 22d of May, 1882, the Pacific Bank, through its cashier, although it was then insolvent and contemplated insolvency, and had then actually failed and stopped business and taken said steps for the appointment of a receiver, transferred and delivered to the Security Bank certain checks, drafts, bills, and other property, amounting on their face to the sum of $10,967.95, which, with the said $40.25, made the sum of $11,008.20; that the Security Bank thereupon gave to the cashier of the Pacific Bank a certificate of deposit, as follows:

"No. 6216. NATIONAL SECURITY BANK,

"$11,008$\frac{20}{100}$. BOSTON, *May* 22, 1882.

"E. C. Whitney, cash., has deposited in this bank eleven thousand and eight $\frac{20}{100}$ dollars, payable to the order of himself on the return of this certificate properly indorsed.

"CHAS. R. BATT, *Cashier;*"

that the Security Bank collected the money upon the said checks, etc.; that the said certificate of deposit came to the hands of the plaintiff as receiver, among the other assets of the Pacific Bank; that, on a demand made by him, the Security Bank refused to deliver or pay the said property, or its avails, claiming a right to set it off or apply it on the said certificate of deposit for $10,000; that, on the 20th of May, 1882, the Pacific Bank was insolvent; that it, and its directors and

officers, well knew the same, and contemplated insolvency; that it was in the same condition on the 22d of May, 1882; that the said transfer of property to the Security Bank was in fraud of the creditors of the Pacific Bank, with a view of giving the former bank a preference over other creditors, by having the same operate as a payment of the debt due to the Security Bank by the Pacific Bank, by way of set-off or otherwise; that the said transfer was illegal, and, if allowed to operate as a set-off or payment, would work an unlawful preference; and that the Pacific Bank, and its officers and cashier, well knew, when the transfer was made, that the property, or its proceeds, when collected, would or might be availed of for the payment of the debt due the Security Bank, by way of set-off or otherwise, and contemplated the same, or was bound and is presumed by law to have contemplated and intended the same.

The second count of the declaration alleges the giving of the certificate of deposit for $11,008.20; that the plaintiff, as receiver, presented to the Security Bank said certificate, duly indorsed, and demanded payment thereof; but that the defendant refused to pay it. The third count alleges that the defendant owes to the plaintiff, as receiver, $11,008.20, as and for money had and received by the defendant to the use of the plaintiff. The declaration demands the recovery of $11,008.20, with interest.

The defendant filed an answer and a declaration in set-off. The substance of these papers is, that the defendant has a claim in set-off against the Pacific Bank for the amount of the certificate of deposit of the latter bank for $10,000 which was as follows:

"The Pacific National Bank of Boston, Mass.
"$10,000. Boston, *May* 13th, 1882.
"This certifies that there has been deposited in this bank ten thousand dollars, payable to the order of Nat. Security Bank on return of this certificate properly indorsed.
"No. 2513. E. C. Whitney, *Cashier.*
"(Countersigned) G. H. Benyon, *Teller.*"

The plaintiff put in an answer to the defendant's declaration in set-off, making substantially the same averments which are contained in the first count of the plaintiff's declaration.

On these issues there was a trial by a jury, which resulted in a verdict for the plaintiff for $12,232.88, and a judgment for him for that amount, with costs. The case was taken to the Circuit Court by the defendant, by a writ of error, and it affirmed the judgment of the District Court, with costs. The opinion of the Circuit Court is reported in 22 Fed. Rep. 697. The plaintiff brought the case to this court by a writ of error; and afterwards Peter Butler, as successor of Price, as receiver, became plaintiff in error.

There was a bill of exceptions taken by the defendant in the District Court. It states that the three counts of the plaintiff's declaration were all for the same cause of action, and that the right of action contained in the first count was founded upon § 5242 of the Revised Statutes. That section provides as follows: "All *transfers* of the notes, bonds, bills of exchange, *or* other evidences of debt owing to any *national banking* association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, *made* with a view to prevent the application of its assets in the manner prescribed by this *chapter*, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void."

That section is incorporated in the Revised Statutes from § 52 of the act of June 3, 1864, c. 106, 13 Stat. 115. The two sections differ in these respects: the word "transfer" becomes "transfers;" the words "and other" become "or other;" the words "any association" become "any national banking association;" the words "with a view to prevent" become "made with a view to prevent;" and the words "this act" become "this chapter." No change was made in the meaning of the statute by inserting in § 5242 the word "made," not found in § 52 of the act of 1864.

Opinion of the Court.

The bill of exceptions states that it was admitted at the trial that the $40.25 was on deposit in the Security Bank before the commission of any act of insolvency by the Pacific Bank, and that as to so much of the plaintiff's claim the set-off was a good answer. As to the rest of the claim, the following facts were proved or admitted:

"On Saturday, May 20, 1882, the Pacific Bank, which had previously failed in November, 1881, and had afterwards reorganized and done business, being deeply insolvent, its directors held a meeting in the afternoon, after the regular close of business for the day, and passed these votes, which votes and the proposed action the directors purposely kept concealed until they were carried out; 'Voted, To go into liquidation. Voted, That the bank be closed to business. Voted, That Lewis Coleman, president, Micah Dyer, Jr., Andrew F. Reed, directors, and William J. Best, be and hereby are appointed a committee to proceed to Washington to confer with the Hon. John J. Knox, Comptroller of the Currency, as to the measures proper to be taken in the present situation; that, if the comptroller shall deem it necessary to appoint a receiver, the directors unanimously recommend for that position Mr. E. C. Whitney, who, since March 18, has discharged the duties of cashier with great ability, diligence, and energy, and who is perfectly familiar with the assets, liabilities, and affairs of the bank and thoroughly understands the steps necessary to be taken to speedily and profitably realize upon the estate to the fullest extent; that, if Mr. E. C. Whitney shall be appointed receiver of the bank, the directors will furnish satisfactory bonds for the faithful discharge of his duties, to any amount which the comptroller may require.'

"And the bank never after did any business except so far as appears in this bill. The committee of the directors went to Washington on Saturday night, and on Monday, May 22, saw the comptroller, who appointed the plaintiff receiver about ten o'clock A.M., and the plaintiff left Washington on Monday and on the following day arrived in Boston and took possession of the bank.

"For some time before this, and ever since the resuscitation

of the bank after its first failure, the Pacific Bank, not being a member of the Boston clearing house, had been in the habit daily, of depositing with the defendant all checks received by the Pacific Bank, to be collected through the clearing-house by the defendant, with which the Pacific Bank was credited as a depositor and against which it drew.

"On Monday morning, May 22, Whitney, the cashier of the Pacific Bank, received by mail, as usual, many letters enclosing drafts and checks, and sent all these checks and drafts, amounting to $10,967.95, to the defendant bank, where they were received and forthwith sent to the clearing-house, with other checks, to be cleared by defendant.

"The messenger who carried the checks to the defendant took at the same time and presented to the defendant a check drawn by Whitney for $11,008.20, being the whole amount of the checks then deposited, and $40.25 already to the credit of the Pacific Bank on its current deposit account with the defendant.

"The defendant's paying teller, at the messenger's request, gave him the defendant's negotiable certificate of deposit, payable on demand, for the said sum of $11,008.20. The defendant at that time held the negotiable certificate of deposit of the Pacific Bank, payable on demand, for $10,000." The copies of those certificates are hereinbefore set forth.

"These transactions took place as early as half-past nine on the morning of May 22, and no officer of the defendant bank then knew or suspected that the Pacific Bank was insolvent or contemplating insolvency, or was not doing business as usual, or that its directors had voted to close it, or that application was to be made for a receiver, and no application had, in fact, at that time been made to the comptroller, it being made about 10 A.M. of that day." The parties had duly demanded of each other payment of their respective claims.

The bill of exceptions also states as follows: "There was other evidence given in the case on both sides, and particularly on the question whether any, and, if any, what, agreement was afterwards made between Whitney, the cashier of the Pacific Bank, and Batt, the cashier of the defendant bank, as

to the terms and conditions on which the deposit made on May 22d, as above stated, should be held by the defendant, part of this evidence consisting of a letter from Whitney to Batt." It then proceeds: "The defendant requested the judge to submit to the jury the three following questions: First, whether or not there was in fact any view or intent on the part of the Pacific Bank, or any of its officers, to give a preference to the defendant over other creditors, or to prevent the application of the assets of the Pacific Bank in the manner prescribed in the bank act; second, whether or not any subsequent agreement was made varying the relation of the two banks as they existed at the time the checks were deposited; third, if the jury answer the preceding question in the affirmative, whether or not such agreement was expressed in Whitney's letter. The defendant at the same time prayed the judge to give several rulings on matters of law applicable to the facts as they might be found by the jury on the above issues. But the judge refused to submit the above or any questions whatever to the jury, or to give any of the rulings prayed for, on the ground that the issues were immaterial, and that there was no question for the jury, and ruled, as matter of law, that, on the undisputed facts in the case, the plaintiff was entitled to recover the amount of the checks and drafts deposited by the Pacific Bank in defendant's bank on Monday."

The court directed a verdict for the plaintiff for $12,232.88, that being the amount of the checks and drafts, with interest from the date of the writ; and the defendant excepted to such rulings and refusals to rule.

The view taken by the Circuit Court was, that, under § 5242, the transfer or payment by a bank, to be void, must be made after the commission of an act of insolvency, or in contemplation thereof, and with a view to prevent the application of its assets as provided by law, or with a view to giving a preference to one creditor over another; that the undisputed facts of the case showed that the act of the cashier could, under the circumstances, have no other result, if allowed to stand, than to operate as a preference in favor of the Secur-

ity Bank; that the Pacific Bank had decided to close its doors and go into liquidation; that after that the necessary consequence of the transfer was to create a preference; that it could not be said that the transfer was made with the intention of going on in business, nor could it be contended that it was made to save the credit of the bank; and that, after the vote of the directors to close the bank and go into liquidation, any transfer of its assets to a creditor, whereby that creditor secured a preference, must be presumed to be made with an intent to prefer. We concur in this view of the case.

The directors of the Pacific Bank held a meeting on the afternoon of Saturday, May, 20, 1882, after the regular close of business for that day, and passed three votes: (1) to go into liquidation; (2) that the bank be closed to business; (3) that the president, two directors, and another person be a committee to go to Washington and confer with the Comptroller of the Currency as to the measures proper to be taken, and that, if the comptroller should deem it necessary to appoint a receiver, the directors unanimously recommended for that position Mr. Whitney, the cashier, and that, if he should be appointed receiver, the directors would furnish satisfactory bonds for his faithful discharge of the duties, to any amount which the comptroller might require. These votes and the proposed action the directors purposely kept concealed. The bank never afterward did any business, except so far as appeared in the bill of exceptions. The committee of the directors went to Washington on Saturday night, and on Monday, May 22, 1882, saw the comptroller, who appointed Mr. Price to be the receiver, about 10 o'clock A.M.; and he left Washington on Monday, and on Tuesday arrived in Boston and took possession of the bank.

Although the Pacific Bank, not being a member of the Boston clearing-house, had been in the habit of daily depositing the checks received by it with the defendant, to be collected by the latter through the clearing-house, the Pacific Bank being credited as a depositor and drawing on the Security Bank against the checks; and although it was in accordance with that custom that Mr. Whitney, the cashier of the Pacific

Bank, sent the checks and drafts, amounting to $10,967.95, to the Security Bank on Monday, May 22, 1882, to be cleared by it, drawing for the $11,008.20 at the time, and receiving in return, on its own request, from the Security Bank, a negotiable certificate of deposit of that bank, payable to the order of Mr. Whitney on the return of the certificate properly indorsed; yet Mr. Whitney knew at the time of these transactions that the certificate of deposit for $10,000, given by him to the Security Bank nine days before, created an indebtedness of the Pacific Bank to the Security Bank for that amount, and was, though negotiable, presumably still held by that bank. It was in fact still held by it. The natural presumption was that, if the certificate were still held by the Security Bank, that bank would, as soon as it should learn that the Pacific Bank was closed to business, seek to retain out of the collections the amount of such certificate, and apply that amount to its payment.

It is sufficient, under § 5242 of the Revised Statutes, to invalidate such a transfer, that it is made in contemplation of insolvency, and either with a view to prevent the application of the assets of the bank in the manner prescribed by chapter 4 of title 62 of the Revised Statutes, or with a view to the preference of one creditor to another. Certainly, the transfer in question was made in contemplation of insolvency, made as it was after the directors had voted that the bank should go into liquidation, and should be closed to business, and that a receiver should be appointed; and it was made with a view, on the part of the Pacific Bank and of its cashier, who represented it and acted for it in this transfer of its assets, to prevent the application of its assets in the manner prescribed by such chapter 4 of title 62, and with a view to prefer the Security Bank to other creditors. The transaction, if allowed to stand, could result in nothing else. The statute made it void, although there was no such view on the part of the Security Bank in receiving the transfer of the assets; and although there was no knowledge or suspicion at that time on the part of the Security Bank that the Pacific Bank was insolvent or contemplated insolvency, or was not doing busi-

ness, or that its directors had voted to close it, or that application was to be made for a receiver; and although the transfer took place before the application was actually made to the comptroller for the appointment of a receiver.

There was no question of fact to be submitted to a jury. From the facts proved, the intent to prefer, on the part of the Pacific Bank, was a necessary conclusion; and it was correct in the District Court to direct a verdict for the plaintiff. If any other verdict, on the facts proved, had been rendered, it would have been the duty of that court to set it aside.

Nor was there any error on the part of the District Court in refusing to submit to the jury the second and third questions which the defendant requested the judge to submit to them. The bill of exceptions does not set forth what the "other evidence" given in the case was, in regard to any subsequent agreement between the cashiers of the two banks, as to the holding of the deposit by the Security Bank. The court ruled that the issues involved in such second and third questions were immaterial; and this court cannot hold otherwise, on the facts set forth in the bill of exceptions. "Any subsequent agreement" must have been made after the receiver had been actually appointed, and could not affect his rights.

The defendant objects that the rulings of the District Court were made, and the verdict and judgment were rendered generally, on the plaintiff's declaration of three counts; and that the first count, which seeks to recover back the money deposited as an unlawful payment, is inconsistent with the second count, which seeks to recover on the certificate of deposit as a valid instrument.

It is a sufficient answer to this contention to say, that no objection was made to the declaration by way of demurrer or otherwise, at the trial or before, and no ruling on the subject was asked for at the trial, or was made the subject of an exception. No objection or exception was taken to the verdict, nor did the defendant request at the trial that the plaintiff should elect on which count he would ask a verdict; nor did the defendant request the court to ask the jury to state on which count of the declaration the verdict was rendered.

Opinion of the Court.

We see no inconsistency between the first and second counts of the declaration. They were in substance for the same cause of action; and the first count is clearly sufficient to support the verdict.

Judgment affirmed.

ROBERTSON *v.* PERKINS.

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

No. 672. Argued January 15, 16, 1889. — Decided January 28, 1889.

The crop ends of Bessemer steel rails are liable to a duty of 45 per cent ad valorem, as "steel" under Schedule C of § 2502 of the Revised Statutes, as amended by § 6 of the act of March 3, 1883, c. 121, 22 Stat. 500, and are not liable to a duty of only 20 per cent ad valorem, as "metal unwrought," under the same schedule.

Where, at the close of the plaintiff's evidence, on a trial before a jury, the defendant moves the court to direct a verdict for him, on the ground that the plaintiff has not shown sufficient facts to warrant a recovery, and the motion is denied, and the defendant excepts, the exception fails, if the defendant afterwards introduces evidence.

Under the practice in New York, allegations in the complaint, that the plaintiff "duly" protested in writing against the exaction of duty, and "duly" appealed to the Secretary of the Treasury, and that ninety days had not elapsed, at the commencement of the suit, since the decision of the secretary, if not denied by the answer are to be taken as true, and are sufficient to prevent the defendant from taking the ground, at the trial, that the protest was premature, or that the plaintiff must give proof of an appeal, or of a decision thereon, or of its date.

THE case is stated in the opinion.

Mr. Solicitor General for plaintiff in error.

Mr. J. Langdon Ward for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action originally brought in the Superior Court of the city of New York, and removed by *certiorari*, by the defendant, into the Circuit Court of the United States for the

Southern District of New York. It was brought by Charles L. Perkins against William H. Robertson, collector of the port of New York, to recover $1460 as duties illegally exacted on an importation of Bessemer steel rail crop ends, from England, in August, 1884. The defendant exacted duties on the articles at the rate of 45 per centum ad valorem, amounting to $2628. The plaintiff claimed that the lawful rate of duty was only 20 per centum ad valorem, or $1168. The complaint contained the allegation that the plaintiff "duly made and filed due and timely protest in writing against the said erroneous and illegal assessment and exaction of the said duty;" that the plaintiff was compelled to pay the $1460 in order to obtain possession of the merchandise; that he duly appealed to the Secretary of the Treasury from the decision of the defendant ascertaining and liquidating the duties; and that ninety days had not elapsed at the commencement of the suit, since the decision of the Secretary of the Treasury on such appeal. The answer of the defendant did not deny the allegations of the complaint as to protest and appeal and the decision of the Secretary of the Treasury. The jury found a verdict for the plaintiff. The parties consented in open court that the amount of the verdict might be adjusted at the custom-house, under the direction of the court. The amount was adjusted as of the date of the verdict, and for that amount, with interest and costs, in all $1742.23, judgment was rendered for the plaintiff. To review that judgment the defendant has brought a writ of error.

At the close of the plaintiff's evidence, the counsel for the defendant moved the court to direct a verdict for the defendant, on the grounds, among others: (1) that the protest which was put in evidence by the plaintiff was served and filed before liquidation, and was, therefore, premature; (2) that no proof was offered or given that there was any appeal to the Secretary of the Treasury, or any decision on such appeal, and no proof of the date of such decision, to show that the suit was brought in time. The motion was denied, and the defendant excepted to the ruling.

Under § 914 of the Revised Statutes of the United States,

the practice, pleadings and forms and modes of proceeding in this case, in regard to the complaint and the answer, were required 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 of New York. By § 481 of the New York Code of Civil Procedure, it is required that the complaint shall contain "a plain and concise statement of the facts constituting each cause of action." Section 500 requires that the answer shall contain "a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief." By § 522, "each material allegation of the complaint, not controverted by the answer," "must, for the purposes of the action, be taken as true."

The allegation of the complaint in this case is, that the plaintiff "duly made and filed due and timely protest in writing," and "duly appealed to the Secretary of the Treasury," and "that ninety days have not elapsed since the decision of the Secretary of the Treasury on the aforesaid appeal." As none of these allegations were denied in the manner required by § 500 of the code, they were, by § 522, to be taken as true, and no issue was joined upon any one of them. This is the ruling in regard to these provisions by the Court of Appeals of the State of New York. In *Lorillard* v. *Clyde*, 86 N. Y. 384, the complaint alleged that, in pursuance of a certain agreement, a corporation "was duly organized under the laws of this State." It was contended, on a demurrer to the complaint, that the agreement was illegal, because it provided that the parties thereto, consisting of five persons only, should form a corporation, whereas the statute contemplated that at least seven persons should unite in order to form a corporation. But the court held that the allegation that a corporation was "duly organized under the laws of this State," pursuant to the agreement, imported that the requisite number of persons united for that purpose; that it must be assumed that the corporation was regularly organized; and that it was unnecessary for the plaintiff to show in his complaint the precise steps taken to

accomplish that result. The word "duly" means, in a proper way, or regularly, or according to law. See, also, *Tuttle* v. *The People*, 36 N. Y. 431, 436, and cases there cited; *Fryatt* v. *Lindo*, 3 Edw. Ch. 239; *The People* v. *Walker*, 23 Barb. 304; *The People* v. *Mayor*, 28 Barb. 240; *Burns* v. *The People*, 59 Barb. 531; *Gibson* v. *The People*, 5 Hun, 542.

The plaintiff claimed, by his protest and at the trial, that the articles in question were liable to a duty of only twenty per centum ad valorem, under the provision of Schedule C of § 2502 of the Revised Statutes, as amended by § 6 of the act of March 3, 1883, c. 121, 22 Stat. 501, which imposes a duty of 20 per centum ad valorem on "mineral substances in a crude state and metals unwrought, not specially enumerated or provided for in this act." The collector had imposed a duty of 45 per centum ad valorem on the articles, under the following provision of the same Schedule C, 22 Stat. 500: "Steel, not specially enumerated or provided for in this act, forty-five per centum ad valorem: *Provided*, That all metal produced from iron or its ores, which is cast and malleable, of whatever description or form, without regard to the percentage of carbon contained therein, whether produced by cementation, or converted, cast, or made from iron or its ores, by the crucible, Bessemer, pneumatic, Thomas-Gilchrist, basic, Siemens-Marten, or open-hearth process, or by the equivalent of either, or by the combination of two or more of the processes, or their equivalents, or by any fusion or other process which produces from iron or its ores a metal either granular or fibrous in structure, which is cast and malleable, excepting what is known as malleable iron castings, shall be classed and denominated as steel."

At the close of the plaintiff's evidence, the defendant moved the court to direct a verdict for the defendant, on the further ground that the plaintiff had not shown facts sufficient to entitle him to recover. The motion was denied by the court, and the defendant excepted to the ruling. But, as the defendant did not then rest his case, but afterwards proceeded to introduce evidence, the exception fails. *Accident Ins. Co.* v. *Crandal*, 120 U. S. 527.

Opinion of the Court.

The plaintiff introduced evidence for the purpose of showing that the article in question fell under the denomination of "metal unwrought," not specially enumerated or provided for in the act; and the defendant introduced evidence to show the contrary. It appeared by the evidence of the plaintiff, that the crop end of a Bessemer steel rail, such as the article in question, was the imperfect end of a rail, which was cut off to bring the remainder down to a solid rail of regular length; that the end thus cut off was of the same texture and fabric with the rail which remained after such end was cut off, and was made in the same manner; and that the crop end so cut off was Bessemer steel. It also appeared that such ends, when imported, were sold as an article of merchandise in this country, and were sometimes remelted in furnaces; and that they were sometimes used, after importation, for manufacturing other articles by reheating them, without their being remelted, and had a value as a manufactured article, other than for the purpose of remelting.

At the close of the testimony on both sides, the defendant moved the court to direct a verdict for him, on the grounds, that the plaintiff had not produced sufficient evidence to make a case; that there was no evidence that the imported articles were unwrought metal; and that they were steel, which was specially provided for in the statute. The motion was denied by the court, and the defendant excepted to the ruling.

The court charged the jury that the only question was whether the article was wrought or unwrought metal; that the word "wrought" meant wrought into something suitable for use, and not merely wrought in some manner, by being manufactured or treated; that, if the article was a mere excess of material, left after the making of steel rails, it was not wrought metal, within the sense of the statute; that, if it was something left over in excess of the material, the jury were to return a verdict for the plaintiff; but if it was an article fit for use in itself, made at the same time with the making of the rail, they should return a verdict for the defendant. The defendant excepted to that part of the charge which stated that the only question for the jury was whether the article

was wrought or unwrought metal; and also to that part which stated that if the article was a mere excess of material in making steel rails, it was not wrought metal in the sense of the statute.

We are of opinion that the court erred in its disposition of the case, and its charge to the jury. The motion to direct a verdict for the defendant, on the ground that the article was not metal unwrought, not specially enumerated or provided for in the statute, but was steel, specially enumerated and provided for in the same statute, in a clause other than that regarding metals unwrought, ought to have been granted. The article fell within the definition of steel given in the statute. The testimony showed that it was metal produced from iron or its ores, by the Bessemer process, within the definition of the articles which the statute stated should "be classed and denominated as steel." It was none the less steel because it was an excess of material, as the result of making steel rails, cut off from the steel rail, and not suitable for use in itself, without being remelted or reheated. The charge of the court on this subject was subject to the exception and objection made to it.

It results from these views that

The judgment below must be reversed, and the case be remanded to the Circuit Court with a direction to grant a new trial.

BROWN *v.* SUTTON.

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

No. 97. Argued and submitted November 26, 1888. — Decided January 28, 1889.

On the whole proof in this case, some of which is referred to in the opinion of the court: *Held*,

(1) That the appellant's intestate intended that the property in dispute should belong to the appellee, that he bought it for her, and that he promised her orally that he would make over the title to her

upon the consideration that she should take care of him during the remainder of his life, as she had done in the past;

(2) That there had been sufficient part performance of this parol contract to take it out of the operation of the Statute of Frauds, in a court of equity, and to render it capable of being enforced by a decree for specific performance.

(3) That the appellee had been guilty of no laches by her delay in commencing this suit.

BILL IN EQUITY, to compel a specific performance of a parol contract to convey a tract of real estate in Wisconsin. Decree in complainant's favor, from which respondents appealed. The case is stated in the opinion.

Mr. Erastus F. Brown (with whom was *Mr. Edgar K. Brown* on the brief) for appellants.

Mr. Edwin Hurlbut and *Mr. Winfield Smith*, for appellee, submitted on their brief.

MR. JUSTICE MILLER delivered the opinion of the court.

The bill was brought by Sarah S. Sutton, the appellee, against Erastus F. Brown and Francis A. Kenyon, executors of the last will of John S. Kenyon, and was in the nature of a suit for specific performance of a contract and for the conveyance of the title to a certain house and grounds in the city of Oconomowoc, in Wisconsin. There was no written agreement on the subject, but the suit is based upon the idea of a verbal promise or agreement upon the part of John S. Kenyon in his lifetime that he would convey the property to Mrs. Sutton, the appellee, and that such part performance had been had in its execution as to bring the case within the exception made by that doctrine in the requirement of the Statute of Frauds that the sale of lands must be in writing.

The executors and trustees under the will filed their answer, denying the existence of any verbal promise at all, and also denying that it was so far performed as to justify a decree. The court, however, rendered a decree in favor of Mrs. Sutton, that she was entitled to the property, and that the defendants

in the action should convey to her. It is from this decree that the present appeal is taken.

A history of the relations of the testator, John S. Kenyon, to Mrs. Sutton and her husband, is essential to a correct decision of the case. The following facts regarding them are in the main undisputed by either party.

In 1868 Mr. Kenyon lived with his wife in Harlem, in the city of New York; was a man of some wealth, an officer of a bank in Harlem, and at his death left an estate of nearly $200,000. He was without children or close kin in whom he was much interested, as was shown by his will, in which, after having made some slight provisions for some of his sisters, he devised the great bulk of his fortune to fifteen charitable and religious societies or associations. The father of Mrs. Sutton lived in New York and Brooklyn, and she had been intimate with Mr. Kenyon since her birth, being at the time of the trial about forty-four years old. Prior to 1868 she married Charles T. Sutton, and ever since lived with him as his wife, but had no children. The wife of Mr. Kenyon was for a very considerable period, certainly from 1868 to 1872, when she died, an invalid, requiring much care and attention. Mrs. Sutton spent a large part of her time, both before and after the date first mentioned, with her, assisting in the care of her during sickness. In 1868 Mr. Kenyon and his wife visited Oconomowoc, at the house of George F. Westover, whose wife was a sister of Mrs. Sutton. Thereafter the Kenyons removed to Tremont, near New York City, where Mrs. Kenyon died in February, 1872. During a large part of this time, and at her death, Mrs. Sutton was with her. Shortly after her decease, Mr. Kenyon and Mr. and Mrs. Sutton went to Oconomowoc together, lived in the family of Westover, paying therefor a consideration, and so continued until April, 1874, except a few weeks, when Mr. Kenyon was absent. Westover then removed to Chicago, and on the 28th of that month Kenyon bought a cottage in the village of Oconomowoc, and lived in it with the Suttons, who kept the house. On July 1, 1874, Kenyon made a deed of this cottage to Mrs. Sutton, declaring it to be in accordance with the request of his wife during her lifetime, as a tribute

from her to Mrs. Sutton. For seven years these three continued living together in that cottage, Kenyon making certain contributions for board, or as his quota towards the expenses of housekeeping. During these years he made frequent trips to New York on business connected with the bank of which he was a shareholder and probably a director, being absent from several weeks to three months at a time. While in New York in 1879 upon one of these visits, he made a will, in which, after disposing of several small items of personal property, giving to Mrs. Sutton all the personal property in her house at Oconomowoc, except his jewels, and the interest during her life on one-third of $10,000, and to his sisters some slight bequests of jewelry and furniture, the body of his estate was bequeathed to his executors as trustees for the associations referred to. In November, 1879, the Suttons closed the cottage and spent the winter in New York, in a house belonging to Mr. Kenyon and furnished by him, the family consisting of the same three persons and one servant. Thereafter they seem to have vibrated for a year or two between the house in New York and the cottage in Oconomowoc, always living together as one family. In September, 1880, Mr. Kenyon bought, for the consideration of $2300, the premises in dispute in this action, known as the "Oaks," situated in Oconomowoc, and in 1881 began the erection thereon of a large dwelling-house. Late in the fall of 1881 he went with the Suttons again to New York, and they all resided together as usual in his house, until he was stricken with apoplexy, and died in January following.

The bill alleges that the property called the Oaks was bought by Mr. Kenyon for Mrs. Sutton; that he had promised to buy it for her as a consideration for the services rendered to him, and to be thereafter performed, in keeping house for him and giving him her care and society, and that he also agreed to build thereon a new house, of sufficient dimensions to accommodate others besides these three who lived together as a family, so that if the necessity should arise, in event of Mr. Kenyon's death, she might be enabled to make a living by keeping boarders. It is claimed that the land was bought and

the house built in accordance with this promise, or at least that it was in progress of erection at the time of his death. A definite promise on his part to do this is asserted, the consideration for which was sufficient in what she had already done and had agreed thereafter to do for him. Mr. and Mrs. Sutton were placed in possession of the premises as soon as the purchase was made, and they were living there at the time the present suit was brought.

The controversy in the present case is really whether any such promise or agreement was made, because if it was there can be little doubt that the delivery of possession to the Suttons, and the construction of this house under their direction and control, is a sufficient part performance to take the case out of the Statute of Frauds.

As Mrs. Sutton was not competent as a witness to establish a promise on the part of Mr. Kenyon to convey the property to her, under § 858 of the Revised Statutes, and as Mr. Sutton, being her husband, was also incompetent, it can be readily seen, in the absence of any written agreement upon the subject or any correspondence between the parties, which could not reasonably be expected to exist as they were nearly always living together, that it is almost impossible to prove a direct verbal promise from Mr. Kenyon to her in regard to that matter. Any such promise must be largely inferred from the situation and circumstances of the parties, and must depend almost wholly on verbal statements made by Mr. Kenyon to others.

The depositions in the case contain full and ample evidence of the declarations of Mr. Kenyon on this subject. They are in substance, that he had bought the property for Mrs. Sutton; that he had given it to her, had placed her in possession of the ground, and was building a house upon it for her at the time of his death; and that he treated her and her husband as, and frequently called them, his "children," or "the children."

There can be no question that Mr. Kenyon bought the property in dispute with the intention, clear and well defined in his own mind, that he was buying it for Mrs. Sutton; and when he came to build the house upon it there can be as little

doubt that he erected it for her with the intention that it should be her house, expecting to live with the Suttons as long as he lived, and that it would go to her in the event of his dying before she did. It may be said, and it is true, that this unexecuted purpose of his is not of itself sufficient to constitute a contract to convey to her the house, nor would it alone be a sufficient foundation for a decree; but it leaves the case in such a position that no very strong evidence is required that such a contract did exist, as it would be entirely consistent with all the other uncontradicted testimony in regard to what he had said and done and with the possession of the property by her. There is also quite a sufficient consideration for such a promise in the services, care and attention rendered by her to an old man in his declining years, in connection with the fact that at the time he bought this property he was very sure of receiving these attentions as long as he lived. The evidence shows that this expectation on his part was fully realized. Let us examine briefly the positive evidence of a promise on this subject.

We have the testimony of Mr. Westover, whose relation to Mr. Kenyon and the family has already been noted, in whose house they lived for two summers prior to his removal to Chicago, and who seems to have been on intimate terms with Mr. Kenyon, that he had many conversations with him about his private matters, although he was not a man who talked generally about his affairs. He states that Mr. Kenyon was not well, and never was well, since he first went to Oconomowoc; that he was a pretty old man, at least old enough to be Mrs. Sutton's father, and probably older than her own father was; that he needed a great deal of nursing, and wanted more care and attention when near her in the little details of life than any man he ever saw; that he seemed to dread to be alone, and in fact she went everywhere with him, and devoted the most of her life during those years to him as a daughter to a father. He says: "She filled the place that an exceedingly attentive daughter would to a weak, sickly, old father. I never saw a case in a family of more marked service in that line than was that case. No person but Mrs.

Sutton was relied upon to look after his personal wants at all."

The witness then went on to state a conversation that he had with Mr. Kenyon about his affairs, in which he said of his relatives: "All they want of me is my money; some day they will be terribly disappointed;" and proceeded to say that no one had filled the place of a relative to him as had Mrs. Sutton; that he was under great obligations to her, and how to discharge it, to repay her, or attempt to repay her, was something that he was considering, and that he was going to recompense her for her services to him in some way. After the purchase of the property in dispute here, Westover asked Mr. Kenyon about it, and gives his language as follows: "He told me then that that was the final result of his determination as to Mrs. Sutton; that he had bought the place for her; that she wanted it, and he had made up his mind that it was the very best that could be done, *and he had promised her that* he would put a house on the place, such as she wanted, *and the place should be hers.* He said that it was not perhaps as much as Mrs. Sutton was really entitled to, but he thought that after all it would be better for her than if she should be provided for in some other way that would be even larger. He said that he had made her home his home, as I knew; and it was understood that he was to continue thereafter making his home with Sortie, that is, Mrs. Sutton."

Mr. Kenyon then went on to say, as the witness states, that by having a fine building on the place she would be able, if anything should happen to him, to take care of herself by keeping boarders; and continued:

"The house will be such as Mrs. Sutton wants. I have agreed that Sortie shall have the house just exactly as she wants it; just to suit her. He said he was to continue to make his home with Mr. and Mrs. Sutton, and that in view of the past and her services to him, and what had been done, and in view of the position which she was occupying as to him, and the services she had performed and was still to perform, *he had promised her that place*, and he had bought it for her because it pleased her, and he had promised to build such a house thereon as she should want."

If this statement be true, here is at once the promise and the consideration for it, amounting to an agreement stated in Mr. Kenyon's own language, with all the clearness of detail necessary to a contract. There was no question about the property to be conveyed, the promise to build the house, the parties to the agreement, or the consideration for the promise.

The witness then details a conversation which he had in 1881, in which Mr. Kenyon reminded him of what he had said to him before on the same subject, and said that after much thought he had concluded that was the best arrangement, and she had agreed to it; that it was arranged between them that he should continue to live with her in the future; that he was under obligations to her for what she had done for him individually, and that he had made arrangements with her and she would continue to do for him as she had done, *and he had promised to buy that place for her and fix it up and deed it to her.* The witness then testified as to the board paid by Mr. Kenyon, and said: "I understood from him, as he said, that the services of Mrs. Sutton which she had rendered him, and which he was under obligations to requite, together with those of the same kind which she had agreed to perform in the future, were the basis *of his promise to convey her the premises in dispute*, and were outside of anything which he had furnished in cash expense of living."

Julia L. White, who was well acquainted with Mr. Kenyon, details various conversations with him, in one of which he said that he wanted to give the property which is now in controversy to Mrs. Sutton, for she had taken care of him and had promised and was to continue to take care of him as long as he lived, and that *he then said he had promised to give* it to her. She testifies that Mr. Kenyon stated to her that he desired to purchase this property for Mrs. Sutton on account of the services and care she had already given to him, *and had promised to give him;* and that he said on Wednesday before his death that he had bought the place, that it was for Mrs. Sutton, to make her home there for the care she had given him and for the care she promised to take of him until his death.

Mr. Small, who lives adjoining the property in dispute, details a long conversation he had with Mr. Kenyon in regard to the building of the house, and states that he said: "I am not building it for myself; I am building it for Mrs. Sutton." Mr. Kenyon then went on to say that he did not want to be bothered with the building of it; he had left it all to Mr. and Mrs. Sutton; he had nothing to do with the building except to furnish the money; that the rooms had all been arranged by her, and that he intended she should have it as she wanted it. He states that he asked Mr. Kenyon, in whom the title was, whether it was in Mrs. Sutton at that time, and he replied: "No, when the the property was bought I took the deed, but I intend to have the property all fixed in Mrs. Sutton." "I said, 'Haven't you done anything about it yet?' He said, 'No.' Said I, 'You may have it in your mind to do something you want to do, but if you do not do it,' if you should be taken away, it won't be done. Under our law, unless there is a writing made, or the parties put in possession under the agreement, it won't amount to anything.' He said, 'I can't make anything out here for the reason my papers are in New York. I desire to make some alterations in my affairs. Then I shall fix it up, but I shall put them in possession. I have put them in possession. Mrs. Sutton has had possession ever since I went to New York in the summer. I turned it over to them then, and they are now in possession. Mrs. Sutton has the keys to the little house and all the property, and I intend they shall be in possession, and are in possession just as perfect as I can make it. If I had my papers here I should have them altered now. I have my attorney down there. I don't want to do anything until I get down there.' He said, 'I propose to give it to them. Mrs. Sutton has been very kind to me in sickness and disease in my family; took care of my wife until she died. I have a good home myself with them. I propose now to repay them in this way.'" The witness also testifies as to other conversations, in which Mr. Kenyon declared that the keys and the possession were in the Suttons; that the property was theirs to all intent and purposes; that the title was taken in his name when he bought the prop-

erty, but that he intended Mrs. Sutton should have it, and that he frequently spoke of them as "the children."

Mrs. Williams, an insurance agent, while examining the house at the request of Mrs. Sutton, with reference to a policy, met Mr. Kenyon on the premises. He showed her over the house and directed her attention to certain alterations that the Suttons had made in the plan, and said: "It is as they want it; it is the children's; it don't make any difference to me how they ffx it." And again she states that he said in regard to the gables that he would have made every one different, but the children (a phrase which he often used with reference to Mr. and Mrs. Sutton) wanted it so, and it did not make any difference to him; "*it was theirs.*"

To William K. Washburn, who was working about the grounds, Mr. Kenyon said that he was fixing it up for Mr. and Mrs. Sutton, that it was their place, and they were in possession.

In regard to some of the details, Mr. Eastman, another witness, testified that Mr. Kenyon said he had nothing to do with the building of it; that Mr. Sutton was building it for himself.

Mr. Anderson, a resident of Oconomowoc, testifies that he asked Mr. Kenyon, in a conversation that they had about the place now in dispute, if he felt anything like a Granger; and that his reply was that he could not say he did, as he did not buy the place for himself, but had bought it for Mrs. Sutton, who undoubtedly would be a permanent resident, although he should make it his home with them while there, as he had for several years made their place his home. In another conversation, Mr. Kenyon said to him that the building was much larger than they intended in the start, but he was building it entirely for Mrs. Sutton, and it had been enlarged at her suggestion; that Mr. Sutton had the entire control, and he had authorized him to build and finish it and make the improvements exactly as Mrs. Sutton wished. On his cross-examination he testified that Mr. Kenyon said he had bought it, but not for himself; that he had bought it for Mrs. Sutton, and they would make it a permanent residence, and he should make it his home with them whenever he was there.

Celestia Edwards testifies to a conversation with Mr. Kenyon about the property, in which he remarked that they would have a very beautiful place and home there, to which he replied that he liked it very well, but it did not make any difference to him; "it was all theirs, it was the children's; they were fixing it up just to suit themselves."

Clarence I. Peck also testifies to a conversation about this place, in which Mr. Kenyon said that he intended to finish it up in good style for "the children," as he called them; meaning Mr. and Mrs. Sutton; and also that he said on another occasion: "The place belongs to Charlie and Sortie, anyhow, and I thought I would give the job of superintending it to Charlie."

Some comment is made that the most direct testimony on the subject of a promise comes from the sister and brother-in-law of the plaintiff, but there is nothing to discredit their evidence, no impeachment of their character is attempted, nor is it shown that they are in any way dependent upon her. No reason is given why they should state anything false, and their testimony is wholly uncontradicted. It is also consistent with all the circumstances of the case.

It is further made a subject of comment that Mrs. Sutton did not make claim to the title to this property, nor bring this suit for two or three years after the death of Mr. Kenyon; but it is easy to suppose that she really believed that for want of a written promise or agreement she could not enforce her right to the property. While this principle of the necessity for a written agreement in regard to the title to real property is almost universally understood among all classes of people, however unlearned in the law, it is not very well known that there is an exception to it in the case of a promise, not in writing, but so far performed as to take it out of the Statute of Frauds.

On the whole, we think that the evidence justifies the inference that Mr. Kenyon, having a clear intention that this property should belong to Mrs. Sutton, bought it for her, and also promised her that he would make over the title to her upon consideration that she should take care of him during the remainder of his life as she had done in the past.

The decree of the Circuit Court is therefore *Affirmed.*

BARTON v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 1184. Submitted January 2, 1889. — Decided January 21, 1889.

The act of March 3, 1883, c. 97, 22 Stat. 473, relating to longevity pay, deals with credit for length of service and the additional pay which arises therefrom, and not with the matter of regular salary; and it has no reference to benefits derived from promotions to different grades, but is confined to the lowest grade having graduated pay.

THE Court of Claims dismissed the claimant's petition whereupon he took this appeal. The case is stated in the opinion.

Mr. George S. Boutwell for appellant.

Mr. Attorney General, *Mr. Assistant Attorney General Howard*, and *Mr. F. P. Dewees* for appellees.

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

This is an appeal from a judgment of the Court of Claims finding in favor of the United States, and dismissing the petition of the claimant, Barton.

The findings of fact and conclusion of law were as follows:

"I. The claimant was appointed acting assistant paymaster in the volunteer navy of the United States, January 30, 1864; assistant paymaster, March 2, 1867; passed assistant paymaster, February 10, 1870; and paymaster in the regular navy, May 29, 1882. He has been continuously in the navy from his first appointment to the present time.

"II. He has received the salary and graduated or longevity pay allowed by the act of July 17, 1861, 12 Stat. 258, and the act of March 2, 1867, c. 197, § 3, 14 Stat. 516, now Rev. Stat. 1412, and the benefit of all laws in force during the time he has held the offices mentioned in the preceding finding, except that he has received no additional benefits under the

acts of August 5, 1882, c. 391, 22 Stat. 287, and March 3, 1883, c. 97, 22 Stat. 473.

"III. If he be entitled under said last-mentioned acts of 1882 and 1883 to allowance for the sums which he would have received had he entered the regular navy when he entered the volunteer navy, and had he been promoted from time to time, under the rule of promotion provided by the Revised Statutes, §§ 1380, 1458, 1496, and the previous statutes embodied therein, the defendant would be indebted to him to an amount which, for reasons which appear in the opinion, we do not compute.

"*Conclusion of Law.*

"Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is not entitled to recover, and his petition must be dismissed."

The acts of Congress of 1882 and 1883 read thus:

"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: *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." Act of August 5, 1882, c. 391, 22 Stat. 287.

"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: 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.*" Act of March 3, 1883, c. 97, 22 Stat. 473.

Under the provisions of the act of July 17, 1861, entitled "An act to provide for the appointment of assistant paymasters in the navy," 12 Stat. 258, assistant paymasters were entitled to receive graduated pay. And under the provisions of § 3 of the act of March 2, 1867, 14 Stat. 516, Rev. Stat. § 1412, Barton received a credit as assistant paymaster for three years and thirty-one days' service in the volunteer navy as acting assistant paymaster, and his second five years' service in the regular navy commenced after the expiration of the five years preceding, including therein the volunteer service; and he has consequently received all the benefits, under the longevity pay acts, of his whole service, "as if all such service had been continuous and in the regular navy."

But he contends that if he had been appointed in the regular navy January 30, 1864, he would have been promoted from time to time earlier than he was, and that he is entitled to pay in the several grades of service as if he had received such earlier promotion. And by his petition he claims that the difference between what he has received and what he would have received if he had been commissioned as assistant paymaster January 30, 1864, when he entered the volunteer navy, amounts to $7672.40, made up of the differences of pay in the several grades if he had attained them as early as he believes he would if his service had commenced in the regular navy.

The argument is, that under the act of 1883, which amended and superseded that of 1882, officers so situated as Barton, while denied rank and commissions under the statute, have the right to the pay of the several grades they might have reached if their appointments in the regular navy are treated as having been made at the date of their entry into the volunteer service.

We cannot concur in this interpretation of the act, which, in our opinion, deals with credit for length of service and the additional pay which arises therefrom, and not with the matter of regular salary, and has no reference to benefits derived from promotion to different grades, but is confined to the lowest grade having graduated pay.

It was upon this view that it was held in *United States* v.

Rockwell, 120 U. S. 60, that the effect of the act was to lengthen the time of service in the lowest grade, having graduated pay, by crediting all previous services for the purpose only of increasing longevity pay in that grade.

It follows that the Court of Claims was right in its conclusion in the premises, and we need not enter upon the consideration of what the learned Chief Justice of that court correctly terms "the complicated problem of promotion which he [Barton] might have had, involving, as it does, the promotion of many other officers above and below him in rank, who would in like manner be affected by the provisions of the statute, and whose promotion, dependent upon previous service not found in this case, would materially affect his own."

The judgment appealed from is

Affirmed.

CARR *v.* HAMILTON.

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

No. 105. Argued December 4, 1888. — Decided January 28, 1889.

When a life insurance company becomes insolvent and goes into liquidation, the amount due on an endowment policy, payable in any event at a fixed time, and sooner if the party dies before that time, should, in settling the company's affairs, be set off against the amount due on a mortgage debt from the holder of the policy to the company, by way of compensation or reconvention.

When a life insurance company becomes insolvent before the time fixed for the termination of an endowment policy, payable to the holder in case of survival until that time, or to his children in case of his death before it, the contingent interest of each party is fixed by the insolvency, to be determined by the tables ordinarily used for that purpose.

Where a holder of a life policy borrows money of his insurer, it will be presumed *prima facie*, that he does so on the faith of the insurance and in expectation of possibly meeting his own obligation to the company by that of the company to him.

Newcomb v. *Almy*, 96 N. Y. 308, disapproved.

Opinion of the Court.

BILL IN EQUITY to foreclose a mortgage. The case is stated in the opinion.

Mr. Afred Goldthwaite for appellant.

Mr. N. C. Blanchard for appellee. *Mr. R. J. Looney* and *Mr. T. Alexander* were with him on the brief.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case arises out of a policy of life insurance, dated July 14, 1869, granted by The Life Association of America, a corporation of the State of Missouri, to William E. Hamilton, the appellee, of Shreveport, Louisiana, upon the life of said Hamilton; and also out of a mortgage given by said Hamilton to the said association, for a loan of money; and the main question is, whether the amount due on the policy ought to be set off by way of compensation or reconvention against the amount due on the mortgage.

The policy was not an ordinary one, payable only at the termination of the life insured, but was what is sometimes called an endowment policy, payable at a certain time at all events, or sooner if the party should die sooner; and the premiums were all to be paid within a certain limited time, to wit, ten years. By the terms of the policy, in consideration of $877.80, paid by Hamilton, trustee, and of the annual payment of a like amount on the 14th of July, every year, for nine years thereafter, the association assured his life in the amount of $10,000, payable to him or his assigns, on the 14th of July, 1884; or, if he should die previously, payable to his children, naming them.

By the rules of the association, the insured was only required to pay two thirds of the annual premium in cash, and had the option of a credit or loan for the other third, paying the interest thereon at eight per cent per annum. Hamilton availed himself of this privilege of credit, and made all the cash payments required for the whole ten years. His premium loan amounted in 1879, when the association failed, to $2372.90, and the equitable value of his policy, at that time, was

$7779.95; leaving in his favor the sum of $5407.05. This is the amount which he contends should be allowed to him by way of compensation or reconvention against his mortgage debt due to the association.

The mortgage debt referred to arose as follows: In March, 1870, Hamilton borrowed of the association the sum of $3850, — being, as he contends, entitled to such loan as a policy holder, and which he would not have made but for his being such policy holder. To secure the payment of this loan he gave his promissory note for $3850, dated 11th of March, 1870, and payable twelve months after date with eight per cent interest after maturity; and to secure the note he gave a mortgage of same date on certain lots and buildings in Shreveport, Louisiana. The mortgage contained the usual *pact de non alienando*, and was recorded 11th March, 1870, and reinscribed 28th May, 1881.

By an amended charter of the association, approved October 2d, 1869, it was authorized by its directors to form separate departments and branches in the different States, with separate organizations of directors and officers, but having a general connection with the parent company; and it was provided that each department should have the management and investment of the funds received therein. Under this charter a separate department was made of Louisiana and Texas, and Shreveport was one of the districts of this department. The loan made by Hamilton, who resided in Shreveport, was made, as he testifies, from the funds raised from the business of the association in that district.

The Insurance Association became insolvent in 1879, and on the 13th of October, in that year, proceedings were instituted against it by the Superintendent of the Insurance Department of Missouri, under the laws of that State, for the liquidation of its affairs, and such proceedings were had that on the 10th day of November, 1879, a decree was made by the Circuit Court of the city of St. Louis, (having jurisdiction of the matter,) declaring that the association was insolvent and that its condition was such as to render its further proceedings hazardous to the public and to its policy holders, and that the

association be dissolved, and its officers and agents enjoined from exercising any control over its property or affairs, and from the further continuance of its business of life insurance. The decree further proceeded to vest the title to all the property and assets of the association in the Superintendent of the Insurance Department of the State, to hold and dispose of the same for the use and benefit of the creditors and policy holders of the institution; and its officers were directed to convey, assign and transfer all its property and assets to the said superintendent. In short, the association was put into a condition of absolute bankruptcy and liquidation.

In June, 1883, the Insurance Superintendent of Missouri for the time being, finding Hamilton's note and mortgage amongst the assets of the Life Association, filed a petition for executory process, in the Circuit Court of the United States for the Western District of Louisiana, for the seizure and sale of the property covered by the defendant's mortgage before referred to; and afterwards filed a bill of foreclosure against Hamilton, the appellee. The latter, besides an answer, filed a cross-bill, setting up the amount due on the policy of insurance by way of compensation and reconvention. It is conceded that the interest was paid on the mortgage debt up to March, 1879; and there is no question that the equitable value of the policy in November, 1879, was, as before stated, $5407.05 after deducting all deferred premiums. This was more than enough, by over $1300, to pay and satisfy the mortgage. The question is whether the appellee is entitled to such compensation or reconvention.

Natural justice and equity would seem to dictate that the demands of parties mutually indebted should be set off against each other, and that the balance only should be considered as due. But the common law, for simplicity of procedure, determined otherwise, and held that each claim must be prosecuted separately. "The natural sense of mankind," says Lord Mansfield, "was first shocked at this in the case of bankrupts; and it was provided for by 4 Ann. c. 17, § 11, and 5 Geo. II. c. 30, § 28." *Green* v. *Farmer*, 4 Burrow, 2214, 2220, cited in 2 Story's Eq. Jur. § 1433; *S. C.* 1 W. Bl. 651. In pursuance

of these old statutes, and of the dictates of equity, the principle of set-off between mutual debts and credits has for nearly two centuries past been adopted in the English bankrupt laws, and has always prevailed in our own whenever we have had such a law in force on our statute book; and it mattered not whether the debt was due at the time of bankruptcy or not. See Babington on Set-off, 118; *Ex parte Prescott*, 1 Atk. 230, 231; Bacon's Abridg. tit. Bankrupt (K); Acts of Congress 1800, c. 19, § 42, 2 Stat. 33; 1841, c. 9, § 5, 5 Stat. 445; 1867, c. 176, § 20, 14 Stat. 526; Bump on Bankruptcy, 10th ed. 91. It is difficult to see why this principle of justice should not apply to persons holding policies of life insurance in a company which becomes bankrupt and goes into liquidation. By that act the company becomes *civiliter mortuus*, its business is brought to an absolute end, and the policy holders become creditors to an amount equal to the equitable value of their respective policies, and entitled to participate *pro rata* in its assets. If any one is indebted to the company, especially if his debt was contracted with reference to, and because of, his holding a policy, there would seem to be strong reason for allowing him a set-off, and no good reason to the contrary.

One objection raised against the allowance of set-off, or compensation, in the present case, is that when the Life Association became insolvent, and when the present suit was commenced, the insurance had not become absolute in Hamilton, and did not become so until July 14th, 1884, — previous to which time his children had a contingent interest therein, they being the beneficiaries in case he should die before that date. But this reason cannot be sound; for a settlement of the company's affairs cannot be postponed to await the determination of every contingency on which its policy engagements are suspended. This would postpone a settlement for at least half a century. Every person's interest in life insurance is capable of instant and present valuation, almost as certain and determinate as the discount of a note or bill payable in the future. Tables of mortality and of all values dependent thereon are adopted by every company, and furnish an assured basis of computation for this purpose. The table used by the

Life Association of America is set out in the record, and other tables based upon it are used to facilitate the calculations desired.

Another reason urged against allowing a set-off in this case is, that the defendant, Hamilton, holds the policy as trustee, and cannot set off his claim as trustee against a debt due in his own right.

This argument has no better foundation than the other. Hamilton was only trustee so far as his children were interested; he could not be trustee for himself; and his interest was separate from theirs. The value of each was easy of calculation by any competent actuary. The policy had less than five years to run, and the interest of his children was contingent upon his dying within that time, he being then fifty-one years of age. Calculated according to the American table of mortality annexed to the charter of the association and contained in the record, at five per cent compound interest, (the usual rate assumed,) the value of the children's interest was less than seven per cent of the total insurance, or less than $700; whilst the value of Hamilton's interest was more than seventy per cent of the insurance, or more than $7000.[1] Or, first deducting from the whole present value of the policy (which at five per cent per annum for five years deferred is $7835.26) the amount due for deferred premiums ($2372.90), the value of the children's interest was less than $500, and that of Hamilton's nearly $5000, a sum sufficient to cancel all

[1] The process is a simple one, as shown by the elementary books on the subject. The policy at the time the association failed (Nov. 1879) had nearly five years to run; suppose it five. Present value of $10,000, five years deferred, at 5 p. c. compound interest is $7835.26. This sum less the value of his children's expectancy, was the value of Hamilton's interest. He was then 51 years old. The mortality table shows that out of 68,842 persons living at that age, 1001 die the first year; 1044, the second year; 1091, the third; 1143, the fourth; and 1199, the fifth; showing that the chances of the children's receiving the insurance the first year were only 1001 in 68,842, or $\frac{1001}{68842}$; the second year, 1044, etc.; and the present value of the expectancy for each year would be the sum expected divided by 1.05, 1.05^2, 1.05^3, etc. The present value of the children's expectancy for each year, therefore, was as follows, to wit:

his indebtedness to the company and leave a considerable balance over.

The proceedings which took place in the Circuit Court of St. Louis in the course of liquidating the affairs of the association may be referred to in this connection. In the progress of the case an actuary was appointed by the court to value all the policies of the company then in force. Hamilton presented a petition to the court, claiming that the net value which his policy had on November 10, 1879, (the day the association was declared bankrupt and dissolved,) should be an offset to his note of $3850, and the interest thereon. The actuary made a report exhibiting the particulars relating to the policy, and concluded as follows: "The value of the policy on November 10, 1879, the date of the dissolution of the company by order of the court, was, of the whole $10,000, $7779.95; from which deducting outstanding note of $2372.90 left $5407.05, as the net value, and which amount was allowed by the Commissioner and approved by the Circuit Court."

1st year, $\frac{1001}{68,842} \times \frac{10,000}{1.05} =$	$138.48
2nd year, $\frac{1044}{68,842} \times \frac{10,000}{1.05^2} =$	137.53
3rd year, $\frac{1091}{68,842} \times \frac{10,000}{1.05^3} =$	136.90
4th year, $\frac{1143}{68,842} \times \frac{10,000}{1.05^4} =$	136.60
5th year, $\frac{1199}{68,842} \times \frac{10,000}{1.05^5} =$	136.46
Total for the five years =	$685.97
This deducted from,	7,835.26
Leaves value of Hamilton's interest,	$7,149.29
Or,	
If the entire present value,	$7,835.26
Is reduced by the amount of deferred premiums,	2,372.90
The net equitable value is,	$5,462.36
If this be divided in the same proportion as before, the value of the children's interest was,	$478.22
And that of Hamilton's,	4,984.14

In November, 1879, his interest would be a little more, and that of the children a little less, than in July. By the subsidiary tables in use by all life insurance companies the above calculation would be greatly shortened and simplified.

Opinion of the Court.

It does not appear whether the Circuit Court of St. Louis allowed the set-off or not. But the Circuit Court of the United States dismissed the original bill in the present case, and granted a perpetual injunction against the sale of the defendant's property under his mortgage, but disallowed his demand of reconvention. The form of the decree was as follows: After stating the titles of the bill and cross-bill, the decree was in the words following, to wit:

"In the above cases, after trial and due consideration by the court, it is ordered and adjudged by the court that John F. Williams, superintendent, take nothing on his bill of complaint, and said bill is hereby dismissed.

"And it is further adjudged and ordered that the bill of complaint of W. E. Hamilton be sustained and the injunction of said Hamilton be, and is hereby, made perpetual.

"And it is further ordered that the demand in reconvention of the said Hamilton in his bill of complaint be, and is hereby, rejected without prejudice and of nonsuit." Also, decree for costs.

We think that this decree attained the substantial justice of the case. If not absolutely correct it erred against the defendant, who has not appealed. The counsel for the appellant, however, strenuously contends that compensation could not properly be allowed in this case. In support of his views he refers to the case of *Newcomb* v. *Almy*, 96 N. Y. 308, decided by the Court of Appeals of New York. That case was almost parallel with the present one, and the claim of set-off was disallowed. The suit was brought by the receiver of an insolvent life insurance company against the holder of an endowment policy issued by the company, to recover the amount of a promissory note. The defendant, as in this case, sought to set off the value of his policy against the note. The policy was not yet due, and in case the defendant died before it became due, the amount was payable to his wife. The court assumed that the interests of the assured and his wife were so involved together that they could not be separated; and that it did not yet appear who would be entitled to the insurance, — not adverting to the fact that the interests of all the parties

became fixed by the insolvency of the company, and must be computed as expectancies reduced to present values. It is true, the court does, in the next sentence, concede that the policy had a reserve value, — but asks, "To whom was that value payable?" The plain answer was at hand, that the reserve value of each person's interest was payable to him or her. We cannot but think that if the true character of the interests in question had been brought to the attention of that learned court, it would have come to a different conclusion from that which was reached.

The counsel for the appellant further contends that, by the law of Louisiana, (which must undoubtedly govern the case,) compensation is not allowed against an insolvency in favor of a party whose credit was not due when the insolvency occurred. The Civil Code of Louisiana on the subject of set-off is identical with the Code Napoléon. The article apropos of the point now under consideration is the 1291st of the Code Napoléon, and the 2209th of the Civil Code of Louisiana, and reads as follows: "Compensation takes place only between two debts, having equally for their object a sum of money, or a certain quantity of consumable things of one and the same kind, and which are *equally liquidated and demandable* [exigibles, *i.e.* due]." Now, although upon a bankruptcy declared, all claims against the bankrupt become instantly due (subject, of course, if not matured, to a rebate of interest), and are equally entitled to dividends of the bankrupt assets, yet, in order that a claim may be the cause of compensation, the commentators hold that it must be due [exigible] at the time when the bankruptcy is declared. Touillier, vol. 7, art. 381; Demolombe, vol. 28, art. 540. There have also been judicial decisions to the same effect, though not uniformly so. See Merlin Rep. vol. 3, p. 262, tit. Compensation.

But if there are technical reasons in the law of Louisiana for rejecting the defence when set up by way of compensation, it was nevertheless allowed by the Supreme Court of that State, by way of reconvention, in a case exactly like the present. *Life Association of America* v. *Levy*, 33 La. Ann. 1203. Levy was the holder of an endowment policy in the same

company as Hamilton, and in the same district (Shreveport). As in this case the policy had not matured. But the court held that it might be set up by way of reconvention, and that the amount to which the defendant was entitled could be recovered by him and deducted from the amount of his indebtedness to the company. This decision was based on a statute of Louisiana, enacted in 1839, as an amendment to article 375 of the Code of Practice. Article 375 was originally in the following form, to wit: "In order to entitle the defendant to institute a demand in reconvention, it is requisite that such demand, though different from the main action, be, nevertheless, necessarily connected with, and incidental to, the same; as, for instance, the demand instituted by the possessor in good faith against him who sues in order to evict him, or for the purpose of obtaining the payment of the improvements made on the premises." The amendment adopted in the act of 1839, and now forming part of the article, provides, "that when the plaintiff resides out of the State, or in the State, but in a different parish from the defendant, said defendant may institute a demand in reconvention against him for any cause, although such demand be not necessarily connected with, or incidental to, the main cause of action." The court in *Life Association* v. *Levy*, say: "The right of the defendant to set up and urge his demand in reconvention against the plaintiff, a resident of the State of Missouri, is, under our law, and the jurisdiction of our State, too plain to require argument;" and reference is made to *Spinney* v. *Hide*, 16 La. Ann. 250; *Spears' Liquidator* v. *Spears*, 27 La. Ann. 642. The court add: "The objections urged by plaintiff to the allowance of the reconventional demand, on the ground that it would be a compensation of plaintiff's demand, and that this cannot take place, because plaintiff is insolvent, and defendant cannot compensate his own debt, but is entitled only to such dividend as may be declared after a final settlement, and because the policy holders of the association are partners and can only sue for a settlement of the partnership affairs, are fully met, discussed, and overruled by the lower judge, and we think properly." The court, in its judgment,

allowed the cash value of the policy, as reported by the actuary, with interest thereon from the time of the adjudication in bankruptcy, November 10, 1879. In our opinion this was a just judgment, and the present case being precisely like, is governed by it.

It is true, the court below disallowed the claim in reconvention; but it decreed a perpetual injunction against the enforcement of the defendant's mortgage, and thereby did substantial justice. The result which the court reached was correct, though it may have been led thereto on an insufficient ground. We are free to say, however, that if the court below went on the ground that the defendant was entitled to the benefit of compensation, we should be disposed to concur with it, notwithstanding the doctrine laid down by the commentators. We are inclined to the view that where a holder of a life policy borrows money of his insurer, it will be presumed, *prima facie*, that he does so on the faith of the insurance and in expectation of possibly meeting his own obligation to the company by that of the company to him, and that the case is one of mutual credit, and entitled to the privilege of compensation or set-off whenever the mutual liquidation of the demands is judicially decreed on the insolvency of the company. The case of *Scammon* v. *Kimball, Assignee*, 92 U. S. 362, is in concurrence with this view. It was there held, that a banker, having insurance in a company which was rendered utterly insolvent by the great Chicago fire of 1871, by which the banker's insured property was consumed with the rest, had a right to set up the amount of his insurance against money of the company in his hands on deposit. The insurance was not a debt due at the time of the insolvency; it became due afterwards, when the banker had performed all the conditions required in such cases. As the defendant took no appeal, the case is so clearly decided rightly as regards any complaint to be made by the plaintiff against the decree, that we have no difficulty in affirming it.

Decree affirmed.

Syllabus.

MORLEY SEWING MACHINE COMPANY *v.* LANCASTER.

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

No. 165. Argued January 11, 1889. — Decided February 4, 1889.

Claims 1, 2, 8 and 13 of letters patent No. 236,350, granted January 4, 1881, to James H. Morley, E. S. Fay and Henry E. Wilkins, on the invention of said Morley, for an improvement in machines for sewing buttons on fabrics, namely, "1. The combination, in a machine for sewing shank-buttons to fabrics, of button-feeding mechanism, appliances for passing a thread through the eye of the buttons and locking the loop to the fabric, and feeding mechanism, substantially as set forth. 2. The combination, in a machine for sewing shank-buttons to fabrics, of a needle and operating mechanism, appliances for bringing the buttons successively to positions to permit the needle to pass through the eye of each button, and means for locking the loop of thread carried by the needle to secure the button to the fabric, substantially as set forth." "8. The combination, in a machine for sewing buttons to fabrics, of button-feeding and sewing appliances, substantially as set forth, and feeding appliances and operating mechanism whereby the feeding devices are moved alternately different distances to alternate short button stitches with long stitches between the buttons, as specified." "13. The combination, with button-sewing appliances, of a trough, appliances for carrying the buttons successively from the trough to the sewing devices, and mechanism for operating said appliances and sewing devices, as set forth," are valid.

The Morley machine contains and is made up of three main groups of instrumentalities: (1) mechanism for holding the buttons in mass, and delivering them separately, in proper position, over the fabric, so that they may be attached to it by the sewing and stitching mechanism; (2) the stitching mechanism; (3) the mechanism for feeding the fabric along, so as to space the stitches and consequently the buttons when sewed on.

A description given of the devices used by Morley, which make up the three mechanisms; and of those used in the alleged infringing machine, (the Lancaster machine,) and making up the same three mechanisms.

The Morley machine was the first one which accomplished the result of automatically separating buttons which have a shank from a mass of the same, conveying them in order to a position where they can be selected by the machine, one after another, and, by sewing mechanism, coupled with suitable mechanism for feeding the fabric, be sewed thereto at prescribed suitable distances apart from each other.

No machine existing prior to Morley's is shown to have accomplished the operation of turning a shank button, the head of which is heavier

than its shank and eye combined, into such a position that a plane passing through its eye shall be perpendicular to a plane passing through the long axis of the sewing needle, so as to insure the passage of the needle through the eye.

The Lancaster machine infringes the Morley patent, although there are certain specific differences between the button-feeding mechanisms in the two machines, and also certain specific differences between their sewing mechanisms.

Morley, having been the first person who succeeded in producing an automatic machine for sewing buttons of the kind in question upon fabrics, is entitled to a liberal construction of the claims of his patent.

Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine.

Morley having been the first inventor of an automatic button-sewing machine, by uniting in one organization mechanism for feeding buttons from a mass, and delivering them one by one to sewing mechanism and to the fabric to which they are to be secured, and sewing mechanism for passing a thread through the eye of the button, and securing it to the fabric, and feeding mechanism for moving the fabric the required distances to space the buttons, another machine is an infringement, in which such three sets of mechanism are combined, provided each mechanism, individually considered, is a proper equivalent for the corresponding mechanism in the Morley patent; and it makes no difference that, in the infringing machine, the button-feeding mechanism is more simple, and the sewing mechanism and the mechanism for feeding the fabric are different in mechanical construction, so long as they perform each the same function as the corresponding mechanism in the Morley machine, in substantially the same way, and are combined to produce the same result.

The defendant employs, for the purposes of his machine, known devices, which, in mechanics, were recognized as proper substitutes for the devices used by Morley, to effect the same results. In this sense the mechanical devices used by the defendant are known substitutes or equivalents for those employed in the Morley machine to effect the same results; and this is the proper meaning of the term "known equivalent," in reference to a pioneer machine such as that of Morley. Otherwise, a difference in the particular devices used to accomplish a particular result in such a machine would always enable a defendant to escape the charge of infringement, provided such devices were new with the defendant in such a machine, because, as no machine for accomplishing the result existed before that of the plaintiff, the particular device alleged to avoid infringement could not have existed or been known in such a machine prior to the plaintiff's invention.

Opinion of the Court.

In equity, for the infringement of letters patent. Decree dismissing the bill, from which the complainants appealed. The case is stated in the opinion.

Mr. Benjamin F. Thurston for appellants.

Mr. J. E. Maynadier and *Mr. George E. Smith* for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought November 6, 1882, in the Circuit Court of the United States for the District of Massachusetts, by the Morley Sewing Machine Company and the Morley Button Sewing Machine Company against Charles B. Lancaster, for the alleged infringement of letters patent No. 236,350, granted January 4, 1881, to James H. Morley, E. S. Fay and Henry E. Wilkins, on the invention of said Morley, on an application filed June 23, 1880, for an improvement in machines for sewing buttons on fabrics. The machine of the defendant is constructed in accordance with the description contained in letters patent No. 268,369, granted November 28, 1882, to Joseph Mathison, William D. Allen, and C. B. Lancaster, on the invention of said Mathison, for improvements in machines for securing buttons to material, on an application filed August 1, 1882.

The specification of the Morley patent says: "My invention consists in mechanism for automatically sewing shank-buttons on to fabrics, shoes, etc., and the objects of my invention are to form a double-threaded stitch on the top side of the material being sewed upon, transversely to the direction of feed, and on the reverse side of the material two parallel lines of stitches at right angles to the first named ones, to make alternately long and short stitches, and to so feed buttons to be sewed by said machines as to present them at the proper time and in the proper place to be operated upon." The specification then describes, by reference to twenty-four figures of drawings, the mechanical means used by the patentee to perform the mechanical operations described. The specification then proceeds:

"Having thus described the machine and constructions set forth in the drawings, I wish it to be understood that the same is only one of different mechanisms which I have contemplated, and which may be effectually employed for carrying out the main feature of my invention, to wit, the automatic mechanical sewing of buttons to a fabric. Thus, different means may be adopted for carrying the thread through the eye of the button into the fabric, as, for instance, passing the hooked needle through said eye to a position to seize the thread from the straight needle, or form [from] a suitable carrier, and then draw the loop down through the fabric to be secured beneath by a shuttle or needle thread, or the eye pointed needle may be used in connection with a loop-spreader and shuttle for carrying a thread through the loop, a single thread or two threads being used. It will further be understood that wires may be sometimes substituted for threads, and that other feed mechanisms may be employed, the needles moving with, but not controlling, the fabric, as in the construction described."

There are eighteen claims in the patent, only four of which are relied upon by the plaintiffs, namely, claims 1, 2, 8, and 13, which are as follows: "1. The combination, in a machine for sewing shank-buttons to fabrics, of button-feeding mechanism, appliances for passing a thread through the eye of the buttons and locking the loop to the fabric, and feeding mechanism, substantially as set forth. 2. The combination, in a machine for sewing shank-buttons to fabrics, of a needle and operating mechanism, appliances for bringing the buttons successively to positions to permit the needle to pass through the eye of each button, and means for locking the loop of thread carried by the needle to secure the button to the fabric, substantially as set forth." "8. The combination, in a machine for sewing buttons to fabrics, of button-feeding and sewing appliances, substantially as set forth, and feeding appliances and operating mechanism whereby the feeding devices are moved alternately different distances to alternate short button stitches with long stitches between the buttons, as specified." "13. The combination, with button-sewing appliances, of a trough, appliances for carrying the buttons successively from the trough

to the sewing devices, and mechanism for operating said appliances and sewing devices, as set forth." The defendant's machine is known as the Lancaster machine.

The Morley machine contains and is made up of three main groups of instrumentalities: (1) mechanism for holding the buttons in mass, and delivering them separately, in proper position, over the fabric, so that they may be attached to it by the sewing and stitching mechanism; (2) the stitching mechanism; (3) the mechanism for feeding the fabric along, so as to space the stitches and consequently the buttons when sewed on.

In the button-feeding mechanism, there is a hopper containing the buttons in mass. The principal use of the machine is to sew buttons on to the uppers of buttoned boots, and the button designed to be used is one having a round ball affixed to a shank, which terminates in an eye. On the bottom of the hopper is a hopper-valve, which picks out the buttons one by one and delivers them into an inclined trough. This trough has a V-shaped groove along its bottom, midway between its sides, and the buttons enter the upper part of the trough with their shanks in all directions, and it becomes necessary to turn them over, so that the eyes will lie in the groove while the bodies of the buttons occupy the trough. The contrivance for accomplishing this consists of a flexible, corrugated strip of metal, lying over the top of the trough, and oscillated by proper machinery, which, by contact with the bodies of the buttons, will roll them over so that their eyes will lie in the groove. After the buttons are thus arranged, they slide down the trough, being aided to do so by a jarring motion imparted to the latter. When they arrive at its lower end, which is bent so as to be nearly vertical, they lie with their heads towards the front of the machine, that is, the side farthest from the driving pulley. In one modification of the machine, the buttons are held in the trough by a button-wheel, which is mounted on a vertical axis, and is provided with pockets, each capable of receiving a button, and admits of being intermittently revolved at proper times. This button-wheel is used (1) to close the bottom of the trough; (2) to receive buttons into its pockets; and (3) by its own revolution, to turn

the buttons around, so that their eyes will lie towards the front of the machine. In order to prevent the buttons from falling out of the pockets, the button-wheel rests upon a stationary table, which closes the bottoms of all of the pockets but one. When a button arrives over the notch in the table, it has been turned around, on a vertical axis, 180°; but, as a plane passing through its eye is then vertical, it must be turned on a horizontal axis, through 90°, so that its eye may lie flat, in order that the needle, which ascends from beneath, may pass through the eye. Therefore, when a button arrives over the notch in the table, a plunger or punch descends into the pocket and drives the button into a button-carrier, which lies at that time immediately under the notch, and under the pocket into which the punch enters. When the button enters the carrier, a plane passing through its eye is still vertical, and the carrier therefore turns around, on a horizontal axis, 90°, to bring the eye of the button into such a position that it can be entered by the needle; and, as the carrier turns, it retracts, so as to bring the eye into such a position that a plane passing through it will be horizontal, and the needle will readily enter it. The patent describes a modified form of the contrivances for bringing the button into a position for the needle to enter its eye, in which modification the button-wheel is dispensed with, and a light spring is applied to the bottom of the trough, to hold up the column of buttons, such spring operating as a spring-gate, opened at proper intervals by mechanism, and shutting itself automatically. This mechanism, which also receives the button and turns it around 90° on a horizontal axis, and transfers it to the place where it is to be sewed, is a sort of spring nippers, one of the jaws of which is split so as to receive the shank of the button.

The above contrivances constitute what is called in claim 1, "button-feeding mechanism;" in claim 2, "appliances for bringing the buttons successively to positions to permit the needle to pass through the eye of each button;" in claim 8, "button-feeding appliances;" and, in claim 13, "a trough, appliances for carrying the buttons successively from the trough to the sewing devices, and mechanism for operating said appliances."

In the Morley patent, there is a contrivance for feeding the fabric so as to space the stitches, and consequently to space the buttons. The needles, while inserted in the fabric, move in the direction of the feed, carrying the fabric with them. The motion of the needles or feed is derived from revolving cams, and the two needles swing like an inverted pendulum. This kind of feed was well known in machines for sewing leather, prior to the date of the Morley patent. This feeding contrivance is what is called in claim 1, "feeding mechanism," and in claim 8, "feeding devices."

The Morley patent describes its stitch as being made by means of two needles, one eye-pointed, like the Howe needle, and the other a hooked or crochet needle, such as is used in machines for sewing leather. These needles are set at an inclination to each other, across the line of the seam, and enter the fabric from beneath, and, when they get above it, cross each other. The eye-pointed needle pierces the fabric and carries a bight of thread up above it, and then retreats a little to form a loop by causing the thread to expand away from the needle. During this time, the hooked needle has also penetrated the fabric from beneath, and, when the loop is formed, passes between the eye-pointed needle and the thread, and, as both needles descend, the hook catches the thread supplied by the eye-pointed needle, and carries a bight of thread across the fabric and down through it to the under side, thus forming the transverse stitches on the button side of the fabric, the eye-pointed needle being described as passing through the eye of the button, although it is stated that instead the hooked needle may pass through such eye. The passage of the needle through the eye, after it has passed through the fabric, holds the button upon the fabric. When the eye-pointed needle retracts and forms a loop above the eye of the button, a loop-spreader is employed to spread the loop, and a shuttle, carrying either one thread or two threads, is passed through the loop, the eye-pointed needle, in its retraction, carrying, by means of the loop, the thread or threads furnished by the shuttle, and the stitch being the ordinary lock-stitch. The stitch described in the Morley patent as made by eye-pointed and hooked

needles, both operating from the lower side of the fabric, and making transverse stitches on its upper side and longitudinal stitches on its lower side, is a stitch known prior to the date of the Morley patent.

In the Lancaster machine there are found combined together the same three main groups of instrumentalities above set forth as being found in the Morley patent. There is in the Lancaster machine a hopper containing the buttons in mass, and an inclined surface which supports a column of the buttons, the buttons lying with their shanks up and their bodies down. This hopper is provided with a reciprocating brush, which sweeps over the buttons and rolls them over so that their shanks, pointing upward, will fall into one or another of slits in a metal plate which covers the inclined flat surface. These slits all converge into a single slit, so that the buttons slide down the various slits and ultimately lie in a single column in the single slit, with their shanks upward, upon an inclined plane surface. This single slit, and the plane surface which it covers, are twisted at the end, in such a manner that a plane passing through the slit is nearly horizontal, and the surface which is in contact with the head of the button is nearly vertical. Consequently, when the buttons reach the bottom, they lie in such a position that a plane passing through the eye of the lowermost button is horizontal, or nearly so. The column of buttons is held up by a light spring, and this spring-gate is opened by the button itself, because the so-called trough holding the column of buttons vibrates sidewise, and a thread which passes through the eye of the lowermost button prevents that button from vibrating with the contrivance, and the button is pulled out by the thread, and, in being pulled out, overcomes the resistance of the spring. The eye of the lowermost button in the column lies directly under the needle, so that the needle enters it while it is still in the column. The contrivance containing the column then vibrates sidewise, so as to get out of the way of the needle in a subsequent feeding operation. The spring in the Lancaster machine, which holds up the column of buttons, was a common device in screw blank and eyelet machinery, to hold up a column of blanks and permit them to be removed one by one.

In the Lancaster machine, there is a contrivance for feeding the fabric so as to space the stitches, and consequently to space the buttons, and the machine feeds by means of a single needle which reciprocates in a straight line, and, while it is inserted in the fabric, moves in the direction of the feed, carrying the fabric with it, the motion of the needle or feed being derived from revolving cams. The expert for the defendant says that he finds no substantial difference between the mechanisms which feed the fabric in the two machines.

As to the stitching mechanism of the Lancaster machine, the needle is on the upper side of the fabric, and descends through it. It is an ordinary crochet needle, provided with a cast-off, both the needle and cast-off being like those described in the Morley patent, and the same which had been used for many years in sewing leather. The machine is also provided with a thread-carrier beneath the fabric, like that used in machines for sewing leather. The eye of the button in the Lancaster machine makes a part of the stitch, and the stitch cannot be made unless a button is supplied at every alternate perforation of the needle. It is therefore necessary that the machine should have some contrivance for carrying some of the loops of the thread over the bodies of the buttons, so that the loop may be locked by the eye of the button. In making the stitch, the needle first passes down through the eye of the button, carrying its hook below the fabric. The thread-carrier beneath the fabric then puts a loop of thread into the hook, and the hook rises, pulling a loop of thread through the fabric and through the eye of the button. The needle then descends again, sliding through such loop and piercing the fabric, and leaving the loop on top of the fabric. The thread-carrier then again puts the thread into the hook of the needle, and the needle rises again, carrying another bight of the thread through the fabric and through the loop on top of the fabric, thus locking that loop. As the needle rises, a contrivance seizes both parts of the loop carried up through the second hole made by the needle, opens it wide and passes it over the body of the button, and the part of the loop which is over the button is then pulled down through the fabric, and consequently around

the shank of the button, thus locking the stitch. A succession of these operations forms the stitch, and sews a row of buttons on the fabric, each alternate loop of the stitch being locked by the button itself. If the buttons were removed from the stitch, there would remain a succession of loops, and consequently no seam.

In the operation of the Lancaster machine, after the needle has passed through the eye of the button, the end of the so-called trough and the needle move together, while the needle is making its feeding motion. The so-called trough then stands still until the needle has ascended and pulled a loop of thread through the eye, and has again pierced the fabric. When the needle has got into the fabric the second time the button is pulled out of the end of the trough by the retreat of the trough towards the rear of the machine, and is so pulled out because at that time the fabric is standing still and the button is held to it by the loop of thread which is passed through the eye of the button. After the button is thus pulled out of the end of the trough, the trough stands still for a while, while a loop is passed over the body of the button, as above described, and the trough then returns again, so as to hold the eye of a second button in the path of the descending needle, the button being thus released, not by the motion of the fabric, but by the motion of the trough which carries the column of buttons.

It satisfactorily appears, that the Morley machine was the first one which accomplished the result of automatically separating buttons which have a shank from a mass of the same, conveying them in order to a position where they can be selected by the machine, one after another, and, by sewing mechanism, coupled with suitable mechanism for feeding the fabric, be sewed thereto at prescribed suitable distances apart from each other. The machine performs automatically these three functions of selecting, sewing, and spacing. The problem to be performed was to select from a mass of buttons, furnished with heads and with wire eyes projecting therefrom, single buttons, and to present them in succession to the needle of a sewing mechanism, so that the needle could pass through

the eye and secure it to the fabric. Machinery existed before for selecting from a mass wood-screw blanks, horse nails and pins, and delivering them to other machinery; but, in such constructions, the shank of the article being heavier than its head, the tendency was for the articles to arrange themselves in the way with the shanks downward, the heads being supported on the top surface of the way. With such buttons as are used in the two machines in controversy, as the heads are much heavier than the shanks and the eyes combined, the buttons will not naturally arrange themselves with their shanks downward. It is therefore necessary to have some means for turning each button into such a position that a plane passing through its eye shall be perpendicular to a plane passing through the long axis of the sewing needle, so as to insure the passage of the needle through the eye. No machine existing prior to Morley's is shown to have accomplished that operation.

The substance of the defence in the case is, that there are certain specific differences between the button-feeding mechanisms in the two machines, and also certain specific differences between their sewing mechanisms; and hence that there is no infringement. This was the view taken by the Circuit Court in its opinion, 23 Fed. Rep. 344.

Morley, having been the first person who succeeded in producing an automatic machine for sewing buttons of the kind in question upon fabrics, is entitled to a liberal construction of the claims of his patent. He was not a mere improver upon a prior machine which was capable of accomplishing the same general result; in which case, his claims would properly receive a narrower interpretation. This principle is well settled in the patent law, both in this country and in England. Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine.

In *McCormick* v. *Talcott*, 20 How. 402, 405, the inquiry

was, whether McCormick was the first person who invented, in a reaping machine, the apparatus called a divider, performing the required functions, or whether he had merely improved an existing apparatus, by a combination of mechanical devices which performed the same functions in a better manner. This court, speaking by Mr. Justice Grier, said: "If he" (the patentee) "be the original inventor of the device or machine called the divider, he will have a right to treat as infringers all who make dividers operating on the same principle, and performing the same functions by analogous means or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such. But if the invention claimed be itself but an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form or combination, performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first."

So, also, in *Railway Co.* v. *Sayles*, 97 U. S. 554, 556, this court, speaking by Mr. Justice Bradley, said, in regard to brakes for eight-wheeled railroad cars: "Like almost all other inventions, that of double brakes came when, in the progress of mechanical improvement, it was needed; and being sought by many minds, it is not wonderful that it was developed in different and independent forms, all original, and yet all bearing a somewhat general resemblance to each other. In such cases, if one inventor precedes all the rest, and strikes out something which includes and underlies all that they produce, he acquires a monopoly, and subjects them to tribute. But if the advance towards the thing desired is gradual, and proceeds step by step, so that no one can claim the complete whole, then each is entitled only to the specific form of device which he produces, and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors, and does not include theirs. These general principles are so obvious, that they need no argument or illustration to support them."

Opinion of the Court.

The same view was directly applied in *Clough* v. *Barker*, 106 U. S. 166, 177, to the Clough patent for an improvement in gas-burners. The first claim of that patent was for "the bat-wing burner, perforated at the base, in combination with the surrounding tube, substantially as described." The second claim read thus: "In combination with the bat-wing burner, perforated at the base, and surrounding-tube, the tubular valve for regulating the supply of external gas to the burner, substantially as described." It appeared that in no prior structure had a valve arrangement been applied to regulate the flow of gas in such a combination as that covered by the first claim of the patent. It was, therefore, held, that the patentee was entitled to the benefit of the doctrine of equivalents, as applied to the combination covered by the second claim. In the defendant's burner, the regulation was made by a tubular valve on the outside of the perforations, instead of on the inside, as in the patent, but performing its work by being screwed up or down, as in the patent. This court said: "Although in the Clough structure the burner and surrounding-tube revolve together in adjusting their position in reference to that of the tubular valve, so as to let in or turn off the supply of gas through the perforations, and although in the Clough structure the flame revolves by the revolution of the burner, and although in the defendant's burners the revolution of the surrounding-tube regulated the supply of gas through such perforations, and neither the burner nor the flame revolved, the defendant's valve arrangement must be held to have been an equivalent for that of Clough to the full extent to which that of Clough goes, involving, perhaps, patentable improvements, but still tributary or subject to the patent of Clough. It is true that that patent describes the tubular valve as being inside of the burner-tube. But Clough was the first person who applied a valve regulation of any kind to the combination to which he applied it, and the first person who made such combination; and he is entitled, under decisions heretofore made by this court, to hold as infringements all valve regulations, applied to such a combination, which perform the same office in substantially the same way as, and were known

equivalents for, his form of valve regulation." See, also, *Duff* v. *Sterling Pump Co.*, 107 U. S. 636, 639.

The same doctrine was applied by this court in *Consolidated Valve Co.* v. *Crosby Valve Co.*, 113 U. S. 157, to the Richardson patent, the claim of which was, "A safety valve with the circular or annular flange or lip *cc*, constructed in the manner, or substantially in the manner, shown, so as to operate as and for the purpose herein described." It appeared that Richardson was the first person who made a safety valve which, while it automatically relieved the pressure of steam in the boiler, did not, in effecting that result, reduce the pressure to such an extent as to make the use of the relieving apparatus practically impossible, because of the expenditure of time and fuel necessary to bring up the steam again to the proper working standard; and that his valve was the first which had a strictured orifice leading from the huddling chamber to the open air, to retard the escape of the steam, and to enable the valve to open with increasing power against the action of the spring, and to close suddenly, with small loss of pressure in the boiler. It was held, that that claim covered a valve in which were combined an initial area, an additional area, a huddling chamber beneath the additional area, and a strictured orifice such as that above mentioned, the orifice being proportioned to the strength of the spring. It was also held, that, under the claim of a second patent, namely, "The combination of the surface beyond the seat of the safety-valve, with the means herein described for regulating or adjusting the area of the passage for the escape of steam, substantially as and for the purpose described," the patentee was entitled to cover the combination, with the surface of the huddling chamber and the strictured orifice, of a screw-ring to be moved up or down to obstruct such orifice more or less, in the manner described. It was further held, that both of the patents were infringed by a valve which produced the same effects in operation by the means described in Richardson's claims, although the valve proper was an annulus, and the extended surface was a disc, inside of the annulus, the Richardson valve proper being a disc, and the extended surface an annulus surrounding the disc; and although the valve

proper of the defendant had two ground joints, and only the steam which passed through one of them passed through the stricture, while, in the Richardson valve, all the steam which passed into the air passed through the stricture; and although in the defendant's valve the huddling chamber was at the centre, instead of at the circumference, and was in the seat of the valve, under the head, instead of in the head, and the stricture was at the circumference of the seat of the valve, instead of being at the circumference of the head. These conclusions were based on the fact, stated in the opinion of the court, that no prior structure was known or recognized as producing any such result as that produced by Richardson's apparatus; that the prior structures never effected the kind of result attained by his apparatus, because they lacked the thing which gave success; and that, taught by Richardson, and by the use of his apparatus, it was not difficult for skilled mechanics to take the prior structures and so arrange and use them as to produce more or less of the beneficial results first made known by him.

The doctrine thus applicable to a machine patent is of a kindred character with that applied, in this country and in England, to a patent for a process.

In *Tilghman* v. *Proctor*, 102 U. S. 707, the claim of Tilghman's patent was for "the manufacturing of fat-acids and glycerine from fatty bodies by the action of water at a high temperature and pressure." In the opinion of this court delivered by Mr. Justice Bradley, the claim was sustained as a claim for a process, irrespective of the particular mode or form of apparatus for carrying it into effect, inasmuch as the patent described a practical and useful mode of carrying it into effect. It was said in the opinion, (p. 721:) "Had the process been known and used before, and not been Tilghman's invention, he could not then have claimed anything more than the particular apparatus described in his patent; but being the inventor of the process, as we are satisfied was the fact, he was entitled to claim it in the manner he did." It was also held that, in such a case, a person who subsequently discovers a new mode of carrying out the patented process is not entitled to use the process without the consent of the patentee.

Reference was made in the opinion in that case to the decision in *Neilson* v. *Harford*, 1 Webster Pat. Cas. 295, which related to Neilson's patent for the process of applying a blast of heated air to anthracite coal in a smelting furnace, by forcing such blast through a vessel situated between the blowing apparatus and the furnace, and heated to a red heat, the form of the heated vessel being stated by the patent to be immaterial. On this question this court said: "That a hot blast is better than a cold blast for smelting iron in a furnace, was the principle or scientific fact discovered by Neilson; and yet, being nothing but a principle, he could not have a patent for that. But having invented and practically exemplified a process for utilizing this principle, namely, that of heating the blast in a receptacle between the blowing apparatus and the furnace, he was entitled to a patent for that process, although he did not distinctly point out all the forms of apparatus by which the process might be applied, having, nevertheless, pointed out a particular apparatus for that purpose, and having thus shown that the process could be practically and usefully applied. Another person might invent a better apparatus for applying this process than that pointed out by Neilson, and might obtain a patent for such improved apparatus; but he could not use the process without a license from Neilson. His improved apparatus would, in this respect, stand in a relation to the process analogous to that which an improvement on a patented machine bears to the machine itself."

In regard to the case of *Neilson* v. *Harford*, this court, speaking by Chief Justice Taney, in *O'Reilly* v. *Morse*, 15 How. 62, 115, 116, said, in reference to the opinion of the Court of Exchequer in that case, delivered by Baron Parke: "We see nothing in this opinion differing in any degree from the familiar principles of law applicable to patent cases. Neilson claimed no particular mode of constructing the receptacle, or of heating it. He pointed out the manner in which it might be done; but admitted that it might also be done in a variety of ways, and at a higher or lower temperature, and that all of them would produce the effect in a greater or less degree, provided the air was heated by passing through a

heated receptacle. And hence it seems that the court at first doubted whether it was a patent for anything more than the discovery that hot air would promote the ignition of fuel better than cold. And if this had been the construction, the court, it appears, would have held his patent to be void, because the discovery of a principle in natural philosophy or physical science is not patentable. But after much consideration, it was finally decided that this principle must be regarded as well known, and that the plaintiff had invented a mechanical mode of applying it to furnaces; and that his invention consisted in interposing a heated receptacle between the blower and the furnace, and by this means heating the air after it left the blower and before it was thrown into the fire. Whoever, therefore, used this method of throwing hot air into the furnace used the process he had invented, and thereby infringed his patent; although the form of the receptacle or the mechanical arrangements for heating it might be different from those described by the patentee. For, whatever form was adopted for the receptacle, or whatever mechanical arrangements were made for heating it, the effect would be produced in a greater or less degree, if the heated receptacle was placed between the blower and the furnace, and the current of air passed through it. Undoubtedly, the principle that hot air will promote the ignition of fuel better than cold, was embodied in this machine. But the patent was not supported because this principle was embodied in it. He would have been equally entitled to a patent if he had invented an improvement in the mechanical arrangements of the blowing apparatus, or in the furnace, while a cold current of air was still used. But his patent was supported because he had invented a mechanical apparatus by which a current of hot air, instead of cold, could be thrown in. And this new method was protected by his patent. The interposition of a heated receptacle, in any form, was the novelty he invented."

This court also said, in *Tilghman* v. *Proctor*, (p. 728:) "If the mode of applying the process is not obvious, then a description of a particular mode by which it may be applied is sufficient. There is, then, a description of the process and of

one practical mode in which it may be applied. Perhaps the process is susceptible of being applied in many modes and by the use of many forms of apparatus. The inventor is not bound to describe them all, in order to secure to himself the exclusive right to the process, if he is really its inventor or discoverer. But he must describe some particular mode, or some apparatus, by which the process can be applied with at least some beneficial result, in order to show that it is capable of being exhibited and performed in actual experience."

The English doctrine is to the same effect. In the case of *Curtis* v. *Platt*, before Vice-Chancellor Wood, in 1863, reported in a note to *Adie* v. *Clark*, 3 Ch. Div. 134, the Vice-Chancellor said, (p. 136,) in regard to a patent for an improvement in spinning-mules: "When the thing is wholly novel, and one which has never been achieved before, the machine itself which is invented necessarily contains a great amount of novelty in all its parts; and one looks very narrowly and very jealously upon any other machines for effecting the same object, to see whether or not they are merely colorable contrivances for evading that which has been before done. When the object itself is one which is not new, but the means only are new, one is not inclined to say that a person who invents a particular means of doing something that has been known to all the world long before has a right to extend very largely the interpretation of those means which he has adopted for carrying it into effect." In the same case, on appeal before the Lord Chancellor, (Lord Westbury,) (p. 138,) the views of Vice-Chancellor Wood were concurred in.

In *Bädische Anilin und Soda Fabrik* v. *Levinstein*, 24 Ch. Div. 156, 171, in regard to a patent for improvements in the production of coloring matters for dyeing and printing, Mr. Justice Pearson said: "Where a patent is taken out for a process for arriving at a known result, (I mean, a result known before the patent is taken out for the process *simpliciter*,) any other person may take out a patent for another process, or may use another process without taking out a patent, without any infringement of the process first taken out. But when a patent is taken out for a new result not known before, and there is one

process described in the patent which is effectual for the purpose of arriving at that new result at the time when the patent is taken out, the patentee is entitled to protection against all other processes for the same result; and no person can, without infringing upon his patent, adopt simply a different process for arriving at the same result." As authority for this view, he cites the cases of *Jupe* v. *Pratt*, 1 Webster Pat. Cas. 146; *Household Co.* v. *Neilson*, 1 Webster Pat. Cas. 685; and *Curtis* v. *Platt*, *ubi supra*, and Goodeve Pat Cas. 102. He decided in favor of the plaintiff.

On appeal to the Court of Appeal, 29 Ch. Div. 366, the decree was reversed, Lords Justices Bowen and Fry being in favor of a reversal, and Lord Justice Baggallay against it. On further appeal to the House of Lords, 12 App. Cas. 710, the decision of the Court of Appeal was reversed, and the decision of Mr. Justice Pearson was restored, Lord Halsbury, (Lord Chancellor,) Lord Herschell, and Lord Macnaghten sitting in the case and concurring. In the judgment given by Lord Herschell it is stated that all the judges of all the courts were agreed on the question of infringement.

A recent and instructive case is that of *Proctor* v. *Bennis*, 36 Ch. Div. 740, in regard to a patent for self-acting mechanism for supplying fuel at intervals to, and distributing it over the surface of, a fire. The court of first instance held the patent to be valid and to have been infringed. In the Court of Appeal, Lords Justices Cotton, Bowen, and Fry unanimously affirmed the decision, and held that a patent for a combination of known mechanical contrivances, producing a new result, was infringed by a machine producing the same result by a combination of mechanical equivalents of such contrivances, with some alterations and omissions, which did not prevent the new machine from being one which took the substance and essence of the patented invention; but that, where the result was old, and the novelty consisted only of improvements in a known machine for producing a known result, the patentee must be tied down strictly to the mode which he had described of effecting the improvements.

Lord Justice Cotton, after referring to the case of *Curtis* v.

Platt, 3 Ch. Div. 135, note, said, (p. 757:) "Where there is no novelty in the result, and where the machine is not a new one, but the claim is only for improvements in a known machine for producing a known result, the patentee must be tied down strictly to the invention which he claims, and the mode which he points out of effecting the improvement. But here the throwing coal on to the furnace by the intermittent radial action of a flap or door was new. Nothing of the kind had been done before. It is true, there had previously been imperfect machines for feeding furnaces automatically, but that had not, previously to this machine, been done by any intermittent radial action of a flap or door, as is done by the plaintiff. In my opinion, therefore, the opinions expressed by the judges with reference to mere improvements in an old machine for an old purpose cannot apply to a case like this, where there was not only novelty in the machine, but novelty in the result to be produced by that machine."

Lord Justice Bowen said, (p. 764:) "Now, I think it goes to the root of this case to remember that this is, as was described by one of the counsel, really a pioneer invention; and it is by the light of that, as it seems to me, that we ought to consider whether there have been variations or omissions, and additions, which prevent the machine which is complained of from being an infringement of the plaintiff's. With regard to the variations, I take precisely the same view that the Lord Justice Cotton has taken; and I will not travel over the ground again. With regard to the additions and omissions, it is obvious that additions may be an improvement, and that omissions may be an improvement; but the mere fact that there is an addition, or the mere fact that there is an omission, does not enable you to take the substance of the plaintiff's patent. The question is not whether the addition is material, or whether the omission is material, but whether what has been taken is the substance and essence of the invention. That seems to me to be the true test, as propounded by the House of Lords in *Clark* v. *Adie*, 2 App. Cas. 315, 320."

Lord Justice Fry said, (p. 766:) "The pith and substance of the plaintiff's invention is, in my judgment, putting coals upon

a fire by an intermittent radial action, an invention which, it may be remarked, reproduces with great exactitude the action of the human arm in placing coals upon a fire." Also, (p. 768:) "In the present case, we have these broad features of likeness, that in both machines the motion is a radial motion, in both machines it is an intermittent motion, in both machines it is of course produced by means of a radius, in both machines that radius is moved in one direction by tappets, and the same radius is moved in the opposite direction by a spring. All those broad features of the machines are in common; but there is this difference, that in the plaintiff's machine a shaft is impelled by the tappets and by the spring, whereas in the defendant's machine the radius itself is impelled by the tappets and the spring. It follows that the radius in the plaintiff's is attached to the shaft, whereas the radius in the defendant's works on a pin. That is the broad distinction between them. The result, however, appears to me to be substantially the same; by substituting the pin for the shaft as the centre on which the radius acts, and by impelling the radius itself instead of impelling the shaft fixed to the radius, you have produced in substance precisely the same radial action by the same means. You drive your radius in one direction by tappets, and you drive it in the other direction by the spring, and you produce the same result, namely, the feeding of coal by a radial motion made intermittent in one direction by the operation of the tappets, and in the other direction by the spring. I think, therefore, that we have a new combination for a new object, and that the gist of that combination has been taken by the defendant, and that, consequently, there is an infringement."

Applying these views to the case in hand, Morley having been the first inventor of an automatic button-sewing machine, by uniting in one organization mechanism for feeding buttons from a mass, and delivering them one by one to sewing mechanism and to the fabric to which they are to be secured, and sewing mechanism for passing a thread through the eye of the button, and securing it to the fabric, and feeding mechanism for moving the fabric the required distances to space the

buttons, another machine is an infringement, in which such three sets of mechanism are combined, provided each mechanism, individually considered, is a proper equivalent for the corresponding mechanism in the Morley patent; and it makes no difference that, in the infringing machine, the button-feeding mechanism is more simple, and the sewing mechanism and the mechanism for feeding the fabric are different in mechanical construction; so long as they perform each the same function as the corresponding mechanism in the Morley machine, in substantially the same way, and are combined to produce the same result.

The view taken on the part of the defendant, in regard to the question of infringement, is that, inasmuch as the Lancaster machine uses different devices in its mechanisms which correspond to those referred to in the first, second, eighth and thirteenth claims of the patent, those claims are to be limited to the special devices described in the patent, which make up such combinations, although both machines contain the same main group of instrumentalities which, when combined, make up the machine.

But, in a pioneer patent, such as that of Morley, with the four claims in question such as they are, the special devices set forth by Morley are not necessary constituents of the claims. The main operative features of both machines are the same. In each there is a receptacle for shank-buttons in a mass; in each the mass of buttons passes in order into a conveyer-way; and in each the buttons conveyed to the sewing mechanism are presented successively with their shanks in a horizontal position, so as to allow of the passage of the needle through the eye. In the Morley machine, the buttons are carried along the raceway with their shanks downward, and are turned over by proper devices, so that the needle can enter the eye. In the Lancaster machine, the buttons travel along the raceway with their shanks upward, and the twisted shape of the raceway causes the buttons to be presented properly in succession to the needle. The only difference is, that in the Morley machine there is an active operating device for turning the buttons, in the shape of a button-wheel which receives them,

and shuts off the column, and takes one at a time out of the raceway; while in the Lancaster machine there is a passive device for accomplishing the same result of turning the buttons, and there is no button-wheel, but there is a spring-gate at the end of the raceway, which shuts off the column and, with the addition of other devices, allows one button at a time to be withdrawn from the raceway. But in the Morley patent a modification is described, whereby the button-wheel is dispensed with, and a spring-gate, as in the Lancaster machine, is employed, and an active device is used to open the spring-gate and discharge the button, while in the Lancaster machine an active instrumentality is used to effect the same result, in combination with the sidewise movement of the raceway and in connection with the fact that the needle enters the eye of the button and passes a thread through it.

As to the mechanism for feeding the fabric, it is substantially the same in the two machines, for in each the needle operates to feed the fabric, while inserted in it, and it makes no difference that in the Morley machine the two needles swing like an inverted pendulum, while in the Lancaster machine the single needle swings in a straight line.

The principal difference relied on by the defendant is in regard to the sewing or stitching mechanism, based upon the difference in the kind of stitch used in the two machines for fastening the button to the fabric. The two stitches are, indeed, different, specifically considered. Morley uses the chain stitch. In the Lancaster machine, the stitch is made by looping the thread upon itself, and putting the bight of the loop around the shank of the button, so as to prevent the loop from pulling out, as it would otherwise do. The Morley patent, however, is not for any particular kind of stitch, or for any particular kind of mechanism for making such stitch. When the form of the stitch is changed, the instrumentalities for making it must change. Morley says, in his specification, that different means for making a stitch may be employed, as well as other feed mechanisms.

The contention of the defendant, in regard to the sewing mechanism, rests upon the proposition, that the convolution

or concatenation of thread which makes up the stitch in the Lancaster machine is different from that which is found in the Morley machine. In each machine, however, the buttons are spaced at the proper distances apart by the feeding mechanism which moves the fabric along, and the feeding device is moved alternately different distances, to alternate short stitches with long stitches between the buttons. In each machine, the button is taken possession of by the sewing mechanism, and the needle in each enters the eye of the button. In the Lancaster machine, however, the thread is so looped as to embrace also the shank of the button, and thus, if the button were not present in the Lancaster machine, the lock-stitch would not be formed, but merely a succession of loops, which could be pulled out of the fabric. But this convolution or concatenation of the thread to form the fastening of the stitch, and the particular device which forms such convolution or concatenation, are not made, by the Morley patent, elements which enter into the claims in question.

Those claims are not for a result or effect, irrespective of the means by which the effect is accomplished. It is open to a subsequent inventor to accomplish the same result, if he can, by substantially different means. The effect of the rule before laid down is merely to require that, in determining whether the means employed in the Lancaster machine are substantially the same means as those employed in the Morley machine, the Morley patent is to receive a liberal construction, in view of the fact that he was a pioneer in the construction of an automatic button-sewing machine, and that his patent, especially in view of the character and terms of the four claims in question, is not to be limited to the particular devices or instrumentalities described by him, used in the three main elements of his machine, which, combined together, make it up. This is the principle applied by this court in *Consolidated Valve Co.* v. *Crosby Valve Co.*, 113 U. S. 157.

In all three of the main mechanisms used in the Lancaster machine, the means employed in it are substantially equivalents of those employed in the Morley machine. There is in each a hopper containing the mass of buttons, and an inclined con-

veyer-way leading from the hopper to the sewing mechanism. The only question in regard to the button-feeding mechanism is, whether the means employed in the Lancaster machine for turning the buttons so that the eyes will come into the path of the needle, are within the means employed for the same purpose in the Morley machine. In the Morley machine there is a flexible, corrugated strip of metal, which is oscillated to and fro, and operates to roll the buttons over, so that their shanks will occupy a groove at the bottom of the trough. In the Lancaster machine, the reciprocating brush which sweeps over the bottom of the hopper in which the buttons lie in a mass, operates in an equivalent way with the corrugated strip of the Morley machine, and causes the shanks, which stand upward, of the buttons which have been rolled over by its action, to enter slits in a metal plate, which converge in the single conveyer-way. The only difference is that, in the Morley machine, the shanks are caused to lie in one direction at one time in their path, and in the Lancaster machine the same result is accomplished by equivalent devices at another time.

As to the instrumentalities employed in the two machines for bringing the buttons one by one so that their eyes will stand in a horizontal position, ready to receive the needle, the buttons in the Morley machine pass down the conveyer-way with their eyes pointing downward, and occupying the groove, and from the conveyer-way they enter one by one into a button-wheel, which, by revolving, turns them 180°, and they are then received into a carrier which further turns them 90°, so as to get the eye into a horizontal plane. In the Lancaster machine it is not necessary to turn the buttons more than 90°, because they have been so rolled over by the brush in the hopper that their eyes point upward and enter the slits, and the conveyer-way is twisted and so turns the button that its eye will occupy a horizontal plane, ready to receive the needle. Then the needle, entering the eye of the button, pulls the button out of the conveyer, and the latter moves out of the way, leaving the button in the possession of the sewing mechanism.

These instrumentalities are the equivalents of each other, the differences being merely formal, active instrumentalities

being employed in one case to turn the buttons, and in the other that end being accomplished by the twisting of the conveyer-way. To employ a curved path to change the plane occupied by a body passing along that path was well known in mechanics, and is a device shown in the Morley patent for turning the buttons from a nearly vertical position to a horizontal position, by a corresponding variation in the inclination of the conveyer-way. The only difference in the particular devices in the two machines in this respect results from the fact that in the Morley machine the buttons pass from the hopper with their shanks downward, while in the Lancaster machine they pass with their shanks upward. From this it results that, while the means employed in the two machines are substantially the same, to effect the same result, active agents can be used in the one case, while passive agents are used in the other, to effect the same turning of the button. Indeed, in the modified form of construction suggested in the Morley specification, there is a spring-gate for holding the buttons up, while in the Lancaster machine there is a similar spring, the only difference being that in the Morley machine the spring-gate is opened by a special device, while in the Lancaster machine the button itself opens the spring when the button-holding contrivance moves out of the way. In that modification of the Morley arrangement, as the specification states, the button-wheel and the plunger are dispensed with, and it is not necessary to turn the button 180° on a vertical axis. So, in this respect, the only difference between the two machines is, that in the Morley machine the spring-gate is opened by an active device, while in the Lancaster machine the conveyer-way is moved sidewise by an active device, leaving the button behind, which opens the spring-gate because the needle has entered the eye of the button.

In regard to the sewing mechanism in the two machines, a sewing needle with thread is employed in each to fasten the buttons to the fabric. In each, the thread is continuous, and follows the fabric as that is moved along by the mechanism which feeds it. The Morley machine employs the common stitch. In the Lancaster machine there is a peculiar stitch, in

which a loop is drawn around the shank of the button and thus the stitch is locked against being drawn out; but notwithstanding the new convolution or concatenation of thread used in the Lancaster machine to secure the shank of the button to the fabric, the sewing mechanism of that machine is a substantial equivalent for the corresponding mechanism of the Morley patent. The invention of Morley in that respect did not consist in the peculiarity of the stitch, but in the combination of the needle, and the mechanism for operating it, with a button having a shank and an eye, the eye being held in a horizontal plane in the path of the needle, so that the thread carried by the needle could secure the button to the fabric. It is immaterial, in so securing the button, whether or not a loop is passed over the head of the button. The defendant's device and arrangement may be an improvement, and the subject of a patent, but nevertheless the use of it involves the plaintiff's invention.

It may be true that the defendant's peculiar form of stitch was unknown before; and it may also be true that his arrangement for carrying the buttons with their eyes upward, and turning the eyes into a horizontal plane by the twisting of the conveyer-way, was not before known. Of course, they were not before known in a machine for automatically sewing buttons to a fabric, because Morley's machine was the first to do that. But still, the defendant employs for the above purposes known devices, which, in mechanics, were recognized as proper substitutes for the devices used by Morley to effect the same results. Thus, in the Lancaster machine, the brush for rolling over the buttons is the obvious equivalent of the corrugated plate in the Morley machine. The mode of operation used in the Lancaster machine for rolling over the buttons so that their shanks shall point in a particular direction before entering the main conveyer-way is the same mode of operation found in the Morley machine, where the corrugated plate rolls the buttons over during their passage to the grooved conveyer-way, so that their shanks shall all point in the same direction. In the Lancaster machine the action resulting from the twisted way is a mechanical equivalent for the button-wheel, the

punch, and the carrier used in the Morley machine to turn the eye into the proper plane for the needle to enter it; and the specific difference in the devices in this respect becomes less when the modification described in the Morley patent is used, so that in each of the two machines the button is turned only 90° on a horizontal axis, and in each of them a spring-gate is employed, opened in the one case by an active device, while in the other case an active device moves the conveyer away from the particular button which is being held by the needle.

In this sense the mechanical devices used by the defendant are known substitutes or equivalents for those employed in the Morley machine to effect the same result; and this is the proper meaning of the term "known equivalent," in reference to a pioneer machine such as that of Morley. Otherwise, a difference in the particular devices used to accomplish a particular result in such a machine would always enable a defendant to escape the charge of infringement, provided such devices were new with the defendant in such a machine, because, as no machine for accomplishing the result existed before that of the plaintiff, the particular device alleged to avoid infringement could not have existed or been known in such a machine prior to the plaintiff's invention.

It results from these views that the decree of the Circuit Court must be

Reversed, and the case be remanded to that court with a direction to enter a decree in favor of the plaintiffs, sustaining the validity of claims 1, 2, 8, and 13 of the plaintiffs' patent, and adjudging that those claims have been infringed by the defendant, and ordering a reference to a master to take an account of profits and damages in respect to such infringement, and awarding to the plaintiffs a perpetual injunction in respect to the four claims above mentioned; and to take such further proceedings as shall be according to law and not inconsistent with this opinion.

ELY v. NEW MEXICO AND ARIZONA RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 1133. Submitted January 14, 1889. — Decided January 28, 1889.

Under the statutes of the Territory of Arizona, a complaint in a civil action, alleging that the plaintiff is the owner in fee of a parcel of land, particularly described, and that the defendant claims an adverse estate or interest therein, and praying for a determination of the defendants' claim and of the plaintiff's title, and for an injunction and other equitable relief, is good on demurrer.

THIS was a complaint, filed in a district court of the Territory of Arizona and county of Pima, by Frank Ely against the New Mexico and Arizona Railroad Company and several individuals, alleging that the "plaintiff is the owner in fee of all that piece or parcel of land granted by the Mexican authorities to Leon Herreros on May 15, 1825," called the Rancho San José de Sonoita, situated in the Sonoita Valley in the county aforesaid, and more particularly described and bounded in the complaint, according to the calls of a survey made by the government of Spain in June, 1821; and that the "defendants, and each of them, claim an estate or interest in and to the above described land and premises adverse to this plaintiff; that the said claim of the said defendants and each of them is without any right whatsoever; and the said defendants have not, nor have any or either of them, any estate, right, title or interest whatever in said lands and premises or any part thereof. Wherefore the plaintiff prays:

"1st. That the defendants, and each of them, be required to set forth the nature of his claim, and that all adverse claims of the defendants, and each of them, may be determined by decree of this court.

"2d. That by said decree it be declared and adjudged that the defendants have no estate or interest whatever in or to said land or premises, or in or to any part thereof, and that the title of the plaintiff is good and valid.

"3d. That the defendants, and each of them, be forever enjoined and debarred from asserting any claim whatever in or to said land or premises, or to any part thereof, adverse to the plaintiff, and for such other and further relief as to this honorable court shall seem meet and agreeable to equity, and for his costs of suit."

The defendants demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and judgment given for the defendants, dismissing the action. The judgment was affirmed in the Supreme Court of the Territory. 19 Pacific Reporter, 6. The plaintiff appealed to this court.

Mr. Rochester Ford for appellant.

Mr. B. H. Hereford and *Mr. Thomas Mitchell* for appellees.

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

The judgment of the Supreme Court of the Territory of Arizona in favor of the defendants, upon their demurrer to the complaint, proceeded upon the ground that the action must be treated as a suit in equity only, and that the complaint made out no case for equitable relief, and therefore could not be maintained under the opinions of this court in *Holland* v. *Challen*, 110 U. S. 15, 25, and *Frost* v. *Spitley*, 121 U. S. 552, 557. See also *More* v. *Steinbach*, 127 U. S. 70. But each of those cases came from a Circuit Court of the United States, in which the distinction between actions at law and suits in equity is preserved. The present action, arising under territorial statutes, is governed by different considerations.

The statutes of Arizona provide that "there shall be in this territory but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs," to be commenced by complaint, containing "a statement of the facts constituting the cause of action, in ordinary and concise language," and "a demand of the relief

which the plaintiff claims." Compiled Laws of 1877, c. 48, §§ 1, 22, 39. Under precisely similar statutes of the Territory of Montana, it has been adjudged by this court that both legal and equitable relief may be granted in the same action, and may be administered through the intervention of a jury or by the court itself, according to the nature of the remedy sought. *Hornbuckle* v. *Toombs*, 18 Wall. 648; *Hershfield* v. *Griffith*, 18 Wall. 657; *Davis* v. *Bilsland*, 18 Wall. 659; *Basey* v. *Gallagher*, 20 Wall. 670.

By the Compiled Laws of Arizona, c. 48, § 256, "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 adverse to him, for the purpose of determining such adverse claim, estate or interest."

By the act of the Territory of 1881, c. 59, that statute is amended by striking out the requirement of the plaintiff's possession, so as to read as follows: "An action may be brought by any person against another who claims an estate or interest in said real property adverse to him, for the purpose of determining such adverse claim."

The manifest intent of the statute, as thus amended, is, that any person owning real property, whether in possession or not, in which any other person claims an adverse title or interest, may bring an action against him to determine the adverse claim and to quiet the plaintiff's title. It extends to cases in which the plaintiff is out of possession and the defendant is in possession, and in which, at common law, the plaintiff might have maintained ejectment. An allegation, in ordinary and concise terms, of the ultimate fact that the plaintiff is the owner in fee is sufficient, without setting out matters of evidence, or what have been sometimes called probative facts, which go to establish that ultimate fact; and an allegation that the defendant claims an adverse estate or interest is sufficient, without further defining it, to put him to a disclaimer, or to allegation and proof of the estate or interest which he claims, the nature of which must be known to him, and may not be known to the plaintiff.

These conclusions accord with the decisions of the courts of

Statement of the Case.

California and Indiana under similar statutes, from one of which the present statute of Arizona would seem to have been taken. *Payne* v. *Treadwell*, 16 California, 220, 242–247; *Statham* v. *Dusy*, 11 Pacific Reporter, 606; *Heeser* v. *Miller*, 19 Pacific Reporter, 375; *Jefferson &c. Railroad* v. *Oyler*, 60 Indiana, 383, 392; *Trittipo* v. *Morgan*, 99 Indiana, 269.

The result is, that the complaint in this case is sufficient to authorize the court to determine the claim of the defendants and the title of the plaintiff, and also, if the facts proved at the hearing shall justify it, to grant an injunction or other equitable relief.

Judgment reversed, and case remanded to the Supreme Court of Arizona, with directions to overrule the demurrer to the complaint, and to take such further proceedings as may be consistent with this opinion.

PATTEE PLOW COMPANY *v.* KINGMAN.

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

No. 88. Argued November 16, 19, 1888.— Decided February 4, 1889.

The second claim of reissued letters patent No. 6080, granted to James H. Pattee, October 6, 1874, for improvements in cultivators, changes the first claim of the original patent, (1), by omitting the plates B, and (2) by the addition of the direct draft; and thus substantially enlarges the invention, and consequently is invalid.

The machines manufactured by the defendants do not infringe letters patent No. 174,684, granted to Thomas W. Kendall, March 14, 1876, for improvements in cultivators.

Letters patent No. 187,899, granted to Henry H. Pattee, February 27, 1877, for improvements in cultivators, embrace nothing that is not old, and nothing that is patentable, — that is, which involves invention rather than mechanical skill.

IN EQUITY for the infringement of letters patent. Decree dismissing the bill, from which complainant appealed.

Mr. John R. Bennett for appellant.

Mr. L. L. Bond for appellees. *Mr. E. A. West* was with him on the brief.

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

This is an appeal from a decree of the Circuit Court of the United States for the Eastern District of Missouri, dismissing appellant's bill of complaint.

The bill charges appellees with infringement of the second claim of reissued letters patent No. 6080, dated October 6, 1874, which is a reissue of original patent No. 124,218, to J. H. Pattee, dated March 5, 1872; of the first and second claims of original patent No. 174,684, granted Thomas W. Kendall, March 14, 1876; and of original patent No. 187,899, granted Henry H. Pattee, February 27, 1877; all for improvements in cultivators.

Appellee is an Illinois corporation, having a branch house in St. Louis, selling, among other things, cultivators manufactured by B. D. Buford &. Co., at Rock Island, Illinois, which are the alleged infringing machines.

The opinion of the Circuit Court was as follows:

"Reissued patent 6080, of 1874, second claim of which is under consideration, has, as to that claim, expanded the original beyond legal limits. Therefore, said reissued patent is void, to the extent claimed, wherein the defendant is alleged to have infringed. Second, as to the Kendall patent No. 174,684, there is no infringement. Third, as to the Pattee patent of 1877, No. 187,899, said patent is void, there being no novelty of invention therein that is patentable."

The second specification of the original Pattee patent No. 124,218, states that the invention consists "in pivoting the wheels to the axle in such manner that the wheels may either one be advanced forward of the other, throwing the axle diagonal with the line of progression, while the wheels preserve the same relative position to the said line of progression."

The second specification of the reissue reads as follows: "It consists in *hinging the ends of the axle to plates, to which the draft animals are attached, and which are supported on wheels* in such manner that the wheels *are retained in the line of progression of the machine by the draft of the animals, and* may either one be advanced forward of the other, throwing the axle diagonal with the line of progression, while the wheels preserve the same relative position to the said line of progression."

The fourth specification of the original is: "It consists in the peculiar construction of the hitching device, allowing the draft animals to advance or recede, the one ahead or in the rear of the other, without influencing the plow-beams to the extent of the variation made by the said animals, all as hereinafter fully described."

The sixth specification of the reissue is: "It consists in the *arrangement* of *a* hitching device *with the draft-plates, which allow* the draft animals to advance or recede, the one ahead or in rear of the other, without influencing the plow-beams to the extent of the variation made by the said animals, all as hereinafter fully described."

The description of the accompanying drawings is given in the original and in the reissue, thus:

Original.

"A is the axle, bowed or elevated at its central part. B B are plates secured to the ends of the axle A. The ends of the plates B B are *turned* outward, forming *snugs b b b b*. b^1 b^1 are snugs projecting inward from the plates B B. C C are *triangular-shaped draft-plates*, from which project snugs *c c c c*, corresponding with the snugs *b b b b*. D D are pins or bolts, passing

Reissue.

"A represents the axle, formed as shown in the drawings, of an elevated central part A, vertical side portions A^1 A^1, and *horizontal projections a a*, from each of the vertical side portions A^1. B B are draft-plates, with projecting forward ends *b*, to which the draft animals *may be attached direct* or by *any suitable* device, and with an enlarged rear end, from which

through holes in the snugs *c c* and *b b*, and thereby pivoting the plates C C to the axle A. E E are the wheels. F F are the wheel-spindles, their inner ends shouldered, threaded, and secured in slots *e e* in the lower ends of the plates C C by nuts *f f*. G G are eveners, pivoted near their centres in the forward ends of the plates C C. H H are bars, their forward ends pivoted to the inner ends of the eveners G G, and their rearward ends pivoted to the snugs b^1 b^1. I I are hooks on the outer ends of the eveners G G, to which the draft animals are attached."

project lugs b^1 b^1, corresponding with the *projections a a* of the axle A, to which they are hinged by vertical bolts C, as plainly shown in the drawings. D D are the supporting wheels. E E are the wheel-spindles, their inner ends shouldered, threaded, and secured in slots *e* in the lower ends of the plates B by nuts e^1. G G are eveners, pivoted near their centres in the forward ends of the plates B. H H are bars, their forward ends pivoted to the inner ends of the eveners G G, and their rearward ends pivoted to lugs a^1 a^1, which project inwardly from the vertical parts A^1 of the axle. I I are hooks on the outer ends of the eveners G G, to which the draft animals are attached."

From this on, the original and reissue specifications are substantially alike, the description of figure 1 of the reissue closing with the words, "It will be evident that the draft-plates B support and give direction to the course of the wheels, while the wheels in turn serve to support them."

The first claim of the original is for: "The axle A, having plates B hinged to the wheel-spindle plates C, so that the wheels are retained in the line of progression when one is in advance of the other, as set forth."

The second claim of the reissue is for: "The axle A, hinged to the wheel-spindle or draft-plates B B, so that the wheels are retained in the line of progression *by the draft of the animals*, when one is in advance of the other, substantially as described, and for the purpose specified."

The third claim of the original is: "The evener-bars G G and bars H H, when combined and arranged to operate with the hinged axle A, plates C, and wheels E E, substantially as and for the purpose specified."

And the sixth claim of the reissue: "The evener-bars G and bars H, combined and arranged to operate with the hinged axle A, plates B, and wheels D, substantially as and for the purpose specified."

That purpose is stated in the second claim to be the retaining of the wheels "in the line of progression by the draft of the animals, when one is in advance of the other," and as this purpose can only be accomplished by the aid of the evener-bars G G and bars H H, that is, not by the combination of the second claim alone, but only by carrying into it the eveners and bars of the sixth claim, it follows that the latter must be brought into the former by intendment.

In the original patent the mode of attachment of the team to the cultivator is stated to be by the hooks I I "on the *outer ends* of the *eveners* G G, to which the draft animals *are attached*," while the reissue patent contains these words: "B B are draft-plates, with projecting forward ends *b*, to which the draft animals may be attached *direct*, or by any suitable device."

An examination of the machine discloses that the wheels are kept in the line of progression by the eveners G G and their connection, and when they are dispensed with, and the hitch made direct, the wheels follow the animals and may get out of the line of progression.

As it is admitted that if the eveners are elements of the second claim, the effect of their omission and of hitching directly to the draft-plates instead of to the eveners would be to enlarge the claim, and as in our judgment this is precisely what was done, the reissue must be held to have been illegally expanded.

It may also be observed that the connecting bow in the original patent, called an axle, consists of a central curved portion with a plate attached to each end, and two spindle-plates, a combination of five parts. In the reissue the axle

and side-plates are treated as one part, making with the two spindle draft-plates three parts. There is, therefore, an omission in the latter combination, which tends, by reducing the number of elements, to render its scope less narrow than that of the original.

As we have seen, the original first claim was for "the axle A, *having plates* B, hinged to the wheel-spindle plates C, so that the wheels are retained in the line of progression when one is in advance of the other, as set forth."

The second claim of the reissue is for "the axle A hinged to the wheel-spindle or draft-plates B B, so that the wheels are retained in the line of progression *by the draft of the animals* when one is in advance of the other, substantially as described, and for the purpose specified."

The axle, having plates as described hinged to wheel-spindle plates, is not identical with an axle omitting the first-named plates, or having them so affixed as to become a constituent part thereof. The omission of the plates B and the addition of the direct draft are significant and material changes, and it is well settled that a reissue can only be granted for the same invention intended to be embraced by the original patent, and the specification cannot be substantially changed, either by the addition of new matter or the omission of important particulars, so as to enlarge the invention as intended to be originally claimed.

Passing to the question of infringement, it will be found that when the extent of the invention is determined, as it must be, by reference to the state of the art, the appellee's machine does not infringe in respect to those parts of the claim which can be held to have been unanticipated. It is alleged in the bill that in *Pattee* v. *Moline Plow Company*, in the United States Circuit Court for the Northern District of Illinois, the court sustained the validity of said reissued letters patent No. 6080. Upon referring to that case (10 Bissell, 377 and 9 Fed. Rep. 821) we find that Judge Blodgett held: "From the proof in this case it is quite clear to me that Pattee was not the first to conceive and embody in a working machine the idea of a tongueless straddle-row cultivator. The first

machine shown in the proof which embodies this idea is that patented by Isaac Constant, in November, 1851. It is a tongueless straddle-row cultivator, with all the elements for a working machine of that description, and so arranged as to be what may be called in this art self-sustaining, that is, it will stand upon its own supports. This was also done by Arnton Smith in January, 1855; by Whitely in 1860 to 1865; by E. W Vangundy in February, 1864; by Pratt in October, 1864; and by Adam Young in November, 1866. All these show cultivators constructed without a tongue, with two plow-beams held together by a yoke, each plow drawn by its own draft animal and operating independently of the other."

The Constant patent here referred to is in this record and shows a tongueless cultivator, in which the inside beams move vertically and laterally, independent of each other, and each draft animal is hitched to its own side, while the side supports are beams to which two cultivator shovels are applied.

The Smith machine is a tongueless cultivator, in which two mold-board plows are connected together by a bar in front, not arched up in the centre. A horse is to be attached to each plow, and the coupling so made as to allow an independent motion.

Of the Pratt patent Judge Blodgett says that Pattee's arched and jointed axle is fully anticipated by it in form of construction, function and mode of operation. This Pratt patent shows a flexible, parallel, tongueless cultivator, in which each horse pulls his own side of the machine.

The patent to William Tasker of 1859 has an axle hinged to draft or spindle arms, having projecting bars so coupled that the wheels are retained in the line of progression by the draft of the animals. Tasker's fifth claim is: "The connecting of the wheel stumps to a vertical spindle or spindles, capable of turning freely in vertical collar bearings or sockets, as hereinbefore described." The description as to this part of his machine is thus: "J J are adjustable stumps for carrying the running wheels K K. These stumps pass through the overhanging lugs L L, formed at the top and bottom of each of the round spindles M M, which are contained in the vertical

sockets N N (one of which is shown in section in figure 3) of the cast-iron frame C, and are free to turn therein, thereby enabling the stump of each wheel to swivel or lock round when turning the plow, as shown by the dotted lines in figure 2."

If Pattee's claim were merely for a combination of an axle, having an elevated central portion, with the wheel-spindles, so that the draft of the team controls the direction of the wheels, the Tasker patent anticipates it, but the combination differs from that in the arrangement by which the evener-bars are carried inwardly so as to connect with the arch or central part of the axle, making the axle a part of the evener so combined, and thus maintaining the parallelism of the wheels.

Appellee's machine does not have "the wheel-spindles or draft-plates" of the patent, nor the axle A with side-plates B, but it uses the Pratt axle of 1864. Nor in appellee's machine is the parallelism of the wheels maintained by the draft devices, nor are they retained in the line of progression by the draft of the animals, but turn as the animals may pull. The beam-frames of appellee's machine have nothing to do with the wheel-spindle. The snugs of Pattee's have nothing to do with the plow-beams. The differences are so great that interchangeability of the parts of the two machines would be utterly out of the question.

In our judgment the reissue if valid, when limited to what alone could be claimed as new, is not infringed by appellee.

The first and second claims of the Kendall patent No. 174,684 are as follows;

"1. The runners E, arranged to support the axle of a tongueless cultivator, with the plows D suspended therefrom, in manner substantially as described.

"2. The combination of the runners E, plows D, hook-rods F, and axle A of a tongueless cultivator, substantially as and for the purpose specified."

As stated on behalf of appellant, "the second claim in said patent is a claim for substantially the same combination as recited in the first claim, but differently worded from the first claim," and as the hang-up devices are necessary for the suspension of the plows, the two claims may be treated as one.

The invention is said in the specifications to consist of the use of runners attached to the truck-frame or axle in such manner that they will not interfere with the operations of the machine when in use, and will act as supporting runners for the axle when the rear ends of the plows are elevated and suspended thereon; and, second, in the combination of hooks or rods for suspending the plows on the axle, with said axle and plows.

The drawings show the axle, the wheels, the draft-plates, and the plows of an ordinary cultivator of the tongueless class. The runners, constituting as alleged the "main feature" of the improvement, are journaled on the outer ends of the spindles of the wheels, midway their lengths, and their forward ends curved inward, and secured to the draft-plates by a threaded end and nut, while their rear ends are extended backward and downward and curved in such position that when the plows are in operation in the field and the axle upright, the rear ends of the runners will be above and free from the surface of the ground, and when the rear ends of the plows are elevated and suspended by any means from the axle, the rear ends of the runners will rest upon the ground and support the axle from being pulled backward and downward.

In short, as in the machines with a tongue, the plows are raised up and suspended from the tongue to keep them off the ground, so in the tongueless machine the plows are raised up and hooked on to the axle, and, to prevent their falling backward with the axle, runners are provided, connected with the axle and the hitching-arm of the machine, which sustain the axle when the plows are hooked on, but are themselves raised from contact with the ground by the draft when the plows are in use.

The runners are described as "journaled on the outer ends of the spindles," but it is also stated that they "may be attached *rigidly* to any suitable part of the axle at one or more points of attachment, and extend backward in the same manner as described.

These runners having the wheel-spindle or axle for their fixed point of support, are necessarily rigid and unyielding, and work

automatically, their rear ends being raised by the pulling of the team and lowered by the weight of the plow-beams when placed on the hooks.

The rigidity of the runners and the resulting automatic action are the essential characteristics of the patent, for tongueless wheel cultivators with runners to keep the plows off the ground were common and well known in the art when it was issued.

It is contended by appellant that the true state of the art is contained in the prior patents of Poling of 1872 and Robertson of 1875, and while many others are exhibited, an examination of these will, we think, sufficiently establish the conclusion just expressed.

Poling's patent is for a tongueless cultivator, provided with runners, which are placed under the beams by hand, when the plows are being transported, and which are taken out and carried on the beams when the plows are in operation.

Robertson's patent is for a tongueless cultivator, with draft-plates, wheels and beams, and runners pivoted to the beams near the axle, and arranged with set-screws to lock the plows up and let them down. It is immaterial to the operation of the runners whether they act directly on the plow-beams or through the axle.

In appellee's machine the runner is arranged upon the end of an arm which projects backward from the axle. When the plows are in use the runner is turned up out of the way. When the runners are used the plows are raised and the runners prevented from turning up by a catch on the arm.

This machine does not contain runners constructed as the Kendall runners are, in the rigid form, and operated by the draft of the team to keep them off, or by the weight of the plows to keep them on the ground, and so lacks the distinctive features of the Kendall patent.

It is not automatic, but requires manipulation every time the use is changed.

When the runner is put in use its rear extension is turned down by hand, and a locking-dog, hung within a slot in the arm, turned into position. When the runner is not to be used,

it must be moved so as to release the dog and permit it to be thrown up, and the arm is then thrown upward and forward, the dog being allowed to drop so as to afford a support for the runner.

This jointed runner with a lock cannot be held to be the Kendall rigid bar.

We agree with the Circuit Court that there is no infringement.

Patent No. 187,899 is described as being for a new and improved mode of constructing the arch or central and main part of straddle-row cultivator beam-yokes or axles, and of connecting the side parts thereto, and the invention as consisting "in constructing said arch of curved adjacent bars of iron or steel, to the ends of which may be attached, by riveting, the cast-iron parts for securing thereto the plows and wheels, and which may be strengthened by the use of stiffening bolts."

The use of parallel bars is exceedingly common, and so far as the attachment of the bars to the end plates is concerned there is nothing new in that method.

The Burnham and Lathrop patent of 1866 shows a yoke connecting the plow-beams together, made with two parallel bars with end castings, put together with one bolt near the rear ends of the beams instead of with two bolts at the front ends, as in appellant's machine. The specification says: "The two frames G G are connected by an arched or semi-circular yoke H^x, the ends of which are pivoted to bars I I, which are secured on the tops of the plow frames G G by pivots *e*, the bars being allowed to turn freely on the pivots *e*."

The Louden patent of 1876 has an arched axle of tubular wrought iron, gas-pipe being stated to be very suitable, having end castings attached rigidly or cast thereon.

The Barr patent of 1872, and the Miller patent of the same year, show arched axles or beam-yokes of two or more parts.

The Perkins patent of the same year shows the beams themselves made of parallel curved bars.

What is sought in all these patents is strength and lightness, together with cheapness and durability, but they are simply modes of construction. And that described in this patent

embraces nothing that is not old and really nothing that is patentable, that is, which involves invention rather than mechanical skill.

Upon the whole case we are satisfied with the conclusions reached by the Circuit Court, and its decree is, therefore,

Affirmed.

UNION PACIFIC RAILWAY COMPANY *v.* McALPINE.

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

No. 128. Argued December 14, 15, 1888. — Decided January 28, 1889.

In October, 1874, Mrs. M. owned a tract of land consisting of four acres on Kansas River in the town of Wyandotte, Kansas, called Ferry tract, and the Kansas Pacific Railway Company owned a tract of 25¼ acres lying north of Wyandotte. In that year negotiations were opened between her and the company for an exchange of $2\frac{70}{100}$ acres of the Ferry tract, valued at $2000, for the 25¼-acre tract, valued at $1500, Mrs. M. offering to take for the difference in value a quarter section of land estimated at $3 an acre. Negotiations for the exchange were had between Mrs. M. and officers of that company. On February 26, 1878, the president of the company informed its general superintendent, in substance, that the exchange would be made, and directed him to proceed with the matter. The superintendent turned the matter over to the attorney of the company, who acquainted Mrs. M. with the conclusion. She, considering the proposition for an exchange of lands accepted, took possession of the 25¼ acre tract with her husband, and made valuable improvements upon it, and has remained in possession ever since. The railway company, who had previously been permitted to lay a track across the land for temporary use, took possession of the $2\frac{70}{100}$ acres and made improvements thereon. In June, 1878, at a meeting of the directors of the company, the president presented a form of deed to Mrs. M. of 25¼ acres in exchange for the $2\frac{70}{100}$ acres at the landing, and asked for instructions. It was then resolved that an exchange of said lands be made and the deed executed to Mrs. M. whenever the land to be conveyed by her was released from a tax claim thereon. A deed from her and her husband of the $2\frac{70}{100}$ acres, had previously been executed to the company and sent to its officers. After this resolution of the board, proceedings were taken by her for the release of the tax claim mentioned in it, which was accomplished, under the advice of the attorney of the company, by purchasing

in the property upon the sale made for such alleged tax. A deed was then demanded of the company for the 25¼-acre tract, and being refused, the present suit was brought for the enforcement of the contract. On the 24th of January, 1880, the Kansas Pacific Railway Company had become consolidated with the Denver Pacific Railway and Telegraph Company, and the Union Pacific Railway Company, under the name of the latter. By the articles of consolidation all the property of the constituent companies was conveyed to the new company, with a declaration that the assignment and transfer were made "subject to all liens, charges and equities pertaining thereto." Previous to this transfer and consolidation, and in May, 1879, a mortgage was made by the Kansas Pacific Company of its property, including the 25¼-acre tract, to Gould and Sage as trustees; *Held*,

(1) That the resolution of the Board of Directors of June 28, 1878, was a ratification in part of the negotiations for the exchange of the two tracts, and Mrs. M. having accepted this action, it is not valid ground of objection by the Kansas Pacific Company to the enforcement of the contract that it called for less than was originally agreed upon.

(2) That the taking possession of the tracts by the parties pursuant to the contract and continuing in possession and making improvements thereon constitute part performance of such contract sufficient to take it out of the Statute of Frauds and authorize a decree for full performance.

(3) That the obligation of the Kansas Pacific Company to execute a conveyance to Mrs. M. passed to the defendant company upon the consolidation mentioned and the transfer to it of the property of the Kansas Pacific Company.

(4) That the trustees under the mortgage of 1879 took the property with notice of the rights of Mrs. M., and subject to their enforcement.

In equity. For the specific performance of a contract to convey real estate. Decree for complainants. Respondent appealed. The case is stated in the opinion.

Mr. J. M. Wilson for appellant. *Mr. J. P. Usher*, *Mr. John F. Dillon* and *Mr. A. L. Williams* filed briefs for same.

Mr. William M. Springer and *Mr. James M. Mason* (with whom was *Mr. John W. Day* on the brief) for appellees.

Mr. Justice Field delivered the opinion of the court.

This case comes from the Circuit Court of the United States for the District of Kansas. It is a suit for the specific per-

formance of a contract for the exchange of lands in the State of Kansas between Maria W. McAlpine, one of the complainants below and appellees here, and the Kansas Pacific Railway Company, alleged to have been made in 1878, her contention being that the defendant, the Union Pacific Railway Company, has succeeded not only to the property but to the obligations of that company. The decree of the Circuit Court was in favor of the complainants, and the case is brought here on the appeal of the defendants. *McAlpine* v. *Union Pacific Railway Co.*, 23 Fed. Rep. 168.

Nearly every fact essential to the maintenance of the suit is controverted, and in relation to many of the facts there is a perplexing conflict of evidence. It would serve no useful purpose to detail and discuss the mass of testimony contained in the record and show, out of the varying statements of witnesses, the attendant circumstances and the accompanying documents, where the preponderance of evidence rests with respect to any essential matter. We shall briefly state the facts which seem to us to be sufficiently established. It appears that the town of Wyandotte, in Kansas, is situated at the junction of the Kansas and Missouri rivers, and that on the 16th of September, 1861, the title to a small tract of land bordering on the north side of the Kansas River, within the town, being four acres in extent, and known as the "Ferry Tract," was vested in one Isaiah Walker under a patent of the United States. This tract afforded an available and convenient landing from steamboats. On the 21st of October, 1874, the title to it passed to Maria W. McAlpine by conveyance of the sheriff of Wyandotte County, under a decree of the District Court of the Tenth Judicial District of Kansas, rendered in a partition suit between her and parties claiming interest therein. The other complainant and appellee, Nicholas McAlpine, is the husband of Maria. In the early part of 1878, negotiations were had between the McAlpines and officers of the Kansas Pacific Railway Company, for the exchange of two acres and seventy one-hundredths of an acre of this Ferry tract for a parcel of land consisting of twenty-five acres and a quarter, lying north of Wyandotte, then owned by that

company. The two acres and seventy one-hundredths of an acre were valued by the McAlpines at $2000. The 25¼ acre tract held by the railway company was valued at $1500. For the difference in value the McAlpines offered to take a quarter section of land in Pottawatomie County, Kansas, which was estimated to be worth three dollars an acre. The negotiations were had with the company through its president, its general superintendent, and its attorney at law. It does not appear that any of these officers, except its president, Robert E. Carr, acted upon any previous authority conferred by the Board of Directors. All its members, however, were aware of the negotiations, and no one expressed any doubt that what was done in the matter would be finally approved by the Board. Mr. Carr testified that whatever he did in regard to the exchange as an officer of the railway company was done after consultation and advice with the Board of Directors; and that in this case he also consulted with the receiver. The railway company was then and for some period subsequently, in the hands of a receiver appointed in a foreclosure suit apparently of a friendly character, resulting in a decree extending the time for paying the amount due. The rights of the receiver were merely temporary, the title of the property remaining in the railway company, and on the termination of the receivership possession was restored to the company. Mr. Carr, after becoming acquainted with the terms of the proposed exchange, and acting upon the advice of the Board, on the 26th of February, 1878, sent to the general superintendent of the company the following communication:

"Kansas Pacific Railway,

"Office of General Manager for the Receivers.

"St. Louis, *Feb.* 26, 1878.

"T. F. Oakes, Gen. Supt.

"Dear Sir: Respecting the settlement for right of way with McAlpine, I beg to say you can settle with him on the basis of exchanging the lot of land belonging to company above Wyandotte, about 25 acres, for his Walker Ferry tract.

That we will also, in addition, give him one hundred and sixty acres of land, to be selected by him out of the lands of the company, the appraised price of which does not exceed five hundred dollars; back taxes and claims on all to be satisfactorily cleared up.

"Respectfully, ROBERT E. CARR."

This communication was turned over by the general superintendent to the attorney of the company, with an indorsement over his initials, "Go ahead with this."

The McAlpines, considering the proposition for an exchange of lands as accepted, and the terms of the contract as settled, on the 25th of March following executed to the Kansas Pacific Railway Company a deed in due form of the two acres and seventy one-hundredths of an acre. In this deed Isaiah Walker and wife united, and it was then transmitted to the officers of the railway company for delivery. Soon afterwards, the McAlpines went into possession of the 25¼-acre tract, and have remained in its possession ever since. They put valuable improvements upon the land, and there are now many buildings upon it. The railway company had been permitted by the McAlpines and their predecessors, to lay a railroad across the Ferry tract for temporary use in transporting railroad material from steamboats to its main line. After the acceptance of the terms of the proposed exchange, the railway company took possession of the entire tract, that is, of the two acres and seventy one-hundredths of an acre, and kept and used it until the consolidation of the company with the defendant, when its possession and use passed to the latter, which has ever since held it. But it was not until the 28th of June, 1878, that the Board formally acted upon the subject. What was then done appears from the following extract from the minutes of its meeting:

"Pursuant to call of the president, the Board of Directors of the Kansas Pacific Railway Co. met at the office of the company, in St. Louis, on Friday, June 28th, instant, at 2 P.M.

"Present: Messrs. Perry, Meier, Edgell, Treadway, Edgerton and President Carr.

"The president presented a form of deed to Maria W. McAlpine to 25¼ acres of land in Wyandotte County in exchange for two and seventy hundredths acres of land at the tie landing in Wyandotte County, and asked for instructions in regard to signing the same.

"On motion of Mr. Meier, and seconded by Mr. Perry, it was resolved that the exchange of said lands be made, reserving the right of way therein, and the deed of the company be properly executed and delivered to Maria W. McAlpine whenever the land to be conveyed by her has been released from the tax claim thereon and a proper deed made for the same is delivered."

It appears that, pending the negotiations and before this action of the Board, it was discovered that a small part of the Ferry tract was clouded by a tax claim of some kind, and it is to the release of that claim that reference is made in the proceedings of the Board. The McAlpines were informed by the attorney of the company of its resolution. In accordance with its condition they proceeded to take measures to remove the tax claim, and they did so, upon the advice of the attorney, by bidding in the property at the sale made for such tax, which subjected them to an expenditure of several hundred dollars. They then notified the attorney of the removal of the claim, and called upon the company to execute its deed to them of the 25¼-acre tract in accordance with the contract. This the company postponed doing from time to time, under various pretences and pretexts, apparently in the expectation of securing by delay some undue advantage over the McAlpines. In the meantime, the Kansas Pacific Company became united and consolidated with the Denver Pacific Railway and Telegraph Company, and the Union Pacific Railway Company, under the name of the latter, which sets up against the claim of the McAlpines that the alleged contract for an exchange of lands was never made with the Kansas Pacific Company, or, if made, that nothing was ever done under it to take it out of the Statute of Frauds; and that even if such were the case, the contract was not enforceable against the defendant, the Union Pacific Company. We do not state the several objec-

tions urged against the demand of the complainants in the language of the appellants, but we give the substance of them, or at least of such of them as we deem of sufficient importance to notice.

Some criticism is made by the appellants upon the form of the allegations respecting the contract with the Kansas Pacific Company. It is alleged that such contract was with the defendant in 1878, acting under the name and style of the Kansas Pacific Railway Company, when the defendant company was not organized until 1880. It is true, the form of the allegation is not apt or even accurate, but it does not appear to have misled the defendant in any respect, and the case was heard on its merits, as though the allegations had followed the order in which the proceedings were taken by the original company, afterwards merged and consolidated into the defendant company. We do not, therefore, allow the criticism to affect our decision. It was not made in the court below, where objections to the form of averments should be presented, if they are to be considered here.

We agree with the Circuit Court that the record of the Board of Directors of the Kansas Pacific Railway Company of the 28th of June, 1878, measures and fixes the limits of the liabilities and obligations of that company. It shows a ratification of the past negotiations between the McAlpines and the company for the exchange of the two acres and seventy one-hundredths of an acre of the Ferry tract for the 25¼-acre tract. It does not, it is true, make any mention of the 160 acres in Pottawatomie County, but of that land we need not concern ourselves, for as to it the bill was dismissed and no appeal was taken by the complainants. If they were willing to accept a deed of the 25¼-acre tract in exchange for the two acres and seventy one-hundredths of an acre of the Ferry tract, it did not lie with the railway company to complain that they did not make a claim for the other land. It certainly was no ground for the company to repudiate the contract as ratified, that it called for less than was originally agreed upon. That land being left out of consideration, we have the respective parcels to be exchanged sufficiently identified, and from other docu-

ments they can be described by metes and bounds. That is certain, as the maxim obtains, which can be rendered certain. And if the contract, for want of the signature of the corporation or of its lawfully authorized agents, is not strictly within the Statute of Frauds, yet the possession taken of the several parcels — of the 25¼-acre tract by the McAlpines, and of the $2\frac{70}{100}$-acre tract by the railway company — in pursuance of such contract, and continued ever since, and their expenditures for buildings and other improvements upon the respective parcels constitute a part performance sufficient to take the contract out of the operation of the statute, and authorize a decree for its full performance. The fact that possession was taken before the ratification of the Board in June, 1878, did not impair the effect of that possession as an act of part performance. The taking possession of, that is, exercising control and dominion over the property, was referable entirely to the contract. It was an act done with respect to the property by the consent of the vendor, which would not have been done if there had been no contract. This consent gave to the act, which would otherwise have been tortious, its character as one of part performance.

It is not perceived how the effect of this possession, taken in behalf of Mrs. McAlpine — for it was in her interest alone that the exchange was made, the title to the Ferry tract being in her and not in her husband — is destroyed or weakened as an act of part performance by the fact that, in June of the previous year, Mr. McAlpine and one Arthur had taken a lease of the 25¼-acre tract until January 1, 1878. It does not appear that Mr. McAlpine remained upon the land after the termination of the lease, which was before negotiations were opened for its acquisition, by exchanging for it the property of Mrs. McAlpine. If Arthur remained upon the premises after such termination, he surrendered and left them when informed that the contract for the exchange had been made. It is plain, in our judgment, that the subsequent possession of Mrs. McAlpine, to whom the deed of the company was to be executed, was taken under that contract, and that the improvements were made on the faith that in pursuance of it the title would be conveyed to her.

Nor do we perceive that the obligation of the contract was released or impaired by the fact that when in April, 1880, the superintendent notified Mr. McAlpine that the company would not make the exchange, Mrs. McAlpine wrote to him asking when the company would be ready to remove its track from her land and come to a settlement for its use. That inquiry drew from the superintendent a request that she would "delay conclusions" until he could confer with New York parties. Her letter referred to the contract made two years before, and stated that then an exchange of lands was considered desirable by the railway people, as they had been using her land for several years, for a steamboat landing and wharf, and were still using it, without making any compensation for its use. The inquiry which followed was intended as an intimation of what would be expected if the contract were abandoned, not as a consent to such abandonment; but it is seized hold of and put forth by the defendant as an admission that no contract was ever concluded. It does not, in our judgment, justify any such inference. Nothing was ever heard from the New York parties, nor does it appear that any communication was ever made to them on the subject. And Mrs. McAlpine afterwards called upon the company to execute its deed pursuant to its contract. It was not until some time in December, 1880, that the general superintendent informed her that the contract for the exchange of the 25¼-acre tract would not be carried out under any circumstances, but that he would take the responsibility of paying her $1500 for her land as an amicable settlement. In January, 1881, the present suit was commenced; and if, under the pretexts put forth by the company, the performance of the contract could be defeated, a great wrong would be done to the complainants. Their possession, instead of being lawful, might be treated as a continuing trespass upon the property of the railway company; and the improvements placed upon the land, and the consequent increase in its value, would be lost to them. It is the wrong and hardship which would be done to a purchaser under these circumstances, by allowing the vendor to escape from the obligations of his contract for the want of some formality in its execution, that con-

stitute the ground of the jurisdiction of courts of equity in such cases to compel performance. A principle of common justice forbids that one shall be permitted to lead another to act upon a contract of purchase with him, and incur expenses by reason of it, and then, upon some pretext of a defect in a matter of form, refuse compliance with its provisions, and thus deprive the purchaser of the benefit of his labor and expenditures. Courts of equity in such cases interfere and compel the vendor to keep his engagements. *Lester* v. *Foxcroft*, 1 Colles Parl. Cas. 108; *Wills* v. *Stradling*, 3 Ves. 378, 381; *Gregory* v. *Mighell*, 18 Ves. 328; *Parkhurst* v. *Van Cortland*, 14 Johns. 15.

The obligation of the Kansas Pacific Railway Company to execute the contract by a conveyance of the 25¼-acre tract to the McAlpines passed with the property to the defendant, the Union Pacific Railway Company, upon the consolidation of the two companies under the latter name. Whenever property charged with a trust is conveyed to a third party with notice, he will hold it subject to that trust, which he may be compelled to perform equally with the former owner. The vendee in that case stands in the place of such owner. *Taylor* v. *Stibbert*, 2 Ves. Jr. 437, 439; *Dunbar* v. *Tredennick*, 2 Ball & Beatty, 304, 319. Without reference, therefore, to the articles of union and consolidation, the Union Pacific Railway Company would, on general principles, be held to complete the contract made with the Kansas Pacific Company; and the articles in specific terms recognize this obligation. The union and consolidation embraced three companies, the Denver Pacific Railway and Telegraph Company, as well as the Kansas Pacific Company and the Union Pacific Company. By the 8th article, the three companies transferred to the consolidated company all their rights, privileges, exemptions and franchises, and all their property, real, personal and mixed, with the appurtenances; with a declaration that the assignment and transfer were made "subject to all liens, charges and equities pertaining thereto." The tenth article exempted the new company from any separate or individual liability for the outstanding debts, obligations or liabilities of the respective constituent companies; but it also provided that nothing there-

in contained should "prevent any valid debt, obligation or liability of either constituent company from being enforced against the property of the proper constituent company," which by force of the articles became the property of the consolidated company. The property transferred, which included the 25¼-acre tract, thus passed to the new company, subject to all charges, liens and equities to which it was before subject, and the obligation of the Kansas Pacific Company to make a conveyance of that tract devolved upon the defendant.

The same principle applies also to the mortgage executed in 1879 by the Kansas Pacific Company to Gould and Sage, as trustees covering the 25¼-acre tract. At that time the order of June 28, 1878, was a matter of record in the books of the Kansas Pacific Company, and the McAlpines were in possession of the tract. Under these circumstances, it may be claimed that the property was taken by the trustees with notice of the rights of the complainants, and, therefore, subject to their enforcement. It is sufficient that the Union Pacific Company cannot set up that mortgage as a release from its obligation to make a conveyance in execution of the contract with the McAlpines.

Decree affirmed.

MORRIS *v.* GILMER.

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

No. 1150. Submitted January 2, 1889. — Decided January 28, 1889.

When the record discloses a controversy of which a Circuit Court cannot properly take cognizance, its duty is to proceed no further, and to dismiss the suit; and its failure or refusal to do so is an error which this court will correct of its own motion, when the case is brought before it for review.

It appearing from the evidence in this record that the sole object of the plaintiff in removing to the State of Tennessee was to place himself in a situation to invoke the jurisdiction of the Circuit Court of the United States, and that he had no purpose to acquire a domicil or settled home there, and no question of a Federal nature being presented to give juris-

Statement of the Case.

diction independently of the citizenship of the parties, the court below should have dismissed the case.

Hartog v. *Memory*, 116 U. S. 588, explained and qualified.

THE court stated the case as follows:

The first assignment of error relates to the action of the Circuit Court in overruling a motion to dismiss this suit, as one not really and substantially involving a dispute or controversy properly within its jurisdiction.

On the 7th of July, 1884, the present appellee, James N. Gilmer, who was then, and during all his previous life had been, a citizen of Alabama, instituted a suit in equity, in one of the Chancery Courts of that State, against Josiah Morris, individually, and against Josiah Morris and F. M. Billing as composing the firm of Josiah Morris & Co., citizens of Alabama. Its object was to obtain a decree declaring that the transfer, by the plaintiff to Morris, of sixty shares of the capital stock of the Elyton Land Company, an Alabama corporation, was made in trust and as collateral security for the payment of a debt due from the plaintiff to Josiah Morris & Co.; ordering an accounting in respect to the amount of that debt, the value of the stock, and the dividends thereon received by Morris; and directing him upon the payment of the debt and interest, or so much thereof as appeared to be unpaid, to transfer sixty shares of the stock to the plaintiff, and pay over any dividends received in excess of the debt due from the latter.

Besides putting in issue all the material averments of the bill, the answer relied upon laches and the Statute of Limitations in bar of the suit. The cause went to a hearing, upon pleadings and proofs, and, on the 29th of April, 1885, a final decree was rendered dismissing the suit; the Chancery Court holding that the claim was barred by the Statute of Limitations. Upon appeal, the decree was affirmed by the Supreme Court of Alabama, on the 27th of January, 1886. That court, as appears from the opinion of its Chief Justice, refused to modify the decree, so as to make it a dismissal without prejudice to another suit. *Gilmer* v. *Morris*, 80 Alabama, 78.

The present suit was instituted, September 20, 1886, in the

Statement of the Case.

Circuit Court of the United States by Gilmer, claiming to be a citizen of Tennessee, against Morris and Billing. It relates to the same shares of stock, and the relief asked is that Morris be decreed to account for and pay over to the plaintiff all dividends paid after it came to the defendant's hands, (after deducting Gilmer's indebtedness to Morris or to Morris & Co.,) and to transfer the sixty shares of stock to the plaintiff. The defendants filed a plea setting up the final decree in the state court in bar of the present suit. That plea having been overruled, *Gilmer* v. *Morris*, 30 Fed. Rep. 476, they separately answered; Billing disclaiming any interest in the stock, or in the dividends thereon. The plaintiff filed a replication. Subsequently, December 16, 1887, the defendant Morris filed in the cause the affidavit of A. S. Gerald to the effect that, in a conversation held by him with the plaintiff on or about November 14, 1887, the latter informed him "that he had returned to the city of Montgomery to reside permanently, and had been living here with that intent some time previous to said conversation;" and also his own affidavit to the effect that he had been informed and believed that the plaintiff returned to the city of Montgomery "some time in the latter part of May or early part of June, 1887, with the purpose and intent of permanently residing in the State of Alabama, and has continuously resided in said State of Alabama ever since said time." On the 17th of November, 1887, before the final hearing of the cause, the defendants, with leave of court, filed a written motion for the dismissal of the suit upon the ground that it did not really and substantially involve a controversy within the jurisdiction of the Circuit Court; basing his motion upon the above affidavits of Gerald and Morris, and upon the depositions of the plaintiff, and of his father, F. M. Gilmer, taken in this cause in behalf of the plaintiff. The father, in his deposition taken *de bene esse*, October 27, 1886, makes the following statements on cross-examination:

"Q. Where does your son, J. N. Gilmer, now reside? A. He resides in Memphis, Tennessee.

"Q. When did he remove there? A. I think he removed in April or May.

"Q. Of this year? A. Yes, sir, of this year.

"Q. Did he take his family with him? A. He did.

"Q. Did he take his furniture with him? A. He did.

"Q. Is not his home at present furnished with the same furniture and pictures that were in it when he was there? A. No, sir.

"Q. Does any one occupy his house? A. Yes, sir.

"Q. Who? A. Mr. Mitchell.

"Q. How long has he occupied it? A. I think he occupied it on the first of the month; it was rented to him the month before.

"Q. You think he occupied it from the first of October? A. Yes, sir.

"Q. I ask you if up to the first of October his furniture and effects were not in the house? A. No, sir, his effects went with him.

"Q. Did he remove all his furniture? A. Yes, sir.

"Q. Were not pictures left hanging on the wall of the house? A. No, sir.

"Q. Did he not move to the State of Tennessee for the purpose of bringing this suit in the United States court, and did he not so view it before he left? A. That is a question that he only can answer. I cannot answer for him.

"Q. I ask you if he did not tell you that his purpose in moving to Tennessee was for the purpose of bringing this suit in the United States court? A. He did not tell me that.

"Q. I ask you if you do not know that it was his purpose, and if it was not done under advice? A. I can tell you what I believe, but I cannot tell you what I know about it. I do not know it.

"Q. You say that you do not know whether that was his purpose or whether he was ever so advised? A. Well, I can say I advised him to do that.

"Q. Well, before his removal? A. Yes, sir.

"Q. How long before he removed was it that you advised him? A. Well, it was some months.

"Q. When did you advise him? Was it after the decision of the Supreme Court of Alabama in the chancery suit that you have spoken of? A. Yes, sir, it was after that.

"Q. I ask you if you didn't advise him to move for the purpose of bringing this suit in the United States court? A. I did.

"Q. And he changed his residence after that advice? A. I can say, further, that it was not the only thing that induced me to advise him. I wanted him relieved from his military occupation. I did not think that he would ever succeed in business as long as he was hanging on to a military organization, and I thought that his wife's mother lived in Memphis, and the family there were very desirous that they should go there. That was really the primary cause of my advising him, and I then suggested to him, 'If you go there you will have an opportunity of instituting suit' (in U. S. court). The prime object was to get him rid of all military organizations.

"Q. But part of the purpose was to get him so that he could institute suit in the United States court? A. Well, it was incidental. The primary purpose with me was to get him square out of the military organization.

"Q. Don't you know that he said his purpose in moving to Tennessee was to bring this suit in the United States court? A. I do not know that he said that. I may have heard him, but I cannot now bring it to mind.

"Q. Don't you know that it was his purpose to return here at the termination of this suit; don't you know this? A. I do not:

"Q. Do you know that he has moved to Tennessee, permanently, or with a view of remaining there? A. I do not.

"Q. Has he gone into any business in Tennessee? A. He has.

"Q. What is his business? A. Cotton-ginning business.

"Q. On his own account? A. No, sir; in connection with others.

"Q. Is he proprietor or employé? A. I really do not know.

"Q. Do you know whether he has made any investment in Tennessee? A. I do not.

"Q. Have his business connections here been severed? A. Yes, sir.

"Q. Entirely? A. Yes, sir; entirely.

"Q. How long before this present suit begun did he move

to Tennessee? A. I do not know when this suit was instituted, exactly; but I suppose about four or five months.

"Q. What month did he move away in; do you know? A. I do not bear in mind the exact date; I think it was in April.

"Q. Of this year? A. Yes, sir.

"Q. When did you say that your intimacy with Mr. Morris ceased? A. At the institution of this suit of J. N. Gilmer in the Chancery Court. . . .

"Q. That suit was commenced in the Chancery Court of Alabama by Gilmer, the same plaintiff, with Morris, the same defendant, and prosecuted through the Chancery Court, and then went to the Supreme Court on appeal, did it not? A. It did. . . .

"Q. And you were examined as a witness? A. I was.

"Q. Is not this a continuation of that same controversy — that suit? A. It is a continuation of the merits of the same transaction, but it is a new controversy.

"Q. How old are you, Mr. Gilmer? A. I am 76 years old."

Redirect examination:

"Q. Do you know whether J. N. Gilmer sold his residence before he left? A. He did.

"Q. Did he sell any other property — did he sell his cows and horses? A. He sold everything, sir, that he didn't carry with him.

"Q. Before he went to Memphis? A. Yes, sir."

The plaintiff, in his deposition, taken April 26, 1887, made these statements on cross-examination:

"Q. Where do you reside now? A. In Memphis.

"Q. What State? A. The State of Tennessee.

"Q. How long have you resided there? A. One year.

"Q. Did you not go there, Mr. Gilmer, for the purpose of getting jurisdiction to the Federal court of this State? A. I did, sir.

"Q. Is it your purpose to return to Montgomery if you gain this suit? A. That depends altogether upon circumstances.

"Q. What circumstances? A. If inducements be offered to make it to my interest, I may.

"Q. Well, is there not expectation that such inducements will be offered? A. I have had inducements offered, but I have not accepted.

"Q. I repeat the question: Is it not your expectation that, in the event you gain this suit, such inducements will be offered you to return here that you will accept them? A. Yes, sir.

"Q. So that you think, if you gain this suit, you will come back to Montgomery to live? A. Yes, sir.

"Q. Were you born and raised here in Montgomery? A. I was.

"Q. And lived here until May, 1885, or June, was it? A. I left here on the first day of May, 1886.

"Q. That was after the suit in the State Chancery Court had been decided against you in the Supreme Court of Alabama? A. Yes, sir."

Upon consideration of said affidavits and depositions, and after argument by counsel for the respective parties, the motion to dismiss was denied. The cause subsequently went to a final decree giving the plaintiff the relief asked. *Gilmer* v. *Morris*, 35 Fed. Rep. 682.

Mr. Henry C. Tompkins, *Mr. Alexander T. London*, *Mr. Samuel F. Rice* and *Mr. Daniel S. Troy* for appellant.

Mr. Henry C. Semple and *Mr. W. A. Gunter* for appellee.

It is insisted, by the appellant, that the lower court should have dismissed this case for the want of jurisdiction, and there is an assignment of error, to that effect, in the argument of counsel.

So far as this matter is concerned, there is nothing in the record on which to predicate any assignment of error. The averment of citizenship to give jurisdiction in the bill is full.

Before the passage of the act of March 3, 1875, 18 Stat. 470, it was well settled "that the citizenship of the parties could not be put in issue on the merits, but that it must be brought forward at an earlier stage in the proceedings by plea in abatement, in the nature of a plea to the jurisdiction." *Farmington* v.

Pillsbury, 114 U. S. 138, 143. "Such was the condition of the law when the act of 1875 was passed;" but by that law "the old rule established by the decisions, which required all objections to the citizenship of the parties, unless shown on the face of the record, to be taken by plea in abatement, before pleading to the merits, was changed, and the courts were given full authority to protect themselves against the false pretences of apparent parties." *Ib.*

The terms of that act are: "If in any such suit . . . it shall appear to the satisfaction of the Circuit Court, *at any time after such suit has been brought* . . . that such suit does not really and substantially involve a suit or controversy properly within the jurisdiction of said Circuit Court . . . the said Circuit Court shall proceed no further therein, but shall dismiss the suit, . . . but the order dismissing . . . said cause shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

In *Williams* v. *Nottawa*, 104 U. S. 209, 212, in speaking of cases under this law it is said: "Whether, if a defendant allows a case to go on until judgment has been rendered against him, he can take advantage of the objection on appeal, or writ of error, we need not decide. That would be a different case from this."

In *Hartog* v. *Memory*, 116 U. S. 588, construing this statute, and reviewing all the prior decisions, the following propositions may be said to be definitely settled.

1. That the general rule, well settled before the act of 1875, that when the citizenship necessary to give jurisdiction appeared on the face of the record, evidence to contradict the record was not admissible, except under a plea in abatement, and that a plea to the merits was an admission of the citizenship and waiver of a plea to the jurisdiction — was not altered by the act of 1875.

2. That the act of 1875 was enacted to enable the court, of its own motion, at any stage of the cause, to investigate the question of jurisdiction; and upon doing so, to protect itself from fraud, by a proper judgment.

3. That neither party under that act, has the right, *with-*

out pleading at the proper time, and in the proper way, to introduce evidence, the only purpose of which is to make out a case for dismissal; and that they cannot call on the court to go behind the averments of citizenship in the record, except by plea to the jurisdiction.

4. That the case is not to be tried by the parties as if there was a plea to the jurisdiction, when no such plea has been filed; and that the evidence must be directed to the issues, and that it is only when facts *material to the issues* show there is no jurisdiction, that the court can dismiss the case.

This authority disposes of the question at issue. The appellant did not plead to the jurisdiction; he pleaded in bar, and, after judgment against him on that, he filed his answer setting up other issues to the merits, on which the testimony was taken.

When the case came on for trial on these issues, to which, of course, the evidence could only be directed, the appellant, putting, as we affirm, an unwarranted construction on some immaterial, illegal and irrelevant evidence, asked the court to adopt his views, and, without more, to dismiss the cause in which he had already been defeated on the only debatable matter on the merits.

We do not deny that it was in the power of the court, if it suspected that its jurisdiction had been imposed upon, to have caused the proper inquiry to be made, or issue to be framed for that purpose. But this was a matter entirely for the court.

We insist that the law still is, as heretofore declared, that a citizen of the United States can instantly transfer his citizenship from one State to another by commensurate acts and purposes. And the right to sue in the courts of the United States attaches and adheres as an incident to the citizenship. *Rice* v. *Houston*, 13 Wall. 66, 68. And it makes not the slightest difference that the purpose of the change of domicil was to seek the independent judgment of a Federal court. *Briggs* v. *French*, 2 Sumner, 251; *Manhattan Ins. Co.* v. *Broughton*, 109 U. S. 121, 125, 126; *Jones* v. *League*, 18 How. 76; *Cooper* v. *Galbraith*, 3 Wash. C. C. 546; *Castor* v. *Mitchell*,

4 Wash. C. C. 191; *Case* v. *Clark*, 5 Mason, 70; *Gardner* v. *Sharp*, 4 Wash. C. C. 609; *Read* v. *Bertrand*, 4 Wash. C. C. 514; *Shelton* v. *Tiffin*, 6 How. 163.

The motive of a party in changing his domicil is not inquirable into. If the removal is real and is only for a day, the citizenship is acquired necessary for bringing suit. The motive can only be looked at as an element of evidence, to determine the reality of the removal. "Where a person lives is taken *prima facie* to be his domicil, until the facts establish the contrary." *Ennis* v. *Smith*, 14 How. 400, 423. A party who resides in a State with his family, and carries on business there is deemed a citizen of that State. *Knox* v. *Greenleaf*, 4 Dall. 360; *Byrne* v. *Holt*, 2 Wash. C. C. 282; *Shelton* v. *Tiffin*, 6 How. 163. "For the purposes of jurisdiction of the courts of the United States, domicil is the test of citizenship. A person cannot be a citizen of the State when he has abandoned his domicil there." *Poppenhausen* v. *India Rubber Co.*, 14 Fed. Rep. 707; *Case* v. *Clark*, 5 Mason, 70; *Cooper* v. *Galbraith*, 3 Wash. C. C. 546; *Lanz* v. *Randall*, 4 Dillon, 425; *Sheppard* v. *Graves*, 14 How. 505; *Kemna* v. *Brockhaus*, 5 Fed. Rep. 762.

All persons born or naturalized in the United States are, by the 14th amendment of the Constitution, "citizens of the United States and of the State where they *reside*." The appellee being in business in Alabama, with a family, and furniture, and property, including a residence, sells everything, and severing entirely his business connections, establishes his home and residence in Tennessee, and goes into business there. This is sufficient to satisfy any court that Tennessee had become his domicil.

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

It is unnecessary to decide whether the Circuit Court erred in overruling the plea of former adjudication, or in rendering the decree appealed from; for we are of opinion that the motion to dismiss the suit, as one not really involving a con-

troversy within its jurisdiction, should have been sustained. It is provided by the fifth section of the act of March 3, 1875, (18 Stat. 472,) determining the jurisdiction of the Circuit Courts of the United States, that if in any suit commenced in one of such courts "it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

The case presents no question of a Federal nature, and the jurisdiction of the Circuit Court was invoked solely upon the ground that the plaintiff was a citizen of Tennessee, and the defendants citizens of Alabama. But if the plaintiff, who was a citizen of Alabama when the suit in the state court was determined, had not become, in fact, a citizen of Tennessee when the present suit was instituted, then, clearly, the controversy between him and the defendants was not one of which the Circuit Court could properly take cognizance; in which case, it became the duty of that court to dismiss it. It is true that, by the words of the statute, this duty arose only when it appeared to the satisfaction of the court that the suit was not one within its jurisdiction. But if the record discloses a controversy of which the court cannot properly take cognizance, its duty is to proceed no further and to dismiss the suit; and its failure or refusal to do what, under the law applicable to the facts proved, it ought to do, is an error which this court, upon its own motion, will correct, when the case is brought here for review. The rule is inflexible and without exception, as was said, upon full consideration, in *Mansfield, Coldwater &c. Railway* v. *Swan*, 111 U. S. 379, 382, "which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of

the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relations of the parties to it." To the same effect are *King Bridge Co.* v. *Otoe County*, 120 U. S. 225; *Grace* v. *American Central Insurance Co.*, 109 U. S. 278, 283; *Blacklock* v. *Small*, 127 U. S. 96, 105, and other cases. These were cases in which the record did not affirmatively show the citizenship of the parties, the Circuit Court being without jurisdiction in either of them unless the parties were citizens of different States. But the above rule is equally applicable in a case in which the averment as to citizenship is sufficient, and such averment is shown, in some appropriate mode, to be untrue. While under the judiciary act of 1789, an issue as to the fact of citizenship could only be made by a plea in abatement, when the pleadings properly averred the citizenship of the parties, the act of 1875 imposes upon the Circuit Court the duty of dismissing a suit, if it appears at any time after it is brought and before it is finally disposed of, that it does not really and substantially involve a controversy of which it may properly take cognizance. *Williams* v. *Nottawa*, 104 U. S. 209, 211; *Farmington* v. *Pillsbury*, 114 U. S. 138, 143; *Little* v. *Giles*, 118 U. S. 596, 602. And the statute does not prescribe any particular mode in which such fact may be brought to the attention of the court. It may be done by affidavits, or the depositions taken in the cause may be used for that purpose. However done, it should be upon due notice to the parties to be affected by the dismissal.

It is contended that the defendant precluded himself from raising the question of jurisdiction, by inviting the action of the court upon his plea of former adjudication, and by waiting until the court had ruled that plea to be insufficient in law. In support of this position *Hartog* v. *Memory*, 116 U. S. 588, is cited. We have already seen that this court must, upon its

own motion, guard against any invasion of the jurisdiction of the Circuit Court of the United States as defined by law, where the want of jurisdiction appears from the record brought here on appeal or writ of error. At the present term it was held that whether the Circuit Court has or has not jurisdiction is a question which this court must examine and determine, even if the parties forbear to make it or consent that the case be considered upon its merits. *Metcalf* v. *Watertown*, 128 U. S. 586.

Nor does the case of *Hartog* v. *Memory* sustain the position taken by the defendant; for it was there said that "if, from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once, of its own motion, cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition." In that case, the citizenship of the parties was properly set out in the pleadings, and the case was submitted to the jury without any question being raised as to want of jurisdiction, and without the attention of the court being drawn to certain statements incidentally made in the deposition of the defendant against whom the verdict was rendered. After verdict, the latter moved for a new trial, raising upon that motion, for the first time, the question of jurisdiction. The court summarily dismissed the action, upon the ground, solely, of want of jurisdiction, without affording the plaintiff any opportunity whatever to rebut or control the evidence upon the question of jurisdiction. The failure, under the peculiar circumstances disclosed in that case, to give such opportunity, was, itself, sufficient to justify a reversal of the order dismissing the action, and what was said that was irrelevant to the determination of that question was unnecessary to the decision, and cannot be regarded as authoritative. The court certainly did not intend in that case to modify or relax the rule announced in previous well-considered cases. In the case before us the question was formally raised, during the progress of the cause, by written motion, of which the plaintiff

had due notice, and to which he appeared and objected. So that there can be no question as to any want of opportunity for him to be heard, and to produce evidence in opposition to the motion to dismiss.

We are thus brought to the question whether the plaintiff was entitled to sue in the Circuit Court. Was he, at the commencement of this suit, a citizen of Tennessee? It is true, as contended by the defendant, that a citizen of the United States can instantly transfer his citizenship from one State to another, *Cooper* v. *Galbraith*, 3 Wash. C. C. 546, 554, and that his right to sue in the courts of the United States is none the less because his change of domicil was induced by the purpose, whether avowed or not, of invoking, for the protection of his rights, the jurisdiction of a Federal court. As said by Mr. Justice Story, in *Briggs* v. *French*, 2 Sumner, 251, 256, "if the new citizenship is really and truly acquired, his right to sue is a legitimate, constitutional and legal consequence, not to be impeached by the motive of his removal." *Manhattan Ins. Co.* v. *Broughton*, 109 U. S. 121, 125; *Jones* v. *League*, 18 How. 76, 81. There must be an actual, not pretended, change of domicil; in other words, the removal must be "a real one, *animo manendi*, and not merely ostensible." *Case* v. *Clarke*, 5 Mason, 70. The intention and the act must concur in order to effect such a change of domicil as constitutes a change of citizenship. In *Ennis* v. *Smith*, 14 How. 400, 423, it was said that "a removal which does not contemplate an absence from the former domicil for an indefinite and uncertain time is not a change of it," and that while it was difficult to lay down any rule under which every instance of residence could be brought which may make a domicil of choice, "there must be, to constitute it, actual residence in the place, with the intention that it is to be a principal and permanent residence."

Upon the evidence in this record, we cannot resist the conviction that the plaintiff had no purpose to acquire a domicil or settled home in Tennessee, and that his sole object in removing to that State was to place himself in a situation to invoke the jurisdiction of the Circuit Court of the United States. He went to Tennessee without any present intention

to remain there permanently or for an indefinite time, but with a present intention to return to Alabama as soon as he could do so without defeating the jurisdiction of the Federal court to determine his new suit. He was, therefore, a mere sojourner in the former State when this suit was brought. He returned to Alabama almost immediately after giving his deposition. The case comes within the principle announced in *Butler* v. *Farnsworth*, 4 Wash. C. C. 101, 103, where Mr. Justice Washington said: "If the removal be for the purpose of committing a fraud upon the law, and to enable the party to avail himself of the jurisdiction of the Federal courts, and that fact be made out by his acts, the court must pronounce that his removal was not with a *bona fide* intention of changing his domicil, however frequent and public his declarations to the contrary may have been."

The decree is reversed, with costs to the appellant in this court, and the cause remanded, with a direction to dismiss the suit without costs in the court below.

WHITE *v.* COTZHAUSEN.

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

No. 129. Argued December 13, 14, 1888. — Decided January 28, 1889.

The Voluntary Assignment Act of the State of Illinois of 1877, which went into effect July 1, 1877, was intended to secure equality of right among all the creditors of the debtor making the assignment, and was a remedial act, to be liberally construed.

In Illinois the surrender by an insolvent debtor of the dominion over his entire estate, with an intent to evade the operation of the Voluntary Assignment Act of that State, and the transfer of the whole or substantially the whole of his property to a part of his creditors in order to give them a preference over other creditors, whether made by one instrument or more and whatever their form may be, operates as an assignment under that act; the benefit of which may be claimed by any unpreferred creditor who will take appropriate steps in a court of equity to enforce the equality contemplated by it.

Statement of the Case.

A creditor in Illinois who attempts to secure to himself an illegal preference of his debt by means of a conveyance to him of the property of his debtor when insolvent, to the exclusion of other creditors, is not thereby debarred, under the operation of the Voluntary Assignment Act, from participating in a distribution under that act of all the debtor's property, including that thus illegally conveyed to him.

THE case was stated by the court in its opinion as follows:

This is an appeal from a decree declaring two conveyances of real property in Illinois, a bill of sale of numerous pictures, a judgment by confession in one of the courts of that State pursuant to a warrant of attorney given for that purpose, and certain transfers of property accompanying that warrant, to be void as against the appellee, Cotzhausen, a judgment creditor of Alexander White, Jr. It is assigned for error that the decree is not supported by the evidence. Besides controverting this position, the appellee contends that the conveyances, judgment by confession and transfers were illegal and void under the provisions of the act of the General Assembly of Illinois, in force July 1, 1877, concerning voluntary assignments for the benefit of creditors. Ill. Sess. Laws of 1877, 116; 1 Starr. & Curtis Annotated Stats. Ill. 1303.

The record contains a large amount of testimony, oral and written; but the principal facts are as follows:

Alexander White, Sr., died, intestate, in the year 1872; his wife, Ann White, four daughters, Margaret, Elsie, Mary S. and Annie, and two sons, Alexander and James B., surviving him. Each of the children, except James, was of full age when the father died. At the request of the mother, and with the assent of his sisters, Alexander White, Jr., qualified as administrator and in that capacity received personal assets of considerable value. With their approval, if not by their express direction, he undertook the management of the real estate of which his father died possessed; making improvements, collecting rents, paying taxes and causing repairs to be made. He received realty in exchange for stock in a manufacturing company and in part exchange for the homestead, taking the title in his own name.

Statement of the Case.

After the death of the father, the widow and children remained together as one household, the expenses of the family and of each member of it being met with money furnished by Alexander White, Jr., out of funds he received from time to time and deposited in bank to his credit as administrator. But no regular account was kept, showing the amount paid to or for individual members of the family.

In 1878 it was determined by the widow and children to have an assignment of dower and a partition of the real property; and proceedings to that end were instituted in the Circuit Court of Cook County, Illinois. Before the close of that year, or in the spring or summer of 1879, having failed to obtain from the administrator a satisfactory account of the condition of the estate, they consulted an attorney, who, upon investigation, ascertained (using here the words of the appellants' counsel) that Alexander White, Jr., "had lost the entire personal estate, and had nothing except his interest as an heir in certain of the real estate with which to make good his losses." It appeared, as is further stated, that he had mortgaged some of the real property the title to which had been taken in his name; had anticipated rents on other property; had exchanged lands for stock in a heating and ventilating company; had allowed taxes to accumulate; and had, besides, induced some members of the family to guarantee his notes to a large amount. Upon these disclosures being made, the property was put under the immediate charge of the younger son, and the attorney with whom the mother and sisters had advised was directed to collect the amount due from Alexander White, Jr. Thereupon, a friendly accounting was had, which resulted in a report by him to the Probate Court, on the 18th of July, 1879, of his acts and doings as administrator during the whole period from the date of his appointment, April 9, 1872, to July 21, 1879. The report admits a balance due from him as administrator of $89,646.05, and charges him, "by virtue of the statute," (Rev. Stat. Ill. 1874, c. 3, § 113,) with $40,123.80, being interest on that sum from January 21, 1875, to July 21, 1879, at the rate of ten per cent per annum; in all, the sum of $129,769.85. He does not seem to have asserted any claim

whatever for his services as administrator or for managing the real property.

That report was approved by the Probate Court, which made an order, July 22, 1879, directing the said sum of $129,769.85 to be distributed and paid by the administrator as follows: To the widow, $43,256.61, and to each of the other children, $14,418.87.

It should be stated, in this connection, that, on the 16th of July, 1879, two days before the report to the Probate Court, the proceedings in the partition suit were brought to a conclusion by a decree assigning dower to the widow, and setting off specific parcels of land to Margaret and Alexander respectively, and other parcels to the remaining heirs jointly.

On the same day, Alexander White, Jr., executed two conveyances, one to his sisters (except Margaret) and his brother James, jointly, for part of the lands assigned to him by the decree of partition, and the other to his sister Margaret for the remaining part; the former deed reciting a consideration of $56,859.20, which is about the aggregate of the several amounts subsequently directed to be paid by the administrator to his brother and sisters (except Margaret), while the latter deed recited a consideration of $14,214.80, which is about the sum directed to be paid to his sister Margaret. Two days later, July 18, 1879, Alexander White, Jr., executed to his mother, brother and sisters (except Margaret) a bill of sale of his interest in certain pictures which had come to his hands as administrator. And, three days thereafter, July 21, 1879, he executed to his mother a note, accompanied by a warrant of attorney to confess judgment, and by a conveyance and transfer of certain real and personal property as collateral security for the note. Subsequently, September 4, 1879, pursuant to that warrant of attorney, judgment was entered against Alexander White, Jr., for $43,807.50, in the Circuit Court of Cook County. It is not claimed that any money was paid to him in these transactions; and it is admitted that the sole consideration for his transfers of property to the members of his family was his alleged indebtedness to them respectively.

By the final decree in these consolidated causes, it was ad-

judged that the two conveyances of July 16, 1879, the bill of sale of July 18, 1879, and the judgment by confession of September 4, 1879, and the transfers accompanying the warrant of attorney of July 21, 1879, were made without adequate consideration and with intent to hinder, delay and defraud the appellee Cotzhausen, who was found by the decree to be a creditor of Alexander White, Jr., in the sum of $27,842.22, the aggregate principal and interest of four several judgments obtained by him against White, in 1881 and 1882. The debts for which these judgments were rendered originated in the early part of 1878, in a purchase from Cotzhausen of nearly all the stock of the American Oleograph Company, whose principal place of business was Milwaukee, Wisconsin. In this purchase Alexander White, Jr., was interested. It is to be interred from the evidence that the principal object he had in making it was to transfer the office of the company to one of the buildings owned by the family in Chicago, and to start or establish his younger brother in business. His mother and sisters were evidently aware of his purchase and approved the object for which it was made.

It may be here stated that Margaret White died unmarried and intestate before the decree in this cause was entered, but the fact of her death was not previously entered of record. The parties to the present appeal, however, have, by written stipulation filed in this cause, waived all objections they might otherwise make by reason of that fact. It is further stipulated that the appellants are the only heirs at law of Margaret White. The appellee waives all objections to the present appeal on the ground that Alexander White, Jr., did not join in it.

Mr. Charles M. Osborn and *Mr. Ira W. Buell* for appellants.

The case developed by the evidence shows a preference given by Alexander to his family in the payment of the debts due to them, and we understand the law to be well settled that a debtor resident of Illinois, although insolvent or in failing cir-

cumstances, may prefer one creditor to the exclusion of others, when done in good faith and for a valuable consideration. That this is the law of the State of Illinois, we cite: *Tomlinson* v. *Matthews*, 98 Illinois, 178; *Payne* v. *Miller*, 103 Illinois, 442; *Eads* v. *Thompson*, 109 Illinois, 87. See also *Bean* v. *Patterson*, 122 U. S. 496.

Upon the questions of fact, we contend that all that the evidence in this case shows is, that Alexander White did give to his mother, brother and sisters a preference in the payment of debts justly due from him to them. That not only is there no evidence to prove either of the hypotheses upon which the bill was based, or that upon which the decree was rendered, but that the evidence adduced by the appellee himself expressly contradicts the allegations of the bill, and also the findings on which the decree is based.

Mr. Enoch Totten (with whom was *Mr. John C. Spooner* on the brief) for appellee.

No question of law is presented by the assignment of error. The contest turns on the weight of evidence. We invoke the familiar doctrine that *every presumption on appeals is in favor of the finding and decree below*, and that the burden is on the appellants to show error. *Mann* v. *Rock Island Bank*, 11 Wall. 650. The rule on reviewing the conclusion of a master in chancery is equally applicable here. *Medsker* v. *Bonebrake*, 108 U. S. 66, 71; *Tilghman* v. *Proctor*, 125 U. S. 136, 149.

Without reference to the violated provisions of the state statute, the question in this case is not merely one of inadequacy or want of consideration, but it is also as to the good faith of the transaction. "A sale may be void for bad faith though the buyer pays the full value of the property bought. This is the consequence, where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, and with guilty knowledge." *Clements* v. *Moore*, 6 Wall. 299, 312. A sale by one *insolvent of all his property, is presumptively* fraudulent, because the necessary effect of

such a sale must be to hinder and delay creditors. *Walcott* v. *Almy*, 6 McLean, 23; *Power* v. *Allston*, 93 Illinois, 587; *Singer* v. *Jacobs*, 3 McCrary, 638; *Burdick* v. *Gill*, 2 McCrary, 486. And this presumption is strengthened where the sale has been made to one in *confidential relations* with him. 1 Smith's Leading Cases, 50. Where *all* the debtor's estate was conveyed to his *wife or near relatives* or children, for an *inadequate* consideration, it was held to be a badge of fraud. *Pickett* v. *Pipkin*, 64 Alabama, 520; *Thomas* v. *Beck*, 39 Connecticut, 241. And where the consideration was *inadequate, coupled* with an agreement for his *future support. Egery* v. *Johnson*, 70 Maine, 258; *Church* v. *Chapin*, 35 Vermont, 223.

The application of the above principles of law to this case readily appears. The appellants contend that a debtor in failing circumstances may prefer one creditor to the exclusion of others, when he does so in good faith and for valuable consideration.

Such was the drift of judicial decisions generally, but the Voluntary Assignment Act of the State of Illinois, of 1877, (which went into effect July 1st, 1877,) radically changed the law on this subject in that State.

Section 13 of that act is as follows: "Every provision in *any assignment* hereafter made in this State, providing for the payment of one debt or liability in preference to another, shall be void, and all debts and liabilities within the provisions of the assignment shall be paid *pro rata* from the assets thereof." Laws of Illinois, 1877, page 120.

In view of this legislation the appellee contends that — ignoring the question of consideration and good faith altogether — the several conveyances and confession of judgment by Alexander White, were, in effect, a general assignment, giving preferences, and consequently void, because in contravention of that statute.

The evidence shows that these several conveyances of real and personal property, were made about the same time, and after the debtor had resolved to voluntarily dispose of the whole of his estate, and that thereby he substantially stripped

himself of all his assets without reservation or exception. Late decisions of the highest court of the State of Illinois leave no doubt that the above statute forbids *preferences* in such cases. *Preston* v. *Spaulding*, 120 Illinois, 208; *Strong* v. *Chenay*, Chicago Legal News, Dec. 1, 1888. See also *Freund* v. *Yeagerman*, 26 Fed. Rep. 819; *Winner* v. *Hoyt*, 66 Wisconsin, 229.

Mr. Justice Harlan delivered the opinion of the court. After stating the case, he continued:

Too much stress is laid by the appellee upon the fact that Alexander White, Jr., after qualifying as administrator, was authorized by his mother and sisters to control, in his discretion, both the real and personal estate of which his father died possessed. The granting of such authority cannot be held to have created any lien in favor of his creditors, upon their respective interests. Nor can it be said that they surrendered their right to demand from him an accounting in respect to his management of the property. Upon such accounting, he might become indebted to them; and, to the extent that he was justly so indebted, they would be his creditors, with the same right that other unsecured creditors had to obtain satisfaction of their claims. The mode adopted by them to that end, with full knowledge as well of his financial condition as of the fact that he was being pressed by Cotzhausen, was to take property on account of their respective claims. After he had executed the conveyances, bill of sale, warrant of attorney and transfers, to which reference has been made, he was left without anything that could be reached by Cotzhausen. So completely was he stripped by these transactions of all property that, subsequently, when his deposition was taken, he admitted that he owned nothing except the clothing he wore. He recognized his hopelessly insolvent condition, and formed the purpose of yielding to creditors the dominion of his entire estate. And it is too plain to admit of dispute that in executing to his mother, sisters and brother the conveyances, bill of sale, warrant of attorney and trans-

fers in question his intention was to give them, and their intention was to obtain a preference over all other creditors. What was done was in execution of a scheme for the appropriation of his entire estate by his family to the exclusion of other creditors, thereby avoiding the effect of a formal assignment.

The first question, therefore, to be considered is, whether the several writings executed by Alexander White, Jr., for the purpose of effecting that result, may be regarded as, in legal effect, one instrument, designed to evade or defeat the provisions of the statute of Illinois, known as the Voluntary Assignment Act, in force July 1, 1877.

The first section of that statute provides: "That in all cases of voluntary assignments hereafter made for the benefit of creditor or creditors, the debtor or debtors, shall annex to such assignment an inventory, under oath or affirmation of his, her, or their estate, real and personal, according to the best of his, her, or their knowledge; and also a list of his, her, or their creditors, their residence and place of business, if known, and the amount of their respective demands; but such inventory shall not be conclusive as to the amount of the debtor's estate, but such assignment shall vest in the assignee or assignees the title to any other property, not exempt by law, belonging to the debtor or debtors at the time of making the assignment, and comprehended within the general terms of the same. Every assignment shall be duly acknowledged and recorded in the county where the person or persons making the same reside, or where the business in respect of which the same is made has been carried on; and in case said assignment shall embrace lands, or any interest therein, then the same shall also be recorded in the county or counties in which said land may be situated."

Other sections provide for publication of notices to creditors; for the execution by the assignee of a bond and the filing of an inventory in the County Court; for the report of a list of all creditors of the assignor; and for exception by any person interested to the claim or demand of any other creditor.

The sixth section provides "that at the first term of the said

County Court, after the expiration of three months, as aforesaid, should no exception be made to the claim of any creditor, or if exceptions have been made, and the same have been adjudicated and settled by the court, the said court shall order the assignee or assignees to make, from time to time, fair and equal dividends (among the creditors) of the assets in his or their hands, in proportion to their claims," etc.

The eighth section declares that "no assignment shall be declared fraudulent or void for want of any list or inventory as provided in the first section."

The thirteenth section is in these words: "Every provision in any assignment hereafter made in this State providing for the payment of one debt or liability in preference to another shall be void, and all debts and liabilities within the provisions of the assignment shall be paid *pro rata* from the assets thereof."

The main object of this legislation is manifest. It is to secure equality of right among the creditors of a debtor who makes a voluntary assignment of his property. It annuls every provision in any assignment giving a preference of one creditor over another. No creditor is to be excluded from participation in the proceeds of the assigned property because of the failure of the debtor to make and file the required inventory of his estate and the list of his creditors. Nor, if such a list is filed, is any creditor to be denied his *pro rata* part of such proceeds because his name is omitted, either by design or mistake upon the part of the debtor. The difficulty with the courts has not been in recognizing the beneficent objects of this legislation, but in determining whether, in view of the special circumstances attending their execution, particular instruments are to be treated as part of an assignment, within the meaning of the statute.

The leading case upon this subject in the Supreme Court of Illinois is *Preston* v. *Spaulding*, 120 Illinois, 208. In that case the members of an insolvent firm, in anticipation of bankruptcy, made, within a period of less than thirty days, four conveyances of their individual estate to near relatives, and various payments of money to her relatives, on alleged debts.

After these conveyances and payments, and with full knowledge of impending failure, the members of the firm held a conference with their legal advisers before the expiration of said thirty days, respecting the measures to be adopted by them and the shape their failure was to assume. It was determined that they should make a voluntary assignment, but that preference be given to certain creditors by executing to them what are called judgment notes. The assignment in form was made, but on the same day and before it was executed, the creditors to whom the notes were given caused judgment by confession to be entered thereon, and immediately, and before the deed of assignment was or could be filed, caused execution to be issued and levied, whereby they took to themselves the great bulk of the debtor's estate. The trustee, named in the assignment, having refused to attack the preferences thus secured, a creditor brought suit in equity upon the theory that the giving of the judgment notes and the making of the deed of assignment were parts of one transaction, and, consequently, the preferences attempted were illegal and void under the statute. The Supreme Court of Illinois, considering the question whether the preferential judgments obtained in that case were within the prohibitions of the act of 1877, said: "The statute is silent as to the form of the instrument or instruments by which an insolvent debtor may effect an assignment. . . . If, then, these preferences are to be held to be within the 'provisions' of the assignment or 'comprehended within its general terms,' it must be because they fall within the intent and spirit of the act. It will be observed, this act does not assume to interfere, in the slightest degree with the action of a debtor, while he retains the dominion of his property. Notwithstanding this act, he may now, as heretofore, in good faith sell his property, mortgage or pledge it to secure a *bona fide* debt, or create a lien upon it by operation of law, as, by confessing a judgment in favor of a *bona fide* creditor. But when he reaches the point where he is ready, and determines, to yield the dominion of his property, and makes an assignment for the benefit of his creditors, under the statute, this act declares that the effect of such assignment shall be the surrender and

conveyance of all his estate, not exempt by law, to his assignee — rendering void all preferences and bringing about the distribution of his whole estate equally among his creditors; and we hold that it is within the spirit and intent of the statute, that when the debtor has formed a determination to voluntarily dispose of his whole estate, and has entered upon that determination, it is immaterial into how many parts the performance or execution of his determination may be broken, — the law will regard all his acts having for their object and effect the disposition of his estate, as parts of a single transaction; and, on the execution of the formal assignment, it will, under the statute, draw to it, and the law will regard as embraced within its provisions, all prior acts of the debtor having for their object and purpose the voluntary transfer or disposition of his estate to or for creditors; and if any preferences are shown to have been made or given by the debtor to one creditor over another in such disposition of his estate, full effect will be given the assignment, and such preferences will, in a court of equity, be declared void, and set aside as in fraud of the statute."

After setting out the details of the plan devised to secure certain creditors a preference in advance of the filing of the deed of assignment, the court further said: "It will be observed that all this was strictly in accordance with the *forms* of law, but will any one deny that a most palpable fraud was, in fact, perpetrated upon appellee, Spaulding, by the debtors, or that the acts of the debtors were in fraud of the statute? . . . This voluntary assignment act is in its character remedial, and must, therefore, be liberally construed, and no insolvent debtor having in view the disposition of his estate, can be permitted to defeat its operation by effecting unequal distribution of his estate by means of an assignment, and any other shift or artifice under the forms of law; and whatever obstacles might be encountered in other courts of this State, . . . a court of equity, when properly invoked, was bound to look through and beyond the *form*, and have regard to the substance, and having done so, to find and declare these preferential judgments void, under the statute, and to set them

aside." See also *Miner's National Bank's Appeal*, 57 Penn. St. 193, 199; *Winner* v. *Hoyt*, 66 Wisconsin, 227, 239; *Wilks* v. *Walker*, 22 So. Car. 108, 111.

We agree with the Supreme Court of Illinois that this statute, being remedial in its character, must be liberally construed; that is, construed "largely and beneficially, so as to suppress the mischief and advance the remedy." That court said in *Chicago, &c. Railroad* v. *Dunn*, 52 Illinois, 260, 263: "The rule in construing remedial statutes, though it may be in derogation of the common law is, that everything is to be done in advancement of the remedy that can be done consistently with any fair construction that can be put upon it." See also *Johnes* v. *Johnes*, 3 Dow, 1, 15. If, then, we avoid over-strict construction, and regard substance rather than form; if effect be given to this legislation, as against mere devices that will defeat the object of its enactment, the several writings executed by Alexander White, Jr., all about the same time, to his mother, sisters and brother, whereby, in contemplation of his bankruptcy, and according to a plan previously formed, he surrendered his entire estate for their benefit, to the exclusion of all other creditors, must be deemed a single instrument, expressing the purposes of the parties in consummating one transaction, and operating as an assignment or transfer under which the appellee, Cotzhausen, may claim equality of right with the creditors so preferred. It is true there was not here, as in *Preston* v. *Spaulding*, a formal deed of assignment by the debtor under the statute. But of what avail will the statute be in securing equality among the creditors of a debtor who, being insolvent, has determined to yield the dominion of his entire estate, and surrender it for the benefit of creditors, if some of them can be preferred by the simple device of not making a formal assignment, and permitting them, under the cover or by means of conveyances, bills of sale or written transfers, to take his whole estate on account of their respective debts, to the exclusion of other creditors? If Alexander White, Jr., intending to surrender all his property for the benefit of his creditors, and to stop business, had excepted from the conveyances, bill of sale and transfers executed to

his mother, sisters and brother, a relatively small amount of property, and had shortly thereafter made a general assignment under the statute, it could not be doubted, under the decision in *Preston* v. *Spaulding*, and in view of the facts here disclosed, that such conveyances, bill of sale and transfers would have been held void as giving forbidden preferences to particular creditors; and his assignment would have been held, at the suit of other creditors, to embrace not simply the property owned by him when it was made, but all that he previously conveyed, sold and transferred to his mother, sisters and brother. But can he, having the intention to quit business and surrender his entire estate to creditors, be permitted to defeat any such result by simply omitting to make a formal assignment, and by including the whole of his property in conveyances, bills of sale, and transfers to the particular creditors whom he desires to prefer? Shall a failing debtor be allowed to employ indirect means to accomplish that which the law prohibits to be done directly? These questions must be answered in the negative. They could not be answered otherwise without suggesting an easy mode by which the entire object of this legislation may be defeated.

We would not be understood as contravening the general principle, so distinctly announced by the Supreme Court of Illinois, that a debtor, even when financially embarrassed, may in good faith compromise his liabilities, sell or transfer property in payment of debts, or mortgage or pledge it as security for debts, or create a lien upon it by means even of a judgment confessed in favor of his creditor. *Preston* v. *Spaulding*, *ubi supra*; *Field* v. *Geoghegan*, 125 Illinois, 70. Such transactions often take place in the ordinary course of business, when the debtor has no purpose, in the near future, of discontinuing business or of going into bankruptcy and surrendering control of all his property. A debtor is not bound to succumb under temporary reverses in his affairs, and has the right, acting in good faith, to use his property in any mode he chooses, in order to avoid a general assignment for the benefit of his creditors. We only mean, by what has been said, that when an insolvent debtor recognizes the fact that he can no longer go on in busi-

ness, and determines to yield the dominion of his entire estate, and in execution of that purpose, or with an intent to evade the statute, transfers all, or substantially all, his property to a part of his creditors, in order to provide for them in preference to other creditors, the instrument or instruments by which such transfers are made and that result is reached, whatever their form, will be held to operate as an assignment, the benefits of which may be claimed by any creditor not so preferred, who will take appropriate steps in a court of equity to enforce the equality contemplated by the statute. Such we think is the necessary result of the decisions in the highest court of the State.

The views we have expressed find some support in adjudged cases in the Eighth Circuit, where the courts have construed the statute of Missouri providing that "every assignment of lands, tenements, goods, chattels, effects and credits made by a debtor to any person in trust for his creditors, shall be for the benefit of all the creditors of the assignor in proportion to their respective claims." Referring to that statute, Krekel, J., said, in *Kellog* v. *Richardson*, 19 Fed. Rep. 70, 72 — following the previous case of *Martin* v. *Hausman*, 14 Fed. Rep. 160 — "a merchant may give a mortgage or a deed of trust in part or all of his property, to secure one or more of his creditors, thus preferring them, but he cannot convey the whole of his property to one or more creditors and stop doing business. Such turning over and virtually declaring insolvency brings the instrument or act by which it is done within the assignment law of Missouri, which requires a distribution of the property of the failing debtor for the benefit of all the creditors in proportion to their respective claims. Such is the declared policy of the law; it places all creditors upon an equal footing." So in *Kerbs* v. *Ewing*, 22 Fed. Rep. 693, where Judge McCrary, referring to the Missouri statute, said: "No matter what the form of the instrument, where a debtor, being insolvent, conveys all his property to a third party, to pay one or more creditors, to the exclusion of others, such a conveyance will be construed to be an assignment for the benefit of all the creditors; the preference being in contravention of the assignment

laws of this State." Again, in *Freund* v. *Yaegerman*, 26 Fed. Rep. 812, 814, it was said by Treat, J., that the conclusion reached by Mr. Justice Miller and Judges McCrary, Krekel, and himself, was, "that under the statute of the State of Missouri concerning voluntary assignments, when property was disposed of in entirety or substantially — that is, the entire property of the debtor, he being insolvent — it fell within the provisions of the assignment law. The very purpose of the law was that no preference should be given. No matter by what name the end is sought to be effected, it is in violation of that statute. You may call it a mortgage, or you may make a confession of judgment, or use any other contrivance, by whatever name known, if the purpose is to dispose of an insolvent debtor's estate, whereby a preference is to be effected, it is in violation of the statute." See also *Perry* v. *Corby*, 21 Fed. Rep. 737; *Clapp* v. *Dittman*, 21 Fed. Rep. 15; *Clapp* v. *Nordmeyer*, 25 Fed. Rep. 71.

If Alexander White, Jr., had made a formal assignment of his entire property in trust for the benefit, primarily or exclusively, of his mother, sisters and brother, as creditors, its illegality would have been so apparent that other creditors would have been allowed to participate in the proceeds of sale. By the conveyances, bill of sale, confession of judgment and transfers, all made about the same time, and pursuant to an understanding previously reached, he has effected precisely the same result as would have been reached by a formal assignment to a trustee for the exclusive benefit of his mother, brother and sisters. The latter is forbidden by the letter of the statute, and the former is equally forbidden by its spirit. Surely, the mere name of the particular instruments by which the illegal result is reached, ought not to be permitted to stand in the way of giving the relief contemplated by the statute. Courts of equity are not to be misled by mere devices, nor baffled by mere forms.

It remains only to consider the effect of these views upon the decree below. We have already seen that the Circuit Court proceeded upon the ground that the conveyances, bill of sale, confession of judgment and transfers by Alexander

White, Jr., were made without adequate consideration, and with intent to hinder, delay and defraud the appellee. Upon these grounds it gave him a prior right in the distribution of the property. We are not able to assent to this determination of the rights of the parties; for the mother, sisters and brother of Alexander White, Jr., were his creditors, and, so far as the record discloses, they only sought to obtain a preference over other creditors. But their attempt to obtain such illegal preference ought not to have the effect of depriving them of their interest, under the statute, in the proceeds of the property in question, or justify a decree giving a prior right to the appellee. It was not intended, by the statute, to give priority of right to the creditors who are not preferred. All that the appellee can claim is to participate in such proceeds upon terms of equality with other creditors.

It results that the decree below is erroneous, so far as it directs the property, rights and interests therein described to be sold in satisfaction primarily of the sums found by the decree to be due from Alexander White, Jr., to the appellee. The case should go to a master to ascertain the amount of all the debts owing by Alexander White, Jr., at the date of said conveyances, bill of sale and transfers. In respect to the amounts due from him to his mother, sisters and brother, respectively, it is not necessary, at this time, to express any opinion, further than that the accounting in the Probate Court between them is not conclusive against the appellee. It will be for the court below to determine, under all evidence, what amounts are justly due from Alexander White, Jr., to his mother, sisters and brother, taking into consideration all the circumstances attending his management of the property, formerly owned by his father, whether real or personal.

To the extent we have indicated, the decree is reversed, each side paying one-half the costs in this court; and the cause is remanded, with a direction for further proceedings not inconsistent with this opinion.

The Chief Justice did not sit in this case or participate in its decision.

PINKERTON *v.* LEDOUX.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 114. Argued December 7, 1888. — Decided February 4, 1889.

The report upon a Spanish or Mexican grant by the surveyor general of New Mexico under the act of July 22, 1854, § 8, 10 Stat. 308, which required such report to be "laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bonâ fide* grants," is no evidence of title or right to possession.

In ejectment, the question whether the tract in dispute is within the boundaries of a grant of public land, is to be determined by the jury on the evidence, as explained by the court.

When the description in the petition and grant of a Mexican grant differs from the description in the act of possession the former must prevail.

If, from the description and words in the petition and writ of possession of a Mexican grant the jury cannot definitely locate the boundaries of the grant, they must find for the defendant.

Whether the Nolan title has any validity without confirmation by Congress, *quære.*

Whether the proviso in the act of July 1, 1870, 16 Stat. 646, that when the grants to Nolan to which it related "are so confirmed, surveyed and patented, they shall be held and taken to be in full satisfaction of all further claims or demands against the United States," was not intended to affect the entire claim of Nolan for any grant of lands in New Mexico, *quære.*

EJECTMENT. Judgment for defendant. Plaintiff sued out this writ of error. The case is stated in the opinion.

Mr. F. W. Clancy for plaintiff in error.

Mr. Henry E. Davis for defendant in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is an action of ejectment brought by Pinkerton, the plaintiff in error, to recover from the defendants, Julian Ledoux and Epifanio Ledoux, the possession of a quarter section of land claimed to be within the tract known as the Nolan grant in Colfax and Mora counties in New Mexico, under

which grant the plaintiff claims title; and the main question in the case is, whether the Nolan grant extends far enough westerly and northerly to embrace the lot in question. The action was commenced in July, 1881, in Colfax County, and was afterwards removed to Mora County. The property claimed is described in the declaration as follows, to wit: "that certain tract and parcel of land lying and being situated in the county of Colfax, in the Territory of New Mexico, and being a portion of that larger tract of land commonly known as and called the 'Nolan grant,' (and which said grant was, on or about the eighteenth day of November, A.D. 1845, made by Manuel Armijo, then Governor of the Territory of New Mexico, to Gervacio Nolan and two others,) being the same one hundred and sixty acres of land upon which the said defendants now reside and occupy, and upon which they have a dwelling-house wherein the said defendants or one of them reside, situated on the northwest third of the above-mentioned grant and bounded upon all sides by lands of the plaintiff."

The defendants pleaded not guilty and three special pleas. First, title in themselves by virtue of an entry and a grant from the United States, under which they have erected and placed upon the premises certain valuable improvements, consisting of dwelling-houses, barns, fences, ditches, etc., of the value of $5000, which value they give notice that they will prove at the trial, if the plaintiff shall maintain his title. Secondly, that they built the valuable improvements on the land before the commencement of the action, and that the plaintiff cannot deprive them of possession until such improvements are paid for. Third, not guilty within ten years.

The plaintiff took issue on those pleas, and entered a *nolle prosequi* as to Julian Ledoux. On the trial of the cause the plaintiff gave in evidence, 1st, the original Nolan grant, consisting of the petition for a concession, dated November 15, 1845; the grant upon the same, indorsed thereon and dated Santa Fé, November 18, 1845; and the act of juridical possession, dated November 30, 1845. The petition was made by Gervacio Nolan, Juan Antonio Aragon, and Antonio Maria Lucero, soliciting a grant for a piece of land in the little cañon of Red

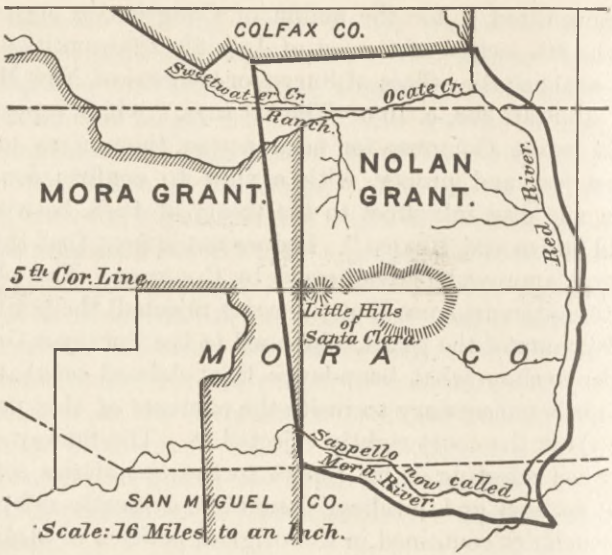
river, bounded "on the north by the possession of Messrs. Miranda and Beaubien; on the south one league in a direct line, including the Sapello river, according to its current; on the west another league from Red river and its current; and on the southeast the little hills of Santa Clara with their range to the little cañon of the Ocate." The grant was made as desired, with the boundaries and limits asked for. The act of juridical possession describes the boundaries as follows: "They are, on the north, the lands of Don Gaudalupe Miranda and Don Carlos Beaubien; on the south, one league south of the Sapello river, following the same range; on the east, one league east of the Red river, with the same range of the river; and on the west, the little cañon of Ocate and five hundred varas west of the little hills of Santa Clara in a direct line." No plat or desiño was shown to have been annexed to the act of juridical possession. If there had been one, it was not given in evidence.

It must be acknowledged that these descriptions are somewhat vague. It would seem that, from the northern boundary, adjoining Miranda and Beaubien, (or the Maxwell grant,) to the southern boundary along the Sapello river, the distance is about forty miles; and if the grant extends westerly from the Red river far enough to embrace the land in question, as claimed by the plaintiff, the general width is from twenty-one to twenty-five miles; the whole tract thus embracing an area of nearly one thousand square miles; whilst, if it is confined to one league west of the Red river, as would seem to be the meaning of the original petition and grant, the quantity would still be over one hundred square miles.

The plaintiff then gave in evidence, without objection on the part of the defendant, the opinion of the Surveyor General, dated July 10, 1860, reporting on the grant in question, and stating that he believed the documents of title to be genuine, and the grant to be good and valid, and that the land embraced within the boundaries set forth in the petition and juridical possession were severed from the public domain, and that the title therefor was vested in the heirs and legal representatives of Gervacio Nolan; he therefore approved said title,

and transmitted it for the action of Congress, in accordance with the 8th section of the act of July 22, 1854, entitled "An act to establish the offices of Surveyor General of New Mexico, etc." 10 Stat. 308, c. 103. The act says, "which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of 1848, between the United States and Mexico." It does not appear that this title was ever approved or confirmed by Congress. The plaintiff then offered in evidence (but the court rejected) the petition of the claimants of the grant, addressed to the Surveyor General, in order to show what boundaries they claimed on that occasion. It is unnecessary to recite the contents of this petition, as we think the court rightly rejected it. The Surveyor General, when referring in his report to the boundaries set forth in the petition and juridical possession, evidently referred to the boundaries contained in the original petition of Nolan and his associates for the grant, and not to the petition addressed to himself.

The plaintiff then introduced in evidence a map from the Surveyor General's office, which was not admitted as evidence of the boundaries of the grant in question, nor to show any survey thereof, but only to inform the jury as to the location and position of natural objects and course of streams referred to in other documents. The material part of the map was as follows, to wit:



It shows the Nolan grant to be about 40 miles in length, north and south, and 25 miles in width, extending across the the whole of Mora County, and five or six miles into Colfax County on the north and San Miguel County on the south. In the northwestern part of the Nolan grant, as marked on the map, on Ocate creek, some 16 miles west of the Red river, is shown a ranch. On the west side of the grant, about midway between the north and south bounds, are situated the little hills of Santa Clara. No proof was offered with regard to the authenticity or accuracy of this map, except that it was brought from the Surveyor General's office. Very little testimony was offered. Mary McKellar testified that she lived in Colfax County in the ranch noted on the map; that Ledoux's place (the land in question) was about a mile and a half to the northeast of her ranch, two or three miles south of Beaubien and Miranda's grant; that she knew where the stones were put by Mr. Shaw, as the western boundary of the Nolan grant. He was the surveyor sent up from Santa Fé to survey the land. Mr. Ledoux's house is to the east of that line, as surveyed by Mr. Shaw. She also testified about the little hills

of Santa Clara, and the location of the canoncito of the Ocate. Ledoux was examined to show that he was in possession of the lot claimed in the suit. The plaintiff was examined to identify the locality of the little hills of Santa Clara, and the canoncito of the Ocate, and where a line would run, beginning 500 varas west of the hills and running a straight line through the canoncito, and that the defendant lives to the east of that line. He did not know how many canoncitos were on the Ocate. There might be one near Red river; he never was there. He also located the county line between Mora and Colfax Counties. He had only known the country since 1875.

The defendant's counsel admitted that the plaintiff had acquired all the title of the original grantees, in and to the western half of the grant to the north of the Santa Clara hills. The defendant also introduced in evidence a map to show the various localities, position of natural objects, streams, etc., which showed substantially the same state of facts as the map introduced by the plaintiff. This was all the evidence in the cause.

The plaintiff then requested the court to instruct the jury as follows:

"That when a claim to a Spanish or Mexican grant has been favorably reported by the Surveyor General of New Mexico, as the one here in question has been, the grantees, or their heirs or assigns, are entitled to the absolute and exclusive possession of the land embraced within the limits of such grant, and in this case it is admitted that the plaintiff has all the right, title and interest of the original grantees to all that portion of said grant north of an east-and-west line running through the Serritos de Santa Clara and west of a northwest and southeast line half way between the east and west boundaries of said grant."

And the court refused to give said instruction, and the plaintiff excepted.

We think the refusal was right. The Surveyor General's report is no evidence of title or right to possession. His duties were prescribed by the act of July 22d, 1854, before referred to, and consisted merely in making inquiries and reporting to

Congress for its action. If Congress confirmed a title reported favorably by him it became a valid title; if not, not. So with regard to the boundaries of a grant; until his report was confirmed by Congress, it had no effect to establish such boundaries, or anything else subservient to the title.

The judge charged the jury that they must be satisfied from a preponderance of evidence that the defendant was within the boundaries petitioned for by Nolan, and into which he was inducted by the writ of possession, and if not so satisfied, they must find the defendant not guilty; that they must determine what the boundaries are from the words used in the petition and in the writ of possession; that if, from the description thus given, and from the extraneous evidence furnished by plaintiff, they were not convinced that the defendant was upon the land petitioned for and given by writ of possession to the said Nolan, they must find defendant not guilty. If, upon the other hand, they were satisfied from all the evidence that the defendant was upon said land, they must find him guilty.

The judge then compared the words of boundary and description contained in the petition with those contained in the writ or act of possession, and added:

"If, upon comparing these descriptions, you cannot make them agree, you must give the greater weight to the words and descriptions of the petition, for the petition must control the writ. In other words, the writ of possession must conform to the petition, for the grant was made according to the boundaries prayed for in the petition. You would not be justified in going 500 varas west of Los Serritos de Santa Clara for the western boundary of the grant, unless you find some authority for doing so in the words and descriptions of the petition. If, from the descriptions and words in the petition and writ of possession, you find yourselves unable definitely to locate the boundaries of the grant, you must find defendant not guilty."

Then, at the request of the plaintiff, the judge charged: "2. That if they believe from the evidence that the land of which the defendant is in possession is within the limits of the

grant, which has been favorably reported by the Surveyor General, they must find the defendant guilty."

He then charged as follows: "3. The plaintiff can only recover, if at all, on the strength of his own title or right of possession, and not on the defects of any title or right of possession of defendant.

"4. The plaintiff must establish his right to the possession of the land described in the petition or declaration by competent evidence in order for him to recover.

"5. In order to find the defendant guilty, you must find that the defendant did enter upon the land described in the petition or declaration; that the same is within the boundaries of the portion of the grant claimed by plaintiff, and that the defendant was, at the time this suit was instituted, in possession of the same wrongfully, withholding and detaining the same from the plaintiff."

The plaintiff excepted to the giving of each of said instructions, with the exception of the one numbered 2.

The jury, under this charge, rendered a verdict for the defendant, and judgment was entered accordingly; whereupon the plaintiff brought this writ of error. The assignment of errors corresponds to the exceptions. The plaintiff in error, in his brief, discusses two points upon which he insists upon a reversal of the judgment: 1. That there is nothing in the evidence to support the verdict; 2. That the instructions of the court did not properly submit to the jury the only point to be determined, to wit: Was the defendant within the boundaries of the portion of the grant claimed by the plaintiff?

We do not see how the judge who tried the cause could have more clearly stated, than he did in his charge, the real question to be determined by the jury, namely, the question whether the land in dispute was included within the boundaries of the grant, as applied to and sought for, in the actual condition of the country, its surface and mountains and streams. In order to locate a grant of land upon the surface of the earth there must be evidence to show that the place of location agrees with the description in the grant, and that

evidence is for the jury. The plaintiff alleges that it was error in the judge to leave this question to the jury. We think not. The judge may properly explain to the jury the effect of different portions of the evidence, and, of course, if the jury find a verdict against plain evidence, their verdict will be set aside.

The plaintiff complains, however, that the judge laid down an erroneous rule in charging that if the description contained in the petition and grant differed from that contained in the act of possession, the former must prevail, because it was the grant which conferred title. We think there was no error in this charge. If the officer assigned to deliver possession does not follow the grant his acts are not valid.

Where the original grant does not locate the subject of the grant, as where a certain number of square leagues is granted to be located within a certain district, the delivery of possession within the district renders the title complete, and defines the location of the grant.

The cases referred to by the plaintiff were grants of specific ranches, plantations or places, having well known names, and the boundaries designated in the acts of possession ascertained their actual extent and limits; and hence were controlling when the question of title arose. "The judicial possession was conclusive as to the boundaries and extent of the land granted." *United States* v. *Pico*, 5 Wall. 536, 540.

The instruction given, that if from the descriptions and words in the petition and writ of possession the jury could not definitely locate the boundaries of the grant, they must find for the defendant, is supported by several explicit authorities. In *Carpentier* v. *Montgomery*, 13 Wall. 480, it was held that where one of the boundaries was so uncertain that it could not be defined or designated, the grant was void. The same rule was followed in *Scull* v. *United States*, 98 U. S. 410, where the description was so vague that, as sought to be interpreted by the claimant, it would embrace over seven millions of acres; and it was evident to the court that the surveyor was never actually on the ground, and was mistaken as to the locality of the natural objects on which he relied for description. The claim was rejected for uncertainty of description.

We see nothing in the charge of which the plaintiff can properly complain.

This case seems to have been very perfunctorily tried and discussed. There is a question which may be entitled to much consideration, whether the Nolan title has any validity at all without confirmation by Congress. The act of July 22, 1854, before referred to, seems to imply that this was necessary. There is also another act of Congress which may have a bearing on the case. We refer to the act of July 1, 1870, 16 Stat. 646, c. 202, by which another grant to Nolan was confirmed to the extent of eleven leagues. After various provisions with regard to the exterior lines of those eleven leagues, the 4th section declares "that upon the adjustment of said claim of the heirs of Gervacio Nolan, according to the provisions of this act, it shall be the duty of the Surveyor General of the district to furnish properly approved plats to said claimants, etc.: *Provided*, that when said lands are so confirmed, surveyed and patented, they shall be held and taken to be in full satisfaction of all further claims or demands against the United States."

Whether this provision was not intended to affect the entire claim of Nolan for any grant of lands in New Mexico may be a serious question. Without expressing any opinion on the subject, it suffices to say that we see no error in the judgment of the Supreme Court of New Mexico, and it is therefore

Affirmed.

WALWORTH *v.* HARRIS.

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

No. 148. Submitted January 7, 1889. — Decided February 4, 1889.

The lien upon a crop of cotton, created by a statute of Arkansas which gives a lien to a landlord upon the crop grown on demised premises to secure accruing rent, is, when the cotton comes into the hands of a broker in New Orleans, under consignment from the lessee, and without knowledge of the lien on the consignee's part, subordinated to the consignee's lien for advances, arising under the laws of Louisiana.

Statement of the Case.

THE court stated the case in its opinion as follows:

Sarah Walworth, the appellant in the present case, and John B. Walworth, who died pending the suit, said Sarah being now his executrix, with many other persons, are complainants in a bill in chancery, brought in the Circuit Court of the United States for the Eastern District of Arkansas, against Joseph L. Harris, John M. Parker, Z. T. Carlton, Sarah E. Bryan, and others.

The object of the bill was to enjoin Carlton from proceeding to sell property conveyed to him by a deed of trust to secure certain debts due by the Bryans to J. L. Harris & Co. Lemuel C. Bryan and Joel E. Bryan were in business at Point Chicot, in Chicot County, Arkansas, under the partnership designation of L. C. Bryan & Bro. The main occupation was selling goods and buying cotton, but they also had several cotton plantations under their control. Among others they had leased from the heirs of Horace F. Walworth a farm at Point Chicot, for five years, at a rent of $5500 a year, running from January 1, 1879, to January 1, 1884. Although the lease was executed in the name of Lemuel C. Bryan alone, it was for the benefit of the firm of Bryan & Bro., and it went into the general partnership business.

Joseph L. Harris and John M. Parker, trading as partners under the firm name of J. L. Harris & Co., cotton brokers in the city of New Orleans, were the correspondents of Bryan & Bro., and to them the latter firm transmitted the cotton raised and purchased by them in Arkansas.

During the pendency of this lease, to wit, on December 9, 1881, Bryan & Bro. being indebted to Harris & Co., and desiring further accommodations and advancements from them, made a deed of trust to Z. T. Carlton, of the county of Chicot, in Arkansas, in which they conveyed to him as trustee substantially all their property in the State of Arkansas, and all the cotton or other products raised or gathered during the year 1881 on the plantations and tracts of land described, with about 250 bales of cotton, in seed lint and bales, on the Point Chicot plantation, leased from the heirs of Walworth. The

Statement of the Case.

purpose of this conveyance was declared to be to secure the payment of a debt of $35,000, evidenced by notes of Bryan & Bro., dated at New Orleans, La., December 9, 1881, drawn to the order of J. L. Harris & Co., and payable at their office in that city; also any advance in addition to said notes which Harris & Co. might make to Bryan & Bro., with various other agreements not material to be mentioned here.

The bill of the complainants, except the heirs of Walworth, consists of allegations that Harris & Co. had undertaken that out of the proceeds of the property conveyed by this deed of trust to Carlton these creditors should be paid various sums due to them. The heirs of Walworth in addition to this set up that, by virtue of the lease made between them and Bryan & Bro., they had a lien on the cotton raised each year on the Point Chicot plantation for the amount of the rent, $5500 per annum; and further, that by virtue of the laws of Arkansas they had the landlord's lien for rent for the same sum on the cotton raised on the plantation. They also alleged that this cotton, the rent being unpaid, came to the hands of J. L. Harris & Co., who disposed of it, but that they were aware of the existence of such lien and were bound by it.

The Circuit Court, after a hearing on the bill, answer, replication, and evidence, dismissed it, and from that decree only the heirs of Walworth take this appeal, and they only as to the question of their right to recover the rent for one year by virtue of a lien on the cotton which came to the hands of Harris & Co. from the Bryans. All the other questions, therefore, which were raised in the case, as it was originally heard and tried, are eliminated from its consideration in this court.

The lien here asserted seems to be founded upon expressions contained in the contract of lease, and upon the statute of Arkansas concerning the lien of a landlord. The only clause in the lease referring to a lien is the following: "And it is further understood that the lessor shall have his lien on the crop for the security and payment of his rent, as set forth in this lease." This reference to what is set forth in the lease means the amount of the rent and the time of its payment, and the language, that "the lessor shall have his lien on the

crop," evidently refers to the lien which the statute gives. So that, after all, it is the lien given by the statute of Arkansas which is the one sought to be enforced here.

The text of that statute is given below in the opinion.

Mr. J. S. Whitaker and *Mr. D. H. Reynolds* for appellants.

By the laws of Arkansas, the landlord's lien is a charge upon the crop for the rent, and if the purchaser, or mortgagee, has notice of the lien for rent, he takes subject to the lien. Knowledge of the tenancy is sufficient notice to the purchaser or mortgagee of the lien for rent. *Smith* v. *Meyer*, 25 Arkansas, 609; *Volmer* v. *Wharton*, 34 Arkansas, 691. And it is not necessary in Arkansas to record a lease to give a landlord a lien on the crop for rent, as actual knowledge of the tenancy coupled with the lien for rent given by law is sufficient notice to bind parties who deal with the lessee, or acquire an interest in the crop within the period of limitation. *Smith* v. *Meyer*, *supra*.

The landlord's lien is superior to the lien of the mortgagee and continues for six months after the rent becomes due, and he may pursue the produce of the rented premises, or the proceeds thereof in the hands of parties having notice of the lien, at any time within the six months. *Meyer* v. *Bloom*, 37 Arkansas, 43; *Buck* v. *Lee*, 36 Arkansas, 525; *Watson* v. *Johnson*, 33 Arkansas, 737; *King* v. *Blount*, 37 Arkansas, 115. These authorities show that if J. L. Harris & Co., by virtue of their deed of trust, or otherwise, acquired an interest in the crop of cotton raised on Point Chicot plantation in 1881, and at the time had a knowledge of the tenancy of Bryan, from whom they acquired such interest or lien, they acquired subject to the lien for rent.

The removal into Louisiana did not change the rights of the parties, or change the rule for ascertaining and enforcing them. They might increase the difficulty of recovering the property, or the proceeds from them by the removal, but could not deprive the landlords of their lien or give themselves a better claim to it. Nor would the supposed advan-

tage acquired by them, by the removal, give a solid basis on which to rest a claim that the laws of Arkansas giving the lien have no extraterritorial force, and that the removal to Louisiana had brought the cotton within the influence of a lien by statute of that State, that by comity could not be displaced, and thereby give them as it were a new and better right to retain the cotton, or its proceeds against the lien under the laws of Arkansas for the rent. The courts have frequently been called upon to determine the right of parties resulting from a conflict of laws, and it seems to be conceded that one State or nation is not required by its courts through comity to deprive its citizens of a right under its laws by enforcing the laws of another State where the parties before the court come to their interest or claim, in or to the property, by regular course of trade without notice of the claims or rights of others than those from whom they acquire title or interest. But I have failed to find a case where the courts have interposed the shield of comity to protect a party in the possession of property where he has been instrumental in removing the property from a jurisdiction where there were liens in favor of himself and others, to a State where a new lien might attach and for his benefit. *See Bank of Augusta* v. *Earle*, 13 Pet. 519.

As a general rule a personal contract with attendant privileges and effects when made in another State will be enforced in Louisiana upon a movable according to the *lex loci contractus*, provided such enforcement be not contrary to its policy, and does not violate the order of priority established by them, and does not injure the rights of its own citizens, and provided further that the *lex fori* gives the remedy asked for. *Tyree* v. *Sands*, 24 La. Ann. 363; *Chaffe* v. *Heyner*, 31 La. Ann. 594.

And in that State the landlord has a privilege on the growing crop of the year to secure his rents, and this privilege is first except as to laborers' and overseers' wages. *Knox* v. *Booth*, 19 La. Ann. 109; *Duplantier* v. *Wilkins*, 19 La. Ann. 112; Rev. Stat. La. § 2873.

The laws of Louisiana and Arkansas being the same in effect in relation to the lien of landlords for rent, this lien may be

enforced in either of the States. *Cox* v. *Morrow*, 14 Arkansas, 603, 610; *Leonard* v. *Columbia Steam Nav. Co.*, 84 N. Y. 48, 55; *Morris* v. *Chicago, Rock Island, &c. Railway*, 65 Iowa, 727; *Knight* v. *West Jersey Railroad*, 108 Penn. St. 250. See also *Ellett* v. *Butts*, 19 Wall. 544; *Canada Southern Railroad* v. *Gebhard*, 109 U. S. 527, 536.

Mr. F. W. Compton and *Mr. Thomas J. Semmes* for appellees.

Mr. Justice Miller delivered the opinion of the court.

There is no question that, under the laws of Arkansas, there existed a lien on some of the cotton transmitted by Bryan & Bro. to the defendants, Harris & Co., while that property remained in the State of Arkansas; and it is attempted to aid the argument in this case, which holds Harris & Co. liable for that lien on the cotton received by them, by the allegation that they knew that it came from the Point Chicot plantation, and knew the rent was unpaid, and, therefore, had knowledge of the existence of the lien. This knowledge, however, or even notice, is not sustained by the evidence.

The plaintiffs, in their bill, allege that Harris & Co. must have known of this lien, for two reasons: First, because they had paid the rent for two previous years to the heirs of Walworth; and, second, because the lease between the heirs of Walworth and Bryan & Bro. had been in their hands for a short time, so that they must be held to have known its contents.

The bill is sworn to, and the answer is sworn to, with no waiver of an answer under oath, and according to chancery practice the answer of Joseph L. Harris, of the firm of J. L. Harris & Co., so far as it is responsive to these allegations, must be taken as evidence. In regard to the payment of the rent for the two years mentioned, he says that he simply paid it upon the order of Bryan & Bro., out of funds of theirs in his hands, as he would have paid any other order of theirs, and without any knowledge as to the nature, character or

extent of the lien, or that the rent was a lien on cotton in his hands. As regards the possession of the lease referred to, he says that they (Harris & Co.) did, at one time, in the year 1880, which is over a year previous to the crop on which the lien is now claimed, have this lease in their possession; that it was deposited with them by one Whitaker, who claimed to have an interest in the lease as collateral security for a loan of $600; and that Whitaker having soon thereafter paid the same, it was returned to him without any further attention on their part.

This statement is confirmed by the answer, which is also under oath, of Joel E. Bryan, the surviving partner of Byran & Bro., the other brother, Lemuel, having died before the trial. He says that L. C. Bryan & Bro. shipped of the cotton grown on the Point Chicot plantation in the year 1881, 467 bales, all of which was shipped to their own account to J. L. Harris & Co., to be by them sold as cotton factors, and the proceeds applied to the payment of advances made to their firm by Harris & Co., and, referring evidently to the question of the lien stated in the bill to be impressed on said cotton, says that if it was impressed with anything beside the shipping brand of his firm he did not see it; that the whole of said cotton belonged to the firm of Bryan & Bro., taken in the regular course of business, and that the last shipment, made on the 19th day of December, 1881, was sold a few days thereafter, and an account of sales rendered by Harris & Co.

There is no evidence from any quarter contradicting these sworn answers of J. L. Harris and Joel E. Bryan, and we, therefore, think that it is not established that Harris & Co. knew or had notice of any lien in favor of the Walworth heirs for the rent upon the cotton received by them in the last days of these transactions.

It is also apparent, from all this testimony, that the cotton was shipped by Bryan & Bro. to Harris & Co. at New Orleans, as the property of the former, and was received and for the first time came under the control of the latter on landing at that place; and that they received it without any other obligation to account for the rent of the Point Chicot plantation, or

any other lien upon it, except such as would arise from the fact that such a lien existed in Arkansas as between Bryan & Bro. and the Walworth heirs.

The laws of the two States differ from each other on this subject. The statute of Arkansas is found in the Revised Statutes of that State, of 1884, in the following words:

"SEC. 4453. Every landlord shall have a lien upon the crop grown upon the demised premises in any year for rent that shall accrue for such year, and such lien shall continue for six months after such rent shall become due and payable." Mansfield's Digest Stats. Ark. 1884.

This was in force when these transactions took place.

There are also other provisions for the enforcement of this lien, which it is not necessary to embody here.

The Revised Code of Louisiana, arts. 2705 and 2709, limits the right of pledge of the lessor of real estate to the "movable effects of the lessee, which are found on the property leased," and "in the exercise of this right the lessor may seize the objects which are subject to it, before the lessor takes them away, or within fifteen days after they are taken away, if they continue to be the property of the lessee, and can be identified." By the Session Act of 1874, page 114, it is enacted as follows:

"SEC. 2. That when any merchant, factor, or other person has advanced money, property, or supplies on cotton, sugar, or other agricultural products, and the same has been consigned to him by ship, steamboat, vessel, railroad, or other carrier, the said agricultural products shall be pledged to the consignee thereof from the time the bill of lading thereof shall be put in the mail or put into the possession of the carrier for its transmission to the consignee."

It is not necessary to hold that the right of Harris & Co. to this cotton was vested in them on the giving of the bill of lading, or putting on board of a railroad or steamboat, but it is sufficient to hold that when they received it in New Orleans they received it under such rights and limitations as the laws of Louisiana conferred upon them in that regard.

The question here presented of the conflicting rights of

parties claiming property under the laws of two different States, each of which sustains the claims of the party residing in it, is not a new one in this court. The case of *Green* v. *Van Buskirk*, 5 Wall. 307, seems to decide the present one by the principles which it lays down and the analogy of the two cases in regard to the facts. That case was twice before this court for consideration.

It appeared that Bates, a citizen of the State of New York, was the owner of certain safes, which he sent from that State to the city of Chicago, in the State of Illinois. On the 3d day of November, 1857, Bates executed and delivered, in the city of New York, to Van Buskirk and others, a chattel mortgage on these safes to secure an existing debt. On the 5th day of the same month, Green also a creditor of Bates, sued out a writ of attachment in the proper court of Illinois, and caused it to be levied upon these safes in Chicago as the property of Bates. No record had been made at this time of the mortgage in the State of Illinois, nor had the possession of the property been delivered under it. Green recovered a judgment in the attachment suit, and had the safes sold in satisfaction of his debt. He was afterwards found in New York, of which State all three of the parties named were citizens, and was there sued by Van Buskirk for the value of the safes. Green pleaded the proceedings in the Illinois courts in bar of the action, but this plea was overruled. The decision was affirmed by the Court of Appeals of New York, from which judgment Green took a writ of error to this court. It first came under consideration here on a motion to dismiss for want of jurisdiction; but it was held that the question of the right of Green to seize the property under his attachment must be determined by the law of Illinois, where the property was when so seized, and not by the law of New York, and that the Court of Appeals had refused to give to the judgment of the Illinois court the full faith and credit to which it was entitled as a judicial proceeding of the courts of that State.

The inquiry of course involved more or less the question of the effect of those proceedings, but as the case was only before the court on a motion to dismiss for want of jurisdiction, it

had to come up afterwards to be heard on its merits. On the *motion* the court considered very fully the much controverted principle as to the extraterritorial effect of laws affecting the title or liens upon the property in one State when that property was carried away or became the subject of litigation in another State; and while it was seen that in many cases it had been held that a court of one State would give effect to the law of domicil of another State, it was said: "But after all, this is a mere principle of comity between the courts, which must give way when the statutes of the country, where property is situated, or the established policy of its laws prescribe to its courts a different rule. The learned commentator, already referred to, [Story on Conflict of Laws, § 390,] in speaking of the law in Louisiana, which gives paramount title to an attaching creditor over a transfer made in another State, which is the domicil of the owner of the property, says: 'No one can seriously doubt that it is competent for any State to adopt such a rule in its own legislation, since it has perfect jurisdiction over all property, personal as well as real, within its territorial limits. Nor can such a rule, made for the benefit of innocent purchasers and creditors, be deemed justly open to the reproach of being founded in a narrow or selfish policy.' Again, he says: 'Every nation, having a right to dispose of all the property actually situated within it, has (as has been often said) a right to protect itself and its citizens against the inequalities of foreign laws, which are injurious to their interests.'"

The court also cited with approval the following language (§ 388) from the same authority: "The municipal laws of a country have no force beyond its territorial limits, and when another government permits these to be carried into effect within her jurisdiction, she does so upon a principle of comity. In doing so, care must be taken that no injury is inflicted upon her own citizens, otherwise justice would be sacrificed to comity. . . . If a person sends his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations enforced in the country where he places it." See also *Olivier* v. *Townes*, 2 Martin (N. S.) 93; *Denny* v. *Bennett*, 128 U. S. 489.

Opinion of the Court.

When the case of *Green* v. *Van Buskirk* again came before this court on its merits, (7 Wall. 139,) Mr. Justice Davis, in delivering the opinion, said, in reference to this question of the conflict of rights under the laws of different States, which were themselves in conflict:

"It is a vexed question on which learned courts have differed; but after all there is no absolute right to have such transfer respected, and it is only on a principle of comity that it is ever allowed. And this principle of comity always yields when the laws and policy of the State where the property is located have prescribed a different rule of transfer with that of the State where the owner lives." p. 151.

The same principle is reasserted in *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664. That was a case where the Rhode Island company had delivered to Conant & Co., who were contractors on a railroad in Illinois, a locomotive engine, under an instrument in writing which this court construed to be a lease. By the laws of Illinois, to which this engine was carried, such lease or title, whatever it may have been, which the locomotive company insisted that they had retained in the property, was of no avail as against subsequent creditors when the property was found in that State, unless it was properly recorded there. No such record being made of the instrument under which Conant & Co. held it, the engine was seized by attachment against that firm and sold to Hervey, the plaintiff in error in this court. In the following language, taken from the opinion in that case, the doctrine is reiterated that the question must be determined by the laws of Illinois where the property was found and sold, and not by the laws of Rhode Island where the lease or instrument of conveyance was made:

"It was decided by this court in *Green* v. *Van Buskirk*, 5 Wall. 307; 7 Id. 139, that the liability of property to be sold under legal process, issuing from the courts of the State where it is situated, must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every State has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regula-

tions concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. He has no absolute right to have the transfer of property, lawful in that jurisdiction, respected in the courts of the State where it is found, and it is only on a principle of comity that it is ever allowed. But this principle yields when the laws and policy of the latter State conflict with those of the former." p. 671.

The principle here asserted, which is clearly applicable to the case before us, is supported by reference to authorities in those opinions which we think are conclusive. At all events, the cases themselves are conclusive upon this court, and upon the rights of the parties to this suit.

The decree of the Circuit Court dismissing the bill is, therefore,

Affirmed.

HARRIS *v.* BARBER.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 1443. Submitted January 7, 1889. — Decided January 28, 1889.

A judgment of the Supreme Court of the District of Columbia, quashing a writ of *certiorari*, after a justice of the peace, in obedience to the writ, has returned the record of his proceedings and judgment in a landlord and tenant process, is reviewable by this court on writ of error, if the right to the possession of the premises is worth more than $5000.

A judgment of a justice of the peace, which is subject to appeal, cannot be quashed by writ of *certiorari*, except for want of jurisdiction, appearing on the face of his record.

Under the Landlord and Tenant Act of the District of Columbia, requiring a "written complaint on oath of the person entitled to the possession of the premises to a justice of the peace," the oath may be taken before a notary public outside of the District.

Under the Landlord and Tenant Act of the District of Columbia, a complaint which alleges that the complainant is entitled to the possession of the premises, and that they are detained from him and held without right by the defendant, his tenant at sufferance, and whose tenancy and estate therein have been determined by a thirty days' notice in writing to quit, is sufficient to support the jurisdiction of the justice of the peace.

Statement of the Case.

THIS was a writ of error to reverse a judgment quashing a writ of *certiorari* to a justice of the peace.

On December 17, 1881, John H. Harris filed in the Supreme Court of the District of Columbia a petition, verified by his oath, and alleging "that he is in possession of the house and premises known as the Harris House, Nos. 1327–1329 E street northwest, in the city of Washington, in the District of Columbia, under a lease to him from Mary A. Matteson, dated May 3, 1883, and modified April 20, 1885, for a term ending October 1, 1889, at a rent of $3000 per annum, with the privilege of extension for a further term of four years at a rent of $4000 per annum; that under the terms of said lease he expended about $15,000 in permanent improvements and betterments to said building, put it in tenantable condition, and paid the taxes assessed thereon until the sale hereinafter mentioned, besides expending upwards of $20,000 in furniture and appliances for its use as a hotel; that he did this upon the faith and expectation of enjoying his full term as tenant of said premises; that on May 4, 1886, the said land and premises were sold under a deed of trust prior in date to the lease of your petitioner, and of which your petitioner was in actual ignorance at the time of said lease, and were purchased by one Amaziah D. Barber, who, a few days after said sale, notified your petitioner to quit said premises, and on July 31, 1886, instituted a proceeding under the act of Congress regulating proceedings in cases between landlord and tenant in the District of Columbia, before William Helmick, justice of the peace for said District of Columbia, and on August 14, 1886, said justice of the peace rendered judgment against your petitioner for the possession of said premises."

The petition asserted that the proceedings before the justice were void for want of jurisdiction; because the oath to the complaint was not taken before the justice, but before a notary public in the county of Oneida and State of New York, and because "the relation of landlord and tenant did not exist between said Barber and your petitioner by convention, and said Barber relying upon the absence of such relation for his right to possession, his only remedy was by an action of ejectment."

The petition prayed for a writ of *certiorari*, commanding the justice to certify and send up the record of his proceedings. A writ of *certiorari* was issued accordingly, and in obedience to it the justice returned his record, by which it appeared that the complaint to him was subscribed and sworn to by the complainant before a notary public in the county of Oneida and State of New York, and that the whole complaint, except the address and the prayer for process, was as follows:

"Your complainant, Amaziah D. Barber, respectfully represents that he is entitled to the possession of the tenement and premises known as the Harris House, situate on lot five in square No. 254 in the city of Washington, District of Columbia, and that the same is detained from him and held without right by John H. Harris, tenant thereof by sufferance of this complainant, and whose tenancy and estate therein has been determined by the service of a due notice to quit, of thirty days, in writing."

The Supreme Court of the District of Columbia in special term, upon the motion of Barber, rendered judgment quashing the writ of *certiorari;* and that judgment was affirmed in general term. 6 Mackey, 586. Harris sued out this writ of error.

Barber now filed a motion to dismiss the writ of error for want of jurisdiction, as well as a motion to affirm the judgment.

Mr. James S. Edwards and *Mr. Job Barnard* for the motions.

Mr. A. C. Bradley opposing.

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

The grounds relied on in support of the motion to dismiss this writ of error are, in substance, that the granting or refusing of a writ of *certiorari* is a matter of discretion, and not the subject of review; that there is no sufficient pecuniary value in dispute to support the jurisdiction of this court; and that

the proceedings of a justice of the peace under the landlord and tenant act of the District of Columbia cannot be reviewed, except by appeal.

The writ of error before us is not upon the judgment of the justice in the landlord and tenant process, but upon the judgment of the Supreme Court of the District of Columbia quashing the writ of *certiorari* to the justice. The last ground assigned for the motion to dismiss is untenable, because it affects the correctness of the judgment quashing the writ of *certiorari*, and not the jurisdiction of this court to review that judgment.

The other grounds for the motion to dismiss, though more plausible, appear, upon examination, to be also insufficient.

A writ of *certiorari*, when its object is not to remove a case before trial, or to supply defects in a record, but to bring up after judgment the proceedings of an inferior court or tribunal whose procedure is not according to the course of the common law, is in the nature of a writ of error. Although the granting of the writ of *certiorari* rests in the discretion of the court, yet, after the writ has been granted, and the record certified in obedience to it, the questions arising upon that record must be determined according to fixed rules of law, and their determination is reviewable on error. *People* v. *Brooklyn Assessors*, 39 N. Y. 81; *People* v. *Brooklyn Commissioners*, 103 N. Y. 370; *Farmington Co.* v. *County Commissioners*, 112 Mass. 206, 212.

It is argued that the justice of the peace had no jurisdiction to try the title to land; Rev. Stat. D. C. §§ 687, 997; that the only matter in dispute before him was the right of possession; and that the rental value of the property in question cannot be considered as in dispute, because, whatever the judgment might be in the action for possession, the defendant would have to pay that value, either as rent under the lease if the judgment should be in his favor, or for use and occupation if the judgment should be against him.

The case differs from any of the precedents cited at the bar, and is not free from difficulty. But the petition for the writ of *certiorari* alleges, upon the oath of the petitioner, that he is

in the possession of the premises under a lease having nearly a year to run, with a privilege of extension for four years more; and that he has expended $15,000 in permanent improvements upon the leased property, of which he will be deprived, if the judgment of the justice of the peace, which he alleges to be void for want of jurisdiction, is not set aside by writ of *certiorari*. The reasonable inference from this is, that the possession of the premises, with the right to use these improvements, throughout the lease and the extension thereof, would be worth more than $5000, showing that the matter in dispute is of sufficient pecuniary value to support the jurisdiction of this court, under the act of March 3, 1885, c. 355. 23 Stat. 443.

But upon the merits of the case, the judgment below is so clearly right that the motion to affirm must be granted.

The landlord and tenant act, embodied in the Revised Statutes of the District of Columbia, provides not only that every occupation, possession or holding of real estate without express contract or lease, or by a contract or lease the terms of which have expired, shall be deemed a tenancy at sufferance, but also that "all estates at sufferance may be determined by a notice in writing to quit of thirty days," and that "when forcible entry is made, or when a peaceable entry is made and the possession unlawfully held by force, or when possession is held without right after the estate is determined by the terms of the lease by its own limitation, or by notice to quit, or otherwise," then, "on written complaint on oath of the person entitled to the premises, to a justice of the peace, charging such forcible entry or detainer of real estate" — that is to say, charging either a "forcible entry," or any "detainer," whether forcible after a peaceable entry, or without right after the estate is determined — a summons may be issued to the person complained of; and if it appears that the complainant is entitled to the possession of the premises, he shall have judgment for the possession and costs, but if the complainant fails to prove his right to possession, the defendant shall have judgment for costs; and that either party may appeal from the judgment of the justice of the peace to the Supreme Court of the District of Columbia. Rev. Stat. D. C. §§ 680, 681, 684, 686, 688.

Opinion of the Court.

As an appeal lies from the judgment of the justice of the peace, his proceedings cannot be quashed by writ of *certiorari*, unless for want of jurisdiction, appearing on the face of his record. *People* v. *Betts*, 55 N. Y. 600; *Gaither* v. *Watkins*, 66 Maryland, 576.

It is suggested that the justice of the peace had no jurisdiction, because the oath to the complaint was not taken before him, but before a notary public in the State of New York. But the statute only requires a "written complaint on oath of the person entitled to the premises." Rev. Stat. D. C. § 684. As it requires the oath to be made by the complainant in person, and does not in terms require it to be administered by the justice or within the District, it is a more reasonable construction to permit the oath to be taken anywhere before a proper officer, than to require the personal attendance of the complainant at the filing of the complaint.

It is further suggested that the complaint does not allege that the complainant is "entitled to the premises," but only that he is "entitled to the possession" of the premises. But as the whole scope and aim of the complaint are to recover the possession, the difference is immaterial.

The remaining suggestion is that the complaint does not show the defendant to have been such a tenant as is contemplated by the landlord and tenant act of the District of Columbia. But that act, as we have seen, provides that all tenancies at sufferance may be determined by thirty days' written notice to quit, and does not require the facts constituting the relation of landlord and tenant to be set forth in the complaint. Its requirements are satisfied, at least so far as to support the jurisdiction of the justice, by the distinct allegations in the complaint before us, that the complainant is entitled to the possession of the premises, that they are detained from him and held without right by the defendant, that the defendant is his tenant at sufferance, and that the defendant's tenancy and estate in the premises have been determined by such a notice to quit.

As was well said by Mr. Justice Merrick in delivering the opinion of the court below, "These averments constitute fully

a statement of the relation of landlord and tenant between the parties. Now whether the proof came up to these averments or not cannot be inquired into upon a writ of *certiorari*. *Certiorari* goes only to the jurisdiction. It does not go to any errors of judgment that may have been committed by the justice in the progress of the exercise of that jurisdiction."

The decisions cited at the bar, made under statutes requiring the proceedings to be commenced by affidavit of the facts requisite to bring the case within the statutes, and giving no appeal from the decision of the justice of the peace,[1] have no application to this case.

Judgment affirmed.

BANK OF FORT MADISON *v.* ALDEN.

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

No. 853. Submitted January 4, 1889. — Decided February 4, 1889.

A stockholder in an insolvent corporation, who has paid his stock subscription in full by a transfer of a tract of land, in good faith, at an agreed value, for the use of the company's business, is not liable in equity to a creditor of the corporation who had knowledge of and assented to the transaction at the time when it took place, solely upon the ground that the land turned out to be of less value than was agreed upon.

The doctrine that the distribution of a trust fund of a corporation to the individual stockholders upon their resolution does not deprive a creditor, not consenting thereto, of his right to compel the application of the fund to the payment of the debts of the corporation, cannot be invoked by a creditor who is a stockholder consenting to the distribution and participating in the appropriation.

An indorsement of the note of a third party by one member of a partnership in the firm's name, by way of security to a bank, without the knowledge or consent of the other partner, cannot be enforced as a liability against the estate of the latter after his decease.

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[1] N. Y. Rev. Stat. pt. 3, c. 8, tit. 10; *Hill* v. *Stocking*, 6 Hill, 314; *Sims* v. *Humphrey*, 4 Demo, 185; *People* v. *Matthews*, 38 N. Y. 45; N. J. Stat. March 4, 1847, Nixon's Digest (2d ed.) 422; *Fowler* v. *Roe*, 1 Dutcher, (25 N. J. Law,) 549; *Shepherd* v. *Sliker*, 2 Vroom, (31 N. J. Law,) 432.

Opinion of the Court.

In equity. Decree dismissing the bill; complainant appealed. The case is stated in the opinion.

Mr. Henry Strong and *Mr. Theodore Sheldon*, for appellant, cited: *Wellman* v. *Howard Coal and Iron Works*, 19 Fed. Rep. 51; *Wood* v. *Dummer*, 3 Mason, 308; *Fiske* v. *Hills*, 11 Bissell, 294; *Bank of St. Mary* v. *St. John*, 25 Alabama, 566; *Rey* v. *Simpson*, 22 How. 341; *Good* v. *Martin*, 95 U. S. 90; *Bendey* v. *Townsend*, 109 U. S. 665, 667; *Irwin* v. *Williar*, 110 U. S. 499; *Mason* v. *Tiffany*, 45 Illinois, 392; *Doggett* v. *Dill*, 108 Illinois, 560; *Walden* v. *Bodley*, 14 Pet. 156; *Rose* v. *Mynatt*, 7 Yerger, 30; *Maury* v. *Lewis*, 10 Yerger, 115; *McLaughlin* v. *Daniel*, 8 Dana, (Ky.) 182, 184; *Deatly* v. *Murphy*, 3 A. K. Marsh, 472, 474.

Mr. John P. Wilson, for appellees, cited: *Coit* v. *Gold Amalgamating Co.*, 119 U. S. 343; *Foster* v. *Goddard*, 1 Black, 506; *Carneal* v. *Banks*, 10 Wheat. 181; *Simms* v. *Guthrie*, 9 Cranch, 19; *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 793; *Des Moines Gas Co.* v. *West*, 50 Iowa, 16; *Terry* v. *Anderson*, 95 U. S. 628, 636; *Singer* v. *Carpenter*, 125 Illinois, 117.

Mr. Justice Field delivered the opinion of the court.

The Bank of Fort Madison, the complainant below, the appellant here, is a corporation organized under the laws of Iowa. The defendants are executors of the will of James S. Waterman, deceased, who, at the time of his death, was a citizen of Illinois. The bank is a creditor of a corporation created under the laws of Wisconsin, known as the Black River Lumber Company, in the sum of $58,505.53, with interest from January, 1884. Waterman was a stockholder in the company, and the present suit is brought upon the allegation that, at the time of his decease, he was indebted to it in a large amount for stock subscribed, which had been issued to him, but for which he had never paid, except in lands not exceeding in cash value forty per cent of the amount subscribed, and which lands have been reconveyed to him. The object of the suit is

to compel the executors to pay out of his estate the amount of his alleged unpaid subscription, so far as may be necessary for the satisfaction of the claim of the bank. In addition to this, the complainant alleges an indebtedness of the estate of Waterman upon a promissory note of the Lumber Company to the amount of $10,000, which was indorsed by the firm of Ketchum & Waterman, of which the deceased was a partner. The court below decided against the claims of the bank and dismissed the bill. From its decree the case is here on appeal.

It appears that on the 17th of October, 1879, five persons residing at Fort Madison, Iowa, namely, Charles Brewster, Joseph A. Smith, William H. Kretzinger, Samuel Atlee and J. C. Atlee, were the owners of a tract of "pine land" in Wisconsin, amounting to about 13,000 acres. At the same time the firm of Ketchum & Waterman, consisting of Henry Ketchum and M. M. Ketchum and James S. Waterman, were owners of a tract of similar land in that State, amounting to about 30,000 acres, which was subject to a mortgage for $75,000. On that day, these eight persons entered into an agreement in writing to form a corporation under the laws of Wisconsin, to be designated the "Black River Lumber Company, for the manufacture and sale of lumber, logs, and timber," and such other business as might be included in its charter, and to contribute and convey to a trustee or trustees, for the benefit of the company, under certain restrictions, the first tract mentioned, and 25,000 acres of the second tract. The company was to assume and pay all the deferred instalments of the purchase money on this last tract as they matured, and the Ketchums and Waterman were to advance the necessary funds to take up the notes given, which amounted to $25,000, besides interest, and to receive the note of the company for the amount, payable, with eight per cent interest, on or before July 1, 1880, which they were to hold as a lien on the premises.

It was also agreed, by the same instrument, that the parties residing at Fort Madison, owners of the 13,000-acre tract, should have three-sevenths of the stock of the company, and that the Ketchums and Waterman should have four-sevenths

--such stock to be received by them in full payment for their conveyances to the trustee. Each party was to receive stock in proportion to his individual interest in the lands.

Pursuant to this agreement the Black River Lumber Company was, in November, 1879, incorporated under the laws of Wisconsin — the capital stock being fixed at $437,500, divided into 4375 shares of $100 each. The parcels of land mentioned above were conveyed by the respective owners to Joseph M. Beck, of Fort Madison, in trust for the company, upon certain conditions, and to the parties shares were issued as follows: To James S. Waterman, 1250 shares; to H. Ketchum, 625 shares; to M. M. Ketchum, 625 shares; to J. C. Atlee, 468 shares; to S. Atlee, 469 shares; to Charles Brewster, 235 shares; to W. H. Kretzinger, 468 shares; to Joseph A. Smith, 235 shares. No money was paid by any of the parties for the stock, the land conveyed by them to the trustee being taken in full payment of their respective shares.

As stated above, the tract held by the Ketchums and Waterman was subject to a mortgage of $75,000 of the purchase money, and the trust upon which they conveyed the 25,000 acres to the trustee was, that upon the payment of the said purchase money and interest and the taxes thereon, he should convey the lands to the Black River Lumber Company according to the conditions of the contract of October 17, 1879.

As no money was paid by the stockholders for their stock, the company had no funds with which to commence business. To meet this condition the contract of October 17, 1879, provided that the parties residing at Fort Madison should advance from time to time, as the company might require funds, three-fourths of $27,260.42, that is, the sum of $20,445.30, and take the note of the Black River Lumber Company for the amount. Upon this note indorsed by those parties, the amount was borrowed from the Bank of Fort Madison. When this was exhausted the Lumber Company on various occasions borrowed money from the bank, upon its notes, indorsed by different stockholders, until some time in March, 1880, when the loans thus made amounted to $65,000. Of this sum, $10,000 had been loaned upon a note of the company indorsed by the firm

name of Ketchum & Waterman. The indorsement was made by Ketchum, without any authority except that supposed to exist from his partnership in the firm. The bank then refused to make any further advances without additional security to cover existing as well as future loans. A chattel mortgage was thereupon executed to the bank by the Lumber Company upon all its logs and lumber, to secure such advances as well as other debts of the company. The bank immediately took possession of the property and made further advances to the amount of $20,000.

On the 8th of April following, the two Ketchums filed a bill in a state court of Wisconsin to set aside this chattel mortgage, making the bank, the company, and all its stockholders, except Waterman, parties, and alleging that the mortgage was a fraud upon the company; that the amount claimed by the bank was not due to it; and that the company owed a large amount, but had sufficient assets to pay all its debts. The bill prayed that the mortgage be declared invalid; that the property of the company be restored to it; and that, pending the suit, a receiver of the property be appointed. Soon afterwards a stipulation was entered into by all the parties, that one William R. Sill be appointed by the judge of the court receiver of the property and effects of the company, and that, in addition to the usual powers of such officers, he receive authority to manage and control the property and dispose of the same in the customary course of trade, for cash or on credit, and apply the proceeds to pay the debts of the company, and when they were paid that he be discharged, and so much of the property as might be undisposed of be returned to the company; that the receiver give security for the faithful discharge of his trust in the sum of $25,000; and that as soon as he had been appointed, and this security given, the chattel mortgage, executed to the bank, should be cancelled, and M. M. Ketchum, who was general manager of the company, should turn over and deliver to him all its property and effects. An order was made by the court in accordance with this stipulation.

When the first note given for the purchase money of the Ketchum and Waterman tract became due, Waterman ad-

vanced the money to take it up, receiving in lieu of it the note of the Lumber Company, payable on or before July 1, 1880. After this latter note had matured he passed it over to one Milo Smith, who recovered judgment upon it against the Lumber Company. The receiver was authorized to pay all demands against that company, which he did, except those of the bank and this judgment in favor of Milo Smith.

In April, 1881, at a meeting of the stockholders of the Lumber Company, it was resolved that the trustee should reconvey the lands he held to the respective stockholders who had transferred them to him, except that the lands transferred by the Ketchums and Waterman should be conveyed to Waterman alone. To this arrangement the Ketchums assented. It was also agreed that the judgment of Milo Smith should be released as a lien on the lands to be reconveyed to the parties residing at Fort Madison, and should be collected only out of the lands to be reconveyed to Waterman. This arrangement was carried out in 1882, but modified, at the request of the directors of the company, by the trustee conveying the lands to the Lumber Company, and that company simultaneously conveying the same to the original owners as above directed. Milo Smith's judgment was released as to the lands conveyed to the parties at Fort Madison, and as to the funds in the hands of the receiver. This disposition of the lands was made upon the belief, which all parties at the time appeared to entertain, that there would be sufficient money realized from property in the hands of the receiver to pay the demands of the bank in full. As the property consisted principally of logs and timber scattered over a large extent of territory, it was impossible to make any accurate estimate of its value. The suit was removed to the Circuit Court of the United States, and resulted in a final decree on the 15th of January, 1884, which adjudged that there was due by the Lumber Company to the bank the sum of $72,366.14, and directed the receiver to turn over to it certain property and credits in his hands, leaving a balance due of $58,505.53. The receiver was thereupon discharged.

James S. Waterman died on the 19th of July, 1883, and the

defendants below, appellees here, were appointed executors of his last will and testament.

The present suit is brought to enforce the payment of the balance thus adjudged to be due to the bank by the Lumber Company, out of the estate of the deceased. The bill was framed upon the theory that the deceased was at the time of his death indebted to the company in a large amount for the stock issued to him, it being contended that the cash value of the lands conveyed to the trustee for that stock did not exceed forty per cent of the amount subscribed. But this theory falls to the ground before the facts of the case, as detailed above. The parties who became stockholders had, pursuant to a previous agreement, conveyed their lands to a trustee, in trust for the corporation formed, upon an understanding that stock should be issued to them in proportion to their individual interests in the property. The subscription was made upon this arrangement and the parties acted with full knowledge of the conditions on which the property was to be transferred to a trustee, and the stock was to be issued to them. There was no attempt to pass off the property as different or more valuable than it was. There was no deception or misrepresentation of any kind in the case. No demand, therefore, against the estate of the deceased Waterman can be sustained, upon the assumption that by the conveyance of his land he had not paid up all that he contracted or was bound to pay by his subscription. There was no credit given by the bank to the company upon any representation of a different set of facts than that which actually existed. The bank was owned by two of the stockholders of the company, Brewster and Smith, who had participated in and had been well advised of all that was done by the company. They held all the shares of the bank, and were respectively its president and cashier. Such being the case, the answer to the claims of the bank is found in the decision of this court in *Coit* v. *Gold Amalgamating Co.*, 119 U. S. 343, 345. There the holder of a judgment against the corporation, being unable to obtain its satisfaction upon execution, and finding the company was insolvent, brought suit to compel the stockholders to pay what he claimed to be due and

unpaid on the shares held by them. He contended that the valuation put upon the property taken for such stock was illegally and fraudulently made at an amount far above its actual value, but the court said: "If it were proved that actual fraud was committed in the payment of the stock, and that the complainant had given credit to the company from a belief that its stock was fully paid, there would, undoubtedly, be substantial ground for the relief asked. But where the charter authorizes capital stock to be paid in property, and the shareholders honestly and in good faith put in property instead of money in payment of their subscriptions, third parties have no ground for complaint. The case is very different from that in which subscriptions to stock are payable in cash, and where only a part of the instalments has been paid. In that case there is still a debt due to the corporation, which, if it becomes insolvent, may be sequestered in equity by the creditors as a trust fund liable to the payment of their debts. But where full paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account." Under this authority no foundation is laid for calling upon the estate of the deceased to pay anything more for the stock issued to him than was paid.

But assuming this to be the correct doctrine, so far as any alleged difference between the subscription and the value of the property taken in payment is concerned, it is contended that the lands, which, in the hands of the trustee, constituted a trust fund for the benefit of the stockholders and creditors of the company, were not divested of their trust character upon their reconveyance to the stockholders; that the only effect of the reconveyance was to substitute several trustees in place of one, and that the appellant has therefore a right to proceed against either or all of them for an accounting. If this were a suit by a creditor other than a stockholder there would be great force in this position of the appellant. It might be well contended that a conveyance of the trust fund to the stockholders upon their resolution could not deprive a creditor, not consenting thereto, of his right to compel the application of

that fund to the payment of his demand, or of a ratable proportion with other creditors. But the right to compel such application cannot be invoked by a stockholder consenting to such disposition of the trust fund, and himself participating in its appropriation, as in the present case. Here the lands conveyed to the trustee were subject, as stated above, to a mortgage of $75,000, and its payment was assumed by the company. It turned out that the company was not prosperous in its business, and in the year following its organization it became involved in litigation, and a receiver of its property and effects was appointed. And in April, 1880, its stockholders upon consultation came to the conclusion that it would be impossible for the company to comply with its engagement to pay off that mortgage, and they therefore advised, and at their meeting resolved, that the lands should be reconveyed to the original owners, and the company be thus released. The bank, through its stockholders, who were also stockholders of the Lumber Company, united in this advice and resolution, and in pursuance thereof the several reconveyances were made, as stated above, and among others to the stockholders of the bank. It was expected that the original owners would then hold the lands as they had held them before the Lumber Company was organized. That the property when reconveyed was sold by the holders at prices which, if the company could have obtained them, would have made its retention advisable, does not alter the transaction. The case of *Thompson* v. *Bemis Paper Co.*, 127 Mass. 595, supports this conclusion. There a judgment creditor of the corporation, unable to enforce his judgment by execution, filed a bill in equity on behalf of himself and all other creditors, against the corporation and certain stockholders, to enforce a personal liability of the latter, on the ground that the capital of the corporation had been withdrawn and paid to the stockholders. He had at that time contracted for eight shares of the stock, paid for them in part, and voted as owner at meetings of the stockholders. At one of the meetings the sum of $16,528, being the amount of the cash assets of the corporation, was withdrawn from the capital of the corporation and divided among

the stockholders in proportion to the amount of stock held by them respectively. The plaintiff was present and voted in favor of the division. Upon these facts it was held that the bill could not be sustained, although upon its filing the plaintiff was the absolute owner of the eight shares; and that he could not make the act which he had favored and voted for a ground for charging the stockholders with a personal liability for a debt due from the corporation to himself.

The indorsement of the note of the Black River Lumber Company for $10,000, by Ketchum in the firm name of Ketchum & Waterman, was made by way of security to the bank for its loan to that company. The transaction had no connection with the business of the firm. It was a guarantee of another's obligation which no member of the firm had any authority to give. It was not shown, moreover, that the indorsement was made with the consent or even knowledge of Waterman. His estate, therefore, cannot be held liable upon the note.

Decree affirmed.

UNITED STATES *v.* CORWIN.

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

No. 123. Argued December 12, 1888. — Decided February 4, 1889.

In an action against the sureties on a contractor's bond to the United States to recover damages suffered by reason of the nonfulfilment of the contract, the burden of proof is on the United States to show a demand upon the contractor for performance, and his failure and refusal to perform; and a statement of such nonperformance, demand, failure and refusal, made by an officer of the government in the line of his official duty in reporting them to his official superior, is not legal evidence of any of those facts.

AT LAW, on a contract. Judgment for defendants. Plaintiffs sued out this writ of error. The case is stated in the opinion.

Mr. Assistant Attorney General Maury for plaintiffs in error.

No appearance for defendants in error.

Mr. Justice Lamar delivered the opinion of the court.

On the 17th of November, 1883, the plaintiffs in error brought suit in the Circuit Court of the United States for the Western District of Texas against the defendants in error, Dennis Corwin and John Cardwell, as sureties in two bonds, one in the penal sum of $3000, and the other, $2150, given by one Edwin P. Phillips, to secure the faithful performance of two contracts, dated May 20, 1881, between Phillips and these plaintiffs. Phillips being without the jurisdiction of that court, was not sued. By one of these contracts Phillips agreed to furnish to the quartermaster's department, United States army, at the military station of San Antonio, Texas, "such quantity as may be required, not exceeding in all 1,000,000 pounds, of good merchantable oats," at a stipulated price; "the said oats to be furnished and delivered as may be required for the wants of the said station, between the 1st day of July, 1881, and the 13th day of July, 1882, in such quantities and at such times as the receiving officer may require;" and by the second contract he agreed to furnish to the same authorities, at the same place, such quantity as may be required, not exceeding in all 1,000,000 pounds, of good merchantable corn, at a stipulated price, between July 1, 1881, and June 30, 1882, upon like terms, as to quantity and time of delivery, as in the case of the oats.

The petition, after setting out the material parts of both of these contracts, and also of the bonds, alleged that Phillips "wholly failed, refused and neglected to carry out any one or all of his stipulations in said agreements;" that, as a result of such failure on his part, the plaintiffs were compelled to, and did, go into the open market and purchase large amounts of both kinds of grain at a much higher price than was stipulated in said contracts; and that plaintiffs were thus subjected to a loss of $11,564.55, for which sum, or so much thereof as

did not exceed the amounts named as penalties in the bonds, together with interest and costs, etc., they prayed judgment.

Each of the defendants below demurred to the petition, and, at the same time, traversed its allegations.

August 24, 1884, a formal stipulation was filed, waiving a jury and submitting all matters of law and fact to the court. On the following day an amendment to the petition was filed, alleging that on the 8th day of July, 1881, demand was made on Phillips, under the contract, for the delivery of 150,000 pounds of corn and a like quantity of oats. Issue being joined, the United States introduced their evidence, which was wholly documentary, and consisted of transcripts of various original papers deposited in the Treasury Department, and which, it was claimed, was relevant to the case. The defendants in error offered no evidence at all. On the 3d of September, 1885, the court overruled the demurrers to the petition, and upon consideration of the case upon its merits rendered judgment in favor of the defendants in error, upon the ground that, under the contracts sued on, a demand upon Phillips for their performance was a condition precedent to the right of action on the bonds, and that there had been no legal evidence submitted showing that any demand ever had been made. From this judgment the United States sued out the writ of error which brings the case here.

The burden of proof was upon the United States to show that a demand had been made upon Phillips for the performance of each of his said agreements, and to show his failure and refusal to so perform them.

The evidence submitted by the United States to establish this demand and refusal, consisted of several letters, of different dates, written by the quartermaster in charge of the depot at San Antonio to the Chief Quartermaster of the Department of Texas, for authority to purchase certain stated amounts of oats in open market, because (as was alleged therein) Phillips had failed to make deliveries under his contract; all of which letters were referred by the last-named officer to the Adjutant General, with a recommendation that such authority be granted. The Adjutant General approved these requests, and

the purchases were accordingly made. These letters were substantially alike, differing only as to dates and amounts of oats desired, one of which, including indorsements, is as follows:

"Office Depot Quartermaster, U. S. Army,
"San Antonio, Texas, Aug. 2d, 1881.

"Chief Quartermaster, Department of Texas,
"San Antonio.

"Sir: I respectfully request authority to purchase 40,000 lbs. of oats, in open market, the contractor, Mr. E. P. Phillips, having failed to make deliveries under his contract.

"Very respectfully, your obedient servant,
"L. E. Campbell,
"Capt. & A. Q. M., U. S. A., Depot Q'r M'r."

(First indorsement.)

"H'dq'rs, Dep't of Texas,
"Office of Chief Quartermaster,
"San Antonio, Texas, Aug. 2d, 1881.

"Respectfully referred to the Adj't General, Department of Texas, recommending approval of this request in accordance with article 1 of the contract. Mr. Phillips, after having had due notice by requisition from the depot quartermaster to furnish certain quantities of grain, has so far failed to make any delivery, and the amount of grain for which authority is here requested to purchase in open market is absolutely needed for issue to the public and private animals pertaining to this station, and the San Antonio depot, and will last about ten days.

"(Sig'd) "Wm. B. Hughes,
"Major & Chief Q'r'master."

(Second indorsement.)

"Headquarters Department of Texas,
"San Antonio, Aug. 3, 1881.

"Respectfully returned by the Commanding General to the Chief Quartermaster of the department approved.

"(S'g'd) "Thomas M. Vincent,
"Adjutant General."

(Third indorsement.)

"Headq'rs, Dep't of Texas,
"Office of Chief Quartermaster,
"San Antonio, Texas, August 3, '81.

"Respectfully referred to the Depot Quartermaster, San Antonio, inviting attention to preceding indorsement.

"(S'g'd) "W. B. HUGHES,
"Major & Chief Quartermaster."

We agree with the Circuit Court that the transcript does not present any legal evidence of a demand upon the contractor, nor of any such default on his part, as to give the United States a cause of action against him and his sureties. The order of the receiving officer at San Antonio requiring the contractor to deliver the oats in the quantity stated and at the time specified, should have been produced, or its non-production accounted for. The letters of the acting quartermaster, Captain Campbell, applying for authority to purchase oats, and the recommendation by Major Hughes that the application be granted, only prove the necessity and object for such purchase. The assertion by Major Hughes that the contractor, though duly notified by requisition, had failed to comply with his contract, is unsustained by any evidence of any kind. No such requisition can be found among the papers, nor is any reason given for its non-production. Neither is it shown, except by the bare assertion referred to, that the requisition ever reached the contractor.

It is contended by the counsel for the government, that this assertion, being in the official communication of the Chief Quartermaster of the Department of Texas, is itself sufficient and competent evidence of the fact. We do not think that the authorities cited support the proposition. They present applications in various instances of the well established rule that official reports and certificates made contemporaneously with the facts stated, and in the regular course of official duty, by an officer having personal knowledge of them, are admissible for the purpose of proving such facts. Manifestly the

design and meaning of this rule is not to convert incompetent and irrelevant evidence into competent and relevant evidence simply because it is contained in an official communication. Had the officer been testifying under oath, such an assertion would have been excluded as inadmissible, upon the ground that the statement itself implied the existence of primary and more original and explicit sources of information. *Clifton* v. *United States*, 4 How. 242, 247; 1 Taylor Ev. §§ 391, 394; 1 Greenl. Ev. §§ 82, 84. The courts hold this rule, which has been invoked, to be limited to only such statements in official documents as the officers are bound to make in the regular course of official duty. The statement of extraneous or independent circumstances, however naturally they may be deemed to have a place in the narrative, is no proof of such circumstances, and is, therefore, rejected. 1 Taylor Ev. § 705; *United States* v. *Buford*, 3 Pet. 12.

It results from what we have said that there was no evidence submitted showing a demand by the United States under the first contract, and a failure and refusal by Phillips to perform it. As to the contract for supplying corn, it is admitted by the United States that their evidence in support of their claim is not so strong as in the case of the contract for supplying oats. The only evidence touching the contract to supply corn was certain vouchers for corn purchased outside the contract, all dated in the latter part of the year 1881 and the early part of 1882. In the language of the counsel for plaintiffs in error, "we find no correspondence, nor any other form of documentary evidence, tending to show that the demand for performance required by the contract to supply corn had been made by the government."

The judgment of the Circuit Court is

Affirmed.

RUCKMAN *v.* CORY.

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

No. 1199. Submitted January 8, 1889. — Decided January 28, 1889.

B executed and delivered to C his bond in 1855 or 1856 to convey to him a tract of land for a consideration named. C entered into possession, borrowed money of R, paid the consideration money in full, and made valuable improvements on the place. At C's request the conveyance was made to R, in 1858, to secure him. Four years later R, having in the meanwhile been paid in full by C, conveyed the property to a woman without consideration, and then married her. After some time the married couple separated. The wife then brought ejectment to recover possession from C, (who during the whole time had remained in possession,) and obtained a verdict and judgment on the verdict for possession. Thereupon C took a new trial as of right, under the laws of Illinois, and, in 1883 filed his bill in equity against the wife to compel a conveyance of the land to him; *Held*,

(1) That C's remedy was in equity;

(2) That he had not been guilty of such laches as would close the doors of a court of equity against him;

(3) That the evidence in the record was sufficient to support a decree in complainant's favor.

Laches cannot be imputed to one in the peaceable possession of land under an equitable title, for delay in resorting to a court of equity for protection against the legal title; since possession is notice of his equitable rights and he need assert them only when he finds occasion to do so.

A grantee in a deed is not affected by declarations of a grantor, made after the execution and delivery of the deed, unless, with full knowledge of them, he acquiesces in or sanctions them.

In equity. Decree for complainant. Respondent appealed. The case is stated in the opinion.

Mr. William M. Springer and *Mr. Henry W. Wells* for appellant.

Mr. John M. Palmer for appellee.

Mr. Justice Harlan delivered the opinion of the court.

About the year 1855, or 1856, W. D. Bowers executed to the appellee Cory his bond in writing for the conveyance of

certain lands in Mason County, Illinois, the consideration being the sum of one thousand dollars, payable in two equal instalments on the first day of October, 1857, and 1858, with ten per cent interest from the date of sale. Cory went into possession under the purchase on or about May 1, 1856, during which year he prepared and sowed in wheat about seventy-five acres. In 1857 he erected a house on the premises, and, before the wheat crop of that year was cut, he moved into it with his family. During the next year he prepared for cultivation forty additional acres. He has cultivated, more or less, these lands ever since he first took possession of them. All the improvements thereon, including the fencing, as well as the taxes, (except those for the year 1880,) were regularly paid by him.

On the first day of October, 1858, Bowers and wife conveyed the land to Elisha Ruckman, of New Jersey, who was a first cousin of Cory and a man of large means. This was the first time Bowers had heard of Ruckman. Until the delivery of the above deed he knew of no one except Cory in the transaction for the sale of the lands.

On the 24th of April, 1862, Ruckman, by deed executed in New Jersey, conveyed the lands to Margaret Hopping, a single woman, to whom, at a subsequent date, January 25, 1864, he was married. Some time after their marriage, but at what time does not appear, Ruckman and his wife separated; and they were living apart when she brought in the court below an action of ejectment against Cory for the recovery of the lands. In that action — the date of the commencement of which is not shown by the record — she obtained a verdict and judgment; but Cory elected to take, and did take, as of right, a new trial, as provided for in the statutes of Illinois. Rev. Stats. Ill. c. 45. Thereupon he instituted the present suit against Mrs. Ruckman (her husband having died) for the purpose of obtaining a decree requiring her to convey to him, by sufficient deed, all her right, title and interest in these lands. The claim for such relief is rested by the plaintiff upon these grounds: That the lands were purchased by him from Bowers, and paid for, (except as to a small part of the price

stipulated,) with money borrowed for that purpose from Ruckman; that without knowledge or request of Ruckman, and solely for the purpose of securing him in the payment of the amount so loaned, he caused Bowers to make the conveyance directly to Ruckman; that although such conveyance was absolute in form, it was intended to be, and was only to operate as, a security for the debt due from him to Ruckman; that the latter, without his knowledge or consent, and without a good or valuable consideration to sustain it, made the deed of 1862 to Margaret Hopping; that only recently, namely, by said action of ejectment, did she assert any title under the deed to her; that his debt to Ruckman, on account of the borrowed money, has long since been discharged in full; and that, nevertheless, the defendant refused to convey to him, and was inequitably prosecuting her action of ejectment for possession.

The court below gave the plaintiff the relief asked by him.

1. The contention that the plaintiff has a plain, adequate, and complete remedy at law cannot be sustained. It is not certain that he can successfully defend the action of ejectment. Besides, only a court of equity can compel the surrender of the legal title held by the defendant and invest the plaintiff with it.

2. Nor has the plaintiff been guilty of any such laches as would close the doors of a court of equity against him. He was in the peaceful occupancy of the premises for some years prior to any assertion of title upon the part of the defendant under the deed of 1872. If he had not been all the time in the possession of the premises, controlling them as if he were the absolute owner, the question of laches might be a more serious one for him than it is. The bringing of the action of ejectment was, so far as the record shows, the first notice he had of the necessity of legal proceedings for his protection against the legal title held by the defendant. As proceedings to that end were not unreasonably delayed, we do not perceive that laches can be imputed to him. Laches are rather to be imputed to the defendant, who, although claiming to have been the absolute owner of the lands since 1862, took no action

against the plaintiff until the ejectment suit was instituted. *Mills* v. *Lockwood*, 42 Illinois, 111, 118. "Laches," the Supreme Court of Illinois has well said, "cannot be imputed to one in the peaceable possession of land for delay in resorting to a court of equity to correct a mistake in the description of the premises in one of the conveyances through which the title must be deduced. The possession is notice to all of the possessor's equitable rights, and he need to assert them only when he may find occasion to do so." *Wilson* v. *Byers*, 77 Illinois, 76, 84. See also *Barbour* v. *Whittock*, 4 T. B. Mon. 180, 195; *May's Heirs* v. *Fenton*, 7 J. J. Marsh. 306, 309.

3. Reference is made to the depositions of several witnesses, including the plaintiff, who testified in his own behalf, in which are detailed statements made by Ruckman, at different times after 1862, in reference to the title to these lands. This evidence, it is contended, and properly so, was incompetent under the well-established rule that "a grantee in a deed is not affected with the declarations of the grantor made after the execution and delivery of the deed, unless, with full knowledge of such declarations, he acquiesces in or sanctions them." *Higgins* v. *White*, 118 Illinois, 619, 624; *Steinbach* v. *Stewart*, 11 Wall. 566, 581; *Winchester and Partridge M'f'g Co.* v. *Creary*, 116 U. S. 161, 165. But the question remains, whether the decree cannot be sustained by such evidence in the record as is competent and relevant. We think it can. At any rate, after a careful sifting of the proof, and giving due weight to all the facts and circumstances that may properly be considered, we do not see our way clear to disturb the decree.

There are no other questions in the case that we deem it necessary to notice.

The decree is affirmed.

EASTERN RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 134. Argued January 22, 23, 1889. — Decided February 4, 1889.

Prior to the expiration, June 30, 1877, of a written contract with a railroad company for carrying the mails, the Postmaster General, acting under provisions of law, notified the company in writing that from the day of that expiration to a day which made a term of four years, the compensation would be at rates named in the notice, "unless otherwise ordered." The company transported the mails, and accepted pay therefor at those rates, without objection. On the 1st July, 1878, the Postmaster General reduced the rates 5 per cent under the provisions of an act of Congress to that effect. The company made no objections to this, and continued to transport the mails for the rest of the term of four years, and received pay therefor at the reduced rates. They then brought suit to recover the amount of the reduction made after July 1, 1878; *Held*,

(1) That there was no contract to carry the mails for four years at fixed rates;

(2) That the company might have refused to transport them at the reduced rates;

(3) That its failure to do so and the absence of a protest constituted an assent to the rates fixed by the reduction.

THE case was stated thus by the court in its opinion.

The claim upon which this action is brought is for the balance alleged to be due the appellant for carrying the mails of the United States on certain routes, between July 1, 1878, and June 30, 1881.

It appears from the findings of fact that this company, for some years prior to March 31, 1877, carried the mails on each one of thirteen routes, under written contracts with the Postmaster General prescribing the compensation it was to receive for such services. The last one of these contracts was made March 31, 1874, and covered the period beginning January 1, 1874, and ending June 30, 1877. This contract was made subject to the provisions of the act of March 3, 1873, 17 Stat. 558, c. 231; Rev. Stat. § 4002, which authorized and directed

the Postmaster General to readjust the compensation thereafter to be paid for the transportation of mails on railroad routes, the pay per mile per annum, not to exceed certain rates, graduated by the average weight of the mails carried "to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times after June 30, 1873, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

By an act approved March 3, 1875, 18 Stat. 341, c. 128, the Postmaster General was directed to have the mails weighed by the employés of the Post Office Department, and to have the weights stated and verified to him by them, under such instructions as he considered just to the department and to the railroad companies. Subsequently, by an act approved July 12, 1876, that officer was "authorized and directed to readjust the compensation to be paid from and after July 1, 1876, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails ten per centum per annum from the rates fixed and allowed" by the first section of the act of March 3, 1873. The same act provided that railroad companies, whose railroads were constructed in whole or in part by a land-grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct, shall receive only eighty per centum of the compensation authorized by the act of July 12, 1876, 19 Stat. 78, 79, c. 179; Richardson's Suppl. Rev. Stat. 224.

The company was paid according to the terms of the contract of March 31, 1874, up to and including June 30, 1877.

Prior to February 1, 1877, the Postmaster General sent to claimants, for each of the routes covered by its contract with the United States, a "railroad-distance circular," and, prior to April 16, 1877, a "railroad-weight circular;" the object of the first circular being to obtain accurate information for the use of the department in regard to the length and location of the plaintiff's road, and that of the last being to obtain a state-

ment of mail matter conveyed by it. The information called for by these circulars having been furnished, the Postmaster General, December 20, 1877, readjusted the compensation to be paid for carrying the mails over the routes in question, giving due notice thereof to the sixth auditor and to the railroad company. That order was in this form: "Authorize the Auditor of the Treasury for the Post Office Department to pay the Eastern Railroad Company, quarterly, for carrying the mail between and from July 1, 1877, to June 30, 1881, at the rate of $ per annum (being $ per mile per annum), unless otherwise ordered, subject to fines and deductions." On the same day the Postmaster General sent to the company a circular notice of adjustment of pay for each route in this form: "The compensation for the transportation of mails, etc., on your road, route between and , has been fixed from July 1, 1877, to June 30, 1881, (unless otherwise ordered,) under acts of March 3, 1873, July 12, 1876, upon returns showing the amount and character of the service for thirty days, commencing April 16, 1877, at the rate of per annum, being $ per mile for miles." The compensation thus fixed was the maximum authorized by the act of 1873, as amended by that of 1876.

By the first section of the act of June 17, 1878, making appropriations for the fiscal year of the Post Office Department for the year ending June 30, 1879, and for other purposes, the Postmaster General was "authorized and directed to readjust the compensation to be paid from and after the first day of July, 1878, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails five per centum per annum from the rates for the transportation of mails, as the basis of the average weight fixed and allowed" by the first section of the act of July 12, 1876, 20 Stat. 140, c. 259; Richardson Suppl. Rev. Stat. 359. On the 12th of July, 1878, that officer readjusted the compensation to be paid to the appellant for the transportation of mails on said routes after July 1, 1878. Of this readjustment due notice was given to the company and to the Auditor of the Treasury for the Post Office Department. The

notice to the Auditor was in this form: "Authorize the Auditor to decrease the pay of the Eastern Railroad Company for carrying the mails between and from July 1, 1878, to June 30, 1881, at the rate of per annum, leaving the pay from that date per annum (being per mile,) being a reduction of five per centum from the rates fixed for weight of mails in accordance with the act of June 17, 1878." The notice to the company was in this form: "Please take notice that the Auditor of the Treasury for this Department has been directed to decrease the pay of your company for the conveyance of the mails on Route 9, between Portland and Portsmouth, from July 1, 1878, to June 30, 1881, $558.19 per annum, leaving the pay from the first-named date $13,233.55 per annum, being a reduction of five per centum from the rates fixed for weight of mails in accordance with the provision of the act of June 17, 1878."

In 1879, the Postmaster General, upon the application of the railroad company, caused the mails on the route between Portland and Boston to be re-weighed. That re-weighing resulted in an order, August 26, 1879, considerably increasing the compensation previously directed to be paid, but still it was five per cent less than it would have been under the order of December 20, 1877, unaffected by the reduction made by the order of July 12, 1878.

For carrying the mails on all the routes in question, from July 1, 1877, to June 30, 1881, both inclusive, the railroad company received compensation in conformity with the above orders of the Postmaster General; that is, from July 1, 1877, to June 30, 1878, according to the orders and notice of December 20, 1877, and from July 1, 1878, to December 30, 1881, according to those orders as modified July 12, 1878, and August 26, 1879.

The difference between the amounts actually paid to the claimant under all of said orders, and the amount it would have received under the order of December 20, 1877 — if it was not bound by the order of July 12, 1878, making the reduction of five per cent — is $5926.56, the amount claimed in the petition.

Opinion of the Court.

It does not appear that the company, at any time before the commencement of the action, made any protest against or objection to the readjustments of its compensation made by the Postmaster General.

Mr. A. J. Willard for appellant. *Mr. William E. Earle* and *Mr. James L. Pugh, Jr.*, filed a brief for same.

Mr. Attorney General and *Mr. Assistant Attorney General Howard* for appellees.

Mr. Justice Harlan delivered the opinion of the court. After stating the case he continued.

After the first of July, 1877, the company was under no legal obligation to carry the mails. It carried them after that date under an implied contract that it should receive such compensation as was reasonable, not exceeding the maximum rates prescribed by Congress, and subject to a readjustment of rates as required by the act of 1876. Such readjustment took place on the 20th of December, 1877. If the order made by the Postmaster General on that day, fixing certain rates, upon the basis of a reduction of ten per cent, for carrying the mails, from July 1, 1877, to June 30, 1881, and its acceptance by the railroad company, constituted an express contract, in respect to the compensation to be paid to it, still, as, by the terms of both the order and the notice, those rates were to govern, "unless otherwise ordered," there is no ground for the company to complain of the subsequent reduction of five per cent. This reservation of power in the Postmaster General opened the way for him to exercise the authority conferred, and to conform to the direction given, by the act of 1878. It cannot be said that the reduction of five per cent was a violation of that contract; for, according to its terms, the parties agreed that the rates fixed at the latter date were subject to such future orders as the Postmaster General might make. We do not mean that the railroad company was bound to continue the carrying of the mails, if subsequent changes in the rates were

unreasonable or did not meet with its assent. On the contrary, it was at liberty, when the five per cent reduction was made, to discontinue their transportation on its cars.

Chief Justice Richardson, speaking for the Court of Claims, properly said that the order for the reduction under the act of 1878, and the notice thereof to the company, "constituted an offer on the part of the Postmaster General which the claimant might decline or accept at his pleasure." Having received the reduced compensation without protest or objection, it may be justly held to have accepted that offer.

It is a mistake to suppose that these views are inconsistent with the decision in *Chicago &c. Railway Co.* v. *United States*, 104 U. S. 680, 684. It was there held that the act of 1876 should not be construed as affecting the rights of a railroad company under a contract for transporting the mail which was in all respects valid under the laws in force when it was made; that the language of the acts of 1875 and 1876 "may well be satisfied by confining them to cases where no time contracts for service were then in existence, and to contracts thereafter to be entered into;" and that this did not legitimately apply to contracts then existing, whose terms had not expired. That case differs from the present one in the important particular, that in the former the company bound itself to carry the mails during a certain period, and, consequently its acceptance from time to time, during that period, of less than it was entitled to demand did not prejudice its right to claim what was legally due under its contract; whereas, in the present case, the company could have declined to accede to the readjustments of rates when they were made.

We perceive no error in the judgment, and it is therefore

Affirmed.

Syllabus.

LIVERPOOL AND GREAT WESTERN STEAM COMPANY *v.* PHENIX INSURANCE COMPANY.

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

Argued November 8, 9, 1887. — Decided March 5, 1889.

A decree of the Circuit Court in admiralty on the instance side, finding negligence in the stranding of a ship, can be reviewed by this court so far only as it involves a question of law.

The owner of a general ship, carrying goods for hire on an ocean voyage, is a common carrier.

A common carrier by sea cannot, by any stipulation with a shipper of goods, exempt himself from all responsibility for loss or damage by perils of the sea, arising from negligence of the officers or crew.

Upon a question of the effect of a stipulation exempting a common carrier from responsibility for negligence of his servants, the courts of the United States are not bound by decisions of the courts of the State in which the contract is made.

The general maritime law is in force in this country so far only as it has been adopted by the laws or usages thereof.

The law of Great Britain since the Declaration of Independence is a foreign law, of which a court of the United States cannot take notice, unless it is pleaded and proved.

The law of the place where a contract is made governs its nature, obligation and interpretation, unless it appears that the parties, when entering into the contract, intended to be bound by the law of some other country.

A contract of affreightment, made in an American port by an American shipper with an English steamship company doing business there, for the shipment of goods there and their carriage to and delivery in England, where the freight is payable in English currency, is an American contract, and governed by American law, so far as regards the effect of a stipulation exempting the company from responsibility for the negligence of its servants in the course of the voyage.

An insurer of goods, upon paying to the assured the amount of a loss, total or partial, becomes, without any formal assignment, or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's right of action against the carrier, and may assert that right in his own name in a court of admiralty.

In a through bill of lading for carriage from an inland city in the United States, by a railroad company and its connections, and a steamship company, to an English port, signed by an agent of the companies, "severally, but not jointly," and containing two separate and distinct sets of

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terms and conditions, the one relating to the land carriage, and the other to the ocean transportation, a stipulation, inserted in the first set only, that in case of loss that company alone shall be answerable in whose actual custody the goods are at the time, "and the carrier so liable shall have the full benefit of any insurance effected upon the goods," gives the steamship company no right to the benefit of any insurance.

THIS was a libel in admiralty *in personam* "in a cause of action arising from breach of contract," filed January 27, 1881, in the District Court, against the Liverpool and Great Western Steam Company (Limited) by the Phenix Insurance Company, claiming to have been subrogated to the rights of the owners of goods shipped on board the respondent's steamer, the Montana, at New York, to be delivered at Liverpool, and lost or damaged by her stranding in the course of her voyage, through the negligence of those in charge of her navigation. The libel contained the following allegations:

First. The libellant was a corporation duly organized under the laws of the State of New York for transacting business as insurer, among other things, of maritime risks and adventures; and the respondent was a corporation duly organized under the laws of Great Britain and Ireland for the purpose of owning and navigating steamships and carrying passengers and cargo.

Second. The respondent maintained a line of steamers running between New York and Liverpool, and was a common carrier of passengers and cargo between those ports. The Montana was a steamer owned and navigated by the respondent as one of that line, and on March 2, 1880, left the port of New York with a cargo of merchandise and a large number of passengers received on board by the respondent as a common carrier, to be landed and delivered at Liverpool.

Third. Among such cargo were a lot of bales of cotton, variously marked, all shipped by or on account of Swanson, Porteous & Co., to their own order, and a lot of bales of cotton, variously marked, all shipped by or on account of Hobart, Smith & Co., to their own order, and 22 boxes of bacon and 4 tierces of hams, shipped by or on account of A. Baxter, agent, to his own order; all of which goods were shipped on board

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the Montana in good order and condition; and the respondent agreed to deliver the same in like good order and condition at Liverpool.

Fourth. The Montana failed to deliver her cargo or any portion of the same as agreed, but, during the prosecution of her voyage from New York to Liverpool, stranded on the west coast of Great Britain, at or near Clegyr Point, in Holyhead Bay, and thereby these goods became in large measure lost or destroyed and the remainder greatly damaged.

Fifth. This article set forth particularly the circumstances preceding and attending the stranding.

Sixth. The libellant charges that the stranding of the steamer and the consequent loss and damage of the cargo were due to the negligence of those navigating the steamer, in proceeding at too high a rate of speed, in not having a sufficient lookout, in going upon an improper and dangerous course, in not making due allowance for the influence of the ebb tide, in not having, or in not using and properly using, the outfit and appurtenances — among other things, the lead and compass — and in not so heeding the shore lights and signals, as would have indicated to them her dangerous position, and would have enabled them to regain and keep in a position of safety.

Seventh. The libellant, before the stranding, had made insurances on the goods in sums equal to or less than their value, to persons having an interest in them respectively equal to or greater than the sums insured, and under such insurances had paid, or become liable to pay, to the assured, for the loss or damage of the goods, sums amounting to more than $15,000. The damages of the assured or their assigns for the loss of the goods were greater than the amount of the insurances. And the libellant was subrogated to all their rights against the respondent for its failure to carry and deliver the goods.

The respondent filed an answer, alleging that it had duly appeared in the cause; admitting the jurisdiction of the court, as well as that the respondent was a British corporation for the purpose of owning and navigating steamers, and of carrying passengers and cargo, and since 1866 had been the owner

of certain steamers, plying between New York and Liverpool, and the Montana was a steamer owned and navigated by it; but denying that it was a common carrier; and alleging that the home port of the Montana was at Liverpool, where she was registered, and where the respondent carried on its business, having an agency, however, in the port of New York.

The answer alleged that the goods were shipped and received on board the Montana under bills of lading, which constituted the contracts between the shippers and the respondent, copies of which were annexed to and made parts of the answer (namely, one for the bacon and hams, weighing nearly six tons, which is printed in the margin,[1] and three for the cotton, amount-

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[1] Shipped, in good order and well conditioned, by Arch'd Baxter, agent, in and upon the steamship called Montana, now lying in the port of New York and bound for Liverpool, via Queenstown, twenty-two boxes bacon and four tcs. hams, being marked and numbered as in the margin,

GUION LINE.
United States Mail Steamers.

NEW YORK: 29 Broadway. LIVERPOOL: 11 Rumford St.

B. 22 boxes bacon.
4 tierces ham.
26 Packages.

T. cwt. 5.16.0.0 at 30/.
per ton £8.14.0
Primage. . . . 8, 9
Total £9. 2.9

and are to be delivered from the ship's deck, where the ship's responsibility shall cease, in like good order and condition, at the aforesaid port of Liverpool —

(The act of God, the Queen's enemies, pirates, robbers, thieves, vermin, barratry of master or mariners, restraint of princes, rulers or people, loss or damage resulting from insufficiency in strength of packages, from sweating, leakage, breakage, or from stowage or contact with other goods, or from any of the following perils (whether arising from the negligence, default, or error in judgment of the masters, mariners, engineers or others of the crew, or otherwise howsoever) excepted, namely, risk of craft, explosion or fire at sea, in craft or on shore, boilers, steam or machinery, or from the consequences of any damage or injury thereto, howsoever such damage or injury may be caused, collision, stranding, or other peril of the seas, rivers or navigation, of whatever nature or kind soever, and howsoever such collision, stranding or other peril may be caused, with liberty, in the event of the said steamer putting back to New York, or into any port, or otherwise being prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the goods by any other steamer, and with liberty to sail with or without pilots, and to tow and assist vessels in all situations) —

unto order or to assigns, freight for the said goods being paid immediately on landing, without any allowance of credit or discount, at the rate of thirty shillings sterling per ton of 2240 lbs., gross weight,

ing in all to 550 bales and weighing about 123 tons, of which bills one is also printed in the margin[1] and the others were

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delivered, with customary primage and general average, if any, according to York-Antwerp rules.

Weight, measure, contents, quality, brand and value unknown. The goods to be taken from alongside by the consignee, immediately the vessel is ready to discharge, or otherwise they may be landed and warehoused at his risk and expense. The collector of the port is hereby authorized to grant a general order for discharge immediately after the entry of the ship. The master porterage of the delivery of the cargo to be done by the consignees of the ship, and the expense thereof to be paid by the receivers of cargo. The owners of the ship will not be responsible for money, documents, gold, silver, bullion, specie, jewelry, precious stones or metals, paintings and statuary, unless bills of lading are signed therefor and the value thereof therein expressed.

In accepting this bill of lading the shipper or other agent of the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions, and conditions, whether written or printed.

In witness whereof the agent of the said ship hath affirmed to three bills of lading, all of this tenor and date, one of which being accomplished the others to stand void.

Dated in New York, March 1st, 1880. F. L. Le Sage.

[1] OVERLAND AND OCEAN BILL OF LADING.

THROUGH BILL LADING No. 81.

Louisville and Nashville Railroad

And the Williams and Guion Steamship Company from Nashville, Tenn., to Liverpool, Eng.

FREIGHT.	SHIPPED in apparent good order, by Gilbert Parkes & Co., the following property, marked and numbered as below (contents of packages unknown, and weight subject to correction).	
From Nashville, Tenn.	MARKS.	ARTICLES.
To Liverpool, Eng.	H. E. N. 45 bales.	
Quantity, 73,769 pounds.	D. U. D. 45 "	One hundred and fifty bales cotton.
Amount, £	H. E. L. 60 "	

To be delivered in like good order and condition, unto order Gilbert Parkes & Co., or to their assigns, he or they paying freight, in cash, immediately on landing the goods, without any allowance of credit or discount, at the rate of fifty-four pence (stg.) per 100 lbs. gross weight, delivered with average accustomed (at $4.80 to the Pound Sterling) under the following terms and conditions, viz.:

substantially similar); that the respondent assumed no greater risks or responsibilities than were expressed in the bills of lad-

That the said LOUISVILLE & NASHVILLE RAILROADS and their connections which receive said property shall not be liable for breakage of packages of Eggs, or for rust of Iron and of Iron articles, or for loss or damage by wet, dirt, fire, or loss of weight, or for condition of baling on Hay, Hemp or Cotton; nor for loss or damage of any kind on any article whose bulk requires it to be carried on open cars; nor for damage to perishable property of any kind occasioned by delays from any cause or by changes of weather; nor for loss or damage on any article or property whatever by fire or other casualty while in transit, or while in deposit or places of transhipment, or at depots or landings at all points of delivery; nor for loss or damage by fire, collision, or the dangers of navigation while on seas, rivers, lakes or canals. All goods or property under this Bill of Lading will be subject to its owner's cost to necessary cooperage or baling, and is to be transported to the depots of the Companies or landings of the Steamboats or Forwarding Lines at the points receipted to, for delivery.

IT IS FURTHER AGREED, that said LOUISVILLE & NASHVILLE RAILROAD and connections shall not be held accountable for any damage or deficiency in packages after the same shall have been receipted for in good order by consignees, or their agents, at or by the next carrier beyond the point to which this Bill of Lading contracts. Consignees are to pay freight and charges upon the goods or merchandise in lots or parts of lots, as they may be delivered to them.

IT IS FURTHER STIPULATED AND AGREED, that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that Company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage, and the carrier so liable shall have the full benefit of

To be delivered from the Ship's deck, where the Ship's responsibility shall cease, in the like good order and condition at the aforesaid port of Liverpool (the acts of God, the Queen's enemies, pirates, robbers, thieves, vermin, Barratry of Master or Mariners, restraints of Princes, Rulers or People, Loss or Damage resulting from insufficiency in strength of packages, sweating, leakage, breakage, stowage, or contact with other goods, risk of craft, explosion, or fire at sea, in craft or on shore, before lading or after unlading, accidents from machinery, boilers, steam, or any other accidents of the seas, rivers and steam navigation, of whatever nature or kind soever, excepted; whether any one or more of all such exceptions arise, occur, or are in any way occasioned from or by the negligence, default, or error in judgment of the Master, Mariners, Engineers, or others of the Crew, or of any of the Servants or Employés of the Ship-owners, or otherwise, however); and with liberty during the voyage to call at any port or ports, to receive Fuel, to load or discharge Cargo, or for any other purpose whatever; to sail with or without Pilots, to tow and assist vessels in all situations, and in the event of the said steamer putting back to New York or into any other port, or being otherwise prevented from proceeding in the ordinary course of the voyage, to tranship the goods to any other steamer.

Weight, Length, Contents and Value unknown; and not answerable for Leakage, Breakage, Rust or Mortality, damage caused by heavy weather, or pitching or rolling of the vessel, heating, mold, inherent deterioration, or defective package, or wrong delivery, caused by error, indistinctness, illegibility or deficiency in the marks, brands or numbers. Where goods are weighed or measured on board to ascertain freight, the charges for weighing, etc., to be paid by the consignee, and the Ship-owner to have a lien on the goods for such charge. The consignees, or the parties applying for the goods, are to see that they get their right marks and numbers, and after the lighterman or wharfinger, or the party applying for the goods, has signed for the same, the ship is to be discharged from all responsibility for misdelivery or nondelivery, and from all claims under this Bill of Lading. The ship to be entitled to commence

ing; and that the goods were lost or damaged by perils of the sea and by causes from which the respondent was exempt by law and by the bills of lading.

The answer denied any negligence on the part of those navigating the Montana, as charged in the libel; set forth particu-

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any insurance that may have been effected upon or on account of said goods.

AND IT IS FURTHER AGREED, that the amount of the loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of said goods or property at the place and time of shipment under this Bill of Lading.

THIS CONTRACT is executed and accomplished and the liability of the LOUISVILLE & NASHVILLE RAILROADS and their connections, as common carriers thereunder, terminates on delivery of the goods or property to the Steamship Company at New York, when the liability of the Steamship commences, and not before.

AND IT IS FURTHER AGREED, that the property shall be transported from the port of New York to the port of Liverpool by the said Steamship Company, with liberty to ship by any other Steamship or Steamship Line, subject to the following terms and conditions, viz.:

discharging immediately she arrives. The goods to be taken from the ship by the consignees directly they come to hand in discharging the ship, otherwise the Master or Ship's Agent to be at liberty to enter and land the goods or put them into craft at the merchant's risk and expense, and to have a lien on such goods until the payment of all costs and charges so incurred. The ship's responsibility to cease immediately the goods are discharged from the ship's deck.

The owners of these Steamships will not be accountable for Gold, Silver, Bullion, Specie, Jewelry, Precious Stones or Metals, Statuary or Paintings, unless specified in the Bills of Lading signed therefor, and the value thereof therein expressed.

☞ Parcels for different consignees collected and made up in single packages, addressed to one party for the purpose of evading payment of parcel freight, will be charged with the proper freight on each parcel.

NOTICE. — In accepting this Bill of Lading, the Shipper or Agent of the owner of the Property carried expressly accepts and agrees to all its stipulations and conditions, whether written or printed.

In Witness Whereof, The Agent signing for the said Transportation and Steamship Companies hath affirmed to Three Bills of Lading, of this tenor and date, one of which being accomplished, the others to stand void.

B. F. CHAMPE,
Agent Severally, but not Jointly.

Dated in Nashville, Tenn., Feb. 5, 1880.

[Along the left hand margin were printed the following:]

Bonded Goods, Consignee to Furnish Landing Certificates free of Expenses, and on all Shipments of less than 5 Car Loads Bonding Charges will be Collected.

ATTENTION OF SHIPPERS IS CALLED TO THE ACT OF CONGRESS OF 1851:

"Any person or persons shipping Oil of Vitriol, Unslacked Lime, Inflammable Matches, Gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering AT THE TIME OF SHIPMENT a note in writing, expressing the nature and character of such merchandise, to the master, mate, or officer, or person in charge of the loading of the ship or vessel, shall forfeit to the UNITED STATES ONE THOUSAND DOLLARS."

larly the circumstances preceding and attending the stranding; and alleged that in respect to the employment of a skilled and licensed master and officers, and the careful observation by them of the elements and everything which would, in the exercise of ordinary human skill, enable them to determine and judge the position of the vessel and to navigate her accordingly, and in respect to her seaworthiness and outfit and everything within the reasonable limits of skill and foresight, the respondent fully complied with its contract of affreightment, and with all the requirements of law.

As to the allegations of the libel concerning insurance and subrogation, the answer averred that the respondent had no knowledge, and left them to be proved.

In the District Court, the pleadings and depositions were read in November, 1882, the cause was argued and submitted May 4, 1883, an opinion in favor of the libellant was delivered June 29, 1883, which is reported in 17 Fed. Rep. 377, and a final decree for the libellant for the sum of $13,257.64, with interest and costs, was entered February 19, 1884.

The respondent appealed to the Circuit Court, where the cause was heard and argued July 1 and 2, 1884, upon the testimony taken in the District Court; and on July 31, 1884, the court rendered an opinion in favor of the libellant, and filed its findings of fact and conclusions of law, all of which are reported in 22 Blatchford, 372. The findings of fact were as follows:

"The respondent, The Liverpool and Great Western Steam Company (Limited), is a corporation organized under the laws of Great Britain, and, in the month of March, 1880, and for a long time prior thereto, was the owner of the steamer Montana. The libellant, The Phenix Insurance Company, has been for many years, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of New York for transacting the business of insurance, including marine risks. During said time it had an agency in Liverpool, England, for the adjustment and settlement of losses, and the losses referred to herein were adjusted by such agency, and were paid by it in Liverpool. The Montana was an ocean steamer,

built of iron, and performed regular service as a common carrier of merchandise and passengers between the ports of Liverpool, England, and New York, in the line commonly known as the Guion Line. By her, and by other ships in that line, the respondent was such common carrier.

"On March 2, 1880, the Montana left the port of New York, on one of her regular voyages, bound for Liverpool, England, with a full cargo, consisting of about twenty-four hundred tons of merchandise, and with passengers. She stopped at Queenstown in the afternoon of March 12, and thence proceeded on her voyage. She passed Tuskar rock, on the extreme southeastern portion of Ireland, at about eight o'clock in the evening of March 12, and thence took a course up and across the Irish Channel. The course she took would ordinarily have carried her outside of the range of the South Arklow light, which is a light on the east coast of Ireland, but, with the wind, tides and currents as they were that night, she passed within range of that light, and about nine miles off, at 9.45 P.M. On passing the South Arklow light, the next light which those in charge of the navigation of the Montana expected to make was the South Stack light, on the coast of Wales, at the entrance of Holyhead Bay. The master of the Montana was on the bridge and in charge of her navigation.

"The light-house on South Stack carried two lights. One, the high light, was about 170 feet above high water. It was white in color, and exhibited in all directions at sea, with a range of from twenty to thirty miles, in clear weather. It was a revolving light, making one complete revolution in six minutes, and it showed a white flash light every minute. The other light was also white. It was about 40 feet above high water, and was a semi-revolving light, exhibiting every minute and a half in all directions between east northeast and west by north. Its range in clear weather was from three to four miles, but it was regularly lit only in foggy or thick weather. Both of these lights were lit and burning all through the night of March 12. A fog-bell was regularly sounded at South Stack from ten o'clock in the night of March 12 until six o'clock in the morning of March 13. The bell weighed two and a quarter

tons, and was operated upon by a hammer weighing about ninety-six pounds, which struck the bell on the outside at intervals of fifteen seconds, and was worked by means of clock-work and a caloric engine. The sound was a powerful one, and its range was from three to four miles. The high light on the South Stack was established in 1809, and has ever since been regularly maintained. The fog-bell has been established for about twenty years, and has since then been regularly sounded in foggy weather.

"About east northeast, magnetic, from South Stack, and distant about one mile therefrom, was a fog-gun station, known as North Stack. This fog-gun station had been established about twenty years, and from midnight of March 12 until four o'clock in the morning of March 13 the fog-gun was fired regularly every ten minutes. The gun was a twenty-four pounder, and was each time charged with three pounds of powder, and a large junk wad to give extra sound, the range of the sound being between five and six miles when the fog was thick, with the wind, and about seven miles when the fog lifted. The fog-gun station, since it was established, has been regularly maintained and the fog-gun fired regularly in foggy weather.

"About two miles east, magnetic, from North Stack, was the Holyhead Breakwater light-house. This light-house was at the outer end of Holyhead Breakwater, and it carried a fixed red light at a height of from sixty to seventy feet above high water, with flashes every seven and one half seconds. The range of the light in clear weather was from three to four miles, and the range of the flash was about fourteen miles. The light was established in 1873, and has since then been regularly maintained. At the breakwater light-house was a fog-bell, weighing about five hundred weight, which was operated upon by two hammers, worked by clock-work, and striking the bell on the outside three times in quick succession at intervals of fifteen seconds. The range of the sound was from a mile and a half to two miles. The bell was established in 1873, and was regularly rung in foggy weather. It was in operation from midnight of March 12 until five o'clock in the morning of March 13.

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"About five miles north northeast, magnetic, from Holyhead Breakwater light-house, and across Holyhead Bay, was the Skerries light-house. The Skerries light-house was about northeast, magnetic, from South Stack light-house, and distant therefrom between seven and eight miles. It was situated on a small island about two miles off Carmel Head, and about two or three miles north northwest, magnetic, from Church Bay. It carried a stationary white light between eighty and ninety feet above low-water mark, exhibiting in all directions at sea and in Holyhead Bay, with a range of about sixteen miles. It was burning all through the night of March 12. It was established between seventy and eighty years ago, and has been regularly maintained since. There was at Skerries light-house a fog-horn or siren, worked by two powerful caloric engines at a pressure of fifty pounds to the square inch. The sound made was shrill and powerful, and had a range of eight miles in foggy weather, and the sound was regularly given from ten o'clock at night of March 12 until half past four o'clock in the morning of March 13, at intervals of three minutes. This fog-horn or siren had been established for several years, and it has been regularly maintained ever since.

"All through the night of March 12, until five o'clock in the morning of March 13, a fog overspread the land surrounding Holyhead Bay, and extended, at times, and to some extent, into the bay and out to sea. The proper course of the Montana was to keep three or four miles off the land at the South Stack, and on a course about northeast by east, magnetic, until she had the Skerries abaft her beam, and then to take a course about east by south, magnetic, to Liverpool. There was a westerly variation of about two points between magnetic courses and true courses in the Irish Channel and adjacent waters.

"The Montana, on a course about northeast by east, magnetic, passed within a short distance of South Stack light-house and saw the high light there between one and two o'clock in the morning of March 13. It came into sight, bearing about southeast by east and about one point forward of the starboard beam of the Montana. Her officers expected to see it at a

distance of about twenty miles off, bearing from east northeast to northeast by east. When they saw it first, they thought it to be fifteen miles off, and they remained of that opinion. It passed out of sight abaft their beam, they supposing it was hidden by the horizon. The master of the Montana did not ascertain by cross bearings (which he might readily have made) the distance at which he was from the light. He lost the light because it was shut out from him by a fog which intervened between it and the Montana; and thence he continued, with his engines working at full speed, and giving the Montana a speed through the water of about fourteen knots an hour, and on an east three-quarters south magnetic course, to which he had changed, which took him directly into Holyhead Bay, until after half past two o'clock. Before this time a man had been stationed at the fog whistle of the Montana, who regularly blew it. At about half past two o'clock the master of the Montana heard the fog-gun on North Stack off his starboard quarter, abaft his starboard beam, and he thereupon changed the course of the steamer again to northeast by east magnetic, but he continued his engines at full speed until 2.45 A.M., at which time the engines were put at half speed, which gave the steamer a speed through the water of between nine and ten knots per hour. Five minutes later the shore loomed up through the fog on the starboard bow, and orders were given to slow and stop the engines and to put them full speed astern, but before these latest orders could be executed the Montana ran ashore at Clegyr Point, in Church Bay. After leaving Tuskar, and up to one o'clock in the morning of March 13, the Montana was running with a flood tide. Then there was slack water, and she afterward encountered an ebb tide, which ran from three to four knots an hour.

"At no time that night were any soundings taken on board of the Montana, though soundings would have indicated to her master that he was running rapidly on to the shore. The lights at Holyhead Breakwater and the Skerries were not seen by those in charge of the navigation of the Montana and her lookouts, and those in charge of her navigation did not hear the fog-bell at South Stack or that at Holyhead Breakwater or the

siren at the Skerries, and they did not hear the fog-gun at North Stack until it was on their quarter. When they lost sight of the South Stack light, they were within range of the Skerries light, and ought to and would have seen it unless it was shut out by a fog. The water outside of Holyhead Bay ranged from twenty to eighty fathoms in depth, while the water in Holyhead Bay ranged from five to seventeen fathoms in depth, regularly shoaling as the shore was approached.

"Almost immediately after the Montana ran ashore, she commenced filling with water, and thereby her cargo was in large part destroyed or damaged. Portions of it were thereafter taken from the steamer and forwarded to Liverpool, and there delivered. The Montana was then floated and taken to Liverpool for repairs.

"Those in charge of the navigation of the Montana were negligent, in that, without having taken cross bearings of the light at South Stack, and so determined their distance from the light, they took an east three-quarters south course before passing the Skerries, and without seeing the Skerries light; and in that they continued at full speed after hearing the fog-gun at North Stack; and in that they took a northeast by east magnetic course on hearing said fog-gun, instead of stopping and backing and taking a westerly course out of Holyhead Bay; and in that they did not ascertain their position in Holyhead Bay by means of the lights and fog-signals, or by the use of the lead, or by stopping until they should, by those means or otherwise, learn where their ship was."

The substance of the rest of the findings of fact and of the documents made part thereof was as follows:

The bacon and hams were owned by Jessie Baxter, of Brooklyn, in the State of New York, and were shipped at New York, and the insurance obtained, on her account, by Archibald Baxter, agent. Part of the cotton was owned by Gilbert Parkes & Co., merchants, of Nashville in the State of Tennessee, shipped by them at Nashville, and at or after the date of shipment sold by them to Hobart, Smith & Co., merchants, of the city of New York, who obtained the insurance thereon. The rest of the cotton was owned by Swanson, Porteous & Co.,

merchants, of the city of New York, and was shipped on their account at Nashville, and the insurance obtained by them. All the goods were shipped under the bills of lading annexed to the answer, and were insured at their value by the libellant against perils of the seas and other usual marine risks, including "barratry of the master and mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof;" and were damaged by the stranding. And the libellant afterwards, upon due adjustment of the general and particular average, paid to the assured or their assigns, in settlement of the insurance, various sums of money, amounting in all to £2720. 3s. 3d. in successive instalments, most of which were paid before the filing of the libel, and the rest within a year afterwards and before the argument of this case in the District Court.

The Justice presiding in the Circuit Court stated his conclusions of law as follows:

"On the foregoing facts, I find the following conclusions of law: The stranding of the Montana and the consequent damage to her cargo having been the direct result of the negligence of the master and officers of the steamer, the respondent is liable therefor. The libellant was duly subrogated to the rights of the insured against the carrier for the damage to the cargo insured by the libellant, and is therefore entitled to recover from the respondent the amount of such damage. The libellant is entitled to a decree against the respondent for the following sums:" specifying the sums paid by the libellant, amounting in all to $13,237.64, with interest and costs.

The Circuit Court entered a final decree accordingly on August 21, as of August 16, 1884, and the respondent appealed to this court; and on September 2, 1884, the Circuit Court allowed the appeal, as well as a bill of exceptions tendered by the respondent to each of the court's conclusions of law, and to its refusal to make each of the following conclusions of law proposed by the respondent at the hearing:

"First. The respondent was not a common carrier in respect to the goods in question.

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"Second. It was only a ship carrier, having the right to reject, both by the laws of Great Britain and this country, the carriage of any goods offered to it.

"Third. The respondent is fully protected by virtue of the exceptive clauses in the bills of lading. In respect to a part of the cargo so shipped, the carrier is to have the benefit of any insurance effected by the shipper. The libellant, having paid the loss, therefore, can maintain no action against the carrier. The respondent furnished the carrier with a seaworthy vessel, well equipped and appointed, with most experienced officers, who were carefully and vigilantly attending to their duties, together with a double and careful lookout at the time the ship stranded. No neglect can therefore be charged against the respondent.

"Fourth. The cause of the action was the capricious fog, which settled under the South Stack light, and which rising shut out the light and led the officers to suppose that it was 'dipping' below the horizon and they were not within its range. This cannot be considered an error of judgment, but, if an error of judgment, there has been no case of neglect made out sufficient to charge the respondent.

"Fifth. The mere payment of the loss by the insurance company will not entitle it to a recovery, unless if subrogated, or it appears that there was an express agreement or assignment, which does not appear."

The return to a writ of *certiorari*, granted by this court upon the appellee's suggestion of a diminution of the record, contained the following:

First. A motion, filed in the Circuit Court, August 6, 1884, in behalf of the respondent and on the oath of one of its proctors, stating that it "contends that the question of its liability is governed by, and should be decided under, the law of Great Britain," and that by that law it would be exempt from liability to the libellant; further stating that no proof of that law had been made, because it was understood that the same was recognized by the libellant, and formal proof of it would not be required, and in the District Court the question was argued and British statutes and reports of decisions re-

ferred to, without objection on the part of the libellant, yet the libellant, in the Circuit Court and for the first time, made the point that the proof had not been made, and that court in its decision held the point well taken; and praying that the respondent might be permitted to amend its answer, by averring the existence of that law and its applicability to this suit, and by qualifying the appearance, and the admission of jurisdiction, in this particular, and be also permitted to prove that law in the Circuit Court.

Second. The new answer, proposed to be filed, amending the original answer by qualifying both the allegation that the respondent had duly appeared, and the admission of jurisdiction, by adding "without prejudice to its right to rely upon the hereinafter mentioned law of Great Britain as a ground of defence to the said libel;" and further amending that answer by inserting distinct allegations, "that the said steamer at the time of the said accident was sailing under the flag of Great Britain;" "that the law of Great Britain, at all the times mentioned in the said libel, enabled ship-owners by express contract to exempt themselves from liability for the consequences of any damages or injury to goods transported or carried on their ships, howsoever the same might have been caused, whether arising from negligence, default, or error in judgment of the master, mariners, engineers, or other of the crew, or otherwise;" "that, by the contracts for the transportation or carriage of the goods claimed to have been lost or damaged by the libellant, the respondent had expressly, and in conformity with the said law, exempted itself from any liability whatsoever;" and "that the said contracts were subject to and governed by the said law."

Third. The opinion of the Circuit Court against the motion, delivered August 21, 1884, and reported in 22 Blatchford, 399–404.

Fourth. The order of the Circuit Court, denying the motion, entered September 1, 1884.

Mr. Franklin A. Wilcox and *Mr. Stephen P. Nash* for appellant.

Argument for Appellant.

I. Upon the facts found, the loss was due to error in judgment, not to negligence on the part of those navigating the steamer.

It is quite clear that if the vessel had been where the officers supposed she was, when the light was first seen, fifteen miles off shore, the casualty would not have happened. The negligence imputed is based upon the notion that the officers ought to have distrusted their convictions when they first saw the South Stack light, and verified them by cross bearings and soundings, or stopped when the fog set in until they "should, by these means or otherwise, learn where their ship was." This was very easy to say after the event. These officers were navigators of experience, familiar with the channel; their positions, as servants of the company, and in their calling, were at stake, possibly their lives, as well as the valuable vessel and cargo in their charge. It is submitted that the evidence was not sufficient to justify the finding of negligence, with the consequences which such a finding involved. *The Adriatic*, 17 Blatchford, 194.

II. The owners of the steamer had the right to contract to limit their liability for loss or damage to cargo caused by error of judgment or neglect of the master or mariners of the vessel, and their contract in that respect was valid and effectual.

This risk was an insurable risk, and there is no pretence that the owners were guilty of negligence. Assuming that there was negligence on the part of the master and officers of the vessel, the simple question for the court to determine is whether a carrier on the high seas is responsible to the insurer for accidents caused by the negligence of the master, and which come within the risks insured against. Lord Bramwell in *Grill* v. *General Iron Screw Co.*, L. R. 1 C. P. 476, 480, says, "There is nothing unreasonable in a ship-owner, having once put on board a competent captain and crew, stipulating that he will not be responsible for accidents arising from their negligence, the owner of the goods having a remedy against the underwriters." This is the proposition which the appellant maintains.

(1) This is settled law in New York, the place where the

contract was made. *Maynard* v. *Syracuse Railway Co.*, 71 N. Y. 180, 184; *Spinetti* v. *Atlas Steamship Co.*, 80 N. Y. 71. See also *Perkins* v. *N. Y. Central Railroad*, 24 N. Y. 196, 216; *S. C.* 82 Am. Dec. 281; *Mercantile Mutual Ins. Co.* v. *Calebs*, 20 N. Y. 173; *Smith* v. *N. Y. Central Railroad*, 24 N. Y. 222; *Bissell* v. *N. Y. Central Railroad*, 25 N. Y. 442; *S. C.* 82 Am. Dec. 369; *Dorr* v. *New Jersey Steam Navigation Co.*, 11 N. Y. 485; *S. C.* 72 Am. Dec. 125; *Wells* v. *N. Y. Central Railroad*, 24 N. Y. 181; *Cragin* v. *N. Y. Central Railroad*, 51 N. Y. 61.

(2) The contract was to be chiefly performed on board of the vessel, a part of British territory, a floating island of Great Britain. *Lloyd* v. *Guibert*, 6 B. & S. 100; *S. C.* L. R. 1 Q. B. 115. It was to be finally executed in the British port of Liverpool, and the place where the breach took place and the loss happened was within the territorial limits of Great Britain. The law of Great Britain is in harmony with the law of New York. *Lyon* v. *Mells*, 1 J. P. Smith, 478, 484; *Nicholson* v. *Willan*, 5 East, 507; *Maving* v. *Todd*, 1 Starkie, 59; *Leeson* v. *Holt*, 1 Starkie, 148; *York, Newcastle &c. Railroad* v. *Crisp*, 14 C. B. 527; *Taubman* v. *Pacific Co.*, 26 Law Times (N. S.), 704; *The Duero*, L. R. 2 Ad. & Ec. 393.

(3) The rights of the parties under the bill of lading are to be governed by the law of Great Britain and the general maritime law.

The leading case in this country is *Pope* v. *Nickerson*, 3 Story, 465, decided by Judge Story in a very learned and extensive opinion. There the court holds that the law of Massachusetts, to wit, the domicil of the owners of the vessel, would control, in respect to a vessel which was owned in the State of Massachusetts, but received cargo at a Spanish port to be carried to Philadelphia, and had put into Bermuda in distress, where it became necessary to execute bottomry out of which a suit arose to charge the owners of the vessel on their general liability. The law of Massachusetts limited their liability in respect thereto, while the law of Pennsylvania did not, nor, we believe, the law of Spain.

The leading English case, decided in 1864, *Lloyd* v. *Guibert*,

ubi supra, cites with approval *Pope* v. *Nickerson*. In that case a French vessel, having a French register and carrying the French flag, and owned by persons domiciled in France, was chartered in St. Thomas, a Danish port, to go to Hayti, and carry cargo from there to Liverpool. In the progress of her voyage she was obliged to put into Fayal in distress, where the vessel, freight and cargo were bottomried. The vessel was thereby enabled to complete the voyage and to discharge her cargo in Liverpool, where the vessel, freight and cargo were libelled, and the owners of the cargo were obliged to pay on account of the bottomry to release their cargo. The vessel and freight were sold by decree in admiralty and thus abandoned by the owners. By the law of Great Britain, the owner's liability was not limited. The owners of the cargo brought a suit against the French owners of the vessel, but the court held that the law of the domicil of the owners of the vessel controlled. The case went up on appeal and was decided in November, 1865, before the Exchequer Chamber, L. R. 1 Q. B. 115, the judgment below being affirmed. The opinion of the court is most interesting, and is exhaustive of the subject.

The Moxham, English L. R. 1 P. D. 43; *S. C.* on appeal, Id. 137. An English joint stock company possessed a pier at Malaga, Spain, and instituted a cause of damage against an English steamship which, by the negligence of those in charge, had come into collision with and damaged the pier. The owners of the steamship filed an answer, and alleged, *inter alia*, that the pier formed part of the land of Spain, and that by the law of Spain the master and mariners were alone answerable for the damage. On motion to reject this portion of the answer, it was held that the law of Spain was not applicable; and that by the statutory law of Great Britain a vessel was liable for any damage.

The present case, if considered as an action of tort, would, under this doctrine, be governed by the law of Great Britain. *Pritchard* v. *Norton*, 106 U. S. 124.

Kentucky v. *Bassford*, 6 Hill, 526, was an action upon a bond, conditioned for the faithful performance of duties enjoined by the law of Kentucky, which authorized the obligees

to sell lottery tickets for the benefit of a college in that State; it was held that the stipulations of the bond were to be performed in Kentucky, and that, as it was valid by the laws of that State, the courts of New York would enforce it, notwithstanding it would be illegal in the State of New York. See also *The Avon*, 1 Brown's Adm. 190.

In *Wayman* v. *Southard*, 10 Wheat. 1, 48, Chief Justice Marshall declares the law to be "that in every *forum* a contract is governed by the law with a view to which it was made."

In *Lloyd* v. *Guibert*, *ubi supra*, it is said that "it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather by what general law it is just to presume that they have submitted themselves in the matter." See also 4 Phillimore, Int. Law, 469; *Crapo* v. *Kelly*, 16 Wall. 610, 626.

There is such a concurrence of authority sustaining the validity of these exemptions, that a contrary rule from this court, especially if applied to ocean transportation, would lead to confusion. In *Carr* v. *Lancashire &c. Railway*, 7 Exch. 707 (1852); *Austin* v. *Manchester &c. Railway*, 10 C. B. 454 (1850); and *Walker* v. *York &c. Railway*, 2 El. & Bl. 750 (1853), the three common law courts of England concurred in sustaining the validity of such contracts. See, also, *Great Western Railway* v. *McCarthy*, 12 App. Cas. 218.

In 1854 Parliament enacted a law to regulate such contracts, when made by railroad companies; but it has not interfered with the freedom of contract in matters of ocean transportation. The cases of *Peninsular & Oriental Co.* v. *Shand*, 3 Moore P. C. (N. S.) 272 (1865); *The Duero* (1867–8), cited above; and *Taubman* v. *Pacific Co.* (1872), cited above; and *Chartered Bank &c.* v. *Netherlands &c. Co.*, 10 Q. B. D. 521 (1883), are cases in respect to ocean transportation in which the validity of such exemptions was sustained. In *Taylor* v. *Great Western Steamship Co.*, L. R. 9 Q. B. 546, the defendants were held liable because the words of exemption, as construed by the court, did not cover the case; but it was not hinted by counsel, or by either of the judges, that the exemptions were invalid.

(4) The continental authorities also fully support our position as to the right to make this contract to limit liability.

The first draft of the Commercial Code of Germany prohibited all contracts limiting the liability of common carriers as laid down in that code. The second draft expressly stated that such prohibition should not apply to any common carriers, except railroads. This provision gave rise to a long discussion between the railroads who were opposed to the section, and the general commercial interests which favored it. As a compromise, nothing was said in the code, as it finally passed, about other common carriers, and the prohibition was applied to railroads, but considerably modified, and in a less stringent form. (See foot-note to 3 Endemann, Handbuch des Deutschen Handelsrecht, 485, 1884.)

Under the law as it now stands, it has been expressly decided by the Supreme Imperial Court of Commerce that common carriers, other than railroads, are at liberty to make such contracts limiting their liability. See the case of *Hamburg Am. Packet Co.* v. *Johns*, 25 Entscheidungen des Reichsoberhandelsgerichts, 181.

The same doctrine is held in France. *Duclos* v. *Messageries Maritimes*, at the Court of Appeal at Aix, March 16, 1875; *S. C.* in the Cour de Cassation, March 14, 1877, 1 Dalloz, 449, 450; *Le Normant* v. *Compagnie Générale Transatlantique*, in the Court of Appeal at Rouen, Journal du Palais (1877), 1154; *S. C.* in the Cour de Cassation, April 2, 1877, Journal du Palais (1878), 742; *British India Steam Co.* v. *Stora*, in the Cour de Cassation, July 23, 1878, Journal du Palais (1879), 1092; *Teissier* v. *Compagnie Générale Transatlantique*, in the Court of Appeal of Algeria, December 26, 1881, Journal du Palais (1883), 83; *Levy* v. *Compagnie Générale Transatlantique*, in the Cour de Cassation, January 22, 1884, Journal du Palais (1884), 534.

[The brief contained translations of the judgments in these cases at length. The judgment in *Le Normant* v. *Compagnie Générale Transatlantique*, in the Cour de Cassation, was as follows, as translated in the brief.]

"Whereas as a matter of fact, by taking the engagement by

the bill of lading of the 3rd April 1874, to convey from New York to Havre the goods shipped on board the Amérique, the Compagnie Générale Transatlantique has formally excepted the acts of God, of the enemies, pirates, fire at sea and on land, accidents arising from the machinery, the boilers, the steam, and all other accidents at sea occasioned by the negligence or the mistakes of the captain, of the crew or of the engineer, whatever may be the nature of these accidents, and their consequences.

"Whereas no law prohibits ship-owners from stipulating that they do not answer for the fault of the captain or those of the crew; that such a convention is not contrary to public order or to morality; that, as a matter of fact, although in admitting that public order and morality would not allow a person, in principle, to exonerate himself from the mistakes committed by his employés, and if it be true that the captain is the servant or subordinate of the ship-owner, it is equally true that, in the exercise of his command, the captain escapes, in fact and in law the authority of his principal and his supervision; and, for that reason, the captain is made answerable by articles 221 and 222 of the Code of Commerce, and has an inherent and direct responsibility, and for the same reason article 353 of the same code, whose general terms make no distinction, allows ship-owners as well as the simple shippers to insure against all faults and omissions of the captain or the crew known under the name of the master's barratry.

"Consequently, by declaring valid in this case the clause of the bill of lading by which the Company defendant declined any responsibility for the fault or negligence whatever, imputable to the captain, the crew or the engineers, the contested decision has not transgressed any law."

Section 416 of the Nuovo Codice di Commercio of Italy is as follows:

"In the contract of carriage by railway stipulations that exclude or limit the obligations or the responsibilities by §§ 392, 393, 394, 400, 402, 403, 404, 405, 407, 408, 411 and 415, are null and of no effect, even if permitted by general or

special rules except when, in consideration of the limitation of liability, there should be correspondingly offered by special rates a diminution in price from the price established in the ordinary rates."

This code contains two other sections which are also made by the Court of Cassation the basis of its argument for a decision in favor of our contention. Section 491 relates to that well-known article of the Continental maritime law, whereby owners of vessels can relieve themselves of their personal responsibility for the acts of the master or other agents by abandoning the vessel to the creditors. The other section is 618, wherein barratry is allowed to be made a subject of insurance. Those sections being as above stated, and the spirit of the law being as above shown, a case came up directly on the point, and was decided in favor of the views taken by the appellants herein, in the first instance and subsequently by the Court of Appeals of Lucca, on the 16th of October, 1885, and then by the Court of Cassation on the 14th of June, 1886. The following is a translation of an extract from the judgment in the Court of Cassation:

"All that is to be examined is, if in a contract for maritime transportation, a stipulation that exempts or limits the responsibility of the owner of the vessel for the default or negligence of the master or of the crew, is valid and obligatory; in other words, if the clause inserted in the bill of lading by which it is agreed that the owner of the vessel is not to be responsible for the default or negligence of the master or of the crew is valid and obligatory.

"Such question was resolved by the court hearing the merits in the sense sustaining the validity.

"Indeed there is no disposition of law from which there could be inferred, whether indirectly or by analogy, a prohibition of the stipulation mentioned."

In Holland the liability of common carriers is laid down in § 91, of the Code of Commerce. "Carriers and masters of ships are responsible for all damage to the wares and merchandise transported by them, except what is caused by the nature of the goods, by the act of God, or by negligence

of the sender." This section is expressly made applicable only to carriers by land and inland navigation. No such strict liability is, by the terms of the statute, imposed on other carriers.

Even as to those carriers to whom this section is applicable, the Court of Appeals in a decision of the 21st June, 1861, held that parties were entirely at liberty to limit the strict liability imposed by law, and that such contracts were not against public policy. See 2 Cremers Aanteekeningen op de Nederlandische Wetboeken, 111, pl. 977. This decision has been followed repeatedly by other courts. Utrecht, 24th March, 1874, Weekblad van het Recht, No. 3732. Rotterdam, 29th January, 1881, Paleis van Justitie, 1881, No. 17.

(5) The point now raised is not controlled by decisions of this court. The two which bear most directly on the question are *Railroad Co.* v. *Lockwood*, 17 Wall. 357, and *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331.

These cases both differ from the case at bar in the fact (whatever may be its significance) that the carriers were inland carriers, railroad companies exercising their functions under public authority.

They differ from each other in the fact that in the earliest, a stipulation in the contract of carriage for an exemption from liability for negligence was held void; in the other, such a stipulation was held valid.

The two cases appear to be reconciled by the view stated in both, that the validity of the exemption turns in every case upon the fact whether it is or is not, in the case presented to the court, "just and reasonable."

In *Railroad Co.* v. *Lockwood*, the action was for personal injuries to a passenger, which were found by the jury to have been caused by the negligence of the Railroad Company whose defence was that by the terms of the contract it was exempt from liability. The opinion states the question thus: "The question is, therefore, distinctly raised, whether a railroad company carrying passengers for hire can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage." The question, thus

stated with precision, was the question involved, and though, in the discussion of it the argument took a wide range, it is submitted that the question thus stated was the only one decided.

There were, indeed, at the close of the elaborate opinion, several conclusions stated which went beyond the point directly involved, but it has been so often held in this court that nothing is adjudged by a decision but what is presented by the case, that it is assumed that the court is free to qualify some of these conclusions.

The second of these conclusions — which is the one which is claimed to cover the case at bar — "That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants," cannot certainly be reconciled with the *Hart* case without some qualification of its language; for in this latter case an exemption from liability for negligence was held just and reasonable, and therefore valid. To be sure it was not an exemption from all liability, but it was a substantial and important exemption from liability sustained as lawful because, under the circumstances, just and reasonable. To harmonize the two cases, then, the above second proposition should read thus: "That it is not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants, *where the exemption is not in itself just and reasonable.*" And this is substantially the decision in the *Hart* case, that the exemption, being in a contract fairly made, etc., was "a *proper and lawful* mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives," etc. (p. 343). And in another place, the opinion, after referring to numerous variant decisions, proceeds thus: "Applying to the case in hand the proper test to be applied to *every limitation* of the common law liability of a carrier — *its just and reasonable character* — we have reached the result indicated," which was that the exemption from partial liability for negligence might in that case stand, and then adds: "In Great Britain, a statute directs this test to be ap-

plied by the courts. *The same rule* is the proper one to be applied in this country, in the absence of any statute" (p. 342).

In the third conclusion stated in *Railroad Co.* v. *Lockwood:* "That these rules apply both to carriers of goods and carriers of passengers for hire, *and with special force to the latter*," it seems to be implied that it was the latter case only which was before the court, and that what was said as to carriers of goods might be considered as said *arguendo.*

And some color is given to this view by the language of the learned judge in the case of *Railway Co.* v. *Stevens*, 95 U. S. 655, which was also a case of injury to a passenger. After referring to the case of *Railroad Co.* v. *Lockwood*, the judge says: "We have no doubt of the correctness of the conclusion reached in that case;" — he does not say "all the conclusions," — and then proceeds as follows: "We are aware that respectable tribunals have asserted the right to stipulate for exemption in such a case: and it is often asked, with apparent confidence, 'May not men make their own contracts, or, in other words, may not a man do what he will with his own?' The question at first sight seems a simple one. But there is a question lying behind that, 'Can a man call that absolutely his own which he holds as a great public trust, by the public grant and for the public use, as well as his own profit?' The business of the common carrier, in this country at least, is emphatically a branch of the public service, and the conditions on which that public service shall be performed by private enterprise are not yet entirely settled. We deem it the safest plan not to anticipate questions until they fairly arise and become necessary for our decision" (p. 660).

It is submitted that *inland carriers* were here in mind, and that the question now presented had not then arisen.

None of the cases in this court which have arisen in reference to exemptions in contracts for *ocean* navigation of cargo need be specially considered, as none of them go further than to hold, to use the language of Rapallo, J., in a late case, that "when special perils are expected, such as losses by fire, the exception is held not to cover the case of a fire caused by the negligence of the servants of the carrier, unless the intention

to cover such a case affirmatively appears." *Spinetti* v. *Atlas Co.*, 80 N. Y. 71, 75.

The remark of Gray, J., in *Phœnix Ins. Co.* v. *Erie and Western Transportation Co.*, 117 U. S. 312, may also be cited: "By the settled doctrine of this court, even an express stipulation in the contract of carriage that a common carrier shall be exempt from liability for losses caused by himself and his servants, is unreasonable and contrary to public policy and therefore void" (p. 322).

The remark was not necessary to the decision. The bill of lading in that case contained no such exemption from liability for negligence.

The authority of the *Hart* case, which the learned judge did not refer to, he did not, of course, intend to impugn.

III. — If any law of place governs, it is the law of New York, where the contracts were entered into, or of England, in whose waters the disaster occurred, and where the transportation was to be completed. It must be conceded that under the law, as administered in either of those jurisdictions, the libels should have been dismissed.

That it was not necessary to specially plead that the transaction was governed by the law of England, or some other law than that of New York, seems expressly decided in *Lamar* v. *Micou*, 112 U. S. 452.

In that case this court reversed a decree in equity upon the ground that the law of another State than that of New York governed the case, though that ground was neither *pleaded* nor raised by counsel either below or on an appeal. On motion for a rehearing on this ground, the court said: "The questions so passed upon, though hardly touched by either counsel at the first argument, were vital to the determination of the rights of the parties and *could not be overlooked* by the court." *Lamar* v. *Micou*, 114 U. S. 218, 220. In the present case the facts upon which the point of the *lex loci* is raised are indisputable.

IV. — If, as is ably urged by some of the briefs, there is a maritime law on the subject variant from the common law, then the matter being one of contract between shipper and

carrier to be performed on the high seas, the admiralty courts, at least, should interpret the obligations and validity of the contract by that law; but it is difficult to see how, if the maritime law does so affect the obligations and validity of the contract, any court should refuse to recognize it. It would not be to the praise of the law as a rational department of affairs that the rights of parties under a contract, the terms of which are explicit, should be determined one way in a suit brought in admiralty, and the other way in a suit brought on the common law side of the same tribunal.

Congress not having legislated, there is, it is submitted, no law of the United States on the subject. The Federal courts are supposed to administer the common law or the general commercial law, as the courts of England, and of each of the States having jurisdiction, would administer it, all in the same way, if they were all infallible.

V. The libellants being the underwriters of the cargo, and, being presumed to have knowledge of the clauses in the bills of lading exempting the ship carrier from loss for neglect of the master and mariners, and having with such knowledge taken upon themselves such risk, including barratry, etc., under their policy of insurance, and having received a premium therefor, it would not be just and reasonable that they should be permitted to recover herein. They are equitably estopped.

In *Phœnix Ins. Co.* v. *Erie & Western Transportation Co.*, 117 U. S. 312, Mr. Justice Gray delivering the opinion of the court, is the latest announcement of the views of the court in respect to this subject. The case, it will be remembered, arose out of the stranding of a vessel on Lake Erie, by the gross neglect of the master and mariners, as found by the court. The bills of lading provided that the ship carrier should have the benefit of any insurance effected by the shipper or owner of the property. The Phœnix Insurance Company paid the loss and brought their action against the Erie & Western Transportation Company, owners of the vessel, claiming to be subrogated to the rights of their assured, the shipper; and this court, affirming the decrees below, held that there could

be no recovery, and cited with approval numerous cases in the lower courts to the same effect. See also *Copeland* v. *New England Ins. Co.*, 2 Met. 432; Parsons Mar. Ins. 14, 18; *Dorr* v. *New Jersey Steam Navigation Co.*, 4 Sandf. 141.

It being well settled (1st) that the ship-owner could have insured this very risk with the libellants, (2d) that the shipper or owner of the cargo could have insured the same risk, and (3d) that there was an agreement between the ship-owner and the owner of the cargo, to give the former the benefit of any insurance effected by the latter, in respect to this portion of the cargo, it is respectfully submitted that it is difficult to find any good reason, resting in public policy or otherwise, why the shipper of goods could not lawfully become his own underwriter, in consideration of a premium paid; or in other words, why a clause in bills of lading like the one in question, is not valid in law.

The ship-owner might have insured this very risk with the libellants, or agreed with the shipper for the benefit of insurance to be effected by him. The libellants simply took a risk which this assured had taken, presumably with full knowledge on the part of the libellants, and for a consideration which was sufficient in the estimate of the contracting parties; and the libellants have therefore been subrogated simply to the rights and equities of the shipper, to wit, that this particular risk should fall on the shoulders of the shipper and not the ship-owner.

The underwriters' rights rest upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. *Hall* v. *Railroad Companies*, 13 Wall. 367, 370.

VI. It appearing that by the provisions of certain bills of lading of the cargo in question, the carrier should have the benefit of any insurance that might have been effected upon or for account of said goods, the libellants cannot recover for such loss.

To be sure these bills of lading provide, as between the carrying companies themselves, when their respective duties shall

end, and enumerate what duties each takes upon itself; but they in no way do away with the clause that that company alone shall be held answerable in whose actual custody the same may be at the time of the happening of the loss, etc., and the carrier so liable shall have the full benefit of any insurance that may have been effected, etc.

This clause was binding between the companies on the one hand and the shipper on the other, and by it the shipper gave the benefit of such agreement to that company in whose possession his goods should be at the time of the happening of such loss. *Lamb* v. *Camden and Amboy Railroad*, 46 N. Y. 290; *Ætna Insurance Co.* v. *Wheeler*, 49 N. Y. 616; *Babcock* v. *Lake Shore Railroad*, 49 N. Y. 491; *Whitworth* v. *Erie Railway Co.*, 87 N. Y. 413.

Mr. Morton P. Henry, by leave of court, filed an additional brief on behalf of appellant, in which he maintained:

First. That the contracts contained in the bill of lading for shipments by the British vessel Montana are governed by the British law, and not by the law of the forum, and that the shippers are presumed to have contracted with reference to the law of Great Britain.

Second. That the contracts in the bills of lading for shipment by the Montana, exempting the owners from liability for loss occasioned by the negligence of their servants, were valid under the law of Great Britain as a defence to these actions on the facts found, and the loss was caused by negligent navigation of the respondent's steamship.

Third. That there was sufficient proof on the trial of the cause of the law of Great Britain in the authoritative reports of decisions in the British Courts, which the Circuit Court should have received as evidence of the law of Great Britain as to the validity of the exceptions of liability for negligence of the servants of the owners of British vessels.

Fourth. That the absence of the allegation in the pleadings that the law of Great Britain differed from that of the forum was a subject of amendment in any stage of the proceedings, and that this court can permit such amendment to be made in the present stage of the proceedings.

Argument for Appellant.

The second and fourth points in his brief were as follows:

II. Is there anything in the methods of procedure and trial of causes in the admiralty courts of the United States which, in a suit against English subjects, forbid such courts in a proper case from deciding the cause in accordance with the law of Great Britain, although the pleadings do not allege that the liability of the respondents is governed by that law, if the facts show that the question is presented for the decision of the court?

The proposed amendment to the answer alleged that the respondents were relieved from liability for the negligence of their servants under these contracts by the law of Great Britain. It was an application to the court, before final decree, to decide that the law of the forum did not apply to the case presented by the finding of the facts.

It is believed that under the decisions of this court, the absence of any such allegation as to the law applicable to these contracts, would not prevent the court from deciding the cause under the foreign law upon the original pleadings, even without amendment, if the facts presented had shown that it was a proper case to apply such law.

And that where justice requires it, this court will give a proper decree upon the facts appearing in the cause, although the allegations may not be supported, and the relief granted differs from that which is asked in the prayer of the libel.

In the case of *Dupont* v. *Vance*, 19 How. 162, a suit was brought to recover the value of cargo which had been jettisoned. It was an action for non-delivery of cargo. It was claimed that the evidence showed that the vessel was unseaworthy. The Circuit Court on appeal from the District Court dismissed the libel, holding that it was a case for contribution by action at law or in equity. The Supreme Court reversed the decree of the Circuit Court, and entered a decree awarding to the libellants their contributory proportion, payable by the vessel in general average. There was no amendment of the libel. But as it appeared by the evidence in the cause that it was a case for general average contribution, such relief was given although not specially asked.

In the case of *The Syracuse*, 12 Wall. 167, it was decided that there is no doctrine of a mere technical variance in the admiralty, and when the allegations of specific negligence are not supported, the court will decide on such facts as are presented by the evidence, when the omission to state material facts did not occasion surprise and was not intentional.

The case of *The Virgin*, 8 Pet. 538, was a suit on a bottomry bond. The Circuit Court held the bond to be invalid for want of authority to execute it, and gave a decree *in personam* for the amount of the advances to the master included in the bond.

These cases illustrate the flexibility of the admiralty procedure to give redress where the facts are fairly before the court, without regard to the allegations when no disadvantage has arisen to the other side from any omission of the allegations or pleadings.

The power of amendment is ample in each court in which the case is heard, at every stage of the proceedings, to permit such an amendment to be made. This arises from the nature of the admiralty appeal which is a trial *de novo*. *The Lucille*, 19 Wall. 73.

It may be fairly urged, that no rules of court can limit the right of appeal in admiralty given by statute, so as to confine the appellant to the facts as alleged in the court below, and change the nature of an appeal. In the Circuit Court on appeal, amendments can be made at any stage of the proceedings ; of which an instance may be given in *The Pennsylvania*, 12 Blatchford, 67, where an amendment was allowed permitting the claimant to claim affirmative damages, which had not been set up in the answer after a mandate from the Supreme Court reversing the decree of the Circuit Court dismissing the libel, and dividing the damages. As there would have been a failure of justice to refuse it, the amendment was allowed.

And the Supreme Court may, in the exercise of its appellate jurisdiction, remand the cause to the Circuit Court to allow new allegations to be made where merits plainly appear, but the case is defective on the pleadings. *The Marianna Flora*, 11 Wheat. 1, at p. 38; *The Mary Ann*, 8 Wheat. 380; see also *The Adeline*, 9 Cranch, 244, at p. 284.

Argument for Appellant.

In the case of *The Julia Blake*, 107 U. S. 418, the action was on a bottomry bond, which was not sustained as to the cargo for want of communication with the owners. After hearing in the Supreme Court, the libellant asked to be allowed to recover for the cargo's proportion of actual advances; but, as there was evidence to show that the loss was occasioned by the unseaworthiness of the vessel, this court refused to remand the cause so as to allow such claim to be set up. It was refused because the evidence did not show merits.

If, therefore, the amendment in this cause should have been allowed to bring the question before the Circuit Court of the United States, this court, in the exercise of its appellate jurisdiction, is competent to allow it now, if in the judgment of the court the facts present a proper case to raise the question.

IV. Will the Admiralty Courts of the United States ascertain the law of England in cases affecting the liability of the owners of English vessels sued in their courts by reference to the English decisions and authorities, or must the English law be proved as a fact by the testimony of experts? . . .

That the laws of England permit ship-owners to stipulate for exemption for loss occasioned by the negligence of their servants is authoritatively settled. *The Duero*, L. R. 2 Ad. & Ec. 393; *Chartered Mercantile Bank of India* v. *The Netherlands India Steam Nav. Co.*, 10 Q. B. D. 521; *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72; Carver on Carriage by Sea, 101; Maud & Pollock on Shipping, 358; *Carnegie* v. *Morrison*, 2 Met. 381, 404.

Dr. Lushington in the case of *The Peerless*, 1 Lushington, 30, at page 40, expresses his views on this subject. The question was as to a collision which occurred in the river Hooghly. "It is the duty of the court to carry into effect the local laws of the place where the transaction in question occurred; I should therefore pay regard to the local laws of India or Canada, as I would to those of Liverpool or Newcastle. And to ascertain those laws I do not consider that I am bound to require all the strictness of proof which a court of common law would require in proving a foreign law, and for the following reasons: . . .

"Secondly. More especially because in matters of evidence I must look to the practice of my predecessors and the great distinction which prevails between the description of causes which come under the cognizance of the Court of Admiralty and those in other courts. The cases over which the Court of Admiralty exercises jurisdiction occur in all parts of the world, on the high seas and in remote places. It is a well-known principle confirmed by authority that Courts of Admiralty are to proceed *levato velo*, that is with the utmost expedition. In order to carry this principle into effect this court has, both in foreign matters and civil suits, been accustomed to receive evidence which would not have been admitted in other courts."

He subsequently adds: "I think the court may be safely trusted to weigh evidence that might not be so safe to leave to a jury."

In the case of *The J. F. Spencer*, 3 Ben. 337, copies of official surveys, estimates of repairs and report of sale were received in evidence, although in a proceeding at law they would not have been received for any purpose, because "courts of Admiralty are not bound by all the rules of evidence which are applied in the courts of common law, and they may, where justice requires it, take notice of matters not strictly proved."

Also, in *The Boskenna Bay*, 22 Fed. Rep. 662, the terms of a charter-party were allowed to be given in evidence, although it could not have been read in evidence without more formal proof in a court of law.

Also, in accordance with this view the foreign law has been recognized as governing transactions without strict proof, and upon such proofs as are found in the reports of English decisions.

In the case of *The Maud Carter*, 29 Fed. Rep. 156, claims for premiums of insurance and spars used in the construction of a vessel were allowed as a lien upon a British vessel, although according to the decisions in the same circuit the lien would not have been allowed by the law of the United States.

The court says: "This is a British vessel and subject to British law. Under the circumstances it is the duty of the

court to administer and apply the British law exactly as it would be applied if the vessel were in an English court. The court, under the decision in *The Riga*, L. R. 3 Ad. & Ec. 516, must hold that insurance expressly authorized by the owners is a 'necessary,' within the English act defining the jurisdiction of the Admiralty Court, and that under that act it created a maritime lien upon the vessel."

In *The Velox*, 21 Fed. Rep. 479, the admiralty enforced the priority of lien against a Dutch vessel according to the Code of the Netherlands: it does not appear that expert testimony was produced.

In *Covert* v. *Brig Wexford*, 3 Fed. Rep. 577, the court construed the British Merchant Shipping Act, and gave the master of a British vessel a lien on the vessel under that Act of Parliament, which was not given by the law of the forum.

In *The Adolph*, 7 Fed. Rep. 501, the Code of Sweden was applied, giving the crew three months' wages on abandonment of the voyage. These cases, although not in courts of the last resort, show that the Courts of Admiralty have relaxed the rules of evidence as to the proof of the foreign law, as well as of other facts. If stricter proof were required they would be hampered in the exercise of their jurisdiction.

In this court the following judgments show a relaxation of the rule as to the proof of the foreign law. In the case of *Smith* v. *Condry*, 1 How. 28, a suit was brought for a collision between two American ships in the river Mersey. The defence was that The Tasso, the injuring vessel, was in charge of a licensed pilot of the port of Liverpool, whom the master was compelled to take or incur a penalty, or be liable for full pilotage, and the defendants gave in evidence the British statutes, and the court decided it under the construction of the British Pilotage Act in *Carruthers* v. *Sydebotham*, 4 M. & S. 77, that the master was not responsible for the default of the pilot. The court accepted the construction of the Liverpool Pilotage Act without the aid of expert testimony.

In *The Julia Blake*, 107 U. S. 418, the question was as to the validity of a bottomry bond on cargo given by the master of a British vessel at St. Thomas for want of communication

with the owners. The court says, at p. 426, "Whether, since The Julia Blake was a British vessel, the authority of her master in a Danish port is to be determined by the English law instead of by the general maritime law or the law of Denmark, are questions we deemed unnecessary to consider; for in our opinion even under the most liberal construction of any recognized rule which can be invoked for the authority of the master over the cargo, this bond cannot be sustained."

This case is authority because the court did not refuse to ascertain the law of England if applicable to an English vessel, because it was not proved as a fact.

In *The Maggie Hammond*, 9 Wall. 435, this court enforced a lien against an English vessel for breach of a contract of affreightment made in Scotland without proof of the law of England or of Scotland.

Mr. William G. Choate and *Mr. William D. Shipman*, by leave of court, filed a brief for appellant on behalf of the North German Lloyd Steamship Company. The following are extracts from that brief:

The case now presented to this court is not a question of the common law liability of the common carrier, but a question of the maritime law of the United States. It is unnecessary to point out to the court that the same rule of liability which governs the question by the common law does not necessarily obtain in the maritime law on a particular point. The maritime law of the United States is the maritime law of the world, or the law of the whole commercial world in relation to maritime contracts and maritime torts, so far as it has been adopted by or is applicable to the United States. The common law is the law of England and the United States and the British Colonies. Its rules have no authority or sanction beyond the limits of the countries in which it belongs, except so far as the judicial or legislative powers of other States may have enacted or declared similar provisions; and in determining what is the maritime law in a point not yet settled it is incumbent upon the court to consider what view of the question is taken by the courts or the commercial codes of all other maritime nations.

Argument for Appellant.

It is believed that the foreign law, generally, agrees on this point with that of Great Britain and the State of New York, and differs from the rule of the common law as declared by this court. If this be so, then it would seem to follow, that this court, sitting as a Court of Admiralty, and having regard to the views which obtain among maritime nations on this point, will be bound to hold, that whatever may be the rule of the common law on this subject, the rule of the maritime law permits such a contract as a valid contract between ship and shipper. . . .

It is respectfully submitted, that the dictum of Mr. Justice Gray in *Phœnix Ins. Co.* v. *Erie and Western Transportation Co.*, 117 U. S. 312, overlooks the important consideration, that permitting the insurance removes the sanction for diligence just as certainly and as completely as the stipulation in the bill of lading exempting the ship from liability, and the consideration of public policy which permits the insurance cannot forbid the stipulation. In fact, it is obvious that if the common law rule obtains between the ship and the shipper by the maritime law, and the maritime law permits insurance by the ship-owner against the peril in question, then the ship-owner is allowed to insure against this peril with all the world as underwriters, excepting only the owner of the goods. He alone is forbidden to insure the ship-owner against this peril, by entering into the stipulation in question. This, then, is a public policy which allows itself to be outwitted, which introduces into a system of law a merely arbitrary prohibition between two particular parties without reason to make a certain contract, when it can be made by one of them with all the rest of the world.

From this admitted rule of the maritime law, therefore, allowing the ship-owner to insure, it is a logical and proper inference that the maritime law does not forbid the stipulation between the ship and shipper, for this is merely an insurance by the shipper taking upon himself the risk of this peril for a consideration. . . .

We do not for a moment assume that this court will be deterred from declaring its own view of the law by any array

of the consequences which may follow its decision. Nevertheless, the consequences of a new rule of law, or of extending the operation of an old rule to a new and different field of commerce, are proper to be considered on the question whether the new departure is just and reasonable. . . .

In conclusion, we cannot do better than to refer to the elaborate and luminous opinion of this court in the case of *The Lottawanna*, 21 Wall. 558, delivered by Mr. Justice Bradley, in which, while recognizing the fact, that some modifications have been introduced into the Maritime Code by different nations, he enforces with great vigor the doctrine, that "the convenience of the commercial world, bound together as it is by mutual relations of trade and intercourse, demands, that in all essential things wherein those relations bring them in contact, there should be a uniform law, founded on natural reason and justice" (p. 572). And, again, "This view of the subject does not, in the slightest degree, detract from the proper authority and respect due to that venerable law of the sea, which has been the subject of such high encomiums from the ablest jurists of all countries; it merely places it upon the just and logical grounds upon which it is accepted, and, with proper qualifications, received with the binding force of law in all countries" (p. 574).

Mr. Everett P. Wheeler, by leave of court, filed a brief for appellant on behalf of the Oceanic Steam Navigating Company, citing, *Miller* v. *Tiffany*, 1 Wall. 298; *Junction Railroad Co.* v. *Bank of Ashland*, 12 Wall. 226; *Bell* v. *Bruen*, 1 How. 169; *Cox* v. *United States*, 6 Pet. 172; *Le Breton* v. *Miles*, 8 Paige, 261; *Burckle* v. *Eckhart*, 3 N. Y. 132; 1 Voet ad Pand. (Paris) 315, lib. 4, tit. 1, § 29; Dig. 44, 7, 21; *Andrews* v. *Pond*, 13 Pet. 65; *Robinson* v. *Bland*, 2 Burrow, 1077; *Hibernia Bank* v. *Lacombe*, 84 N. Y. 367; *Everett* v. *Vendryes* 19 N. Y. 436; *Rothschild* v. *Currie*, 1 Q. B. 43; *Cooper* v. *Waldegrave*, 2 Beavan, 282; *Boyce* v. *Edwards*, 4 Pet. 111; *Pope* v. *Nickerson*, 3 Story, 465; *Barter* v. *Wheeler*, 49 N. H. 9; *Pomeroy* v. *Ainsworth*, 22 Barb. 118; *Penobscot &c. Railroad* v. *Bartlett*, 12 Gray, 244; *Curtis* v. *Delaware*

&c. Railroad, 74 N. Y. 116; *Brown* v. *Camden &c. Railroad*, 83 Penn. St. 316; *Prentiss* v. *Savage*, 13 Mass. 20; *Peninsular & Oriental Co.* v. *Shand*, 3 Moore P. C. (N. S.) 272; *The Harrisburgh*, 119 U. S. 199; *Insurance Co.* v. *Brame*, 95 U. S. 754; *Dennick* v. *Railroad Co.*, 103 U. S. 11; *The Scotia*, 14 Wall. 170; *Woodley* v. *Michell*, 11 Q. B. D. 47; *Peek* v. *North Staffordshire Railway*, 10 H. L. Cas. 473; *The Gaetano & Maria*, 7 P. D. 137, reversing *S. C.* Id. 1; *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115, affg. *S. C.* 6 B. & S. 100; *The Woodland*, 14 Blatchford, 499, affg. *S. C.* 7 Ben. 110; *Crapo* v. *Kelley*, 16 Wall. 610; *Marshall* v. *Murgatroyd*, L. R. 6 Q. B. 31.

Mr. William Allen Butler for appellee.

Mr. Justice Gray delivered the opinion of the court.

This is an appeal by a steamship company from a decree rendered against it upon a libel in admiralty, "in a cause of action arising from breach of contract," brought by an insurance company, claiming to be subrogated to the rights of the owners of goods shipped on board the Montana, one of the appellant's steamships, at New York, to be carried to Liverpool, and lost or damaged by her stranding, because of the negligence of her master and officers, in Holyhead Bay on the coast of Wales, before reaching her destination.

In behalf of the appellant, it was contended that the loss was caused by perils of the sea, without any negligence on the part of master and officers; that the appellant was not a common carrier; that it was exempt from liability by the terms of the bills of lading; and that the libellant had not been subrogated to the rights of the owners of the goods.

It is to be remembered that the jurisdiction of this court to review the decree below is limited to questions of law, and does not extend to questions of fact. Act of February 16, 1875, c. 77, § 1; 18 Stat. 315; *The Gazelle*, 128 U. S. 474, 484, and cases there cited.

In the findings of fact, the Circuit Court, after stating, in

much detail, the course of the ship's voyage, the conduct of her master and officers, the position and character of the various lighthouses and other safeguards which she passed, and other attendant circumstances immediately preceding the stranding, distinctly finds as facts: "Those in charge of the navigation of the Montana were negligent, in that, without having taken cross bearings of the light at South Stack, and so determined their distance from the light, they took an east three-quarters south course before passing the Skerries, and without seeing the Skerries light; and in that they continued at full speed after hearing the fog-gun at North Stack; and in that they took a northeast by east magnetic course on hearing said fog-gun, instead of stopping and backing and taking a westerly course out of Holyhead Bay; and in that they did not ascertain their position in Holyhead Bay by means of the lights and fog-signals, or by the use of the lead, or by stopping until they should, by those means or otherwise, learn where their ship was."

"On the foregoing facts," the only conclusion of law stated by the Circuit Court (except those affecting the right of subrogation and the amount to be recovered) is in these words: "The stranding of the Montana and the consequent damage to her cargo having been the direct result of the negligence of the master and officers of the steamer, the respondent is liable therefor." Negligence is not here stated as a conclusion of law, but assumed as a fact already found. The conclusion of law is, in effect, that, such being the fact, the respondent is liable, notwithstanding any clause in the bills of lading.

The question of negligence is fully and satisfactorily discussed in the opinion of the District Court, reported in 17 Fed. Rep. 377, and in that of the Circuit Court, reported in 22 Blatchford, 372. It is largely, if not wholly, a question of fact, the decision of which by the Circuit Court cannot be reviewed here; and so far as it can possibly be held to be or to involve a question of law, it is sufficient to say that the circumstances of the case, as found by the Circuit Court, clearly warrant, if they do not require, a court or jury, charged with the duty of determining issues of fact, to find that the

stranding was owing to the negligence of the officers of the ship.

The contention that the appellant is not a common carrier may also be shortly disposed of.

By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship, carrying goods for hire, whether employed in internal, in coasting or in foreign commerce, is a common carrier, with the liability of an insurer against all losses, except only such two irresistible causes as the act of God and public enemies. Molloy, bk. 2, c. 2, § 2; Bac. Ab. Carrier, A; *Barclay* v. *Cuculla y Gana*, 3 Doug. 389; 2 Kent Com. 598, 599; Story on Bailments, § 501; *The Niagara*, 21 How. 7, 23; *The Lady Pike*, 21 Wall. 1, 14.

In the present case, the Circuit Court has found as facts: "The Montana was an ocean steamer, built of iron, and performed regular service as a common carrier of merchandise and passengers between the ports of Liverpool, England, and New York, in the line commonly known as the Guion Line. By her, and by other ships in that line, the respondent was such common carrier. On March 2, 1880, the Montana left the port of New York, on one of her regular voyages, bound for Liverpool, England, with a full cargo, consisting of about twenty-four hundred tons of merchandise, and with passengers." The bills of lading, annexed to the answer and to the findings of fact, show that the four shipments in question amounted to less than one hundred and thirty tons, or hardly more than one twentieth part of the whole cargo. It is clear, therefore, upon this record, that the appellant is a common carrier, and liable as such, unless exempted by some clause in the bills of lading.

In each of the bills of lading, the excepted perils, for loss or damage from which it is stipulated that the appellant shall not be responsible, include "barratry of master or mariners," and all perils of the seas, rivers or navigation, described more particularly in one of the bills of lading as "collision, stranding or other peril of the seas, rivers or navigation, of whatever nature or kind soever, and howsoever such collision, stranding or other peril may be caused," and in the other three bills of

lading described more generally as any "accidents of the seas, rivers and steam navigation, of whatever nature or kind soever;" and each bill of lading adds, in the following words in the one, and in equivalent words in the others, "whether arising from the negligence, default, or error in judgment of the master, mariners, engineers or others of the crew, or otherwise howsoever."

If the bills of lading had not contained the clause last quoted, it is quite clear that the other clauses would not have relieved the appellant from liability for the damage to the goods from the stranding of the ship through the negligence of her officers. Collision or stranding is, doubtless, a peril of the seas; and a policy of insurance against perils of the seas covers a loss by stranding or collision, although arising from the negligence of the master or crew, because the insurer assumes to indemnify the assured against losses from particular perils, and the assured does not warrant that his servants shall use due care to avoid them. *General Ins. Co.* v. *Sherwood*, 14 How. 351, 364, 365; *Orient Ins. Co.* v. *Adams*, 123 U. S. 67, 73; *Copeland* v. *New England Ins. Co.*, 2 Met. 432, 448–450. But the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods; and, as is everywhere held, an exception, in the bill of lading, of perils of the sea or other specified perils does not excuse him from that obligation, or exempt him from liability for loss or damage from one of those perils, to which the negligence of himself or his servants has contributed. *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344; *Express Co.* v. *Kountze*, 8 Wall. 341; *Transportation Co.* v. *Downer*, 11 Wall. 129; *Grill* v. *General Iron Screw Co.*, L. R. 1 C. P. 600, and L. R. 3 C. P. 476; *The Xantho*, 12 App. Cas. 503, 510, 515.

We are then brought to the consideration of the principal question in the case, namely, the validity and effect of that clause in each bill of lading by which the appellant undertook to exempt itself from all responsibility for loss or damage by perils of the sea, arising from negligence of the master and crew of the ship.

Opinion of the Court.

The question appears to us to be substantially determined by the judgment of this court in *Railroad Co.* v. *Lockwood*, 17 Wall. 357.

That case, indeed, differed in its facts from the case at bar. It was an action brought against a railroad corporation by a drover who, while being carried with his cattle on one of its trains under an agreement which it had required him to sign, and by which he was to pay certain rates for the carriage of the cattle, to pass free himself, and to take the risks of all injuries to himself or to them, was injured by the negligence of the defendant or its servants.

The judgment for the plaintiff, however, was not rested upon the form of the agreement, or upon any difference between railroad corporations and other carriers, or between carriers by land and carriers by sea, or between carriers of passengers and carriers of goods, but upon the broad ground that no public carrier is permitted by law to stipulate for an exemption from the consequences of the negligence of himself or his servants.

The very question there at issue, defined at the beginning of the opinion as "whether a railroad company, carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage," was stated a little further on in more general terms as "the question before propounded, namely, whether common carriers may excuse themselves from liability for negligence;" and a negative answer to the question thus stated was a necessary link in the logical chain of conclusions announced at the end of the opinion as constituting the *ratio decidendi*. 17 Wall. 359, 363, 384.

The course of reasoning, supported by elaborate argument and illustration, and by copious references to authorities, by which those conclusions were reached, may be summed up as follows:

By the common law of England and America before the Declaration of Independence, recognized by the weight of English authority for half a century afterwards, and upheld by decisions of the highest courts of many States of the Union,

common carriers could not stipulate for immunity for their own or their servants' negligence. The English Railway and Canal Traffic Act of 1854, declaring void all notices and conditions made by those classes of common carriers, except such as should be held by the court or judge before whom the case should be tried to be just and reasonable, was substantially a return to the rule of the common law.

The only important modification by the Congress of the United States of the previously existing law on this subject is the act of 1851, to limit the liability of ship-owners, (Act of March 3, 1851, c. 43; 9 Stat. 635; Rev. Stat. §§ 4282–4289,) and that act leaves them liable without limit for their own negligence, and liable to the extent of the ship and freight for the negligence or misconduct of their master and crew.

The employment of a common carrier is a public one, charging him with the duty of accommodating the public in the line of his employment. A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests. Even if the extent of these responsibilities is restricted by law or by contract, the nature of his occupation makes him a common carrier still. A common carrier may become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier is a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of that character.

The fundamental principle, upon which the law of common carriers was established, was to secure the utmost care and diligence in the performance of their duties. That end was effected in regard to goods, by charging the common carrier as an insurer, and in regard to passengers, by exacting the highest degree of carefulness and diligence. A carrier who stipulates not to be bound to the exercise of care and diligence seeks to put off the essential duties of his employment.

Nor can those duties be waived in respect to his agents or servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants. The law demands of the carrier carefulness and diligence in performing the service; not merely an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law.

The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper, that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business.

Special contracts between the carrier and the customer, the terms of which are just and reasonable and not contrary to public policy, are upheld; such as those exempting the carrier from responsibility for losses happening from accident, or from dangers of navigation that no human skill or diligence can guard against; or for money or other valuable articles, liable to be stolen or damaged — unless informed of their character or value; or for perishable articles or live animals, when injured without default or negligence of the carrier. But the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment.

It being against the policy of the law to allow stipulations which will relieve the railroad company from the exercise of care or diligence, or which, in other words, will excuse it for negligence in the performance of its duty, the company remains liable for such negligence.

This analysis of the opinion in *Railroad Co.* v. *Lockwood* shows that it affirms and rests upon the doctrine that an express stipulation by any common carrier for hire, in a contract of carriage, that he shall be exempt from liability for losses caused

by the negligence of himself or his servants, is unreasonable and contrary to public policy, and consequently void. And such has always been the understanding of this court, expressed in several later cases. *Express Co.* v. *Caldwell*, 21 Wall. 264, 268; *Railroad Co.* v. *Pratt*, 22 Wall. 123, 134; *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174, 183; *Railway Co.* v. *Stevens*, 95 U. S. 655; *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, 338; *Phœnix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 322; *Inman* v. *South Carolina Railway*, *ante*, 128.

The general doctrine is nowhere stated more explicitly than in *Hart* v. *Pennsylvania Railroad* and *Phœnix Ins. Co.* v. *Erie Transportation Co.*, just cited; and there does not appear to us to be anything in the decision or opinion in either of those cases which supports the appellant's position.

In the one case, a contract fairly made between a railroad company and the owner of the goods, and signed by the latter, by which he was to pay a rate of freight based on the condition that the company assumed liability only to the extent of an agreed valuation of the goods, even in case of loss or damage by its negligence, was upheld as just and reasonable, because a proper and lawful mode of securing a due proportion between the amount for which the carrier might be responsible and the compensation which he received, and of protecting himself against extravagant or fanciful valuations — which is quite different from exempting himself from all responsibility whatever for the negligence of himself and his servants.

In the other, the decision was that, as a common carrier might lawfully obtain from a third person insurance on the goods carried against loss by the usual perils, though occasioned by negligence of the carrier's servants, a stipulation in a bill of lading that the carrier, when liable for the loss, should have the benefit of any insurance effected on the goods, was valid as between the carrier and the shipper, even when the negligence of the carrier's servants was the cause of the loss. Upholding an agreement by which the carrier receives the benefit of any insurance obtained by the shipper from a third person is quite different from permitting the carrier to compel

the shipper to obtain insurance, or to stand his own insurer, against negligence on the part of the carrier.

It was argued for the appellant, that the law of New York, the *lex loci contractus*, was settled by recent decisions of the Court of Appeals of that state in favor of the right of a carrier of goods or passengers, by land or water, to stipulate for exemption from all liability for his own negligence. *Mynard* v. *Syracuse Railroad*, 71 N. Y. 180; *Spinetti* v. *Atlas Steamship Co.*, 80 N. Y. 71.

But on this subject, as on any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the courts of the State, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the State have concurrent jurisdiction, and upon a contract made and to be performed within the State. *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 368; *Myrick* v. *Michigan Central Railroad*, 107 U. S. 102; *Carpenter* v. *Providence Washington Ins. Co.*, 16 Pet. 495, 511; *Swift* v. *Tyson*, 16 Pet. 1; *Railroad Co.* v. *National Bank*, 102 U. S. 14; *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Smith* v. *Alabama*, 124 U. S. 365, 478; *Bucher* v. *Cheshire Railroad*, 125 U. S. 555, 583. The decisions of the State courts certainly cannot be allowed any greater weight in the Federal courts when exercising the admiralty and maritime jurisdiction exclusively vested in them by the Constitution of the United States.

It was also argued in behalf of the appellant, that the validity and effect of this contract, to be performed principally upon the high seas, should be governed by the general maritime law, and that by that law such stipulations are valid. To this argument there are two answers.

First. There is not shown to be any such general maritime law. The industry of the learned counsel for the appellant has collected articles of codes, decisions of courts and opinions of commentators in France, Italy, Germany and Holland, tending to show that, by the law administered in those countries, such a stipulation would be valid. But those decis-

ions and opinions do not appear to have been based on general maritime law, but largely, if not wholly, upon provisions or omissions in the codes of the particular country; and it has been said by many jurists that the law of France, at least, was otherwise. See 2 Pardessus Droit Commercial, no. 542; 4 Goujet & Meyer Dict. Droit Commercial (2d ed.) Voiturier, nos. 1, 81; 2 Troplong Droit Civil, nos. 894, 910, 942, and other books cited in *Peninsular & Oriental Co.* v. *Shand*, 3 Moore P. C. (N. S.) 272, 278, 285, 286; 25 Laurent Droit Civil Français, no. 532; Mellish, L. J., in *Cohen* v. *Southeastern Railway*, 2 Ex. D. 253, 257.

Second. The general maritime law is in force in this country, or in any other, so far only as it has been adopted by the laws or usages thereof; and no rule of the general maritime law (if any exists) concerning the validity of such a stipulation as that now before us has ever been adopted in the United States or in England, or recognized in the admiralty courts of either. *The Lottawanna*, 21 Wall. 558; *The Scotland*, 105 U. S. 24, 29, 33; *The Belgenland*, 114 U. S. 355, 369; *The Harrisburg*, 119 U. S. 199; *The Hamburg*, 2 Moore P. C. (N. S.) 289, 319; *S. C.* Brown. & Lush. 253, 272; *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115, 123, 124; *S. C.* 6 B. & S. 100, 134, 136; *The Gaetano & Maria*, 7 P. D. 137, 143.

It was argued in this court, as it had been below, that as the contract was to be chiefly performed on board of a British vessel and to be finally completed in Great Britain, and the damage occurred in Great Britain, the case should be determined by the British law, and that by that law the clause exempting the appellant from liability for losses occasioned by the negligence of its servants was valid.

The Circuit Court declined to yield to this argument, upon two grounds: 1st. That as the answer expressly admitted the jurisdiction of the Circuit Court asserted in the libel, and the law of Great Britain had not been set up in the answer nor proved as a fact, the case must be decided according to the law of the Federal courts, as a question of general commercial law. 2d. That there was nothing in the contracts of affreightment to indicate a contracting in view of any other law than the

recognized law of such forum in the United States as should have cognizance of suits on the contracts. 22 Blatchford, 397.

The law of Great Britain since the Declaration of Independence is the law of a foreign country, and, like any other foreign law, is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved.

The rule that the courts of one country cannot take cognizance of the law of another without plea and proof has been constantly maintained, at law and in equity, in England and America. *Church* v. *Hubbart*, 2 Cranch, 187, 236; *Ennis* v. *Smith*, 14 How. 400, 426, 427; *Dainese* v. *Hale*, 91 U. S. 13, 20, 21; *Pierce* v. *Indseth*, 106 U. S. 546; *Ex parte Cridland*, 3 Ves. & B. 94, 99; *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115, 129; *S. C.* 6 B. & S. 100, 142. In the case last cited, Mr. Justice Willes, delivering judgment in the Exchequer Chamber, said: "In order to preclude all misapprehension, it may be well to add, that a party who relies upon a right or an exemption by foreign law is bound to bring such law properly before the court, and to establish it in proof. Otherwise the court, not being entitled to notice such law without judicial proof, must proceed according to the law of England."

The decision in *Lamar* v. *Micou*, 112 U. S. 452, and 114 U. S. 218, did not in the least qualify this rule, but only applied the settled doctrine that the Circuit Courts of the United States, and this court on appeal from their decisions, take judicial notice of the laws of the several States of the Union as domestic laws; and it has since been adjudged, in accordance with the general rule as to foreign law, that this court, upon writ of error to the highest court of a State, does not take judicial notice of the law of another State, not proved in that court and made part of the record sent up, unless by the local law that court takes judicial notice of it. *Hanley* v. *Donoghue*, 116 U. S. 1; *Renaud* v. *Abbott*, 116 U. S. 277, 285.

The rule is as well established in courts of admiralty as in courts of common law or courts of equity. Chief Justice Marshall, delivering judgment in the earliest admiralty appeal in which he took part, said: "That the laws of a foreign

nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court below, cannot be questioned." *Talbot* v. *Seeman*, 1 Cranch, 1, 38. And in a recent case in admiralty, Mr. Justice Bradley said: "If a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was. If not shown, we would apply our own law to the case. In the French or Dutch tribunals they would do the same." *The Scotland*, 105 U. S. 24, 29.

So Sir William Scott, in the High Court of Admiralty, said: "Upon all principles of common jurisprudence, foreign law is always to be proved as a fact." *The Louis*, 2 Dodson, 210, 241. To the same effect are the judgments of the Judicial Committee of the Privy Council in *The Prince George*, 4 Moore P. C. 21, and *The Peerless*, 13 Moore P. C. 484. And in a more recent case, cited by the appellant, Sir Robert Phillimore, said: "I have no doubt whatever that those who rely upon the difference between the foreign law and the law of the forum in which the case is brought are bound to establish that difference by competent evidence." *The Duero*, L. R. 2 Ad. & Ec. 393, 397.

It was, therefore, rightly held by the Circuit Court, upon the pleadings and proofs upon which the case had been argued, that the question whether the British law differed from our own was not open.

But it appears by the supplemental record, certified to this court in obedience to a writ of *certiorari*, that after the Circuit Court had delivered its opinion and filed its findings of fact and conclusions of law, and before the entry of a final decree, the appellant moved for leave to amend the answer by averring the existence of the British law and its applicability to this case, and to prove that law; and that the motion was denied by the Circuit Court, because the proposed allega-

tion did not set up any fact unknown to the appellant at the time of filing the original answer, and could not be allowed under the rules of that court. 22 Blatchford, 402–404.

On such a question we should be slow to overrule a decision of the Circuit Court. But we are not prepared to say that if, upon full consideration, justice should appear to require it, we might not do so, and order the case to be remanded to that court with directions to allow the answer to be amended and proof of the foreign law to be introduced. *The Adeline*, 9 Cranch, 244, 284; *The Marianna Flora*, 11 Wheat. 1, 38; *The Charles Morgan*, 115 U. S. 69; *Merchants' Ins. Co.* v. *Allen*, 121 U. S. 67; *The Gazelle*, 128 U. S. 474. And the question of the effect which the law of Great Britain, if duly alleged and proved, should have upon this case has been fully and ably argued.

Under these circumstances, we prefer not to rest our judgment upon technical grounds of pleading or evidence, but, taking the same course as in *Merchants' Ins. Co.* v. *Allen*, just cited, proceed to consider the question of the effect of the proof offered, if admitted.

It appears by the cases cited in behalf of the appellant, and is hardly denied by the appellee, that under the existing law of Great Britain, as declared by the latest decisions of her courts, common carriers, by land or sea, except so far as they are controlled by the provisions of the Railway and Canal Traffic Act of 1854, are permitted to exempt themselves by express contract from responsibility for losses occasioned by negligence of their servants. *The Duero*, L. R. 2 Ad. & Ec. 393; *Taubman* v. *Pacific Co.*, 26 Law Times (N. S.) 704; *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72; *Manchester &c. Railway* v. *Brown*, 8 App. Cas. 703. It may therefore be assumed that the stipulation now in question, though invalid by our law, would be valid according to the law of Great Britain.

The general rule as to what law should prevail, in case of a conflict of laws concerning a private contract, was concisely and exactly stated before the Declaration of Independence by Lord Mansfield (as reported by Sir William Blackstone, who had been of counsel in the case) as follows: "The general rule,

established *ex comitate et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception, when the parties (at the time of making the contract) had a view to a different kingdom." *Robinson* v. *Bland*, 1 W. Bl. 234, 256, 258; *S. C.* 2 Bur. 1077, 1078.

The recent decisions by eminent English judges, cited at the bar, so clearly affirm and so strikingly illustrate the rule, as applied to cases more or less resembling the case before us, that a full statement of them will not be inappropriate.

In *Peninsular & Oriental Co.* v. *Shand*, 3 Moore P. C. (N. S.) 272, 290, Lord Justice Turner, delivering judgment in the Privy Council, reversing a decision of the Supreme Court of Mauritius, said, "The general rule is, that the law of the country where a contract is made governs as to the nature, the obligation and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance; in either case equally, they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed *de jure*, and a foreign court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations."

It was accordingly held, that the law of England, and not the French law in force at Mauritius, governed the validity and construction of a contract made in an English port between an English company and an English subject to carry him hence by way of Alexandria and Suez to Mauritius, and containing a stipulation that the company should not be liable for loss of passengers' baggage, which the court in Mauritius had held to be invalid by the French law. 3 Moore P. C. (N. S.) 278.

Lord Justice Turner observed, that it was a satisfaction to find that the Court of Cassation in France had pronounced a judgment to the same effect, under precisely similar circum-

stances, in the case of a French officer taking passage at Hong Kong, an English possession, for Marseilles in France, under a like contract, on a ship of the same company, which was wrecked in the Red Sea, owing to the negligence of her master and crew. *Julien* v. *Peninsular & Oriental Co.*, imperfectly stated in 3 Moore P. C. (N. S.) 282, note, and fully reported in 75 Journal du Palais (1864) 225.

The case of *Lloyd* v. *Guibert*, 6 B. & S. 100; *S. C.* L. R. 1 Q. B. 115; decided in the Queen's Bench before, and in the Exchequer Chamber after, the decision in the Privy Council just referred to, presented this peculiar state of facts: A French ship owned by Frenchmen was chartered by the master, in pursuance of his general authority as such, in a Danish West India island, to a British subject, who knew her to be French, for a voyage from St. Marc in Hayti to Havre, London or Liverpool at the charterer's option, and he shipped a cargo from St. Marc to Liverpool. On the voyage, the ship sustained damage from a storm which compelled her to put into a Portuguese port. There the master lawfully borrowed money on bottomry, and repaired the ship, and she carried her cargo safe to Liverpool. The bondholder proceeded in an English court of admiralty against the ship, freight and cargo, which being insufficient to satisfy the bond, he brought an action at law to recover the deficiency against the owners of the ship; and they abandoned the ship and freight in such a manner as by the French law absolved them from liability. It was held, that the French law governed the case, and therefore the plaintiff could not recover.

It thus appears that in that case the question of the intent of the parties was complicated with that of the lawful authority of the master; and the decision in the Queen's Bench was put wholly upon the ground that the extent of his authority to bind the ship, the freight or the owners was limited by the law of the home port of the ship, of which her flag was sufficient notice. 6 B. & S. 100. That decision was in accordance with an earlier one of Mr. Justice Story, in *Pope* v. *Nickerson*, 3 Story, 465; as well as with later ones in the Privy Council, on appeal from the High Court of Admiralty, in which the

validity of a bottomry bond has been determined by the law prevailing at the home port of the ship, and not by the law of the port where the bond was given. *The Karnak*, L. R. 2 P. C. 505, 512; *The Gætano & Maria*, 7 P. D. 137. See also *The Woodland*, 7 Benedict, 110, 118, 14 Blatchford, 499, 503, and 104 U. S. 180.

The judgment in the Exchequer Chamber in *Lloyd* v. *Guibert* was put upon somewhat broader ground. Mr. Justice Willes, in delivering that judgment, said: "It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject matter is immovable property situated in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject matter and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract." L. R. 1 Q. B. 122, 123; 6 B. & S. 133.

It was accordingly held, conformably to the judgment in *Peninsular & Oriental Co.* v. *Shand*, above cited, that the law of England, as the law of the place of final performance or port of discharge, did not govern the case, because it was "manifest that what was to be done at Liverpool was but a small portion of the entire service to be rendered, and that the character of the contract cannot be determined thereby," although as to the mode of delivery the usages of Liverpool would govern. L. R. 1 Q. B. 125, 126; 6 B. & S. 137. It was then observed that the law of Portugal, in force where the bottomry bond was given, could not affect the case; that the law of Hayti had not been mentioned or relied upon in argument; and that "in favor of the law of Denmark, there

is the cardinal fact that the contract was made in Danish territory, and further, that the first act done towards performance was weighing anchor in a Danish port;" and it was finally, upon a view of all the circumstances of the case, decided that the law of France, to which the ship and her owners belonged, must govern the question at issue.

The decision was, in substance, that the presumption that the contract should be governed by the law of Denmark, in force where it was made, was not overcome in favor of the law of England, by the fact that the voyage was to an English port and the charterer an Englishman, nor in favor of the law of Portugal by the fact that the bottomry bond was given in a Portuguese port; but that the ordinary presumption was overcome by the consideration that French owners and an English charterer, making a charter party in the French language of a French ship, in a port where both were foreigners, to be performed partly there by weighing anchor for the port of loading, (a place where both parties would also be foreigners,) partly at that port by taking the cargo on board, principally on the high seas, and partly by final delivery in the port of discharge, must have intended to look to the law of France as governing the question of the liability of the owner beyond the value of the ship and freight.

In two later cases, in each of which the judgment of the Queen's Bench Division was affirmed by the Court of Appeal, the law of the place where the contract was made was held to govern, notwithstanding some of the facts strongly pointed towards the application of another law; in the one case, to the law of the ship's flag; and in the other, to the law of the port where that part of the contract was to be performed, for the nonperformance of which the suit was brought.

In the first case, a bill of lading, issued in England in the English language to an English subject, by a company described therein as an English company and in fact registered both in England and in Holland, for goods shipped at Singapore, an English port, to be carried to a port in Java, a Dutch possession, in a vessel with a Dutch name, registered in Holland, commanded by a Dutch master and carrying the

Dutch flag, in order to obtain the privilege of trading with Java, was held to be governed by the law of England, and not by that of Holland, in determining the validity and construction of a clause exempting the company from liability for negligence of master and crew; and Lords Justices Brett and Lindley both considered it immaterial whether the ship was regarded as English or Dutch. *Chartered Bank of India* v. *Netherlands Steam Navigation Co.*, 9 Q. B. D. 118, and 10 Q. B. D. 521, 529, 536, 540, 544.

As Lord Justice Lindley observed: "This conclusion is not at all at variance with *Lloyd* v. *Guibert*, but rather in accordance with it. It is true that in that case the law of the flag prevailed; but the intention of the parties was admitted to be the crucial test; and the law of the ship's flag was considered as the law intended by the parties to govern their contract, as there really was no other law which they could reasonably be supposed to have contemplated. The plaintiff there was English, the defendant French; the *lex loci contractus* was Danish; the ship was French; her master was French, and the contract was in the French language. The voyage was from Hayti to Liverpool. The facts here are entirely different, and so is the inference to be deduced from them. The *lex loci contractus* was here English, and ought to prevail unless there is some good ground to the contrary. So far from there being such ground, the inference is very strong that the parties really intended to contract with reference to English law." 10 Q. B. D. 540.

In the remaining English case, a contract made in London between two English mercantile houses, by which one agreed to sell to the other 20,000 tons of Algerian esparto, to be shipped by a French company at an Algerian port on board vessels furnished by the purchasers at London, and to be paid for by them in London on arrival, was held to be an English contract, governed by English law; notwithstanding that the shipment of the goods in Algiers had been prevented by *vis major*, which, by the law of France in force there, excused the seller from performing the contract. *Jacobs* v. *Crédit Lyonnais*, 12 Q. B. D. 589.

Opinion of the Court.

That result was reached by applying the general rule, expressed by Denman, J., in these words: "The general rule is, that where a contract is made in England between merchants carrying on business here, as this is, but to be performed elsewhere, the construction of the contract, and all its incidents, are to be governed by the law of the country where the contract is made, unless there is something to show that the intention of the parties was that the law of the country where the contract is to be performed should prevail;" and summed up by the Court of Appeal, consisting of Brett, M. R., and Bowen, L. J., as follows: "The broad rule is that the law of a country where a contract is made presumably governs the nature, the obligation and the interpretation of it, unless the contrary appears to be the express intention of the parties." 12 Q. B. D. 596, 597, 600.

This court has not heretofore had occasion to consider by what law contracts like those now before us should be expounded. But it has often affirmed and acted on the general rule, that contracts are to be governed, as to their nature, their validity and their interpretation, by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view. *Cox* v. *United States*, 6 Pet. 172; *Scudder* v. *Union Bank*, 91 U. S. 406; *Pritchard* v. *Norton*, 106 U. S. 124; *Lamar* v. *Micou*, 114 U. S. 218; *Watts* v. *Camors*, 115 U. S. 353, 362.

The opinion in *Watts* v. *Camors*, just cited, may require a word or two of explanation. It was there contested whether, in a charter party made at New Orleans between an English owner and an American charterer of an English ship for a voyage from New Orleans to a port on the continent of Europe, a clause regulating the amount payable in case of any breach of the contract was to be considered as liquidating the damages, or as a penalty only. Such was the question of which the court said that if it depended upon the intent of the parties, and consequently upon the law which they must be presumed to have had in view, they "must be presumed to look to the general maritime law of the two countries, and not to the local law of the State in which the contract is signed."

The choice there was not between the American law and the English law, but between the statutes and decisions of the State of Louisiana, and a rule of the maritime law common to the United States and England.

Some reliance was placed by the appellant upon the following observations of Mr. Justice Story, sitting in the Circuit Court:

"If a contract is to be performed, partly in one country and partly in another country, it admits of a double aspect, nay, it has a double operation, and is, as to the particular parts, to be interpreted distinctively; that is, according to the laws of the country where the particular parts are to be performed or executed. This would be clearly seen in the case of a bill of lading of goods, deliverable in portions or parts at ports in different countries. Indeed, in cases of contracts of affreightment and shipment, it must often happen that the contract looks to different portions of it to be performed in different countries; some portions at the home port, some at the foreign port, and some at the return port." "The goods here were deliverable in Philadelphia; and what would be an effectual delivery thereof, in the sense of the law, (which is sometimes a nice question,) would, beyond question, be settled by the law of Pennsylvania. But to what extent the owners of the schooner are liable to the shippers for a non-fulfilment of a contract of shipment of the master — whether they incur an absolute or a limited liability, must depend upon the nature and extent of the authority which the owners gave him, and this is to be measured by the law of Massachusetts," where the ship and her owners belonged. *Pope* v. *Nickerson*, 3 Story, 465, 484, 485.

But in that case the last point stated was the only one in judgment; and the previous remarks evidently had regard to such distinct obligations included in the contract of affreightment as are to be performed in a particular port — for instance, what would be an effectual delivery, so as to terminate the liability of the carrier, which, in the absence of express stipulation on that subject, is ordinarily governed by the law or usage of the port of discharge. *Robertson* v. *Jackson*, 2 C. B.

412; *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115, 126; *S. C.* 6 B. & S. 100, 137.

In *Morgan* v. *New Orleans &c. Railroad*, 2 Woods, 244, a contract made in New York, by a person residing there, with a railroad corporation having its principal office there but deriving its powers from the laws of other states, for the conveyance of interests in railroads and steamboat lines, the delivery of property and the building of a railroad in those states, and which, therefore, might be performed partly in New York, and must be performed partly in the other states, was held by Mr. Justice Bradley, so far as concerned the right of one party to have the contract rescinded on account of nonperformance by the other party, to be governed by the law of New York, and not by either of the diverse laws of the other states in which parts of the contract were to be performed.

In *Hale* v. *New Jersey Steam Navigation Co.*, 15 Conn. 538, 546, goods were shipped at New York for Providence in Rhode Island or Boston in Massachusetts, on a steamboat employed in the business of transportation between New York and Providence; and an exemption, claimed by the carrier under a public notice, was disallowed by the Supreme Court of Connecticut, because by the then law of New York the liability of a common carrier could not be limited by such a notice. Chief Justice Williams, delivering judgment, said: "The question is, by what law is this contract to be governed. The rule upon that subject is well settled, and has been often recognized by this court, that contracts are to be construed according to the laws of the state where made, unless it is presumed from their tenor that they were entered into with a view to the laws of some other state. There is nothing in this case, either from the location of the parties or the nature of the contract, which shows that they could have had any other law in view than that of the place where it was made. Indeed, as the goods were shipped to be transported to Boston or Providence, there would be the most entire uncertainty what was to be the law of the case if any other rule was to prevail. We have, therefore, no doubt that the law of New

York, as to the duties and obligations of common carriers, is to be the law of the case."

In *Dyke* v. *Erie Railway*, 45 N. Y. 113, 117, a passenger travelling upon a ticket by which a railroad corporation, established in New York, and whose road extended from one place to another in that state, passing through the States of Pennsylvania and New Jersey by their permission, agreed to carry him from one to another place in New York, was injured in Pennsylvania, by the law of which the damages in actions against railroads for personal injury were limited to $3000. The Court of Appeals of New York held that the law of Pennsylvania had no application to the case ; and Mr. Justice Allen, delivering the opinion, referred to the case of *Peninsular & Oriental Co.* v. *Shand*, before cited, as analogous in principle, and said: "The contract was single and the performance one continuous act. The defendant did not undertake for one specific act, in part performance, in one state, and another specific and distinct act in another of the states named, as to which the parties could be presumed to have had in view the laws and usages of distinct places. Whatever was done in Pennsylvania was a part of the single act of transportation from Attica or Waverly, in the State of New York, to the city of New York, and in performance of an obligation assumed and undertaken in this state, and which was indivisible. The obligation was created here, and by force of the laws of this state, and force and effect must be given to it in conformity to the laws of New York. The performance was to commence in New York, and to be fully completed in the same state, but liable to breach, partial or entire, in the States of Pennsylvania and New Jersey, through which the road of the defendant passed; but whether the contract was broken, and if broken the consequences of the breach, should be determined by the laws of this state. It cannot be assumed that the parties intended to subject the contract to the laws of the other states, or that their rights and liabilities should be qualified or varied by any diversities that might exist between the laws of those states and the *lex loci contractus*."

In *McDaniel* v. *Chicago & Northwestern Railway*, 24 Iowa,

412, 417, cattle transported by a railroad company from a place in Iowa to a place in Illinois, under a special contract made in Iowa, containing a stipulation that the company should be exempt from liability for any damage, unless resulting from collision or derailing of trains, were injured in Illinois by the negligence of the company's servants; and the Supreme Court of Iowa, Chief Justice Dillon presiding, held the case to be governed by the law of Iowa, which permitted no common carrier to exempt himself from the liability which would exist in the absence of the contract. The court said: "The contract being entire and indivisible, made in Iowa, and to be partly performed here, it must, as to its validity, nature, obligation and interpretation, be governed by our law. And by our law, so far as it seeks to change the common law, it is wholly nugatory and inoperative. The rights of the parties, then, are to be determined under the common law, the same as if no such contract had been made."

So in *Pennsylvania Co.* v. *Fairchild*, 69 Illinois, 260, where a railroad company received in Indiana goods consigned to Leavenworth, in Kansas, and carried them to Chicago in Illinois, and there delivered them to another railroad company, in whose custody they were destroyed by fire, the Supreme Court of Illinois held that the case must be governed by the law of Indiana, by which the first company was not liable for the loss of the goods after they passed into the custody of the next carrier in the line of transit.

The other cases in the courts of the several states, cited at the bar, afford no certain or satisfactory guide. Two cases, held not to be governed by a statute of Pennsylvania providing that no railroad corporation should be liable for a loss of passenger's baggage beyond $300, unless the excess in value was disclosed and paid for, were decided (whether rightly or not we need not consider) without much reference to authority, and upon their peculiar circumstances — the one case, on the ground that a contract by a New Jersey corporation to carry a passenger and his baggage from a wharf in Philadelphia across the Delaware River, in which the States of Pennsylvania and New Jersey had equal rights of navigation and

passage, and thence through the State of New Jersey to Atlantic City, was a contract to be performed in New Jersey and governed by the law of that state; *Brown* v. *Camden & Atlantic Railroad*, 83 Penn. St. 316; and the other case, on the ground that the baggage, received at a town in Pennsylvania to be carried to New York city, having been lost after its arrival by negligence on the part of the railroad company, the contract, so far as concerned the delivery, was to be governed by the law of New York. *Curtis* v. *Delaware & Lackawanna Railroad*, 74 N. Y. 116. The suggestion in *Barter* v. *Wheeler*, 49 N. H. 9, 29, that the question, whether the liability of a railroad corporation for goods transported through parts of two states was that of a common carrier or of a forwarder only, should be governed by the law of the state in which the loss happened, was not necessary to the decision, and appears to be based on a strained inference from the observations of Mr. Justice Story in *Pope* v. *Nickerson*, above cited. In a later case, the Supreme Court of New Hampshire reserved any expression of opinion upon a like question. *Gray* v. *Jackson*, 51 N. H. 9, 39.

This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence, of authority, the general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country.

There does not appear to us to be anything in either of the bills of lading in the present case, tending to show that the contracting parties looked to the law of England, or to any other law than that of the place where the contract was made.

The bill of lading for the bacon and hams was made and dated at New York, and signed by the ship's agent there. It

acknowledges that the goods have been shipped "in and upon the steamship called Montana, now lying in the port of New York and bound for the port of Liverpool," and are to be delivered at Liverpool. It contains no indication that the owners of the steamship are English, or that their principal place of business is in England, rather than in this country. On the contrary, the only description of the line of steamships, or of the place of business of their owners, is in a memorandum in the margin, as follows: "Guion Line. United States Mail Steamers. New York: 29 Broadway. Liverpool: 11 Rumford St." No distinction is made between the places of business at New York and at Liverpool, except that the former is named first. The reservation of liberty, in case of an interruption of the voyage, "to tranship the goods by any other steamer," would permit transhipment into a vessel of any other line, English or American. And general average is to be computed, not by any local law or usage, but "according to York-Antwerp rules," which are the rules drawn up in 1864 at York in England, and adopted in 1877 at Antwerp in Belgium, at international conferences of representatives of the more important mercantile associations of the United States, as well as of the maritime countries of Europe. Lowndes on General Average (3d ed.) Appendix Q.

The contract being made at New York, the ship-owner having a place of business there, and the shipper being an American, both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action upon their contract. The contract is a single one, and its principal object, the transportation of the goods, is one continuous act, to begin in the port of New York, to be chiefly performed on the high seas, and to end at the port of Liverpool. The facts that the goods are to be delivered at Liverpool, and the freight and primage, therefore, payable there in sterling currency, do not make the contract an English contract, or refer to the English law the question of the liability of the carrier for the negligence of the master and crew in the course of the voyage. *Peninsular & Oriental Co.* v. *Shand*, *Lloyd* v. *Guibert*, and *Chartered Bank of India* v. *Netherlands Steam Navigation Co.*, before cited.

There is even less ground for holding the three bills of lading of the cotton to be English contracts. Each of them is made and dated at Nashville, an inland city, and is a through bill of lading, over the Louisville and Nashville Railroad and its connections, and by the Williams and Guion Steamship Company, from Nashville to Liverpool; and the whole freight from Nashville to Liverpool is to be "at the rate of fifty-four pence sterling per 100 lbs. gross weight." It is stipulated that the liability of the Louisville and Nashville Railroad and its connections as common carriers "terminates on delivery of the goods or property to the steamship company at New York, when the liability of the steamship commences, and not before;" and that "the property shall be transported from the port of New York to the port of Liverpool by the said steamship company, with liberty to ship by any other steamship or steamship line." And in the margin is this significant reference to a provision of the statutes of the United States, applicable to the ocean transportation only: "ATTENTION OF SHIPPERS IS CALLED TO THE ACT OF CONGRESS OF 1851: 'Any person or persons shipping oil of vitriol, unslacked lime, inflammable matches [or] gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering *at the time of shipment* a note in writing, expressing the nature and character of such merchandise, to the master, mate or officer, or person in charge of the loading of the ship or vessel, shall forfeit to the *United States One Thousand Dollars.*'" Act of March 3, 1851, c. 43, § 7; 9 Stat. 636; Rev. Stat. § 4288.

It was argued that as each bill of lading, drawn up and signed by the carrier and assented to by the shipper, contained a stipulation that the carrier should not be liable for losses by perils of the sea arising from the negligence of its servants, both parties must be presumed to have intended to be bound by that stipulation, and must therefore, the stipulation being void by our law and valid by the law of England, have intended that their contract should be governed by the English law; and one passage in the judgment in *Peninsular & Oriental Co.* v. *Shand* gives some color to the argument. 3 Moore P. C. (N. S.) 291. But the facts of the two cases are

quite different in this respect. In that case, effect was given to the law of England, where the contract was made; and both parties were English, and must be held to have known the law of their own country. In this case, the contract was made in this country, between parties one residing and the other doing business here; and the law of England is a foreign law, which the American shipper is not presumed to know. Both parties or either of them may have supposed the stipulation to be valid; or both or either may have known that by our law, as declared by this court, it was void. In either aspect, there is no ground for inferring that the shipper, at least, had any intention, for the purpose of securing its validity, to be governed by a foreign law, which he is not shown, and cannot be presumed, to have had any knowledge of.

Our conclusion on the principal question in the case may be summed up thus: Each of the bills of lading is an American and not an English contract, and, so far as concerns the obligation to carry the goods in safety, is to be governed by the American law, and not by the law, municipal or maritime, of any other country. By our law, as declared by this court, the stipulation by which the appellant undertook to exempt itself from liability for the negligence of its servants is contrary to public policy and therefore void; and the loss of the goods was a breach of the contract, for which the shipper might maintain a suit against the carrier. This being so, the fact that the place where the vessel went ashore, in consequence of the negligence of the master and officers in the prosecution of the voyage, was upon the coast of Great Britain, is quite immaterial.

This conclusion is in accordance with the decision of Judge Brown in the District Court of the United States for the Southern District of New York in *The Brantford City*, 29 Fed. Rep. 373, which appears to us to proceed upon more satisfactory grounds than the opposing decision of Mr. Justice Chitty, sitting alone in the Chancery Division, made since this case was argued, and, so far as we are informed, not reported in the Law Reports, nor affirmed or considered by any of the higher courts of Great Britain. *In re Missouri Steamship Co.*, 58 Law Times (N. S.) 377.

The present case does not require us to determine what effect the courts of the United States should give to this contract, if it had expressly provided that any question arising under it should be governed by the law of England.

The question of the subrogation of the libellant to the rights of the shippers against the carrier presents no serious difficulty.

From the very nature of the contract of insurance as a contract of indemnity, the insurer, upon paying to the assured the amount of a loss, total or partial, of the goods insured, becomes, without any formal assignment, or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's right of action against the carrier or other person responsible for the loss; and in a court of admiralty may assert in his own name that right of the shipper. *The Potomac*, 105 U. S. 630, 634; *Phœnix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 321.

In the present case, the libellant, before the filing of the libel, paid to each of the shippers the greater part of his insurance, and thereby became entitled to recover so much, at least, from the carrier. The rest of the insurance money was paid by the libellant before the argument in the District Court, and that amount might have been claimed by amendment, if not under the original libel. *The Charles Morgan*, 115 U. S. 69, 75; *The Gazelle*, 128 U. S. 474. The question of the right of the libellant to recover to the whole extent of the insurance so paid was litigated and included in the decree in the District Court, and in the Circuit Court on appeal; and no objection was made in either of those courts, or at the argument in this court, to any insufficiency of the libel in this particular.

The appellant does, however, object that the decree should not include the amount of the loss on the cotton shipped under through bills of lading from Nashville to Liverpool. This objection is grounded on a clause in those bills of lading, which is not found in the bill of lading of the bacon and hams shipped at New York; and on the adjudication in *Phœnix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312, that a stipulation in a bill of lading, that a carrier, when liable for a loss of the goods, shall have the benefit of any insurance that may have

been effected upon them, is valid as between the carrier and the shipper, and therefore limits the right of an insurer of the goods, upon paying to the shipper the amount of a loss by stranding, occasioned by the negligence of the carrier's servants, to recover over against the carrier.

But it behooves a carrier setting up such a defence to show clearly that the insurance on the goods is one which by the terms of his contract he is entitled to the benefit of. *Inman* v. *South Carolina Railway*, *ante*, 128. The through bills of lading of the cotton are signed by an agent of the railroad companies and the steamship company, "severally, but not jointly," and contain, in separate columns, two entirely distinct sets of "terms and conditions," the first relating exclusively to the land carriage by the railroads and their connections, and the second to the ocean transportation by the steamship. The clause relied on, providing that in case of any loss or damage of the goods, whereby any legal liability shall be incurred, that company only shall be held answerable in whose actual custody the goods are at the time, "and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods," is inserted in the midst of the terms and conditions defining the liability of the railroad companies, and is omitted in those defining the liability of the steamship company, plainly signifying an intention that this clause should not apply to the latter. It is quite clear, therefore, that the appellant has no right to claim the benefit of any insurance on the goods. See *Railroad Co.* v. *Androscoggin Mills*, 22 Wall. 594, 602.

The result of these considerations is that the decree of the Circuit Court is in all respects correct and must be

Affirmed.

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.

Syllabus.

LIVERPOOL AND GREAT WESTERN STEAM COMPANY *v.* INSURANCE COMPANY OF NORTH AMERICA. No. 6. Appeal from the Circuit Court of the United States for the Eastern District of New York. This case was argued and decided with that of *Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.*, *supra*, and was substantially like it, except that the through bills of lading were for transportation by the New York Central and Hudson River Railroad Company and the Guion Line Steamship Company from Buffalo in the State of New York to Liverpool *via* New York. The Circuit Court's findings of fact, conclusions of law and opinion are printed in 22 Blatchford, 372, and in 22 Fed. Rep. 715.

Decree affirmed.

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.

ALLEN *v.* SMITH.

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

No. 14. Submitted February 15, 1888. — Decided March 5, 1889.

In a suit in equity, brought by a judgment creditor, to set aside, as fraudulent, another judgment against the debtor, and the sale thereunder to the plaintiff in the latter, of land of the debtor, it was held, that the burden of proof was on the plaintiff, and that the latter judgment had not been successfully impeached.

The plaintiff could not avail himself of the objection that the debtor did not plead the statute of limitations to a part of the claim, in the suit which resulted in the latter judgment; the debtor was at liberty to waive the plea; and there was sufficient in the relations of the parties and in the circumstances of the case to warrant him in doing so.

In equity. Decree dismissing the bill. Complainants appealed. The case is stated in the opinion.

Mr. Attorney General for appellants.

Mr. U. M. Rose for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

This is an appeal by Thomas H. Allen and two other persons, partners under the name of Allen, Nugent & Co., and Thomas H. Allen individually, from a decree of the Circuit Court of the United States for the Eastern District of Arkansas, dismissing their bill in a suit in equity brought by them against Benjamin H. Smith and the heirs-at-law of William H. Todd, deceased, and Levi H. Springer, administrator of Todd, to set aside, as fraudulent and void as against the plaintiffs, as creditors of Todd, a judgment recovered by Smith against Todd, and the sale of certain lands of Todd to Smith on execution on that judgment, and for a sale of those lands under judgments obtained by the plaintiffs, and the payment of those judgments out of the proceeds of such sale.

The substance of the bill is, that, in January, 1875, Todd executed three promissory notes, payable in one, two and three years respectively from their date, in favor of one Cohen, each for $1666.66, with 10 per cent interest; that Allen, Nugent & Co. became the owners of those notes, and brought

suit on the first two of them which fell due, in the Circuit Court of Chicot County, Arkansas, by attachment against Todd, and levied on his interest in certain land in Chicot County on the 18th of June, 1877; that, on February 2, 1878, they obtained judgment in that suit, against Todd, for $4341.64, with 10 per cent interest from that date, the judgment declaring that it was a lien upon the property attached; that like proceedings were had by them by attachment of the same land in a suit on the third note, in the Circuit Court of the United States for the Eastern District of Arkansas, and a judgment was recovered by them against Todd, in that suit, on the 19th of April, 1878, for $2206.47, with 10 per cent interest from that date, the judgment declaring that it was a lien on the land; that in both of those suits Todd was personally summoned; that on the 13th of July, 1876, Todd made another note in favor of Thomas H. Allen & Co., of which firm Thomas H. Allen was a member, for $1507.58, payable thirty days from date; that a judgment was recovered by them on that note, against Todd, in a court in Pennsylvania, on July 17, 1877, for $1637.33; that that judgment was duly assigned to Allen, and he brought suit on it in the Circuit Court of Chicot County, against Todd, by attachment; that the interest of Todd in the land before mentioned was attached in that suit, and personal service was also had upon Todd, and Allen recovered judgment in the suit, against Todd, on February 2, 1877, for $1683.83, with interest from that date; and that the judgment declared that it was a lien on the land attached.

The bill further alleges, that at the time of the execution of the four notes, and afterwards, and up to and after the 1st of August, 1876, and at the time of the levy of the three attachments, Todd was the owner of an undivided half interest in a plantation called the Bellevue plantation, in Chicot County, with certain exceptions, which plantation contained the land mentioned as having been so attached, and other land; that at the July term, 1876, of the Circuit Court of Chicot County, judgments were obtained against Todd in favor of J. McMurray & Co. and of Jurey & Gillis; that a decree in favor of one Halliday, enforceable by execution,

already existed against him in that court, and other creditors of his were pressing him; that, finding himself thus in failing circumstances, he conspired with the defendant Smith, who was his son-in-law, to transfer to Smith a large and valuable part of his property, to save it from his creditors; that, in pursuance of that design, notwithstanding Smith was largely indebted to Todd, after January, 1869, for unpaid purchase money for the half interest in the Bellevue plantation, which Smith had purchased from Todd, and although Smith resided on that plantation, and controlled the crops raised on it, and his services had been taken into account in the adjustments and payments from time to time between the parties, and Smith had kept another manager almost the entire time on a plantation of Todd's called Yellow Bayou, and there was in fact nothing due from Todd to Smith for services, Smith, in pursuance of such fraudulent purpose, brought suit against Todd in the Circuit Court of Chicot County, on the 4th of August, 1876, for the sum of $8000, for pretended services not paid for, which had been rendered by Smith for Todd, in managing his Yellow Bayou plantation and his half interest in the Bellevue plantation, from January, 1869, to that date, at $1000 a year and interest, and caused an attachment to be issued, which was levied, on August 8, 1876, by direction of Smith, on all the personal property of Todd on the two plantations; that on the 14th of August, 1876, the Yellow Bayou plantation was sold, to satisfy Halliday's decree; that after applying its proceeds a balance still remained due to Halliday; that such balance and the McMurray judgments amounted to $1285; that executions were issued on those judgments, and for the balance due Halliday, and on September 28, 1876, to satisfy them, the half interest of Todd in 1200 acres of the Bellevue plantation, being its most valuable part, was sold, and bought in by Smith at less than $3 an acre for an entire interest, when the same was at the time reasonably worth from $20 to $30 an acre; that Todd, in pursuance of his fraudulent scheme, did not redeem the lands from the sale, and Smith afterwards received deeds therefor; that afterwards, on December 19, 1876, Smith directed the sheriff to release to Todd

115 bales of cotton, on which the attachment of Smith had been levied on August 8, 1876, and to attach the interest of Todd in that part of the Bellevue plantation which had been attached in the suits of the plaintiffs, and also to attach some 60 other acres of land which Smith claimed was a part of the Bellevue plantation; that no steps were taken in the attachment suit of Smith against Todd at the January term, 1877, of the Chicot Circuit Court, the judgment in favor of Jurey & Gillis having been in the meantime paid off by money raised from the sale of the cotton so released by Smith; that at the July term, 1877, of the Chicot Circuit Court, and after the levy, on June 18, 1877, of the attachments in the suits by the plaintiffs, an appearance was entered by Todd in the suit, and a pretended answer was filed for him to the complaint; that one Mole, in whose charge and custody the property attached in the suit was left, was at the time in charge of the Yellow Bayou plantation, and he and others, as agents of Todd, had for years been in charge of it; that five of the eight years' services charged for by Smith were barred by limitation; that nevertheless no defence was in good faith put in to the suit, the answer not being sworn to and no issue made; that the case was submitted to a jury, and a verdict rendered, and a judgment entered for $8000 against Todd, which declared that it was a lien upon the property levied on under the attachment in the suit, from the date of the levy; and that, on April 1, 1878, the said property was sold and bought in by Smith for the nominal sum of $4055.

The bill further alleges that the property on which the liens of the plaintiffs are declared to rest is reasonably worth a large sum, say $20,000, and more than enough to pay off their demands, if the fraudulent judgment in favor of Smith, and the sale thereunder, should be set aside, and the property be sold at a fair price.

Smith filed an answer to the bill, taking issue on its material allegations, and denying that there was anything collusive or fraudulent in his obtaining his judgment and buying under it the lands in question. The answer also avers that the suit was vigorously contested by Todd; that Smith was justly

entitled to recover from Todd the whole amount for which the judgment was rendered; and that at the time he acquired title to the lands so purchased, they were subject to two mortgages, one of which was for about $18,000, and the other of which had been foreclosed, and a decree obtained, in October, 1881, fixing a lien on the lands, superior to the title of Smith, for $9743.

The heirs of Todd also put in an answer, taking issue as to the material allegations of the bill, and averring that Smith had had continuously, from about the 1st of January, 1868, the supervision and management of the Yellow Bayou and Bellevue plantations, as long as Todd owned or controlled them, and had never received any compensation for his services before the suit for the $8000 was brought; and that they and each of them believed that the judgment was just, and that the sum was due to Smith from Todd.

Springer, the administrator of Todd, also put in an answer to the same effect as that of Smith.

The bill did not waive an answer on oath, and all three answers were sworn to.

Subsequently, Smith and Springer filed a sworn amendment to their answer, setting up that letters of administration were granted to Springer on the estate of Todd by the Probate Court of Chicot County, on the 4th of August, 1879, and that the demands of the plaintiffs against the estate were not exhibited to the administrator, as required by the statute, before the end of two years from the granting of the letters.

The question to be decided in this case is exclusively one of fact, and concerns the honesty and validity of the claim of Smith against Todd. The claim is supported by a judgment, a copy of which is contained in the record. The complaint in the suit was sworn to by Smith on the 4th of August, 1876. The account filed with the complaint states that the $8000 are due for services rendered in the supervision and management of Todd's Yellow Bayou plantation and his half interest in the Bellevue plantation, from January, 1869, to date, at $1000 per annum, and interest. The attachment was levied on the 5th of August, 1876, on cotton and other personal

property and on certain land. On the 25th of July, 1877, Todd filed his answer, denying each and every allegation of the complaint, and on that day the case was tried by a jury, which found a verdict for Smith and assessed his damages at $8000. The burden of proof is on the plaintiffs in this suit to impeach that judgment. We do not think they have successfully done it. It would not be profitable to discuss the evidence.

Much comment is made on the fact that Todd did not plead the statute of limitations of the State to a part of Smith's claim. But this is not an objection of which the plaintiffs can avail themselves. Todd was at liberty to waive the plea, and there was evidently sufficient in the relations of the parties and in the circumstances of the case to warrant him in doing so.

We have carefully considered the evidence, and the various propositions advanced by the counsel for the appellants in regard to the facts, and are of opinion that the decree of the Circuit Court was right, and that it must be

Affirmed.

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

UNITED STATES *ex rel.* LEVEY *v.* STOCKSLAGER.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 1481. Argued January 24, 25, 1889. — Decided March 5, 1889.

The act approved March 2, 1867, c. 208, 14 Stat. 635, confirmed to the widow and children of one Bouligny, the one sixth part, amounting to 75,840 acres, of a certain land claim in Louisiana, and enacted that, inasmuch as the land embraced in the claim had been appropriated by the United States to other purposes, certificates of new location, in eighty-acre lots, be issued to the widow, in lieu of said lands, to be located on public lands. The next Congress, twenty-eight days afterwards, and on March 30, 1867, passed a joint resolution, which was approved by the President, directing the Secretary of the Interior to suspend the execution of the act, "until the further order of Congress." No action had meantime been taken by the General Land Office to carry out the act. On a petition by

the widow for a mandamus to the Commissioner of the General Land Office directing him to execute and deliver to her the certificates: *Held*,

(1) The execution of the act was suspended not merely until the further order of the same Congress which passed the joint resolution, but until the further order of the legislative body called, in Section 1, of Article 1, of the Constitution, "a Congress of the United States";

(2) The act did not vest in the beneficiaries a title to specific land, nor give them a vested right in the certificates which were to be issued;

(3) No vested right, amounting to property, had attached at the time of the approval of the joint resolution, and it did not deprive the beneficiaries of any property, or right of property, in violation of the Constitution;

(4) If the claim, founded on the act, amounted to a contract, the demand for relief would be substantially a prayer for a specific performance of the contract by the United States, jurisdiction to grant which was not given by statute to the court below.

PETITION for a writ of mandamus. The case is stated in the opinion.

Mr. Walter H. Smith and *Mr. A. B. Browne* (with whom were *Mr. A. T. Britton* and *Mr. S. W. Johnston* on the brief) for plaintiff in error.

Mr. Heber J. May and *Mr. Attorney General* for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a writ of error to review a judgment of the Supreme Court of the District of Columbia, in general term. The writ is brought by the United States, on the relation of Mary Elizabeth Levey, intermarried with George Collins Levey, against Strother M. Stockslager, Commissioner of the General Land Office.

Mary Elizabeth Levey filed a petition in the Supreme Court of the District of Columbia, praying for a writ of mandamus. The petition set forth that the petitioner was formerly Mary Elizabeth Bouligny, the widow of John E. Bouligny, deceased, and the person named in the act of Congress of March 2, 1867, hereinafter set forth; and that she is now the wife of George Collins Levey, and was such on the 29th of March, 1888. The act of Congress referred to (c. 208, 14 Stat. 635) was set forth in the petition, and is in these words:

"*An act for the Relief of the Heirs of John E. Bouligny.*

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and hereby is, confirmed to Mary Elizabeth Bouligny, Corrinne Bouligny, and Felice Bouligny, widow and children of John E. Bouligny, deceased, the one sixth part of the land claim of Jean Antoine Bernard D'Autrive, in the State of Louisiana, said one sixth part amounting to seventy-five thousand eight hundred and forty acres; and that, inasmuch as the said land embraced in said claim *have* [has] been already appropriated by the United States to other purposes, certificates of new location, in eighty-acre lots, be issued to the said Mary Elizabeth Bouligny, for her own benefit and that of her said minor children, in lieu of said lands, to be located at any land office in the United States, upon any public lands subject to private entry at a price not exceeding one dollar and twenty-five cents per acre. The commissioner of the general land office is hereby directed to issue said certificates of new location in accordance with existing regulations in such cases.

"APPROVED, March 2, 1867."

The petition set forth, that, on the 6th of March, 1867, the petitioner's attorney filed with the Commissioner of the General Land Office a certified copy of said act, and requested that the certificates of new location named in the act be issued; that the act was passed by the Thirty-ninth Congress, which adjourned on the 3d of March, 1867; that, at the next session of Congress, being the Fortieth Congress, the latter Congress, on the 30th of March, 1867, passed the following joint resolution (No. 35, 15 Stat. 353:)

"*Joint Resolution directing the Secretary of the Interior to suspend the Execution of a Law passed by the Thirty-Ninth Congress for the Relief of the Heirs of John E. Bouligny.*

"*Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior be directed to suspend the execu-

tion of the act entitled 'An act for the relief of the heirs of John E. Bouligny,' approved March second, eighteen hundred and sixty-seven, until the further order of Congress.

"APPROVED, March 30, 1867;"

that Congress had made no "further order" in the matter; that the defendant was, on the 29th of March, 1888, and since had been, and now is, Commissioner of the General Land Office of the United States; that the petitioner, on that day, demanded of him, as such Commissioner, that he issue to her, for her own benefit and that of her minor children named in the act, certificates of new location for 75,840 acres, in eighty-acre lots, locatable at any land office in the United States, upon any public lands subject to private entry at a price not exceeding $1.25 per acre; that such demand was made in writing, at the office of the said Commissioner, in Washington; that he, on the 12th of April, 1888, refused to grant that request; that on the 13th of April, 1888, she duly appealed from the decision and refusal of the Commissioner to the Secretary of the Interior; that the said Secretary, on the 3d of May, 1888, approved the decision of the Commissioner; and that she had theretofore repeatedly made application to the Commissioners of the General Land Office to issue said certificates of new location, and always met with a refusal to issue them.

The petition prayed that a writ of mandamus might issue to the said Commissioner, directing him to execute and deliver such certificates to her.

On an order to show cause, returnable in the general term of the court, the respondent put in an answer, setting forth that no action had been taken by the General Land Office, for the purpose of carrying out and giving effect to the provisions of the act of March 2, 1867, prior to the passage of the joint resolution of March 30, 1867; that, by the passage of such joint resolution, the power of the respondent to issue the certificates was suspended until the further order of Congress; that Congress had made no further order; that the act of March 2, 1867, did not give to the relator or to the heirs of John E. Bouligny a vested right to the certificates; that, as the act of

March 2, 1867, directed the Commissioner to issue the certificates "in accordance with existing regulations in such cases," it would have imposed upon the respondent the exercise of an official duty, within his discretion, and not reviewable by the court; that such official duty is not a ministerial duty; that, if the relator had acquired a vested right to the certificates under the act, a remedy was afforded in the Court of Claims, under § 1059, to recover their value, provided the petition setting forth the claim had been presented to the court within six years after the claim first accrued; and that the petition ought to be dismissed.

The relator put in a demurrer to the answer, on the ground that it did not set up any legal defence; that the remedy in the Court of Claims, suggested by the answer, did not exist in law; that the right in the certificates, given by the act of Congress, was a vested right, which could not be and was not taken away by the joint resolution; and that the joint resolution was unconstitutional and void.

The court in general term overruled the demurrer, and, the relator electing to stand upon it, a judgment was entered, discharging the rule to show cause and dismissing the petition.

An opinion was delivered by the court in general term. It held that the act of March 2, 1867, was not a grant, and nothing passed by it; that the Louisiana lands named in it were never possessed by the confirmees, and were not to be possessed by them; that under such circumstances there could be no confirmation in regard to them; that the provision for certificates in lieu of them was not a grant, and nothing passed by it, because it was wholly executory; that, the certificates never having been prepared or come into existence, the effect of the joint resolution could, at most, only be to impair the obligation of a contract, and was not the taking of private property; that the contract supposed to exist by virtue of the act of March 2, 1867, could not be enforced either by the executive or the courts, until the United States should grant permission for such enforcement, nor after such permission had been withdrawn; that the power to perform the contract, and the right to insist upon its performance, existed only while such

permission existed; that the relief sought by the relator amounted to a specific performance of the alleged contract of the United States, by one of its officers; that this could not be enforced when the United States had withdrawn its consent; that a writ of mandamus to compel the performance of an official act by a public officer could not be employed to enforce the specific performance by the United States of a contract; and that the respondent had no official duty or power in the premises since the passage of the joint resolution.

The principal question argued at the bar was as to the effect of the joint resolution in suspending the execution of the prior act. There is nothing in the suggestion of the relator that the joint resolution intended only a suspension of the execution of the act during the existence of the Fortieth Congress, and until that Congress should further order. We do not think that such is the proper construction of the joint resolution. It suspends the execution of the act "until the further order of Congress," that is, until the further order of the legislative body called, in Section 1, of Article 1, of the Constitution, "a Congress of the United States," consisting of a Senate and House of Representatives, in which are declared to be vested all legislative powers granted by the Constitution. The joint resolution was one of the character mentioned in Section 7, of Article 1, of the Constitution, to which the concurrence of the Senate and House of Representatives was necessary, and which was approved by the President, and took effect only on such approval. It had all the characteristics and effects of the act of March 2, 1867, which became a law by the approval of the President. Until Congress should further order, the operation of the act of March 2, 1867, was by the joint resolution effectually suspended.

The present case is not at all like the cases of which *Whitney* v. *Morrow*, 95 U. S. 551 and 112 U. S. 693 is a type. The statute involved in that case was the act of February 21, 1823, c. 10, 3 Stat. 724, in reference to land claims in the Territory of Michigan. The third section of that act directed that patents should be issued to persons whose claims to land had been regularly filed with the commis-

sioners appointed under the act of May 11, 1820, c. 85, 3 Stat. 572, and whose claims had been favorably reported on by said commissioners; and the statute confirmed such persons in their claims. That was a statute confirming to persons claims to specific lands, and the patents were to issue for those very lands. The principle established by the decisions of this court in regard to such cases is one always to be adhered to. We do not depart from it in the present case, but only hold that it is not applicable here. The principle thus applied in *Morrow* v. *Whitney*, *supra*, is, that an act of Congress recognizing the validity of the claim of an individual to specific land, as against the United States, operates to transfer to him the interest of the United States, as effectually as a grant could have done; and, where such individual has the possession of the land, or some estate in it, and the United States still hold the legal title to it, the confirmation is substantially a conveyance of an estate or right in the land by the United States to such individual; and, where the land has boundaries which are clearly defined, or are capable of identification, such confirmation perfects the claimant's title to the very land, without the issuing of any patent therefor. But this doctrine necessarily applies only to a case where the United States intend, by the statute, to transfer to, and vest in, the beneficiary, a title to specific land. The present is not such a case. What is stated by the act of March 2, 1867, to be confirmed is "the one sixth part of the land claim" mentioned, said one sixth amounting to 75,840 acres; but the statute states that the land embraced in the claim has "been already appropriated by the United States to other purposes." Therefore, the beneficiaries could acquire no title to it from the United States. The act then proceeds to provide for the issuing of certificates of new location, not covering any part of the 75,840 acres which had been already appropriated by the United States to other purposes, nor covering any specific public lands. The new lands were to be "in lieu" of the lands lost, and were to be selected and located at some land office, and upon public lands which were subject to private entry, and were so subject at a price not exceeding $1.25 per

acre; and the certificates were to be issued by the Commissioner of the General Land Office "in accordance with existing regulations in such cases."

Nor did the act of March 2, 1867, give to the widow and children of Bouligny a vested right in the certificates of new location which were to be issued. No certificates were prepared for issue; no step was taken by the Commissioner of the General Land Office towards issuing them; no new lands were selected or located; and the whole thing remained *in fieri*, and subject to the control of Congress.

The cases cited by the counsel for the relator, of *Fletcher* v. *Peck*, 6 Cranch, 87; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *McGee* v. *Mathis*, 4 Wall. 143; and *United States* v. *Schurz*, 102 U. S. 378, do not apply to the present case. There was here no contract between the United States and the widow and children of Bouligny, in the sense of the cases referred to. In *Fletcher* v. *Peck*, a tract of land had been sold by the Governor of Georgia under the authority of an act of the legislature, to persons who had conveyed it to purchasers for a valuable consideration without notice. It was held that a subsequent legislature could not afterwards repeal the act on the ground that it had been passed through bribery. In *Dartmouth College* v. *Woodward*, it was held that a charter granted to a private corporation was a contract. In *McGee* v. *Mathis*, it was held that a direct grant of land by the United States to a State was a contract; and in that case the scrip had been issued by the State, and was in the hands of the person entitled to receive it, and for that reason it was held that it represented land, and that the act under which it had been issued could not be repealed by the State. In *United States* v. *Schurz*, a patent for land had been signed, sealed, perfected, and recorded, and the power of the land department over it had ceased, so that a writ of mandamus to the Secretary of the Interior, to deliver it to the person in whose favor it had been made out, would lie.

It is also contended for the relator, that she acquired, under the act of March 2, 1867, a right which amounted to property, and of which she could not be deprived by the United States

under the joint resolution, because that was not due process of law. But we are of opinion that the cases cited on that subject by the relator are not applicable. Inasmuch as nothing had been done by the officers of the land department under the act of March 2, 1867, and no certificates had been made out, and the whole matter still remained executory, no vested right had attached at the time of the approval of the joint resolution. Therefore, that resolution did not deprive the widow and children of any property, or right of property, in violation of the Constitution. The transaction was merely the ordinary one of a direction by statute to a public officer to perform a certain duty, and a subsequent direction to him by statute, before he had performed that duty or had entered upon its performance, not to perform it. *Williams* v. *County Commissioners*, 35 Maine, 345; *Butler* v. *Palmer*, 1 Hill, 324; *Hampton* v. *Commonwealth*, 19 Penn. St. 329; Sedgwick on Stat. and Const. Law, Pomeroy's notes, 2 ed. 112.

But if the contention of the relator, that the provisions of the act of March 2, 1867, amounted to a contract between the United States and the widow and children, were correct, that very fact would show that the relief here sought could not be granted to the relator. She prays for a writ of mandamus against the Commissioner of the General Land Office, to issue and deliver to her the certificates of new location; but, in case her claim were in fact founded on contract, her demand for relief would substantially amount to a prayer that the United States be decreed specifically to perform the contract. No jurisdiction is given by any statute to the Supreme Court of the District of Columbia of a suit against the United States or a public officer for the specific performance of a contract made by the United States.

On the whole case, we are of opinion that the judgment of the court below, in general term, must be

Affirmed.

NORTON *v.* BOARD OF COMMISSIONERS OF THE TAXING DISTRICT OF BROWNSVILLE.

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

No. 1442. Submitted January 4, 1889. — Decided March 5, 1889.

A valid power to issue its bonds in aid of railroads, conferred upon a municipal corporation of Tennessee by a statute of that State enacted while the constitution of 1834–5 was in force, not having been accepted and acted upon by the corporation at the time when the constitution of 1870 came into operation, became subject to the conditions and prohibitions of article 2, § 29 of that instrument, and could not be exercised without further legislation in conformity therewith.

The substitution of a new state constitution for an old one abrogates the latter, and if the former contains provisions from the old constitution, with changes and additions, such provisions are not to be treated as ordinary legislation in amendment of prior statutes.

A clause in a new state constitution, designed to keep in force all laws not inconsistent with the instrument will not perpetuate a previous law, enabling a municipality to do, under certain circumstances, that which the new constitution forbids to be done, except under other circumstances.

THE case as stated by the court was as follows:

Plaintiff in error brought suit in the Circuit Court of the United States for the Western District of Tennessee against the Board of Commissioners of the Taxing District of the City of Brownsville, Tennessee, and the president, treasurer, secretary and financial agent of that board, upon certain interest coupons annexed to bonds issued by the city of Brownsville, July 1, 1870. The cause was tried upon an agreed statement of facts, as follows:

The city of Brownsville was incorporated by act of the General Assembly of Tennessee passed on February 24, 1870.

The records of the board of mayor and aldermen show the following proceedings had May 12, 1870:

"BROWNSVILLE, TENNESSEE, *May* 12, 1870.

"A call-meeting of the board of mayor and aldermen met at the mayor's office. Members being all present, the board

was called to order. Reading the minutes of the last meeting was dispensed with. Upon application of J. D. Smith, president of Brownsville and Ohio Railroad Company, and in pursuance of authority in us vested by the act of General Assembly of State of Tennessee passed February 8, A.D. 1870, the board of mayor and aldermen of the city of Brownsville hereby order and direct that an election be held in our said city on Saturday, the 11th day of June next, at which election the qualified voters of our said city will vote upon the proposition to issue the bonds of the corporation to be subscribed as stock in aid of the Brownsville and Ohio Railroad, and in accordance with the provisions of said act, said bonds to have twenty years to run, and be payable in city of St. Louis, Missouri, and bear interest at the rate of eight per cent per annum, said interest payable annually in said city, and said bonds to be issued to amount to the sum of fifty thousand dollars, and be known as Brownsville railroad bonds. Said election is to be advertised in the Brownsville *Bee*, the county newspaper of Haywood County, for twenty days before said election. Said bonds are to be issued to and taken by the Brownsville and Ohio Railroad Company in lieu of the sum of fifty thousand dollars heretofore voted and subscribed by this corporation to the said company in pursuance of § 6 of said act of General Assembly of State of Tennessee of February 8, 1870. In voting at said election those voters who are in favor of the issuance of said bonds in lieu of said subscription shall have written or printed upon their ballots 'bonds,' and those who are opposed to the issuance of said bonds shall have written or printed on their ballots 'no bonds.' It is ordered that the sheriff of Haywood County give notice by advertisement in the Brownsville *Bee* for twenty days of the time, place, and purpose of holding said election, and shall open and hold the same at the usual voting place or places in the city of Brownsville on Saturday, June 11, 1870, and shall, as soon thereafter as practicable, certify the result of said election to this board. Full power and authority is hereby given him to appoint judges and other officers of said election, and to do all things else necessary and proper to carry into effect this order."

Statement of the Case.

On the 13th day of June, 1870, the sheriff of Haywood County, Tennessee, certified to the mayor and aldermen of the city of Brownsville that he did hold the election thus ordered in conformity to the terms of the order on the 11th of June, 1870, and that at said election one hundred and thirty-nine votes were polled, and the result was one hundred and thirty-nine votes were cast for "bonds" and none for "no bonds."

And on the said 13th day of June, 1870, the said mayor and aldermen of the city of Brownsville did ordain as follows:

"On motion, the following ordinance was adopted, to wit:

"Whereas it appears from the certificate of Jno. L. Sherman, sheriff of Haywood County, that in pursuance of an ordinance of this board passed 12th of May, 1870, that he did, on the 11th of June, 1870, open and hold an election within the city of Brownsville upon the proposition to issue fifty thousand dollars corporation bonds running twenty years, bearing interest from date at eight per cent per annum, payable in the city of St. Louis, Missouri, said bonds to be known as the Brownsville Railroad bonds, and to be issued in aid of the construction of the Brownsville and Ohio Railroad, and that at said election one hundred and thirty-nine votes were cast in favor of said bonds and none against, it is therefore ordained by the board of mayor and aldermen of the city of Brownsville that the mayor, T. W. Tyus, subscribe to the Brownsville and Ohio Railroad Company the sum of fifty thousand dollars as stock, and that in payment of said subscription he sign and issue to said Brownsville and Ohio Railroad Company fifty thousand dollars corporation bonds, said bonds bearing interest from date at the rate of eight per cent per annum, payable in the city of St. Louis, Missouri, twenty years from date, said interest to be paid annually, said bonds to be issued in aid of the construction of said Brownsville and Ohio Railroad, and to be known as the Brownsville Railroad bonds."

On the first day of July, 1870, fifty thousand dollars of the bonds of the city of Brownsville were issued under and in pursuance of the foregoing proceedings, payable July 1, 1890, and the same were by said city of Brownsville paid and delivered to the Brownsville and Ohio Railroad Company in payment of

a subscription theretofore made by said city of Brownsville for fifty thousand dollars of the capital stock of said railroad company, and said stock so paid for was delivered by said railroad company to said city of Brownsville and has ever since been held and owned by said city.

The following is a correct copy of one of the said fifty thousand dollars of bonds, and the others are like unto it :

"$500. United States of America. $500.

"City of Brownsville, State of Tennessee.

"Brownsville Railroad Bond.

"Interest at eight per cent, payable annually.

"Know all men by these presents, that the corporation of the city of Brownsville, Tennessee, is indebted to the bearer of this bond in the sum of five hundred dollars, for value received, which the said corporation hereby promises to pay on the first day of July, in the year one thousand eight hundred and ninety, at the office or agency of said corporation, in the city of St. Louis, Missouri, with interest thereon from the first day of July, eighteen hundred and seventy, at the rate of (8) eight per centum per annum, payable annually, at the said office or agency, on the first day of July of each year, on the presentation and surrender of the annexed coupons as they severally become due. This bond is one of a series of one hundred bonds for five hundred dollars each, numbered from one to one hundred, inclusive, amounting in the aggregate to fifty thousand dollars, and issued by authority of an act of the legislature of the State of Tennessee, passed February 8, 1870.

"In witness whereof the city of Brownsville has caused these presents to be signed by its mayor and recorder this first day of July, 1870.

"T. W. Tyus, Mayor.

"John Clinton, Recorder."

G. W. Norton became the holder and owner for value before maturity, and without notice of any infirmity in said bonds other than that given him on the face of the bonds and by

the constitution and laws of Tennessee, of the interest coupons which matured July 1, 1874, taken from said bonds numbered 5, 7, 27 and 41, and the interest coupons which matured on July 1, 1883, 1884, 1885 and 1886, taken from said bonds numbered 27, 35, 41, 44, 62, 82, 83, 84, 85, 86, 48, 49, 55, 57, 58, 60, 90, 91, 95, 96, 97, 98, 99 and 100 being four coupons which matured July 1, 1874, for $40 each, and 24 coupons which matured July 1, 1883, and 24 which matured July 1, 1884, and 24 which matured July 1, 1885, and 24 which matured July 1, 1886, aggregating 100 coupons of $40 each, and upon these 100 interest coupons the said G. W. Norton, on the 20th of May, 1887, instituted his said suit against the Board of Commissioners of the Taxing District of the city of Brownsville in said Circuit Court of the United States for the Western District of Tennessee, being No. 2933 on the law docket of said court, which is the cause recited in the caption hereof, to be submitted to said court upon the pleadings and this agreement of facts.

The mayor and aldermen of the city of Brownsville, at a meeting of said board, held on March 18, 1871, took action, which is thus shown on the minutes of said board:

"On motion, the following ordinance was made and adopted:

"Be it ordained by the Board of Mayor and Aldermen of the city of Brownsville, Tennessee, That the Exchange Bank of St. Louis, in the State of Missouri, is hereby constituted and made the agency of the corporation of the said city of Brownsville, Tennessee, for the purpose of paying the principal and interest, as the same shall become due, of fifty thousand of eight per cent bonds issued by said corporation of Brownsville on the first day of July, 1870, and falling due on the first day of July, 1890; and the mayor is hereby authorized and instructed to collect promptly the taxes levied for the purpose of paying the interest on said bonds and for the purpose of establishing a sinking fund for the redemption of the same, and to place on deposit at the said Exchange Bank of the city of St. Louis by the 1st day of July of each and every year a sufficient amount in currency to redeem all of the coupons of said bonds falling due at that time and not otherwise redeemed."

Statement of the Case.

The city of Brownsville paid the interest on said bonds for the years 1871 and 1872, and has paid the interest on some of them, matured since, for the years 1873, 1874, 1875, 1876 and 1877, but the coupons sued on as aforesaid by G. W. Norton in the case cited in the caption hereof have not been paid.

It is admitted that at an election for mayor of Brownsville, on January 7, 1871, there were 546 votes cast for mayor, and that on June 11, 1870, the citizens of Brownsville entitled to vote in the election held on that day were at least 546 in number. It is also admitted that the Brownsville and Ohio Railroad was never built, and has been abandoned.

It is also admitted that by an act of 1879 the charter of the city of Brownsville was repealed, and that a government was afterwards organized under the act of April 1, 1881. All of these acts and others thought applicable may be read from the books containing the acts of Tennessee.

It is also admitted that there was no subscription by the authorities of Brownsville to the Brownsville and Ohio Railroad or to the corporation which preceded it, called the Brownsville and Dyer County Railroad, otherwise than is shown in the paper immediately following this agreement, before the passage of the act of February 8, 1870; and it is also admitted that no election was held as contemplated in the ordinance set out in said paper.

Paper annexed to Agreement.

"BROWNSVILLE, TENN., *May* 11, 1869.

"At a called meeting of the board of mayor and aldermen, held in the mayor's office, members were all present except Recorder Clinton. The board was called to order and Alderman B. J. Lea appointed recorder *pro tem.* The minutes of the last meeting were read and adopted. A communication was received from Messrs. R. S. Thomas (chairman), J. P. Wood, Jno. R. Watkins, J. M. Rutledge, W. W. Vaughn, D. A. Nunn, and J. P. Parker, praying the board to order an election to vote a tax on the property in the corporation, for the purpose of aiding in building the Brownsville and Dyer

Statement of the Case.

County Railroad, which was received and ordered to be filed; and, on motion, the following ordinance was passed:

"'Be it ordained by the board of mayor and aldermen, That the proposition for the board of mayor and aldermen to levy a tax of one per cent per annum for five years on the taxable property of Brownsville, to aid in the construction of the Brownsville and Dyer County Railroad, for which said tax the said railroad company is, after the last payment, to issue certificate of stock for the amount which is paid by the town of Brownsville, be submitted to the legal voters of Brownsville on the 18th day of May, 1869. Those in favor of said appropriation will vote "for railroad tax;" those opposed to said appropriation will vote "against railroad tax."'"

The court instructed the jury that the bonds from which the coupons sued on were clipped were issued without the authority of law, and were void; and that the new constitution, which went into effect on the 6th day of May, 1870, did not amend, but repealed and abrogated the act of February 8, 1870, so far as said act authorized the issuing of bonds by municipal corporations upon an election held after said new constitution went into effect; and directed the jury to return a verdict for the defendants and against the plaintiff. To the giving of this instruction plaintiff then and there excepted. The jury returned a verdict for the defendants under this charge of the court.

Plaintiff then moved in arrest of judgment, and for a new trial, which motions were overruled; to all which holdings and rulings the plaintiff excepted and tendered his bill of exceptions, which was duly signed, sealed and made part of the record.

Judgment was rendered in favor of the defendants and against the plaintiff for costs, and he thereupon sued out this writ of error.

The act of the General Assembly of Tennessee of February 8th, 1870, so far as in any way relating to the city of Brownsville, is as follows:

"An Act to confer upon the town of Brownsville, in the county of Haywood, the authority to issue corporation bonds in aid of railroads, and for other purposes.

"Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That section 71 of an act passed the 15th day of February, 1869, or so much thereof as to change the name and style of the Brownsville and Dyer County Railroad to the Brownsville and Ohio Railroad which road shall run from Brownsville *via* Friendship, instead of Chestnut Bluff and Dyersburg, to some point in the State of Kentucky west of the Tennessee River, to be determined by said railroad company.

"Sec. 2. *Be it further enacted*, That the corporate authorities of the city of Brownsville, in Haywood County, are hereby authorized to issue corporate bonds to the amount of two hundred thousand dollars, for railroad purposes, to be called Brownsville Railroad Bonds, running not exceeding twenty years, and bearing interest, payable annually, not exceeding the rate of interest at the place where said bonds are made payable.

"Sec. 3. *Be it further enacted*, That the bonds authorized to be issued by this act, or any part thereof, may be subscribed as stock in the Brownsville and Ohio Railroad Company, said bonds to be taken by said company at par, and to issue to the corporation of Brownsville certificates of stock of said railroad company, equal to the amount of bonds received from said corporation.

"Sec. 4. *Be it further enacted*, That upon the application of the president of the Brownsville and Ohio Railroad Company to the corporate authorities of the city of Brownsville, said authorities shall publish or cause to be published in the county newspaper, not less than twenty days, for the purpose of holding an election, to be held in the usual way, in said city of Brownsville, at which election all the legal voters shall have the privilege of voting for or against the issuance of said railroad bonds; and, unless a majority of the votes cast at such election be in favor of the proposed issuance of rail-

road bonds, no authority shall be given by this act to issue the same; but, in case a majority of the votes cast be in favor of the issuance of said bonds, the mayor of the city shall subscribe to the stock of said railroad company the amount so voted; said stock to be paid in bonds, as provided for by this act.

"SEC. 5. *Be it further enacted*, That the corporate authorities of the city of Brownsville shall levy annually an assessment upon all the taxable property within the limits of the corporation, sufficient to pay the annual interest on the bonds that may be issued under the provisions of this act, and also to establish a sinking fund for the ultimate redemption of said bonds.

"SEC. 6. *Be it further enacted*, That a subscription in bonds made by the corporation of the city of Brownsville to the Brownsville and Ohio Railroad Company, under the provisions of this act, may be received in lieu of any other subscription heretofore made by said corporation to said railroad company; and that the provisions of the foregoing sections of this act shall apply to the towns of Troy and Union City, in Obion County, to the same extent as the same applies to the city of Brownsville.

* * * * *

"SEC. 18. *Be it further enacted*, That stock which has been subscribed, or may hereafter be subscribed, by any county, city, or incorporation, to said railroad companies, may be payable in six annual payments; and it shall be lawful for county courts and the corporate authorities of any city or town, making such subscription, to issue *short* bonds bearing interest at the rate of six per cent per annum, to said railroad companies, in anticipation of the collection of annual levies, if thereby the construction of the roads can be facilitated.

* * * * *

"SEC. 22. *Be it further enacted*, That this act shall take effect from and after its passage.

"Passed February 8, 1870, c. 50, Statutes of Tennessee, 1869–70, 360, 364."

Mr. Sparrell Hill, *Mr. Henry Craft* and *Mr. L. P. Cooper* for plaintiff in error.

Mr. W. W. Rutledge and *Mr. William M. Smith* for defendants in error.

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

The question to be determined in this case is whether the act of February 8, 1870, set forth in the foregoing statement, could be availed of under the provisions of the constitution of Tennessee, which was adopted by vote of the people March 26, 1870, and went into effect on the 5th day of May of that year.

By that act the corporate authorities of the city of Brownsville, in Haywood County, Tennessee, were authorized to issue corporate bonds to the amount of two hundred thousand dollars for railroad purposes, to be subscribed as stock in the Brownsville and Ohio Railroad Company, certificates of stock in the latter to be issued to the municipality to the amount of the bonds received, and an election was provided for, to be held upon twenty days' notice, "at which election all the legal voters shall have the privilege of voting for or against the issuance of said railroad bonds; and unless a majority of the votes cast at such election be in favor of the proposed issuance of railroad bonds, no authority shall be given by this act to issue the same; but in case a majority of the votes cast be in favor of the issuance of said bonds, the mayor of the city shall subscribe to the stock of said railroad company the amount so voted; said stock to be paid in bonds, as provided for by this act."

The 29th section of article 2 of the state constitution of 1834–1835 was as follows:

"The General Assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to state taxation."

This language was retained in § 29 of article 2 of the constitution of 1870, which then proceeded thus:

"But the credit of no county, city, or town shall be given or loaned to or in aid of any person, company, association, or corporation, except upon an election to be first held by the qualified voters of such county, city, or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city, or town become a stockholder, with others, in any company, association, or corporation, except upon a like election, and the assent of a like majority."

Then came an exception of certain enumerated counties from the operation of the restriction, until 1880. Sections 1 and 2 of article 11 provided:

"Section 1. All laws and ordinances now in force and in use in this State, not inconsistent with this constitution, shall continue in force and use until they shall expire, or be altered or repealed by the legislature. But ordinances contained in any former constitution, or schedule thereto, are hereby abrogated.

"Section 2. Nothing contained in this constitution shall impair the validity of any debts or contracts, or affect any rights of property, or any suits, actions, rights of action, or other proceedings in courts of justice."

It is clear that the inhibition imposed by § 29 of the constitution of 1870 operates directly upon the municipalities themselves, and is absolute and self-executing; and although power is reserved to the legislature to enable them to give or loan their credit, and to become stockholders, upon the assent of three-fourths of the votes cast at an election to be held by the qualified voters, the county, city or town is destitute of the power to do so until legislation authorizing such election and action thereupon is had.

The prohibition of the gift or loan of credit or the subscription to stock without a three-fourths vote, is not an affirmative grant of authority to give or loan credit or to become a stockholder upon a three-fourths vote.

Prior to the constitution of 1870, the legislature could have conferred on a municipal corporation the power to give or loan its credit, or to subscribe for stock, on such terms and condi-

tions as the legislature chose to impose, but after that constitution went into effect, the municipality was deprived of any power previously conferred, and could thereafter do none of these things save by an act of the legislature imparting the power as limited by the constitution.

In *Aspinwall* v. *The Commissioners*, 22 How. 364, the provision in the state constitution of Indiana, forbidding counties from loaning their credit to any incorporated company, or loaning money for the purpose of taking stock in any such company, and from subscribing for stock, unless paid for when subscribed, was held to have withdrawn all authority to make subscriptions to the stock of incorporated companies, except in the manner and under the conditions prescribed by that instrument, and that consequently a subscription made, and bonds issued after the constitution took effect, under an act of the legislature previously passed, were without authority and void. See *Wadsworth* v. *Supervisors*, 102 U. S. 534, 537.

The same view was held in *Concord* v. *Portsmouth Savings Bank*, 92 U. S. 625, as to a similar provision in the constitution of Illinois, which went into effect July 2, 1870; and in *Falconer* v. *Railroad Co.*, 69 N. Y. 491, arising under the amendments of 1874–1875 to the constitution of New York. *Railroad Co.* v. *Falconer*, 103 U. S. 821.

These cases sufficiently illustrate the distinction between the operation of a constitutional limitation upon the power of the legislature, and of a constitutional inhibition upon the municipality itself. In the former case, past legislative action is not necessarily affected, while in the latter it is annulled. Of course, if an entirely new organic law is adopted, provision in the schedule or some other part of the instrument must be made for keeping in force all laws not inconsistent therewith, and this was furnished in this instance by the first section of article 11; but such a provision does not perpetuate any previous law enabling a municipality to do that which it is subsequently forbidden to do by the constitution.

The inhibition being self-executing and operating directly upon the municipality, and not in itself enabling the latter to proceed in accordance with the prescribed limitation, further legislation is necessary before the municipality can act.

Thus, in *Jarrolt* v. *Moberly*, 103 U. S. 580, an act of the General Assembly of Missouri, approved March 18, 1870, which provided that it should be lawful for the council of any city, or the trustees of any incorporated town, to purchase lands, and to donate, lease or sell the same to any railroad company, and, for the purposes of assisting and inducing such railroad company to locate and build machine shops on such lands, and, for such purposes, to levy taxes, borrow money, and issue bonds, upon the assent of a majority of the qualified voters, was held void, as in conflict with a provision of the state constitution of 1865, declaring that the General Assembly should not authorize any county, city, or town to become a stockholder in, or loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election, should assent thereto. On the 16th of February, 1872, another act was passed providing that "no county court of any county, city council of any city, nor any board of trustees of any incorporated town, shall hereafter have the right to donate, take, or subscribe stock for such county, city, or incorporated town in, or loan the credit thereof to, any railroad company, or other company, corporation, or association, unless authorized to do so by a vote of two-thirds of the qualified voters of such county, city or incorporated town." The election authorizing the issue of bonds was held on the 26th day of March, 1872. On the 29th of March, 1872, the legislature passed another act, so amending the 6th section of the act of March 18th, 1870, as to provide for the assent of two-thirds of the qualified voters of such town or city, at a regular or special election to be held therein. And this court further held that the act of the legislature of February 16, 1872, was merely prohibitory in its character, forbidding the officers of counties, cities, and towns to loan the credit thereof or donate or subscribe stock in any railroad or other company, without the previous assent of two-thirds of their qualified voters, and in itself conferred no authority on those officers when such assent was given; and Mr. Justice Field, delivering the opinion, says: "Further legislation was needed. Such was the evident opinion of the

legislature of the State, for, by an additional act, passed on the 29th of March, 1872, the authority was given in terms."

The rule thus laid down is decisive of the case at bar. The constitutional provision prohibited all municipal gifts, loans, or subscriptions, except when authorized upon certain conditions, but it did not, in itself, operate to confer authority. Further legislation was needed, and such was the evident opinion of the legislature of the State, for, on the 16th of January, 1871, it passed an act entitled "An act to enforce article II, Section 29, of the constitution, to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes," thus giving a practical construction immediately after the adoption of the constitution.

"This act," says the court in *Kelley* v. *Milan*, 127 U. S. 139, 154, "was manifestly passed for the object stated in its title, to carry into effect the provisions of § 29 of article 2, of the constitution of 1870, and to prescribe the manner and the conditions, in conformity with the provisions of that section, in and upon which the several counties and incorporated towns in the State should have the right to impose taxes for county and corporation purposes;" and as to the second clause of the first section of the act, which repeats the language of the constitution, it is remarked: "The enactments in that clause are entirely inhibitory and negative in their character. They do not confer any authority for the giving or loaning of credit upon any municipality, nor confer the right upon any municipality to become a stockholder with others in any corporation; but they only prescribe the condition, that no credit shall be given or loaned, and no ownership of stock be created, unless the prescribed election be first held and the assent of three-fourths of the votes cast at it be first given. But the authority to give or loan credit, and to become a stockholder, under the conditions prescribed in the act of 1871, must be found in an independent grant of authority, in some other statutory provision, either general or special." *Pulaski* v. *Gilmore*, 21 Fed. Rep. 870; *Taxpayers of Milan* v. *Tennessee Central Railroad*, 11 Lea, 330.

Syllabus.

It will be perceived that we do not assent to the view that when the state government commenced under the new constitution, the act of February 8th, 1870, was amended by § 29 of article 2, so as to substitute a vote of three-fourths for that of a majority, and re-enacted, so to speak, by the first section of article 11, above quoted.

The power of ordinary legislation is vested, under all our constitutions, in the legislatures, and the constitutional convention of Tennessee did not assume to exercise such power. The amendment of a law is usually accomplished according to a prescribed course, and there is nothing here to justify the conclusion that § 29 of article 2 was designed to operate by way of amendment to prior laws, nor can it so operate, nor the act of 1870 be held to have been kept in force, for the reasons already indicated.

The proceedings resulting in the issue of the bonds whose validity is under consideration were initiated May 11, 1870, five days after the constitution went into effect, and the election was held on the 11th day of June following.

In our opinion there was no authority to hold the election and to issue the bonds, and their holders consequently cannot recover.

The judgment of the Circuit Court will, therefore, be

Affirmed.

COMMISSIONERS OF THE TAXING DISTRICT OF BROWNSVILLE *v.* LOAGUE.

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

No. 1445. Submitted January 4, 1889. — Decided March 5, 1889.

Mandamus lies to compel a party to do that which it is his duty to do; but it confers no new authority, and the party to be compelled must have the power to perform the act.

If a petitioner for a writ of mandamus to compel the levy of a tax to pay a debt evidenced by a judgment recovered on coupons of municipal

bonds is obliged to go behind the judgment in order to obtain his remedy, and it appears that the bonds were void and that the municipality was without power to tax to pay them, the principle of *res judicata* does not apply upon the question of issuing the writ.

When application is made to collect judgments by process not contained in themselves, and requiring, in order to be sustained, reference to the alleged cause of action on which they are founded, the aid of the court should not be granted when upon the face of the record it appears, not that mere error supervened in the rendition of such judgments, but that they rest upon no cause of action whatever.

THE court, in its opinion, stated the case as follows:

This is a writ of error to the Circuit Court of the United States for the Western District of Tennessee, bringing under review the judgment of that court awarding a peremptory mandamus in favor of John Loague, administrator of R. D. Baker, deceased, against the Board of Commissioners of the Taxing District of the city of Brownsville, Tennessee, to proceed "to levy and collect and pay over to petitioner a tax sufficient to pay each and all" of certain judgments described in the petition for such mandamus.

The petition was filed March 19, 1886, and set forth that Baker was in his lifetime the owner and holder for value of certain coupons representing interest on certain bonds issued by the city of Brownsville, Tennessee, under an act of the General Assembly of that State, passed February 8, 1870, (being the act referred to in the foregoing cause of *Norton* v. *The Board of Commissioners &c.*, No. 1442, *ante*,) upon which he obtained four judgments against said city, in said court, namely: one March 1, 1876, for $2628 and costs of suit; another December 20, 1876, for the sum of $822.50 and costs; another December 21, 1877, for the sum of $822.66 and costs; another on the 14th day of December, 1878, for the sum of $821.60 and costs; that executions were issued on all of said judgments, upon which returns of *nulla bona* were made, and thereupon said Baker instituted proceedings on three of said judgments to compel by mandamus the levy and collection of a tax to satisfy said judgments and costs; which resulted in the collection of $1200 on the first judgment, and an unavail-

ing assessment and levy on the second, and perhaps on the third; but that, except as to the amount aforesaid, all of said judgments remained unpaid; that on the 24th of February, 1879, the General Assembly of Tennessee repealed the charter of the city of Brownsville, but provided in the repealing act that it should "not be so construed as to impair the obligation of existing contracts into which said corporation has heretofore entered." That by an act of the General Assembly of Tennessee, approved March 14, 1879, it was provided that the Governor of the State should appoint an officer for the corporations whose charters had been repealed, to be known as a receiver and back-tax collector, whose duty it should be to collect all back taxes of such municipalities remaining uncollected at the repeal of their charters; that such officer was appointed for Brownsville but did not qualify, and it was impossible for petitioner's intestate to receive any benefit intended to be secured by the appointment and qualification of such officer; and that on the first day of April, 1881, the people and territory of the city of Brownsville were again incorporated and organized into a municipal corporation known as the Taxing District of Brownsville, under an act entitled "An act to establish taxing districts of the second class, and to provide the means of local government therefor," which is given in substance in said petition, together with certain provisions of an act amendatory thereof, passed April 4, 1885.

Reference is also made to an act of January 31, 1879, applicable to "the several communities embraced in the territorial limits of all such municipal corporations in this State, as have had, or may have, their charters abolished," and which provides, as to the commissioners and trustee constituting governing agencies, that "no writ of mandamus or other process shall lie to compel them to levy any taxes; nor shall the commissioners or said trustee, nor the local government created by this act, pay or be liable for any debt created by said extinct corporation, nor shall any of the taxes collected under this act ever be used for the payment of any of said debts," which prohibition in that act and acts amendatory thereof petitioner insists is null and void.

Statement of the Case.

Petitioner avers that defendants have, under the act of April 1, 1881, and the act of April 4, 1885, power to levy and collect taxes to pay said judgments, and then says: "That the defendant corporation, the Taxing District of Brownsville, and its predecessor, the city of Brownsville, have no assets or means of payment of petitioner's judgments aforesaid, and *petitioner's only remedy to enforce the collection of his judgments is that awarded by the act authorizing the issue of the bonds from which the coupons were detached upon which said judgments were obtained*, and petitioner is advised that said remedy remains in full force against the defendants as the municipal authorities of the Taxing District of Brownsville, and can be invoked against them as effectually as it could have been against the corporate authorities of the city of Brownsville before its charter was repealed."

Petitioner prays in conclusion, together with other relief not material to be mentioned here, for an alternative writ, on hearing to be made peremptory, "commanding defendants to levy and collect a tax sufficient to pay petitioner's judgments aforesaid, and all costs on same, and all costs incurred in his mandamus proceedings heretofore had by his intestate to collect the same."

On the 27th of March, 1886, a rule to show cause was entered to which defendants appeared and moved to quash, which motion was treated by agreement as a demurrer, and subsequently the court delivered its opinion in decision of the questions thus raised, (29 Fed. Rep. 742,) a portion of which is as follows:

"Following a public policy reviewed in its application to the city of Memphis in *Meriwether* v. *Garrett*, 102 U. S. 472, the legislature of Tennessee, in 1879, inaugurated a plan of relief for insolvent municipal corporations, whereby it was expected they could escape the payment of their debts, unless the creditors would accept the 'settlements' tendered them under the provisions of the legislation. The general plan was to repeal the charters, so that there should be no officials or agencies liable to judicial compulsion by mandamus; then to apply other agencies of local government invested with all the

powers of the old municipalities, except the taxing power, which was not only withheld, but conspicuously prohibited to those new organizations called 'taxing districts.' The taxes for carrying on the new contrivances were to be levied directly by the legislature itself upon the taxables within their boundaries, and, that body not being amenable to any judicial coercion by mandamus, it was believed that the creditors were wholly without remedy. The legislature then provided for a settlement with creditors upon the general basis of refunding the old indebtedness at the half, the amount at which the State 'settles' or 'compromises' its own indebtedness. The taxes to pay the interest and principal of the new bonds, like other taxes for municipal purposes, were to be levied directly by the legislature; but provision is made that in default of such levy the 'taxing districts' may themselves levy the necessary tax. Acts 1883, c. 170, p. 224. This act applies to all 'taxing districts' of whatever class, and by its twentieth section 'repeals all laws or parts of laws in conflict herewith.' . . . The legislature repealed the defendant's charter in 1879, the judgments here involved being at that time unsatisfied in this court. Acts 1879, c. 27, p. 41. In 1881 the formation of 'taxing districts of the second class' was authorized, and under that act such a 'taxing district' was organized for Brownsville in 1883. Acts 1881, c. 127, p. 174. By these two acts 'commissioners' were substituted for the formerly existing 'mayor and aldermen,' with all the usual authority, legislative, executive and judicial, except the power to levy taxes, which was prohibited. But the act of 1879 especially enacted that nothing contained in it should impair the obligation of then existing contracts, and the act of 1881 'hereby levied' a tax of one dollar per hundred, one-half of which was to be applied to the current expenses and the other to the old debts. Specific power was also given to one of the 'commissioners,' called the 'secretary and financial agent,' to assess and collect this tax. The general act of 1883, already noticed, relating to all taxing districts had been passed, but by an act of 1885 the act of 1881, relating to 'taxing districts of the second class,' was amended, and § 2 gives the commissioners the most ample power to levy

taxes and appropriate money to provide for the payment of 'all the debts and current expenses of the districts.' Acts 1885, c. 82, p. 162. It is apparent that, notwithstanding the general act of 1883, and its broad repealing clause, the legislature (or rather the authors of this legislation relating to Brownsville) considered the act of 1881 as wholly unaffected by it. But by a subsequent act of 1885, at the extra session, the full powers given under the former act of that year were taken away, or rather limited to the payment of the 'compromise' bonds only; the evident object of the last act being to correct this last careless blunder of a departure from the general plan of relief already fully commented upon. Acts extra sess. 1885, c. 10, p. 75."

The act of the extraordinary session referred to was approved June 10, 1885, and reads thus:

"SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, That section 2 of an act entitled 'An Act to establish taxing districts of the second class, and to provide the means of local government therefor,' passed March 30, 1885, be so amended as to read as follows: That section 8 of said act, passed April 1, 1881, be so amended as that the Board of Commissioners, after the debts of the taxing districts shall have first been compounded between said taxing districts and creditors, shall have power by ordinance within the district to levy taxes upon all property taxable by law for state purposes, and upon all privileges and polls taxable by law for state purposes, and may appropriate the money arising from the collection of taxes so levied, after defraying the current expenses of the taxing district, to the payment of the debts of said taxing district that have been compromised; and anything in said section 2d, or in the act passed March 30, 1885, in conflict with this act is hereby repealed.

"SEC. 2. And be it further enacted, That this act take effect from and after its passage, the public welfare requiring it."

The following were among the conclusions reached and announced by the court:

"If a municipal charter be repealed and the same inhabitants and territory be reorganized into another corporation,

the latter is the successor of the former, both in the corporate obligation to pay the existing debts and those corporate powers of taxation conferred as a part of the remedy of the creditors; and any statutory prohibition of its exercise is void, under the inhibition of the Federal Constitution against impairing the obligation of contracts.

"Those agencies existing for the local government of a municipality are bound to perform such duties as are necessary to enforce the taxing power, although not especially designated for that purpose, if there be a general grant of the power of taxation to the municipality itself. This duty is implied from the general grant, whether it be conferred directly by statute upon the particular municipality or devolved upon it as the successor in corporate obligation through a grant to its predecessor. *Therefore* a *mandamus* will lie to enforce, by taxation, the payment of judgments against the original corporation, to be directed to the governmental agencies of the new corporation, they to proceed according to the general laws of the State governing the exercise of the taxing power by municipalities possessing the authority.

"Under the legislation of Tennessee repealing municipal charters and reorganizing the inhabitants into taxing districts, contrived to compel creditors to accept a compromise of their debts at reduced amounts, the prohibitions of the exercise of the taxing power by the new local governments are void, so far as relates to those grants of that power to the old corporations, which enter into contracts as a part of the remedy of creditors; and the 'taxing districts' may be compelled to exercise the power given by these original grants, by proceeding, according to the general tax laws of the State, to certify to the county court clerk the necessary rate to pay the judgment, to be extended upon the tax-books and collected as other taxes are collected. It is not necessary that the particular officials to perform this duty shall be designated in the statute, but the general grant to the corporation implies that the officials governing the municipality shall perform it, and it will be enforced by mandamus against the new commissioners who take the place of the former mayor and aldermen."

"Any taxes levied by the legislature for municipal purposes, or grants of power to a municipality to make such levies, may be repealed, if they be subsequent to the contract involved, as there is no protection under the Federal Constitution except for such powers of taxation as enter into and become a part of the contract itself and belong as a remedy to the creditor."

The demurrer having been overruled, the respondents answered, denying the possession of any power or authority to levy any tax whatever to pay judgments and indebtedness such as represented by the petitioner; and averring that the old corporation had no power or authority in law to levy a tax for such purposes, and consequently no such power or authority devolved upon the taxing district; and that the power and authority to issue the bonds and levy a tax to pay interest thereon, upon which plaintiff's suits were founded, "was given to Brownsville by the act of February 8, 1870, by the legislature of Tennessee, but before the contract was completed or the election under said act of 1870 held by Brownsville, or the bonds issued, the said act of 1870 was repealed and abrogated by the constitution of the State of Tennessee, which went into effect May 5, 1870." Respondents further alleged that the judgments were obtained by default, and that on the previous mandamus proceedings the question of want of power because of the abrogation of the act of February 8, 1870, was not raised. Motion to quash this answer or return was then made by petitioner, and the cause submitted upon such motion, together with an agreed statement of facts to the same effect as the statement in the preceding case, No. 1442, it being also stipulated that the judgments had been obtained by default, and that the question of power in the corporation to levy a tax because the act of 1870 had been abrogated by the constitution, was not raised in defence to the previous applications for writs of mandamus.

The Circuit Court held, (36 Fed. Rep. 149,) that "no defence can be made to a writ of mandamus issued upon a judgment by default against a municipal corporation which might have been made to the original suit upon the coupons," and "there-

fore where bonds issued without legislative authority were invalid, that the defendant corporation was bound by a judgment by default upon the coupons, and could not set up as a defence to the mandamus that there was no act commanding the tax to be levied, this being the same defence as the other, when it depends upon want of authority to issue the bonds, as in this case."

In the opinion of the court, although the act of February 8, 1870, was abrogated by the state constitution and the bonds were therefore void, yet judgment upon the coupons conclusively established the validity of the bonds, and so also the validity of the legislation giving the remedy by a levy of taxes for their payment.

The return of the respondent was accordingly quashed, and judgment entered awarding the peremptory writ as prayed.

Mr. W. W. Rutledge and *Mr. William M. Smith* for plaintiffs in error.

Mr. Sparrel Hill, *Mr. Henry Craft* and *Mr. L. P. Cooper* for defendants in error.

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

Mandamus lies to compel a party to do that which it is his duty to do without it. It confers no new authority, and the party to be coerced must have the power to perform the act.

On the 19th of March, 1886, when this petition was filed, had the Board of Commissioners the power to levy and collect taxes to pay the judgments in question?

The Circuit Court, in deciding that it had, proceeded upon the ground that the source of power was the act of February 8, 1870, and we concur in the view that there was no other. The city of Brownsville possessed no inherent power to tax, and while under an act of February 24, 1870, its inhabitants were constituted a corporation and body politic by the name and style of the "Mayor and Aldermen of the city of Browns-

ville," with power by ordinance "to levy and collect taxes upon all property, privileges and polls taxable by the laws of this State, to appropriate money, and to provide for the payment of the debt and expenses of the city," the power so vested was confined in its exercise to taxation for ordinary municipal purposes, and the payment of debts contracted in the ordinary administration of municipal affairs. Debt created by the issue of bonds in aid of railroad construction was not within the purview of the charter power, but by the act of February 8, 1870, the power to tax to pay the interest on and create a sinking fund for the redemption of the bonds authorized to be issued thereunder was expressly given.

This express grant fell with the abrogation of the act by the taking effect, on the 5th of May, 1870, of the new state constitution, and in *Norton* v. *Brownsville*, *ante*, 471, we have held that the bonds, upon coupons detached from which, the judgments sought to be collected here were rendered, were void, not because of a defective exercise of the power to issue them, but because of a total absence of such power.

It is, however, contended that the coupons, having passed into judgments, not only is all enquiry into their validity precluded, but also any denial of the power to tax to pay them granted by the act of February 8, 1870.

As already remarked, the Circuit Court did not hold that the peremptory writ should go to command a levy to pay judgments as debts in that form, but based its order upon the inability of the respondents by reason of the judgments to assert the abrogation of the act in question.

Under the legislation between the issue of the bonds in 1870 and this application in March, 1886, authority to levy taxes to pay debts of the character represented by these judgments, when uncompromised, did not exist at the latter date, so that plaintiff was remitted, in the assertion of a right to that remedy, to the time when the bonds were issued, and as the city had then no power to tax to pay them other than that derived from the act of February 8, 1870, the relator by his pleadings opened the facts which attended the judgments

for the purpose of counting upon that act as furnishing the remedy which he sought. In this he in effect asked the court to order the levy of a tax to pay the coupons, and relied on the judgments principally as creating an estoppel upon a denial of the power to do so.

Thus invited to look through the judgments to the alleged contracts on which they are founded, and finding them invalid for want of power, must we nevertheless concede to the judgments themselves such effect, by way of estoppel, as to entitle the plaintiff *ex debito justitiæ* to a writ commanding the levy of taxes under a statute which was not in existence when these bonds were issued?

The case of *Harshman* v. *Knox County*, 122 U. S. 306, 319, is referred to by the learned judge holding the Circuit Court as in principle indentical with this.

In that case, under § 17 of the General Railroad Law of Missouri, the County Court of a county was authorized to subscribe to the stock of railroad companies, though created by special charter, provided the requisite assent of the qualified voters was duly obtained; and § 18 of the law provided that a special tax might be levied for the purpose of paying such bonds *without limit as to its amount.* Under § 13 of the act incorporating the Missouri and Mississippi Railroad Company, taxes might be levied to pay bonds issued thereunder, but not to exceed one twentieth of one per cent upon the assessed value for each year. Harshman recovered judgment upon bonds and coupons issued by Knox County in part payment of a subscription made by said county to the capital stock of the Missouri and Mississippi Railroad Company, upon a petition setting forth that the subscription was authorized under the 17th section of the General Railroad Law. The judgment not being paid, he brought his proceeding by mandamus for the levy of a special tax to pay it, without limit as to the percentage, again alleging that the subscription, in part payment of which the bonds were issued, was authorized by vote under said 17th section.

Upon the trial the Circuit Court required the relator to put in, with the record of the proceedings and judgment, the

bonds; and it appeared that the latter recited that they were issued for a subscription authorized by the act incorporating "the Missouri and Mississippi Railroad Company;" and as the jury found that the relator had not proved that, despite the recitals in the bonds, they were issued under the general law, the court rendered judgment in favor of the respondents. But this court reversed that judgment upon the ground that, as "it was part of the plaintiff's case to show, not merely the execution of the bonds by the county authorities, but that they were issued in pursuance of a law making them the valid obligations of the county," and it having been averred that they were issued under § 17 of the General Railroad Law, (c. 63, Stat. 1866,) that fact was confessed by the default, and its truth stood admitted on the record, and as mandamus in such case was a remedy in the nature of an execution, it could in that case be limited in its mandate "only by that which the judgment itself declares." And the court say, Mr. Justice Matthews delivering the opinion: "It may well be that in a case where the record of the judgment is silent on the point, the original contract may be shown, notwithstanding the merger, to determine the extent of the remedy provided by the law for its enforcement; but that is not admissible where, as in this case, the matter has been adjudged in the original action. . . . By the terms of the judgment in favor of the relator, it was determined that the bonds sued on were issued under the authority of a statute which prescribes no limit to the rate of taxation for their payment. In such cases, the law which authorizes the issue of the bonds gives also the means of payment by taxation. The findings in the judgment on that point are conclusive."

But there the power to issue the bonds was not questioned. The controversy was as to the rate of taxation, depending upon which act they were issued under. If the original contract could have been resorted to, the decision might have been otherwise as to the rate, but it was held that that could not be done, because, from the averments which formed part of the complete judgment record, it appeared that the bonds were issued under one act rather than the other, while each of the

acts fully authorized the issue and gave the power to tax to pay. But in the case at bar it appeared from the judgment records, or if not, from relator's petition, that the bonds were issued under an abrogated statute, and were consequently void, and that the respondents possessed no power to tax to pay them, because that power was given only by the statute which had so ceased to exist.

The power invoked is not the power to tax to pay judgments, but the power to tax to pay bonds, considered as distinct and independent, and therefore, when the relator is obliged to go behind his judgments as money judgments merely, to obtain the remedy pertaining to the bonds, the court cannot decline to take cognizance of the fact that the bonds are utterly void and that no such remedy exists. *Res judicata* may render straight that which is crooked, and black that which is white, *facit ex curvo rectum, ex albo nigrum*, (*Jeter* v. *Hewitt*, 22 How. 352, 364;) but where application is made to collect judgments by process not contained in themselves, and requiring, to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the court should not be granted when upon the face of the record it appears, not that mere error supervened in the rendition of such judgments, but that they rest upon no cause of action whatever.

The judgment is reversed and the case remanded, with a direction to dismiss the petition.

NORTON *v.* COMMISSIONERS OF THE TAXING DISTRICT OF BROWNSVILLE.

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

No. 1455. Submitted January 4, 1889. — Decided March 5, 1889.

The writ of error being brought December 28th, 1886, to review a judgment rendered November 29, 1886, the citation being returnable October Term, 1887, and the record being filed in this court December 20, 1888; *Held*, that the court was without jurisdiction.

Syllabus.

THE case is stated in the opinion.

Mr. Sparrel Hill, *Mr. Henry Craft* and *Mr. L. P. Cooper* for plaintiffs in error.

Mr. W. W. Rutledge and *Mr. William M. Smith* for defendants in error.

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

Judgment was rendered against the plaintiffs in error in the Circuit Court of the United States for the Western District of Tennessee on the 29th of November, 1886, and writ of error brought December 28th, 1886, accompanied by a citation to the adverse party, duly returnable to the October Term, 1887, and served in January and March of the latter year. But the record was not filed herein until December 20th, 1888, and the rule is settled that under such circumstances we do not entertain jurisdiction. *Grigsby* v. *Purcell*, 99 U. S. 505; *Credit Company* v. *Arkansas Central Railway Co.*, 128 U. S. 258; *Hill* v. *Chicago & Evanston Railroad Co.*, *ante*, 170; *Edmonson* v. *Bloomshire*, 7 Wall. 306.

The writ of error is

Dismissed.

McKENNA *v.* SIMPSON.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 767. Submitted January 4, 1889. — Decided March 5, 1889.

A state court has jurisdiction of an action brought by an assignee in bankruptcy to set aside, as made to defraud creditors, conveyances made by the bankrupt before the bankruptcy.

When an assignee in bankruptcy resorts to a state court to set aside a conveyance by the bankrupt as made to defraud creditors, and no question is raised there as to his power under the acts of Congress, or as to the rights vested in him as assignee, the judgment of the state court is subject to review here in the same manner and to the same extent as

proceedings of a similar character by a creditor to set aside conveyances in fraud of his rights by a debtor.

The decision of the state court in this case, as to what should be deemed a fraudulent conveyance and as to the application of the evidence in reaching that decision, presents no Federal question.

THE case, as stated by the court in its opinion, was as follows:

This was a suit by an assignee in bankruptcy to set aside certain conveyances of the bankrupt, and of others under his direction, upon the ground that they were made to defraud his creditors. It was commenced in one of the courts of Tennessee. The facts upon which it is founded, briefly stated, are as follows: In August, 1878, Robert McKenna, a resident of that State, one of the defendants below, filed his petition in bankruptcy in the District Court for the Western District of Tennessee, and was, in November, 1878, adjudged a bankrupt. In December following, Oscar Woodbridge was appointed his assignee, and a deed of assignment was made to him of the property and effects of the bankrupt.

In May, 1880, the assignee filed a bill in the Chancery Court of Shelby County, Tennessee, against the bankrupt and his infant daughter, Maud McKenna, to set aside, as fraudulent and void, certain conveyances of about two hundred acres of land in that county; one executed by the bankrupt, Robert McKenna, dated February 15, 1873, to Solomon Rose, for the alleged consideration of $8000; one executed by Rose on the same day for the like consideration to Mrs. John Kirkup, of Kentucky, a sister of McKenna; and one executed by Mrs. Kirkup, August 1, 1876, to Mrs. Anna McKenna, wife of the bankrupt, and her three children, for the alleged consideration of $5000. Of these grantees, Maud McKenna was the only one surviving when the bill was filed. Metcalf and Walker were also made defendants because they claimed a lien upon the premises which had been adjudged in their favor in another suit. Woodbridge, the assignee, having died, the suit was revived in the name of J. Lawrence Simpson, who had been appointed assignee in place of the deceased. Afterwards

the defendant Robert McKenna filed an answer to the complaint, denying that the conveyances were fraudulent and void, and alleging that the object of them was to effect a settlement of the land upon his wife and children, and that his financial condition at the time was such as to render it legal and proper for him to do so, as he had no debts. Robert McKenna having been appointed guardian of Maud McKenna, an answer was filed by him, as such guardian, for her, in which substantially the same matters of defence were set up. The defendants Metcalf and Walker filed an answer and also a cross-bill, asserting their lien on the premises. Proofs were then taken, from which it appeared that no money consideration ever passed between the parties to the several conveyances mentioned; that Solomon Rose, grantor to Mrs. Kirkup, never saw her, and did not remember anything about the transaction, except that McKenna came to his office and asked him to go to the court-house and make the conveyance; and that the deed of Mrs. Kirkup, dated August 1, 1876, was acknowledged July 18, 1878, one month before McKenna's bankruptcy, and was not registered until January 15, 1879, six months afterwards. The court held that the conveyances were voluntary and fraudulent, and made to hinder, delay and defraud the creditors of the bankrupt McKenna; and further, that the conveyances were inoperative to create an estate in the wife and children of McKenna as against the assignee in bankruptcy, the same not having been filed for registration until after the adjudication of the bankruptcy of McKenna. It was also held that the defendants Metcalf and Walker were entitled to the lien asserted by them. A decree was accordingly entered in favor of the complainant, adjudging that the title to the land was in him as assignee, and that neither the defendant Robert McKenna nor Maud McKenna had any title thereto, and ordering that the complainant recover the land and possession thereof; and also in favor of the defendants Metcalf and Walker for their lien on the land. On appeal to the Supreme Court of the State a decree was entered there, in substance, and almost in identical language, in effect affirming the decree appealed from. To review this latter decree the

case is brought here on writ of error by Robert and Maud McKenna. The defendants in error now move to dismiss the writ on the ground that this court has no jurisdiction to review that decree.

Mr. William M. Randolph for plaintiffs in error, argued the case on its merits in his brief. On the question of jurisdiction, he said: In *Glenny* v. *Langdon*, 98 U. S. 20, Mr. Justice Clifford said: "Neither the assignee nor any creditor can have any greater right under the Bankrupt Act than the act itself confers." In the same case the same judge said: "Creditors can have no remedy which will reach property fraudulently conveyed, except through the assignee, for two reasons: 1, because all such property, by the express words of the Bankrupt Act, vests in the assignee by virtue of the adjudication in bankruptcy and of his appointment: 2, because they cannot sustain any suit against the bankrupt. Property fraudulently conveyed vests in the assignee, who may recover the same and distribute its proceeds as the Bankrupt Act requires." In that case the bill was by creditors who sought to maintain a suit to set aside a conveyance made by bankrupt, in fraud of the creditors, the assignee refusing to proceed. In *Trimble* v. *Woodhead*, 102 U. S. 647, *Glenny* v. *Langdon* was re-affirmed, as it was also in the later case of *Moyer* v. *Dewey*, 103 U. S. 301. It is then upon the Bankrupt Act alone that this case is to turn. In *Kidder* v. *Horrobin*, 72 N. Y. 159, the Court of Appeals held that a state court had jurisdiction of an action by an assignee in bankruptcy to recover a debt due the bankrupt. In *Olcott* v. *Maclean*, 73 N. Y. 223, the same court held that a state court had jurisdiction of an action by an assignee in bankruptcy to recover property conveyed by the bankrupt in fraud of his creditors. In *Barton* v. *Geiler*, 108 U. S. 161, this court reviewed on a writ of error to the Supreme Court of Tennessee, a decree rendered in the state court, in a suit brought by an assignee in bankruptcy, to set aside a conveyance made by the bankrupt in fraud of his creditors, and affirmed the decree. And I take it that, although the court did not in that case discuss the question, I am to assume it is

the settled law that the state court in this case had jurisdiction of the original suit, and this court has jurisdiction by the present writ of error. Upon the question of the jurisdiction of this court over the judgment or decree of the Supreme Court of Tennessee by this writ of error, I refer also to *O'Brien* v. *Weld*, 92 U. S. 81; *Sharpe* v. *Doyle*, 102 U. S. 686; *Factors' and Traders' Insurance Co.* v. *Murphy*, 111 U. S. 738; *Hill* v. *Harding*, 107 U. S. 631; *Palmer* v. *Hussey*, 119 U. S. 96; *Winchester* v. *Heiskell*, 119 U. S. 450; *Jenkins* v. *International Bank*, 127 U. S. 484; *Mace* v. *Wells*, 7 How. 272; *Peck* v. *Jenness*, 7 How. 612; *Bush* v. *Cooper*, 18 How. 82.

Mr. C. W. Metcalf and *Mr. S. P. Walker* for defendants in error.

Mr. Justice Field delivered the opinion of the court.

Section 709 of the Revised Statutes points out the cases in which the judgment or decree of the highest court of a State, in which a decision could be had, may be reviewed by the Supreme Court of the United States. It provides for such review in three classes of cases; First, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against its validity; second, where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity; third, where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority.

In neither of the clauses mentioned is there any provision which covers the present case. It is true, by § 4972 of the Revised Statutes the jurisdiction of the District Courts of the United States, as courts of bankruptcy, extends to all cases and controversies arising between the bankrupt and any

creditor or creditors who may claim any debt or demand under the bankruptcy, and to the collection of the assets of the bankrupt, and, indeed, to all acts, matters or things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of his estate, and the close of the proceedings in bankruptcy. Under these provisions the assignee might undoubtedly have brought suit to set aside the conveyances in question in the District Court of the United States for the district. Had he done so, this court would have had jurisdiction to review its decree; but he was not precluded from proceeding in the state court to set aside the alleged fraudulent conveyances. And when he resorted to that court, and no question was raised as to his power under the acts of Congress, or the rights vested in him as assignee, the proceedings were governed, and the judgment of the court upon the validity of the conveyances was subject to review, in the same manner and to the same extent, as proceedings of a similar character by a creditor to set aside conveyances in fraud of his rights by a debtor. *Glenny* v. *Langdon*, 98 U. S. 20, and *Trimble* v. *Woodhead*, 102 U. S. 647, were cases commenced in the Circuit Court of the United States; and *Barton* v. *Geiler*, 108 U. S. 161, was commenced in a state court. See also *Clark* v. *Ewing*, 9 Bissell, 440; *Olcott* v. *Maclean*, 73 N. Y. 223; and *Goodrich* v. *Wilson*, 119 Mass. 429. In the proceedings in the state court no decision was made against the validity of any statute of, or authority exercised under, the United States, or against any title, right, privilege, or immunity claimed under the Constitution of the United States or any statute thereof. No question, indeed, arose under the action of the state court which could bring its decision within the provisions of § 709 of the Revised Statutes.

The several cases to which our attention is called, as being in supposed conflict with this view, have no bearing upon the questions involved. In *O'Brien* v. *Weld*, 92 U. S. 81, the question arose whether under the bankrupt act the District Court of the United States had authority to make the order involved, and the decision of the highest state court was against the authority; and that was held sufficient to sustain

the Federal jurisdiction. In *Factors' Insurance Co.* v. *Murphy*, 111 U. S. 738, the effect to be given to a sale of property under an order of the District Court in bankruptcy was in question, the authority of the court to direct a sale free from encumbrances being denied. *Jenkins* v. *National Bank of Chicago*, 127 U. S. 484, involved a question as to the authority of the assignee in bankruptcy to institute a suit touching any property or rights of property vested in him after the expiration of two years from the time when the cause of action accrued.

The decision of the state court as to what should be deemed a fraudulent conveyance does not present any Federal question, nor does the application by the court of the evidence in reaching that decision raise one.

We are of opinion, therefore, that this court has no jurisdiction to review the judgment of the Supreme Court of Tennessee.

The writ of error must consequently be dismissed; and it is so ordered.

KIMBERLY *v.* ARMS.

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

No. 169. Argued January 21, 22, 1889. — Decided March 5, 1889.

It is not within the general province of a master in chancery to pass upon all the issues in a cause in equity; nor is it competent for the court to refer the entire decision of a case to him without consent of the parties.

When the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, both of fact and of law, and such reference is entered as a rule of court, it is a submission of the controversy to a special tribunal, selected by the parties, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law; and its determinations are not subject to be set aside and disregarded at the discretion of the court.

In practice it is not usual for the court to reject the report of a master, with his findings upon the matters referred to him, unless exceptions are taken to them, and brought to its attention, and unless, upon examination, the findings are found unsupported or essentially defective.

The law exacts good faith and fair dealing between partners, to the exclusion of all arrangements which can possibly affect injuriously the profits of the concern.

Statement of the Case.

If one partner is the active agent of the firm, and as such receives a salary beyond what comes to him from his interest as partner, he is clothed with a double trust in his relations with the other partner which imposes upon him the utmost good faith in his dealings; and if he obtains anything to his own benefit in disregard of that trust, a court of equity will subject it to the benefit of the partnership.

When a letter is mailed, addressed to a person at his post-office address, the presumption is that he receives it.

IN EQUITY. The court, in its opinion, made the following statement of the case:

On the 27th of April, 1878, the complainant, Kimberly, and the defendant, Hannah M. Arms, executed the following articles of agreement:

"Articles of agreement made and concluded this 27th day of April, A.D. 1878, by and between Hannah M. Arms, of Youngstown, Mahoning County and State of Ohio, party of the first part, and Peter L. Kimberly, of Sharon, Mercer County and State of Pennsylvania, of the other part, witnesseth, That the said parties have agreed, and by these presents do agree, to associate themselves in the art, trade and business of leasing, prospecting, buying, mining, working and operating and dealing in lead, iron, silver, gold and other minerals, together with the lands on which the same may be located, and to do and perform all things belonging to said trade or business, which said copartnership shall commence on the 27th day of April, A.D. 1878, and continue until dissolved by either or both of said parties. And to that end and purpose said Hannah M. Arms has this day paid in as capital stock six thousand dollars, and the said Peter L. Kimberly has paid in as capital stock six thousand dollars, which said twelve thousand dollars shall be used, laid out and employed in common between them for their mutual advantage. It is also agreed that all gains, profits and increase as shall arise by reason of said joint business shall be divided equally, share and share alike, between said parties, and that all losses that shall happen to said joint business shall be shared and borne equally between said parties alike.

"That said business shall be carried on under the name and

style of Arms & Kimberly, Charles D. Arms, agent. That Charles D. Arms shall act as agent for said firm, and receive in compensation for his services the sum of twenty-five hundred dollars per annum, or at that rate, while in their employ. That said business shall be carried on in the Territories or States in the United States, or some of them.

"Witness our hands and seals the day and year aforesaid, at Youngstown, O.

"P. L. KIMBERLY. [SEAL.]
"HANNAH M. ARMS. [SEAL.]"

Hannah M. Arms was the wife of the defendant Charles D. Arms, and the instrument, though signed by her, was intended to express an agreement on his part, his name not being used because at the time he was financially embarrassed. She was always treated as a mere nominal party, and he was treated as the real party. On the 10th of May following, Kimberly, having become embarrassed financially, assigned his interest in the partnership thus formed to Edwin M. Ohl. This assignment was made to prevent any interruption in the business of the partnership, Arms having already gone to Arizona in its prosecution. Kimberly took at the time from Ohl a declaration showing that the latter had no personal interest in the partnership, or in the properties that had been or might be acquired by it, but held the interest assigned to him as the trustee of Kimberly. In all subsequent proceedings Kimberly and Charles D. Arms considered and treated each other as the real and sole parties in the partnership, and as solely interested in the properties which it acquired.

Under this contract, and about the first of May following, Arms went to Arizona on the business of the firm, taking with him all its capital, viz., $12,000, to use in its business and to pay his expenses and salary. Whilst there he had his headquarters at Tucson, the capital of the Territory, where he became acquainted with two persons by the name of Witherell and Gage, who were largely interested in property known as the Grand Central Mine, which was reputed to be of great value, and was owned by the Grand Central Mining Company

of Arizona, a corporation created under the laws of Missouri. From them Arms learned of the reputed value of the property, and very naturally became desirous of examining it, and, if found to be as valuable as reported, to acquire an interest in it. Accordingly, in November following, in company with Witherell and two other other persons by the names of Whiteside and Austin, who were also interested in the mine, he went to see the property, travelling a distance of about two hundred miles, a portion of the way through the Apache territory, where they had an escort of soldiers. The expenses attending this visit were large and were borne by Arms and Kimberly. Arms examined the property and found good ore in it. He was informed by one of his companions, Whiteside, that he had in a crude way reduced four tons of ore and obtained $900 in silver. Soon afterwards Arms returned to Ohio, met Kimberly, and reported that he had expended all the moneys of the firm except three twenty-dollar gold pieces. It does not appear that any further account of his expenditure of the moneys was ever rendered.

On the 24th of March, 1879, Arms and Kimberly, after consultation, concluded that it was advisable to increase the capital of their firm to $25,000, and accordingly did so, indorsing upon the original articles an agreement to that effect, signed H. M. Arms by C. D. Arms, and E. N. Ohl, and, pursuant to it, each party paid $6500, Kimberly paying his share to Arms. With this increased capital Arms returned to Arizona, leaving about the first of April, and was there until some time in the following July. Other sums were advanced by Kimberly in the business of the firm as they were from time to time needed. Whilst in the Territory, Arms again made a visit to the Grand Central Mine in company with a mining expert whom he had employed. The expenses of the trip and for the services of the expert were charged to the firm and paid. It is not necessary to state here the different steps taken by Arms which resulted in his acquiring an interest in the Grand Central Mine, by the purchase of a large number of shares of the company owning it with moneys borrowed of one N. K. Fairbank, of Chicago,

for the facts respecting this transaction are detailed in the findings of the master to whom the case was referred, which are hereafter given. The capital of the firm and other sums advanced by Kimberly were invested in various mining properties in Arizona and Colorado, the title of some of which was taken in his name, and of some in the name of Ohl, but all claims arising out of them have been adjusted and settled between the partners.

The only remaining subject of controversy between them grows out of the interest which Arms acquired in the stock of the Grand Central Mining Company, Kimberly claiming that such interest belonged to the firm, and consequently that an undivided half thereof inured to him, and Arms claiming that the interest was acquired by him in his own right and belonged to him individually. The present suit is brought to determine this disputed matter, the complainant, Kimberly, asking for an adjudication in his favor and an accounting by Arms for the stock held by him in the Grand Central Mining Company, and for certain shares in the New York Grape Sugar Company, which he had acquired by a sale of some shares of the mining company. The bill contains all the averments necessary to present the claim of Kimberly, and the answer of Arms contains all the averments necessary to disclose his defence. The answers of the other defendants are not material upon the matters in controversy. Replications to the answers being filed, testimony was taken for some time, when, on the 16th of May, 1884, the parties consented that the case should be referred to a master "to hear the evidence and decide all the issues" between them, and, upon such agreement and at the request of the parties, the court on that day entered the following order:

"By consent and request of all the parties herein, it is ordered by the court that Hon. Richard D. Harrison be and is hereby appointed a special master herein to hear the evidence and decide all the issues between the parties and make his report to this court, separately stating his findings of law and fact, together with all the evidence introduced before him, which evidence shall thereby become part of the report, which

report shall be subject to like exceptions as other reports of masters.

"It is further ordered by like consent and request that said master shall proceed upon twenty days' notice from either party to hear and determine said issues, and with full power and authority to grant such adjournments, amendments, exceptions, and motions as might be granted by the court if the trial was by the court."

Shortly after this order was made a hearing was commenced before the master, and two weeks were occupied in taking testimony and in the arguments of counsel. After holding the case under consideration until April 17, 1885, a period of eleven months, the master made his report, of which the following are the most important parts for the decision of the case, in addition to the facts stated above:

"The report of Richard A. Harrison, special master in chancery, to whom this cause stands referred for the purpose of hearing the evidence and determining all the issues between the parties, and making his report to said court, separately stating his findings of law and fact, together with all the evidence introduced before him, pursuant to an interlocutory decree, rendered at April Term, A.D. 1884.

"Having heard the evidence in the presence of the parties and their counsel, and the arguments of counsel for the parties, in the city of Cleveland, my findings of fact, from such evidence, upon all the issues between the parties, are as follows:"

[The first six findings set forth substantially the facts as to the formation of the partnership between Arms and Kimberly, its object, the original capital put in, and its subsequent increase, the visit of Arms to Arizona on its business, and the purchase of mining properties there, which are narrated above.]

"7. In the years 1878 and 1879, prior to October, 1879, said Charles D. Arms, while acting as the agent of said partnership, and as a partner of said Kimberly, and while receiving a salary from said partnership, and at the expense of said partnership, visited the Tombstone District of Arizona, and the

mining claim then known as the 'Grand Central Mine,' which is in said district, and examined the same, and thus acquired a knowledge of the property.

"8. In the fall of 1879 the Grand Central Mining Company of Arizona, a Missouri corporation, having previously been organized with a capital stock of 800 shares of the par value of $500 per share, representing the said property known as the Grand Central Mine, E. B. Gage and W. F. Witherell, who were the holders of a large portion of said capital stock, proposed to sell a portion of the stock so held by them to said Charles D. Arms, whereupon Arms in October, 1879, came to Sharon, Pennsylvania, where said Kimberly resided, and there met said Kimberly, whereupon it was agreed between them that said Arms should go to Chicago and there arrange with N. K. Fairbank, if possible, to furnish the money to purchase stock in said Grand Central Mining Company of Arizona. Whereupon said Arms did go to Chicago, and did arrange with said Fairbank to furnish $87,500 for the purchase of said stock, and then returned to Youngstown, Ohio, and there again met said Kimberly and informed him of the arrangement he had made with said Fairbank; whereupon it was further agreed between said Arms and Kimberly that if, when Arms got back to Arizona and required the money to purchase said stock, said Fairbank should fail to furnish it, then said Kimberly, upon being notified of Fairbank's failure or refusal to furnish the money, would furnish at least $37,500 for that purpose.

"9. Immediately after making the arrangement last aforesaid, said Arms returned to Arizona, and there, on the 13th of November, 1879, obtained, in writing, from said Gage and Witherell, an option to purchase from them 225 shares of said stock at the price of $87,500 in four months from said date. Said Gage and Witherell also agreed to give said Arms forty additional shares of stock, in case he should finally elect to purchase said 225 shares under said option, and, as a part of said transaction, said Witherell also purchased of said Arms the interest of said Arms and Kimberly in certain mining properties known as the Mexican mine, at and for

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the price of $4500. Afterwards, and prior to March 4th, 1880, said Arms elected to purchase said stock under said option; and, of said 225 shares,

He received	210	shares
Also said (bonus)	40	"
He also purchased of George P. Reed . .	51	"
And of E. B. Gage	23	"
Making in all acquired by said Arms .	324	"

"10. For the purchase of 324 shares, and for assessments upon said stock to pay the expenses of developing said mine and for machinery, said Fairbank advanced to said Arms various sums of money, from time to time; which sums, including interest thereon up to October 13, 1880, aggregated $162,498.08. On or about the 13th of October, 1880, said Arms and Fairbank made a settlement of the moneys so advanced by said Fairbank and of the stock so acquired by said Arms; and said Fairbank received and accepted from said Arms 184 shares of said 324 shares of stock, in full payment and satisfaction of the moneys so advanced by him; leaving said Arms the holder of 140 shares of said stock.

"11. Afterwards, to wit, on or about the —— day of ——, 1881, the Grand Central Mining Company, an Ohio corporation, and a defendant in this suit, was formed and organized, with a capital stock of 100,000 shares of the par value of $100 per share; and said Arms converted said 140 shares of said Missouri corporation into 17,500 shares of said Ohio corporation.

"12. On the 4th of March, 1880, the partnership between said Arms and Kimberly was, by mutual consent, dissolved by them; Arms then claiming that said interest in said Grand Central Mining Company was his own individual property; which claim said Kimberly then disputed, and insisted that said interest belonged to said Arms and himself jointly, in equal proportions. On the 5th of March, 1880, said Edwin N. Ohl signed and delivered to said Arms an instrument of writing whereby he (said Ohl) agreed to convey, upon demand, the property held by him for said firm to said Arms

and Kimberly; and said Arms, at the same time, signed and delivered to said Ohl an instrument of writing, whereby he (said Arms) agreed to convey to said Kimberly, upon demand, all the undivided one half interest, or interests, which he, (said Arms,) had in mining lands and claims, or stocks in mining interests or claims, in the Territory of Arizona, except his interest in what was known as the Grand Central Mining Company; which said interest, it was provided in said instrument, should belong to the said Charles D. Arms absolutely.

"13. Said last-mentioned instrument of writing was not shown to said Kimberly, and he had no knowledge of its provisions until on or about the —— day of July, 1880, when, upon seeing and examining the same for the first time, and after consultation with legal counsel, he, said Kimberly, on the 22d of July, 1880, wrote, addressed and mailed to said Arms, at Youngstown, Ohio, his post-office address, a letter notifying him that he, said Kimberly, would not consent that said Arms should hold said interest in said Grand Central Mining Company as his own property, and insisting that said interest belonged to them jointly, and that he, Kimberly, would have his half of it if he was compelled to get it at the end of a law suit. The evidence does not prove that Arms actually received said letter; and I therefore do not find he received it. Said Kimberly did not know that said first-mentioned instrument was executed until after July, 1880.

"14. On the —— day of August, 1881, said Edwin N. Ohl reconveyed all of his interest in said business to said Peter L. Kimberly.

"15. On the 2nd day of September, 1881, said Kimberly, by his attorney, requested of said Charles D. Arms, who was the president of said Grand Central Mining Company, permission to examine the records and books of said company, and also that said Arms should account with him, said Kimberly, for all the business that he, said Arms, had done since he and said Kimberly had gone into the mining business, all of which said Arms refused to do."

[The 16th and 17th findings show that out of the 17,500 shares of stock of the Grand Central Mining Company, Arms,

sold to different parties, in 1881 and 1882, 4800 shares, receiving therefor in cash $68,900 and from Jebb and Bond 625 shares of stock in the New York Grape Sugar Company, and during those years received cash dividends on his shares amounting to $81,775.]

"Upon the foregoing findings of fact my findings of law are as follows:

"1. That the 12,700 shares of stock in the Grand Central Mining Company standing in the name of said Charles D. Arms on the 14th of August, 1882, and said 625 shares of stock in the New York Grape Sugar Company, received by said Charles D. Arms from said William T. Jebb and H. G. Bond, belong to said copartnership of Arms & Kimberly, composed of said Charles D. Arms and Peter L. Kimberly, and that said Peter L. Kimberly is entitled to have one half of said 12,700 shares of stock and one half of said 625 shares of stock transferred to him.

"2. That the several sums of money received by said Charles D. Arms, from the sales made by him of stock in the Grand Central Mining Company, as well as the several sums of money received by him as dividends on stock held by him in said company, also belong to said copartnership of Arms & Kimberly, composed as aforesaid of said Charles D. Arms and Peter L. Kimberly, and that said Charles D. Arms is liable to said Peter L. Kimberly for one half of said several sums of money, together with interest on such one half, at the rate of six per cent per annum from the respective dates when said moneys were received by said Charles D. Arms."

Then follows a statement showing the amount due from Charles D. Arms to Peter L. Kimberly, on account of moneys thus received by Arms, and also a statement of the depositions offered to the master by the respective parties, which were returned with his report to the court. The report concludes as follows:

"The foregoing is all the evidence offered by either party. On the hearing, counsel for the respective parties agreed that all the evidence so offered, on either side, should be read, sub

ject to the objections by either party, on the ground of incompetency or irrelevancy, and the same was read accordingly.

"Respectfully submitted.

"R. A. HARRISON, *Special Master.*"

Several exceptions were taken by the defendants to the report, amounting in substance to this, that the findings of fact were not supported by the evidence, and that the findings of law were not warranted by the law as applied to the evidence.

On the hearing the court treated the report as merely presenting the testimony in the case, holding that the findings of the master were not entitled to consideration as presumptively correct, so as to throw the burden of proof on the excepting parties. The language of the presiding justice on this head was as follows:

"A question is made as to the legal effect to be given to the findings of fact reported by the special master, it being claimed by counsel for complainant that the presumption in favor of their correctness throws upon the defendants excepting the burden of proof, which otherwise would have to be borne by the complainant. Undoubtedly, in equity causes, where a particular matter, properly referable to a master, has been reported on, the burden is upon the party excepting; but that rule is not applicable to the present case, where the whole cause has been referred, a practice not borrowed from the Code of Procedure of the State, and not sanctioned by the rules prescribed for the courts of the United States sitting in equity. The cause comes before me, as in other cases, for final hearing upon the pleadings and proofs, and, while not conceding to the report of the special master the legal effect claimed for it, it has, nevertheless, in forming the conclusions reached in this decision, had accorded to it that weight which is due to the careful and well-considered opinion of a lawyer chosen by the parties to act as judge, with every qualification to justify the selection."

The court held that the purchase by the defendant, Charles D. Arms, of the shares in the Grand Central Mining Company

was made on his individual account, and not for the firm of Arms & Kimberly, and therefore that the equity of the case was with the defendants. It accordingly entered a decree sustaining the exceptions to the master's report, and setting aside the report and findings and dismissing the bill. The case is here on appeal from this decree.

Mr. Samuel Griffith and *Mr. A. W. Jones* for appellant.

Mr. Thomas W. Sanderson and *Mr. Stevenson Burke* for appellees. *Mr. W. B. Saunders* was with them on the brief.

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

The first question to be considered on the appeal relates to the effect to be given to the findings of fact and of law contained in the report of the special master. The court below refused to treat them as presumptively correct, so as to impose upon the excepting parties the burden of showing error in them. It considered the case as presented on the pleadings and proofs, without reference to the report, to which there was accorded only the weight due to the careful and well considered opinion of a lawyer chosen by the parties to act as a judge, with qualifications to justify the selection. What that weight was, and in what appreciable way it could affect the judgment of the court, does not appear.

A master in chancery is an officer appointed by the court to assist it in various proceedings incidental to the progress of a cause before it, and is usually employed to take and state accounts, to take and report testimony, and to perform such duties as require computation of interest, the value of annuities, the amount of damages in particular cases, the auditing and ascertaining of liens upon property involved, and similar services. The information which he may communicate by his findings in such cases, upon the evidence presented to him, is merely advisory to the court, which it may accept and act upon or disregard in whole or in part, according to its own judgment as to the weight of the evidence. *Basey* v. *Gallagher*,

20 Wall. 670, 680; *Quinby* v. *Conlan*, 104 U. S. 420, 424. In practice it is not usual for the court to reject the report of a master, with his findings upon the matter referred to him, unless exceptions are taken to them and brought to its attention, and, upon examination, the findings are found unsupported or defective in some essential particular. *Medsker* v. *Bonebrake*, 108 U. S. 66; *Tilghman* v. *Proctor*, 125 U. S. 136, 149; *Callaghan* v. *Myers*, 128 U. S. 617, 666. It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him without the consent of the parties. It cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers. But when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law, and such reference is entered as a rule of the court, the master is clothed with very different powers from those which he exercises upon ordinary references, without such consent; and his determinations are not subject to be set aside and disregarded at the mere discretion of the court. A reference by consent of parties, of an entire case for the determination of all its issues, though not strictly a submission of the controversy to arbitration — a proceeding which is governed by special rules — is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise.

The reference of a whole case to a master, as here, has become in late years a matter of more common occurrence than formerly, though it has always been within the power of a court of chancery with the consent of parties, to order such

a reference. *Haggett* v. *Welsh*, 1 Sim. 134; *Dowse* v. *Coxe*, 3 Bing. 20; *Prior* v. *Hembrow*, 8 M. & W. 873. The power is incident to all courts of superior jurisdiction. *Newcomb* v. *Wood*, 97 U. S. 581, 583. By statute in nearly every State, provision has been made for such references of controversies at law. And there is nothing in the nature of the proceeding, or in the organization of a court of equity, which should preclude a resort to it in controversies involving equitable considerations.

By the consent in the case at bar it was intended that the master should exercise power beyond that of a reporter of the testimony. If there had been such a limitation of his authority, there would have been no purpose in adding to his power "to hear the evidence" the power to "decide all the issues between the parties and make his report to the court, separately stating his findings of law and of fact" together with the evidence. To disregard the findings and treat the report as a mere presentation of the testimony is to defeat, as we conceive, the purpose of the reference and disregard the express stipulation of the parties. We are, therefore, constrained to hold that the learned court below failed to give to the findings of the master the weight to which they were entitled, and that they should have been treated as so far correct and binding as not to be disturbed, unless clearly in conflict with the weight of the evidence upon which they were made. That there was no such conflict is manifest. Upon nearly every important particular relating to the partnership between Arms and Kimberly, and its business, there is hardly any discrepancy in the testimony of the parties. It is only as to the circumstances under which Arms obtained his loan from Fairbank, with which he purchased the shares in the Grand Central Mining Company, that there is any serious dispute; and as that transaction is viewed — as the act of a partner or agent of the firm, or as the act of the individual without regard to such partnership — the conclusion is reached as to his liability to account for them. If the findings are taken as correct — there not being sufficient evidence to justify a disregard of them — there is an end to the controversy, for in accordance with them the firm had an interest in the shares

purchased, and the complainant an equitable right to his proportion upon its dissolution.

But, independently of the findings, the facts, which are undisputed or sustained by a great preponderance of evidence, must, we think, lead to the same conclusion. As already stated, Arms made two visits to Arizona on the business of the partnership, which consisted principally in the purchase and sale of mining properties, and whilst there on both occasions he visited and examined the Grand Central Mine, taking long trips for that purpose, accompanied on one of them by an experienced expert, and thus ascertained the great value of the property. The expenses incurred for himself on both trips and for the expert were charged to and paid by the firm. On one of these visits he met Gage and Witherell, who held certain shares in the company owning that mine, which they desired to sell. Upon his return north, in October, 1879, he informed Kimberly of the shares thus held, and advised their purchase. How the necessary means for that purpose could be raised was then discussed between them, Kimberly expressing a willingness to act upon the judgment of Arms and furnish his portion of the money. Arms mentioned that he had a friend in Chicago by the name of Fairbank, a man of great wealth, whom he thought he could interest in the purchase and induce to advance the money. After this consultation Arms went to Chicago and there succeeded in making an arrangement with Fairbank, by which the latter was to furnish the money to purchase the shares held by Gage and Witherell. The arrangement provided that from the moneys first received from the sale or operation of the mine Fairbank should be reimbursed his advances, and that the sum or interest remaining should be equally divided; but in case the investment proved a failure, he should be paid one half of his advances. Arms then returned to Youngstown, in Ohio, and, October 13, telegraphed Kimberly, who was at Sharon, in Pennsylvania, inquiring where he could meet him. Kimberly replied that he would leave for Youngstown that afternoon, and did so, joining Arms at that place. Gage had previously been there, and Kimberly, on his arrival, immediately inquired

for him, evidently desirous of seeing him respecting the proposed purchase of shares held by him and Witherell; for it is not suggested that Gage had any other business than the sale of the shares, with either member of the firm. Arms told Kimberly that Gage had left that morning or that day, and then informed him of the arrangement with Fairbank, including the agreement to refund one half the advances in case the investment proved a failure. To this arrangement Kimberly assented. Arms further said that there might be some misunderstanding with Fairbank, and he wished to know if, in that event, Kimberly would raise the necessary funds to make the purchase, mentioning from forty to fifty thousand dollars. Kimberly assured him that he would if Arms thought it advisable, that is, that the property was worth the money. Soon afterwards Arms went to Arizona and purchased from Gage and Witherell 225 shares in the Grand Central Mining Company. They also gave him a bonus of forty additional shares, which they had agreed to do in case the purchase was made. Arms also effected a purchase of 74 shares from other parties. All these purchases were made whilst the partnership between Arms and Kimberly continued as originally formed, changed only by the increase in its capital. The partnership was not dissolved until March 4, 1880. Under these circumstances, the purchase must be deemed to have been made in the interest of the partnership. One member of a partnership in a particular business cannot secretly engage on his own account in such business and keep his earnings to himself. Such conduct would inevitably lead to gross abuses, tempting one partner to apply to his own use profitable adventures and to turn over to the firm those which were failures. The law exacts good faith and fair dealing between partners, to the exclusion of all arrangements which could possibly affect injuriously the profits of the concern. Arms was not merely a partner of Kimberly; he was the agent of the firm for the transaction of its business, and as such was allowed a salary beyond the interest coming to him as partner. He therefore stood in his relation to Kimberly clothed in some respects with a double trust, both of which imposed upon him the utmost good faith in his dealings, so that he might never

sink the interest of the firm into that of himself alone. Whatever he may have obtained in disregard of such trust, a court of equity will lay hold of and subject to the benefit of the partnership. Neither by open fraud nor concealed deception, nor by any contrivance masking his actual relations to the firm, can a member of it, or an agent of it, be permitted to hold to his own use acquisitions made in disregard of those relations, either as partner or agent. In this statement of their duties we are repeating doctrines of common knowledge, which will be found fully set forth and illustrated in approved treatises on partnerships and agency and in the adjudications of the courts. Thus, in *Mitchell* v. *Reed*, 61 N. Y. 123, to cite one instance, the Court of Appeals of New York held that one member of a partnership could not, during its existence, without the knowledge of his copartners, take a renewal of a lease for his own benefit of premises leased by the firm, upon which it had made valuable improvements and enhanced their rental value, although the term of the renewed lease did not begin until the termination of the partnership. And in giving its decision, the court said: "The relation of partners with each other is one of trust and confidence. Each is general agent of the firm and is bound to act in entire good faith to the other. The functions, rights and duties of partners in a great measure comprehend those both of trustees and agents, and the general rules of law applicable to such characters are applicable to them. Neither partner can, in the business and affairs of the firm, clandestinely stipulate for a private advantage to himself; he can neither sell to nor buy from the firm at a concealed profit for himself. Every advantage which he can obtain in the business of the firm must inure to the benefit of the firm. These principles are elementary." See Story on Part., §§ 174–178; Story on Agency, § 211.

We do not attach any weight, as against the conclusions reached, to the fact that on the 5th of March, 1880, the day following the dissolution of the partnership, in an instrument executed by Arms, agreeing to convey to Kimberly, on demand, the undivided one half interest which he, Arms, had in mining lands or claims, or stocks in mining interests, or

claims in the Territory of Arizona, purchased or located by him prior to January 1st, 1880, he excepted the interest claimed by him in the Grand Central Mining Company, stating that said interest should belong to him absolutely. That instrument was delivered by Arms to Ohl, who kept it in his possession until some time in the following July. It was not shown to Kimberly, nor had he had any knowledge of it until then. So soon as he saw it, after consultation with counsel, he wrote and mailed to Arms a letter under date of July 22, 1880, notifying him that he would not consent to his holding the interest in the Grand Central Mining Company as his own property, and stating that the said interest belonged to them jointly, and that he, Kimberly, would have half of it if he was compelled to obtain it by legal proceedings. Though it is not shown that Arms received the letter, yet, as it was mailed to his post-office address in Youngstown, Ohio, the presumption is that he did receive it. At any rate, Kimberly never in any way assented to the correctness of the statement in the instrument as to Arms' alleged sole interest in the Grand Central Mining Company, but on the contrary repudiated it so soon as it was brought to his knowledge.

The fact that the transaction with Fairbank and the purchase of the shares were made in the name of Arms alone, does not affect the question. All the purchases for Arms and Kimberly were made in his name alone or in that of Ohl. Not one was made in the firm name of Arms & Kimberly. Nor does it make any difference that no money was advanced by Kimberly for the purchase. None was advanced by Arms; the money was raised by a loan which Arms negotiated upon conditions that proved profitable to the lender as well as to himself, and of course to his partner.

The case of *Bissell* v. *Foss*, 114 U. S. 252, does not seem to us to have any bearing on the subject under consideration. There the question was whether a member of a mining partnership, that is, a partnership formed for the development and working of a mine, could acquire the shares of an associate without the knowledge of the other associates and hold them on his own account; and the court held that it was lawful for

him to do so. Mining partnerships or associations, whilst governed by many rules relating to ordinary partnerships, have some rules peculiar to themselves. One of such rules is that a member may convey his interest or shares to another person without dissolving the partnership, and thus bring into it a new member without the consent of his associates; and may purchase interests in the same or in other mines for his own benefit without being required to account to the partnership for the property. *Kahn* v. *Smelting Co.*, 102 U. S. 641.

The partnership between Arms and Kimberly was not a mining partnership, in the proper sense of that term. It was not a partnership for developing and working mines, but for the purchase and sale of minerals and mining lands, and in that respect was subject to the rules governing ordinary trading or commercial partnerships. It can no more be called a mining partnership than a partnership for the purchase of the products of a farm and the lands upon which those products are raised, can be called a partnership to farm the lands.

It follows from the views expressed that the decree of the court below must be

Reversed, and the clause remanded with directions to confirm the report of the special master, and to take further proceedings not inconsistent with this opinion.

PETERS *v.* ACTIVE MANUFACTURING COMPANY.

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

No. 65. Argued January 25, 1889. — Decided March 5, 1889.

Claims 1 and 2 of letters patent No. 178,463, granted June 6, 1876, to George M. Peters, for an improvement in tools for attaching sheet-metal moldings, on an application filed March 7, 1876, namely, "1. A sheath for applying metallic moldings, said sheath being furnished with a stop for advancing the molding, all substantially as and for the purpose specified;

2. The within described sheath for applying metallic moldings, said sheath being furnished with recesses *f' g'*, and a key G, or their equivalent stops, as and for the purposes explained," cover improvements which are merely adaptations of old devices to new uses, not involving invention.

Claim 3 of the patent, namely, "3. A sheath composed of two grooved bars A E B E', bolts or screws C, and washers D, whereby the sheath is rendered capable of adjustment to contain moldings of different diameters, as herein set forth," is not infringed by an apparatus in which no washers are used for adjustment.

IN EQUITY, to restrain an alleged infringement of letters patent. Decree dismissing the bill, from which complainant appealed.

The case is stated in the opinion.

Mr. Benjamin Butterworth for appellant.

Mr. Arthur Stem for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Southern District of Ohio, in January, 1882, by George M. Peters against The Active Manufacturing Company, for the alleged infringement of letters patent No. 178,463, granted June 6, 1876, to the plaintiff, George M. Peters, for an improvement in tools for attaching sheet-metal moldings, on an application filed March 7, 1876.

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

"My invention comprises a peculiarly constructed sheath or holder, wherewith the ornamental molding on the top of the carriage dashes may be applied in the most expeditious manner, and without bending or buckling, or otherwise injuring or marring either said molding or its supporting dash-board.

"In its preferred form, said sheath consists of a two-part holder or receiver, connected together with bolts and washers, and provided with a longitudinal groove or channel of such size and shape as to readily inclose the molding that is to be applied to the upper edge of the dash, a key or other suitable

stop being fitted within the sheath, to prevent the molding slipping through said longitudinal groove when the device is in use.

"The sheath is rendered capable of carrying moldings of various lengths and sizes by an arrangement of adjusting devices whose details of construction will be hereinafter more fully explained.

"In the accompanying drawing, forming part of this specification, Fig. 1 is a perspective view of a two-part sheath in an inverted position, the middle portion and rear end of the device being broken away. Fig. 2 is a perspective view of the molding detached from sheath. Fig. 3 is a plan showing the molding located within the sheath. Fig. 4 is a longitudinal section through the rear end of the sheath, with a screw stop for the molding to bear against. Fig. 5 is a transverse section at the line *x x*, showing the molding incased within the sheath; and Figs. 6 and 7 represent modifications of the holder.

"A and B represent two metallic bars of any appropriate size and having their lower outer edges slightly bevelled off at *a* and *b*. These bars are maintained in a parallel position with reference to each other by means of bolts or screws C and washers or fillings D. Instead of washers and bolts or screws C, the bars may be maintained in parallel position, and separated or brought nearer together, by means of right and left screws, the right-hand thread of said screw engaging a female screw in one bar, and the left-hand thread engaging a female screw in the other.

"The bar A has a longitudinal groove E, formed along its inner surface and near the lower edge of said bar. E' is a precisely similar groove made in the other bar B, and when the two members A B of the sheath are joined together the grooves E E' form a channel that is approximately circular in its transverse section.

"F represents a hook, shackle, or link, pivoted to the front end of the sheath and guttered at *f*, to avoid contact with the upper edge of the dash.

"The bars are furnished with undercut notches *g g'* to receive a detachable key G, which latter serves as a stop or

FIG. 1.

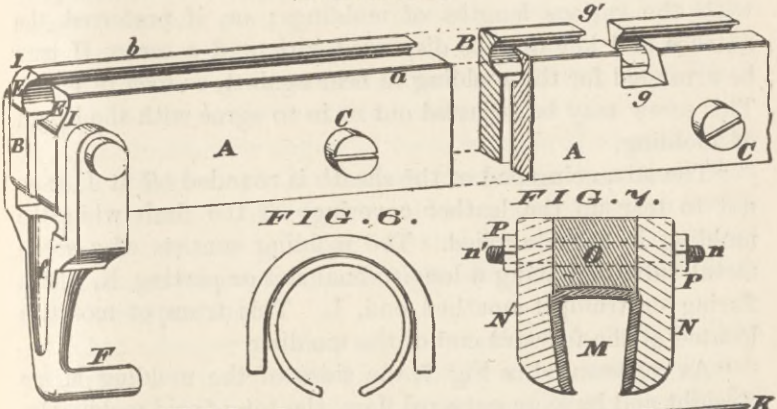


FIG. 6.

FIG. 4.

FIG. 2.

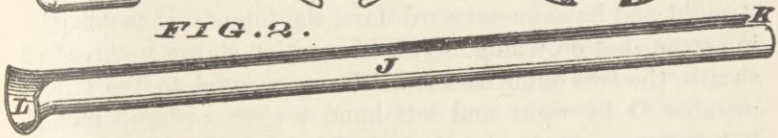


FIG. 3

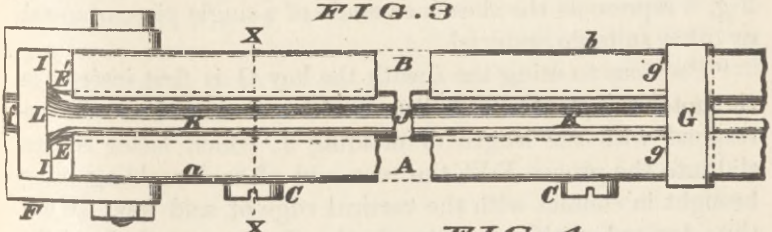


FIG. 4.

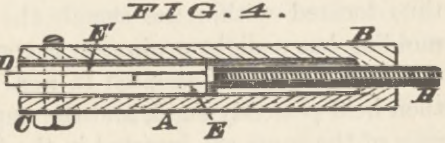
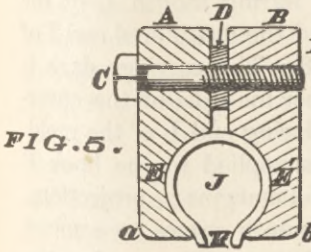


FIG. 5.



abutment for the rear end of the molding to rest against. A series of similar notches may be made in the bars A B at such distances from the front end of the sheath as will correspond with the various lengths of moldings; or, if preferred, the notches and key may be dispensed with, and a screw H may be arranged for the molding to bear against, as seen in Fig. 4. This screw may be adjusted out or in to agree with the length of molding.

"The advancing end of the sheath is rounded off at I, so as not to tear up the leather coverings of the dash while the molding is being applied. The molding consists of a sheet-metal tube J, having a longitudinal slot or parting K, and a flaring or trumpet-mouthed end, L. This trumpet mouth is located at the forward end of the molding.

"As represented in Fig. 7, the sides of the molding M are straight and have an outward flare, the top of said molding being somewhat crowning. This illustration shows a three-part sheath, the two outer bars N N′ being secured to the central member O by right and left hand screws *n n′* and nuts P. Fig. 6 represents the sheath as made of a single piece of metal, or other suitable material.

"Previous to using the sheath the key G is first inserted in the notches *g g′*, at such a distance from the end I as will correspond with the length of molding J, which latter is then slid into the groove E E′, the rear end of said molding being brought in contact with the vertical edge of said key. When thus located within the sheath the flaring mouth L of the molding has a slight projection beyond the chamfered end I of the bars A B, as represented in Fig. 3. The carriage dash is then held perfectly rigid, and the upper margins of the coverings of the same are inserted in the flaring end L of the molding, after which any suitable power is applied to the hook F to draw the sheath along the top of said margins or projections. As the sheath advances the flaring mouth serves to conduct the leather margins into the slot K of the molding, and as the grooves E E′ prevent any radial distension of the tube J, it is evident that the molding is caused to embrace said margins in the most uniform and secure manner. After the molding has

traversed the entire length of the dash, the sheath can then be retracted, thereby leaving the tube J in its proper position upon the dash, the flaring end L being either filed off or else disposed of in any other suitable manner. During the progress of the sheath along the top of dash, the molding is impelled forward by the key G, and consequently no strain whatever is brought to bear upon the flaring end L of the tube.

"As a considerable degree of force is required to anchor the molding J securely to the leathern margins, it is evident that the driving action of key G would have a tendency to buckle said tube; but this defect is obviated by making the channel of the sheath of such capacity as to allow a pretty snug fit of the molding within it.

"When a longer molding is to be applied to a dash, the key G is driven out and inserted in another set of notches nearer the rear end of the sheath; or the same results may be effected by causing the molding to abut against the end of screw H, the latter being adjusted either out or in, so as to agree with the length of molding that the sheath is to carry. The width of channel E E′ may be increased, to receive a molding of greater diameter, by removing washers or filling, and inserting thicker ones in their place, or by turning the right and left hand screws, where the latter are employed.

"It is preferred to make the sheath of two pieces, on account of the facility of grooving them; but it is evident the holder may be made of a greater or less number, if desired. (See Figs. 6 and 7.) It is also preferred to have the sheath embrace the molding as completely as possible, so as to bring the lower edges of the bars A B near the parting K, and thereby prevent any spreading of the tube at said slot; but if the tube is sufficiently stiff to prevent such spreading, the sheath need not surround the molding so completely. This modified form of sheath is shown in Fig. 6.

"Furthermore, the sheath may be composed of wood lined with a metallic bushing. It is evident that this form of sheath may be advantageously employed for attaching sheet-metal moldings for tubes to various articles; and I reserve the right to use it for any and every purpose that it is capable of.

"What I claim as new, and desire to secure by letters patent, is

"1. A sheath for applying metallic moldings, said sheath being furnished with a stop for advancing the molding, all substantially as and for the purpose specified.

"2. The within-described sheath for applying metallic moldings, said sheath being furnished with recesses f' g', and a key G, or their equivalent stops, as and for the purposes explained.

"3. A sheath composed of two grooved bars A E B E', bolts or screws C, and washers D, whereby the sheath is rendered capable of adjustment to contain moldings of different diameters, as herein set forth.

"4. The combination of bars, A E B E' and guttered hook or shackle F f, for the object stated."

Infringement is alleged of claims 1, 2 and 3.

The defences insisted upon are want of invention, want of novelty and non-infringement of claim 3.

The substance of the invention set forth in the specification is the use of a sheath or holder or receiver, having in it a longitudinal groove or channel, in which is placed the molding that is to be applied to the upper edge of the dash-board, the sheath or holder, when pulled, drawing with it the molding over the upper edge of the dash-board, and the key or stop being fitted within the sheath or holder, to prevent the molding from slipping through the groove. One useful effect of the sheath is to support the molding laterally, and prevent it from bending or buckling, or injuring the dash-board. Claim 1 covers the use of a sheath furnished with a stop, which operates to prevent the further advancing of the molding when it reaches the stop. Claim 2 covers the use of a sheath with a stop formed by means of notches or recesses, and a detachable key to be inserted in the notches. Claim 3 covers a sheath composed of two grooved bars, parallel to each other, and having bolts or screws connecting them, and washers between them, so as to render the apparatus capable of being adjusted to contain moldings of different diameters.

The Circuit Court entered a decree dismissing the bill, from which the plaintiff has appealed. The opinion of that court,

reported in 21 Fed. Rep. 319, says in regard to claims 1 and 2: "The respondents' evidence establishes that, as early as September, 1867, Joseph P. Noyes, a manufacturer of combs at Binghamton, New York, used a machine for putting moldings on combs, in which the molding was held in a sheath fitting it closely, and having an extension enough smaller to fit the comb. In this extension there was a sliding follower fitted to abut against the end of the comb. At the extreme opposite end of the larger part of the sheath there was a slot across the sheath, containing a key or stop to prevent the sliding of the molding. The follower was attached to a slide and lever, so that when a molding was laid in the larger part of the sheath and the comb in the smaller part, the comb, being prevented from bending by the walls of the sheath, could be forced into the molding by the action of the slide and lever upon the follower, the molding being prevented from bending by the walls of the part of the sheath within which it was placed. This machine was in use more than three years before the date of the complainant's invention. That this was a comparatively small machine and used only for applying moldings to combs, is not material: *Planing Machine* v. *Keith*, 101 U. S. 490. Nor is it material that the groove or gutter was so open in cross-section that the molding could be dropped into it. Fig. 6 of the drawings accompanying the letters patent issued to complainant shows a sheath of like shape, and is referred to in the specifications as a modified form of the sheath patented, and the claim is so broad as to cover any sheath, of any material, shape, or size, for applying moldings to any article. There is nothing more in the sheath patented to the complainant than an adaptation of the sheath used at Binghamton to the application of moldings to carriage dash-boards — an adaptation which would have occurred to a skilled mechanic without the exercise of the inventive faculty. Had the complainant's invention been first in time and patented, the Binghamton sheath would have been an infringement; and, conversely, had the Binghamton sheath been patented, the complainant's would have been an infringement. That which infringes, if later, would anticipate, if earlier." We concur in these views.

The affirmative evidence on the part of the defendant, in regard to the Noyes apparatus, consists of the testimony of Noyes and Yingling, their testimony having been taken in August, 1882. Noyes testified that he had been engaged in making combs, at Binghamton, Broome County, New York, since 1860, and had, since 1864, made combs with metallic moldings for stiffening the backs. He produced one of such combs, marked A, and one of such moldings, marked B. He further testified as follows: "Q. 6. State whether or not you have ever used any machinery for putting these moldings on combs? Ans. I have. Q. 7. Can you describe any of the machines used by you for putting moldings on combs? Ans. Yes. I have one machine in which the molding is held in a groove, which fits it closely, and the same groove has an extension enough smaller to fit the comb closely, and in this extension there slides a follower, which is fitted to abut against the end of the comb. At the extreme opposite end of the larger part of the groove there is a slot across the groove, containing a key or stop to prevent the molding sliding through the groove. The follower before mentioned is attached to a suitable slide and lever, so that when a molding is laid in the larger part of the groove, and the comb in the smaller part, the comb, being prevented from bending by the walls of the groove, can be forced tightly into the molding, by the action of the follower and its connected parts, the molding being, at the same time, prevented from bending by the walls of the larger part of the groove. Q. 8. Can you produce a drawing illustrating the machine above described and its operation? Ans. I here produce a drawing which illustrates said machine. In this drawing, figure 1, A represents the main body of the machine. In the part A is the groove C and its smaller extension D, in which are placed the molding and the comb, as described in my previous answer. O represents the slot in which is placed the key, marked figure 2. E, figure 1, represents the follower B, the slide of which the follower forms a part; L, K, M and H the lever and connecting parts by which E and B is operated. Figure 3 shows an end view of the slide and follower. Q. 9. Into which of the grooves do you

place the metallic molding? Ans. Into the groove C. Q. 10. And into which the comb? Ans. Into the groove D. Q. 11. In use, the key or stop, figure 2, is placed in the slot O to prevent the metallic molding sliding, is it not? Ans. It is. Q. 12. State whether the groove C in the sheath A effectually prevents the metallic molding from bending as it is forced over the back of the comb. Ans. It does. Q. 13. State how long you have used the above-described machine for putting metallic moldings on combs in the manner described. Ans. Since September, 1867. Q. 14. Can you fix the date by any positive evidence besides your memory? Ans. I can; I have referred to the time-book of the men who made the machines, and find the machine to have been finished at the date named, and remember that it was put into immediate use. Q. 15. Has it been used ever since? Ans. It has been in continued use ever since without any alteration. Q. 16. Have you ever made any effort to keep its use a secret, or has it always been open to the inspection of any person who might come into your shop? Ans. I have made no effort to keep it secret, but the shop has always been open to visitors, and any one could see the machine who cared to look at it." The drawing so produced, marked C, shows a machine substantially like that of the plaintiff.

Yingling testified that he was, at the time of testifying, in the employ of Noyes, and, since 1868, or for about fourteen years, had used a machine like that shown by the drawing C, above referred to, for putting metallic moldings upon combs.

Noyes had stated, on cross-examination, in answer to a question as to who made the machine he had described as made in 1867, that William Knopp and his son were in his (Noyes's) employ as machinists at that time, and worked some on it; that his time-book, kept at that time, which he had consulted, contained a record of the fact that Knopp and his son so worked on the machine; and that the machine was built during the first week in September, 1867. In rebuttal, the plaintiff examined as witnesses William Knopp and three persons named Newman, Coyle, and McAuley.

Knopp testified that he was employed in Noyes's comb fac-

tory from 1865 to 1869, and was familiar with the kind of machinery manufactured by them during that time, for use in their comb factory. He then proceeded: "Q. 5. In September, 1867, or at any other time, did you make machinery for putting metallic backs on combs? A. I did. Q. 6. Without going into detail as to the kind you did make, I will ask you whether, in September, 1867, you made, or helped to make, a machine for putting moldings on the backs of combs, where the molding is held in a groove which fits it closely, and the same groove has an extension enough smaller to fit the comb closely, and in this extension there slides a 'follower,' which is fitted to butt against the end of the comb. At the extreme opposite end of the groove there is a slot across the groove, containing a key or stop, to prevent the molding from sliding through the groove. The follower is attached to a suitable slide or lever, so that, when a molding is laid in the larger part of the groove, and the comb in the smaller part, the comb is prevented from bending by the walls of the groove, and can be forced tightly into the molding, by the action of the follower and of the connecting parts? A. I do not remember that I made anything of that kind. Q. 7. Did you at any other time make such a machine? A. I don't remember that I did. Q. 8. Please examine the comb I now hand you, and state whether Noyes Bros. & Co., at that time when you worked for them, and since, manufactured a comb with metallic back similar to this one, and, if so, state how said metallic back was put on the comb. [Comb marked Exhibit A shown witness and offered in evidence by solicitor for complainant.] A. They manufactured a comb in general appearance similar. The metallic back was put on and fastened to the comb by compression. The back was compressed in a vice to make it fit in a groove in the comb tightly. The molding was placed on the comb by hand, and then put in a vice, and the molding pressed up tightly against the comb. Q. 9. Do you remember working on or making machinery for compressing the molding on the comb, as above described? A. I do. Q. 10. Is the mode above described the only way Noyes Bros. & Co. put metallic moldings on that kind of a comb? A. It is. Q. 11.

You was familiar at that time with the mode employed by them for putting moldings on combs, was you? A. I was."

This testimony of Knopp is very inconclusive. He merely testifies, thirteen years after he had left Noyes's establishment, that he does not remember that he made, fifteen years before the time when he was testifying, a machine like that described in question 6 put to him. The drawing produced by Noyes was not shown to Knopp.

The testimony of Newman, Coyle and McAuley amounts to nothing. Although they were employed in the comb factory of Noyes at the time they gave their testimony, in December, 1882, and had been employed there, Newman from 1862, Coyle for 14 or 15 years, and McAuley for about 30 years, neither of them was shown the comb A, nor the molding B, nor the drawing C, above mentioned, nor was a distinct question put to either of them as to the use of a machine like that described in question 6 put to the witness Knopp.

The only difference between Noyes's device and that of the plaintiff is, that in Noyes's the stop holds the molding stationary while the comb is forced into the molding by the action of the follower. But its action is substantially the same as that of the stop in the plaintiff's patent, which prevents the molding from slipping through the groove.

The case falls within the principle applied in *Pennsylvania Railroad* v. *Locomotive Truck Co.*, 110 U. S. 490, and cases there cited.

As to the third claim, it is not infringed, because, in the defendant's apparatus, no washers are used for adjustment.

The decree of the Circuit Court is affirmed.

PETERS *v.* HANSON.

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

No. 66. Argued January 25, 28, 1889.— Decided March 5, 1889.

Claims 1, 2 and 3 of letters patent No. 213,529, granted to George M. Peters, March 25, 1879, for an improvement in vehicle dashes, namely,

"1. The combination of a dash and laterally adjustable attachments, whereby the same may be connected to vehicles of different widths, substantially as set forth. 2. A dash or dash-frame having slots or openings, whereby attachments may be made at different points, substantially as and for the purposes set forth. 3. A dash provided with bearings having slots or openings, substantially as and for the purpose specified," are for improvements which are merely applications of old devices to new uses, not involving invention.

Claim 4 of that patent, namely, "(4). A dash-frame provided with bearings, arranged to strengthen the frame in those parts whereby the dash is to be connected to the laterally adjustable feet or to the vehicle," sets forth no patentable invention.

Claims 1, 2, 3 and 11 of reissued letters patent No. 9891, granted to George M. Peters, October 11, 1881, for improvements in vehicle dash-frames, on the surrender of original letters patent No. 224,792, granted February 24, 1880, on an application filed May 5, 1879, the reissue having been applied for June 15, 1881, namely, "1. A vehicle dash whose lever bar is provided exteriorly with a channel or recess, the metal on either side of the channel or recess affording a bearing for the dash-foot or other portion of the vehicle to which the dash is connected, for the purposes specified. 2. A dash whose lower rail is composed near or at the ends of two thick portions united by an easily perforated web, for the purposes specified. 3. A dash provided with a rail having vertically flat sides, one or both of said sides being exteriorly channelled, substantially as and for the purposes specified." "11. The foot channelled on either or both sides, substantially as and for the purposes specified" are for improvements which amount only to applications of old devices to new uses, not involving invention.

In equity, to restrain an alleged infringement of letters patent. Decree dismissing the bill. Complainant appealed.

The case is stated in the opinion.

Mr. William Hubbell Fisher and *Mr. Benjamin Butterworth* for appellant.

Mr. Arthur Stem for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought by George M. Peters, in the Circuit Court of the United States for the District of Indiana, against Julius A. Hanson and Cortland C. Van Camp, for the alleged infringement of two letters patent granted to George M. Peters, the plaintiff, namely, letters patent No.

213,529, granted March 25, 1879, for an improvement in vehicle dashes, on an application filed June 19, 1875, and reissued letters patent No. 9891, for improvements in vehicle dash-frames, granted October 11, 1881, on the surrender of original letters patent No. 224,792, granted February 24, 1880, on an application filed May 5, 1879, the reissue having been applied for June 15, 1881.

The answer sets up as to both patents want of novelty and patentability, non-infringement, and the invalidity of the reissue, because it has been expanded beyond the invention disclosed in the original patent, and contains new matter not found in that patent, and is for a different invention.

There was a replication to the answer, proofs were taken and the Circuit Court dismissed the bill. The plaintiff has appealed from the decree. We are not furnished with any opinion given by the Circuit Court stating the ground for its action, but it said, in the brief for the appellant, that the ground was that the inventions were not patentable.

So much of the specification of No. 213,529 as is material, and the drawings referred to in it, are as follows:

"My invention relates, . . . secondly, to the attachment of the dash to the vehicle; and this part of my invention renders the dash capable of attachment to vehicles of different widths, so that it can be sold as an article of manufacture, for application to the vehicle by the purchaser. These features of my invention render the construction easy, expeditious, and economical. Another feature of my invention consists in such a novel construction of the dash as that there shall be at the part of the frame thereof to which the laterally-adjustable foot is to be attached a proper bearing surface for the support and bracing of the dash.

"In the accompanying drawings, which form a part of this specification, figure 1 is a perspective view of sufficient of a vehicle to illustrate my invention; Fig. 2, a sectional detached view; Figs. 3, 4, 5, 6, 8, detached views illustrating modifications, and Fig. 7, a detached perspective view.

"One mode of making the dash-frame is shown in the drawings, in which G F are parallel uprights at each end, C

D E parallel cross-rods, and M L short continuations of the rods G F. . . . In order to connect the frame to the vehicle, and further to permit a frame to be applied to vehicles of different sizes, I construct the frame and the foot H so that, by a lateral adjustment in relation to each other, the desired connection to bodies of different widths may be effected. The frames may be varied in construction to effect this result. Thus, in Figs. 1 and 2 the frame has a wide bearing piece N, of any desired length, with a slot to receive the fastenings of the foot or attachment H, by which the dash and the body of the vehicle are connected adjustably, so that, within the limits of the adjustment, the foot secured to the dash may find its bearings on bodies of various widths. The foot may be of any desired shape, being shown with two branches *b d*, one bolted or otherwise secured to the dash, and the other to the body I of the vehicle. By the above-described means the dashes may be furnished to the trade as independent articles of manufacture, as the foot may be fitted to vehicles in the process of construction or afterward, and the dash secured without altering or moving it. For the like reason the feet adapted to the vehicles and dashes may be sold separately.

"The bearing N for the attachment or foot may be within the frame, as shown in Figs. 1, 2, 3, 4, and 8, or it may be in an extension outside of the frame, the result being the same — *i.e.*, the frame being adapted to be secured without change to bodies of different widths. This bearing portion N may be secured permanently or detachably to the frame bars. Thus in Figs. 1 and 2 it is provided with sockets for the reception of studs at the ends of the bars. In any case it affords a strong and rigid connection between the foot and the frame, so that the latter cannot be bent over under anything less than destructive pressure. This is especially the case when both uprights, F and G, are secured to the bearing piece N, whether within or without the frame proper; but when within the frame, and extending up between the uprights, it stiffens and braces the latter.

"The adjustment of the dash and foot is not necessarily limited to the mode described. For instance, it may be

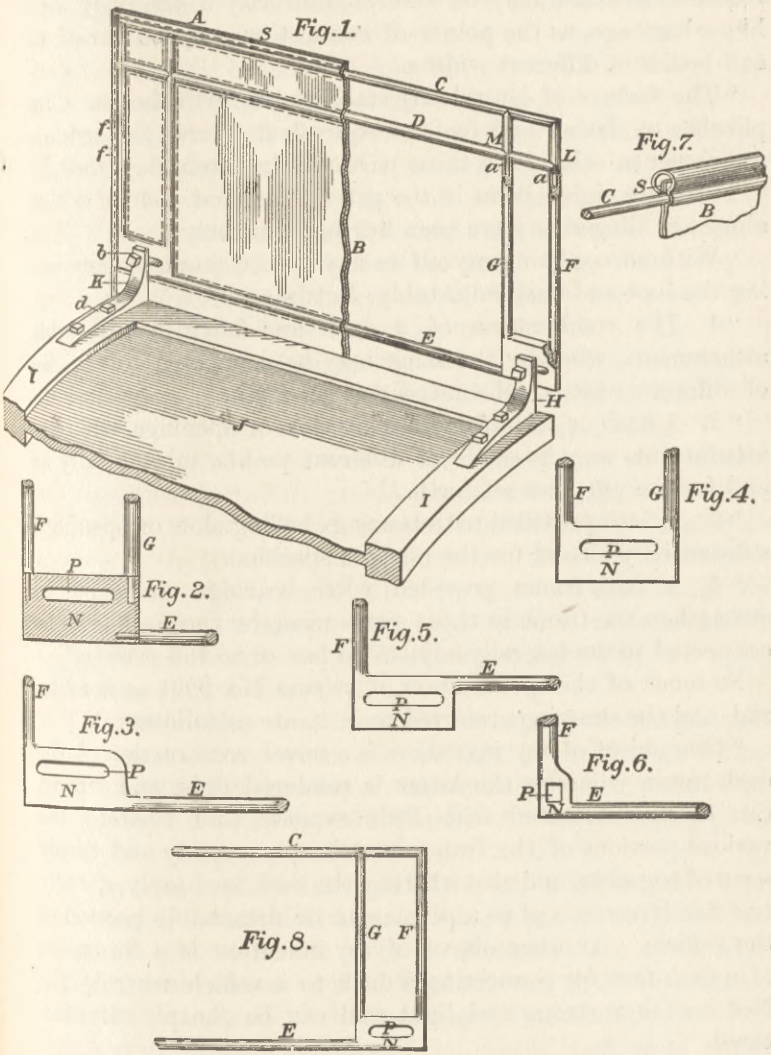


Fig.1.
A
S
C
D
M
L
a
a
f
f
B
G
F
b
H
d
E
H
J
I
Fig.7.
C
S
B
F
G
Fig.4.
P
N
Fig.2.
F
G
P
N
E
Fig.5.
F
E
P
N
Fig.3.
F
P
N
E
F
Fig.6.
P
N
E
C
Fig.8.
G
F
E
P
N

effected by means of a series of holes, affording a means of adjusting the foot at different points. When the foot is not required, the dash may be connected directly to the body with like advantage, as the points of connection may be varied to suit bodies of different widths.

"The feature of lateral adjustability set forth therein is applicable to dashes and feet, or equivalent laterally adjustable attachments, other than those particularly herein described."

There are eight claims in the patent, the first four of which alone are alleged to have been infringed, namely:

"Without confining myself to any special mode of connecting the foot and dash adjustably, I claim —

"1. The combination of a dash and laterally adjustable attachments, whereby the same may be connected to vehicles of different widths, substantially as set forth.

"2. A dash or dash-frame having slots or openings, whereby attachments may be made at different points, substantially as and for the purposes set forth.

"3. A dash provided with bearings having slots or openings, substantially as and for the purpose specified.

"4. A dash-frame provided with bearings, arranged to strengthen the frame in those parts whereby the dash is to be connected to the laterally adjustable feet or to the vehicle."

So much of the specification of reissue No. 9891 as is material, and the drawings referred to in it, are as follows:

"One object of my invention is a novel construction of the dash-frame whereby the latter is rendered light and strong, can be manufactured with little expense, and whereby the various portions of the frame are cheaply, readily and firmly secured together, and also whereby the dash is cheaply, quickly and firmly connected to a permanent or detachable portion of the vehicle. Another object of my invention is a formation of a dash-foot for connecting a dash to a vehicle whereby the foot is at once strong and light and can be cheaply manufactured.

"Referring to the drawings forming part of this specification, Figure 1, A, B, C, and D represent a dash-frame constructed in accordance with my improvements, a section

through the channelled lower rail of dash, and a sectional and perspective view of my special form of bar. Fig. 2, E and F are a perspective and sectional view of a modification of the mode of attaching the bar to the lower rail of the dash where said lower rail is channelled only on one side, and G is a perspective view showing a portion of the lower rail channelled only on one side and a channelled foot of my invention attached thereto, showing manner of attaching the foot to the lower rail by a T-headed bolt. Fig. 3, H, I, Fig. 4, J, K, and Fig. 5, L, M, are sectional views, showing different modes of attaching the foot to the lower rail of the dash. Fig. 6 is a perspective view showing how the extension *e'* of the upper bar may be riveted to the thin web or channelled portion of the lower rail. H', Fig. 1, represents the lower rail of a dash-frame, channelled as shown at B. This rail is provided at either end with the slot *a* or the holes *a'* for attaching the feet to the dash-frame. The lower ends of the upright bars of the frame are split and each half provided with a T head. (Shown at D, Fig. 1.) These T heads are made of the same width as the channel in the lower rail into which they fit. The two halves of this split end are separated from each other to admit the lower rail between them. The upper ends of the upright bar are provided with notches *d*, for the reception of the upper rail of the dash-frame. . . .

"By constructing dash-frames in the manner described much of the expense incurred in the ordinary mode of manufacture is saved. The lower rail is made broad and flat, so that the slot *a* or holes *a'* can be made therein and leave a strong bearing for the attachment of the feet. . . .

"The wide vertical flat faces of the lower rail afford a desirable bearing for the dash-foot or vehicle body, (as the rail can be readily perforated for bolts or rivets, and the thick edges left above and below the perforations are first-rate bearings for said foot or body,) and possess great advantages over the customary convex or oval rails, the central portion of which, being thick, renders them hard to punch, and the edges afford no flat surface for said foot or body to press against. The rail, therefore, when more or less flat on one or both sides,

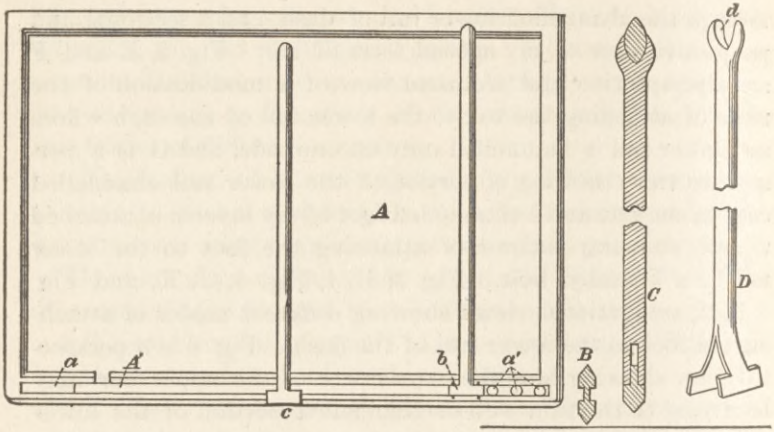


Fig. 1.

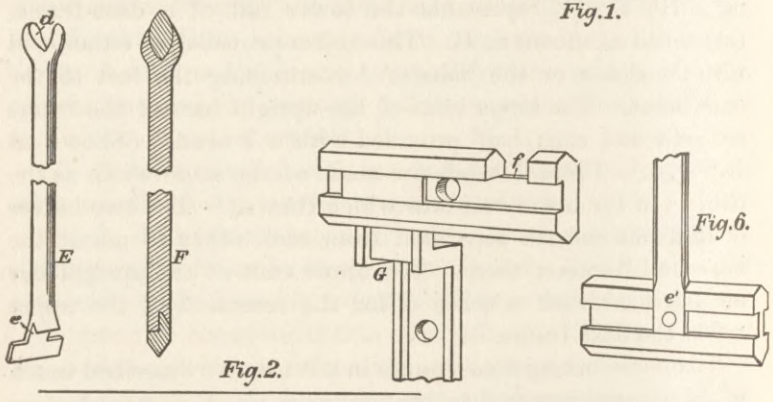


Fig. 2.

Fig. 6.

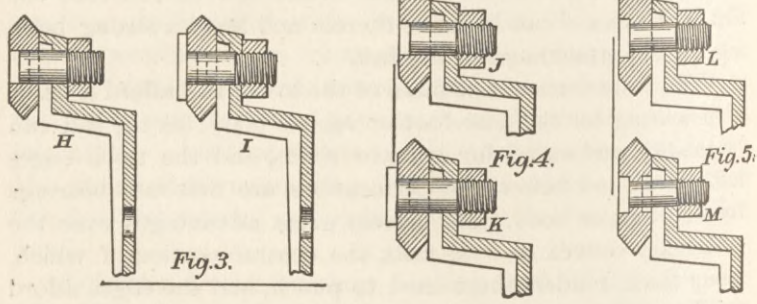


Fig. 3.

Fig. 4.

Fig. 5.

becomes a modification of the forms of rails shown herein and possesses some of their advantages.

"Irrespective of the comparative advantages derived from the bearings being flat over being otherwise shaped, the following, among other advantages, obtains, viz., that the web allows the rail or bar to be readily and quickly perforated, the thick parts, however shaped, connecting said web, serving as supports or bearings for the attachment of the foot or other portion of the vehicle to which the dash is connected. . . .

"G, Fig. 2, is a perspective view of the under side of my channelled or concave foot. . . . The foot may be channelled or concaved on the opposite side to that shown and described herein, or on both sides, these forms of construction being both obvious equivalents of the one shown and described. The depth and the length of the channel or concavity in the dash-rail or foot may be varied to suit the requirements of the manufacturer. Another advantage of that portion of my invention which relates to channelling or recessing the foot is that the same may be readily cast of malleable iron, the channelling obviating the injurious effects arising from the presence of shrunken corners in thick malleable iron castings. The channelling or recessing of the foot enables the latter to be made light and thin and to be better annealed."

There are thirteen claims in the reissue, but only claims 1, 2 3 and 11 are alleged to have been infringed. Those claims are as follows:

"1. A vehicle dash whose lower bar is provided exteriorly with a channel or recess, the metal on either side of the channel or recess affording a bearing for the dash-foot or other portion of the vehicle to which the dash is connected, for the purposes specified.

"2. A dash whose lower rail is composed near or at the ends of two thick portions united by an easily perforated web, for the purposes specified.

"3. A dash provided with a rail having vertically flat sides, one or both of said sides being exteriorly channelled, substantially as and for the purposes specified."

"11. The foot channelled on either or both sides, substantially as and for the purposes specified."

We will first consider claims 1, 2, 3 and 4, of No. 213,529. Claims 1, 2 and 3 relate to the means of adjusting laterally the feet of a dash. Formerly, the feet which connected the dash to the body were welded to the frame of the dash and made solid with it. When a manufacturer made both the dash and the body, he welded the feet of the dash to the frame at such points as were proper for the particular body for which the dash was designed. In the course of business, it came to pass that dashes were made by other persons than the manufacturer of the carriage, who either made his carriage-body, or bought it from some person other than the manufacturer of the dash. Under such a course of business, if the feet of the dash were welded to and made solid with the dash-frame, they might not fit the various sizes of carriage bodies. Hence arose the idea of making the feet separate and not welding them to the dash, but attaching them thereto by a bolt and nut at the proper point. As the dash is covered with patent leather, it is not convenient to bore through its iron frame after that frame is covered and in the hands of the carriage-maker. Therefore, a hole was bored in the lower rail of the frame of the dash, before it was covered, to receive the bolt by which the foot was to be attached to the frame. But, as vehicles varied in width and shape, it was necessary to place the feet sometimes nearer together, and sometimes farther apart from each other. Therefore, two holes, one on each side, in the frame of the dash, for receiving each a bolt, would not always be in the most convenient places. So it became obvious that it would be proper to make two holes, or even more, on each side, so that if one hole did not come at the right point, another would. Carrying out the same idea, it would be obvious that the bits of metal left laterally between the holes might be cut away, and thus a slot be made, or a long hole instead of two or more round ones, admitting of the more perfect adjustment of the place of attachment of the feet to the frame of the dash. It certainly required no invention to put two holes or a slot in the rail of a dash, instead of one hole, for the purpose indicated.

The use of a bolt passing through a hole and secured by a

nut, to fasten one article of iron to another, was a well-known device; and so was the use for the same purpose of a slot which admitted of the adjustability or change of position of the bolt. The specification of the patent states that "the adjustment of the dash and foot is not necessarily limited to the mode described," but that "it may be effected by means of a series of holes, affording a means of adjusting the foot at different points."

The testimony of Mr. Wood, an expert for the defendants, on the subject of the state of the art in that regard, is as follows: "Q. 21. State whether or not there is anything novel in mechanics in the use of slots for the purpose of adjustment. Ans. 21. No; there is nothing novel about adjustable slots, elongated slots, or holes bored extra large for that purpose. Q. 22. State, if you know, how long and in what manner and for what purposes adjustment has been accomplished by means of slots. Ans. 22. Well, any kind of mechanical work that has to be put together so as to be adjusted or duplicated in case of breakage — as, for instance, railroad iron. The butt ends are held together by bolts passing through elongated slots, so that the expansion and contraction of the rail will admit of self-adjustment; in fact, slots were a well-known mechanical principle, which has been used from a mouse-trap to a locomotive, you might say. Q. 23. In the ordinary railroad iron, is or is not the T-rail channelled? Ans. 23. Yes, sir; T channelled. Q. 24. Are or are not the slots of which you speak as provided for adjustment made in the web of the rail? Ans. 24. They are. Q. 25. Name some of the familiar uses in mechanics, of slots for the purposes of adjustment, and describe the manner of their use. Ans. 25. They are so generally used in the construction of everything that is made of iron, or that iron is used in the construction of, that it would be almost impossible to pick out anything they were not used in for the purpose of adjustment. Q. 26. Well, can't you name some of the familiar uses? Ans. 26. Bridge-work, jail-work, vehicles, dashes, tops. Q. 27. Is it or is it not universally used on gauges for lathes, sewing-machines, grain drills, and all classes of machinery where the feed mechanism is

made adjustable? Ans. 27. Yes, sir. Q. 28. How long has it been so used? Ans. 28. Used, as I know of, for the last twenty-five years."

So, also, Mr. Brackett, another expert for the defendants, says: "Q. 11. Where it is desirable or necessary in mechanics to provide for adjustment of parts attached to one another, what is the most common form or manner of securing adjustability? Ans. 11. Where two pieces are bolted together the general form is by an oval or slotted hole. We have always used such a connection wherever it is possible, in frame structures or sliding parts, where difference in length or position is required. Q. 12. Can you name a few of the applications of this slot for the purpose of adjustment, in your own business and outside of it? Ans. 12. We use it in all bearing plates where bridges are anchored to the masonry, and where rollers are placed under one end, to allow for contraction and expansion. It is also used for roof-truss bearing plates, to allow the roof to change its position on the wall, and for the fastening of columns to continuous girders, where the change of temperature changes the position of the girders or the columns. It is also in common use in such work as slide gauges, where the adjustment of the gauge is required. It is used on an iron planer, where the difference of the length of the parts is required at different times. It is also used on the ordinary carpenter's plane, to adjust the position of the knives. It is used on a rotary wood planer for the same purpose, and, in fact, there is hardly an adjustable part of a machine where two pieces come in close contact but that it is the most common mode of adjustment, and I consider it as one of the commonest principles of mechanics, and one that has been used, that I know of, for fifteen years, and was an old principle at that time. Q. 13. Would any ordinarily skilled mechanic who had occasion to provide for the adjustment to different positions of the parts of any machine or device be able to apply this principle without suggestion or invention? Ans. 13. He could, for the reason that this would be the first manner in which he would try to make the connection, when, if it did not work, he would look for some other manner to

make connection, for the reason that this is one of the simplest and easiest methods for connecting and allowing adjustment where both parts, when two pieces are used, are made of iron."

There is no contradiction of this testimony, and in view of it the improvements covered by claims 1, 2 and 3 of No. 213,529 are merely applications of old devices to new uses, not involving invention. *Penn. Railroad* v. *Locomotive Truck Co.*, 110 U. S. 490, and cases there cited.

In regard to claim 4 of that patent, the invention is stated in the specification to be the putting, at the part of the frame to which the foot is to be attached, a proper bearing surface to support the brace and dash. Claim 4 states that the bearing is arranged to strengthen the frame in that part by which the dash is to be connected to the foot of the vehicle. There was no invention in providing such bearing, either by an increase in the quantity of metal or otherwise, so as to strengthen the proper part, in a proper way, for its proper duty.

As to reissue No. 9891, claims 1, 2 and 3 relate to channelling or recessing the rail or bar, so that the metal on each side of the channel or recess will be thicker than the metal at the channel or recess, the necessary effect of such arrangement being that the metal on each side of the channel or recess will be thick enough to form a bearing, and the metal in the channel or recess will be capable of being easily perforated. The channelling or recessing of the foot, covered by claim 11, involves the same idea, and the specification states that thereby the foot may be cast of malleable iron, and may be made light and thin, and be better annealed.

The idea of using iron with channels or recesses in it, to produce any result due to the existence of such channels or recesses, was old in the state of the art of working in metals. Mr. Wood testifies as follows: "Q. 3. State whether you are familiar with any uses to which channelled iron is applicable; if so, what uses, and the purpose and manner, and for how long you have known them. Ans. 3. Channelled iron, you might say, has been generally used in many different kinds of

work and ways ever since I have been in the business. I first used it about twenty years ago in putting up hand-rails and stairs. Q. 4. How long was it used for stairs, and why? How did you apply it? Ans. 4. We used it for a hand-rail on the top of the rods which came from the steps, about three feet. We punched holes in the web of the iron — in the face of the iron — and riveted the vertical rods over, which left nice, smooth flanges to stiffen the rail and strengthen it, and was at the same time light and answered the purpose of a solid bar of iron with much less work. Q. 5. Can you name other uses to which channelled iron has been applied? Ans. 5. Yes. I fitted up a large lot of iron for Wood Brothers & Co., of Bridgeport, Connecticut, in 1870, for their landaus, carriages which they were making, which they used — this channel iron — for dropping the tops and for holding the tops up in a position in different ways. These irons were fitted up with poles, with slots in them, for adjustable purposes. I bought the iron from a hardware store, as it was common stock or general stock. We had no trouble to obtain different sizes for the purpose. Since then I have seen it used in a great many different ways and for a great many different purposes; for instance, fire-proof buildings. The girders and beams, the laths and roofing are all made of channelled iron. The bridges, railroad iron, gears of vehicles, jail-work, vault-work, safes, fire and burglar-proof safes, fences, agricultural implements — in fact, it is used for a great variety of work which I can't call to mind just now. Q. 6. For how long has it been so used? Ans. 6. Ever since I have been in the business. Q. 7. What was the shape of the channelled iron you used in 1870 for the carriages made at Bridgeport? Ans. 7. The web of the iron was about two and one-half inches on the face; flanges about a half inch deep. The web was about three-sixteenths of an inch deep. Q. 8. What part of the iron was perforated with slots for adjustment purposes? Ans. 8. The web. Q. 9. Did you buy it already channelled? Ans. 9. Yes, sir. Q. 10. State whether or not you are familiar with the use of channelled iron for the purpose of feet, for any purpose. Ans. 10. Yes; the feet of desks, stoves, machinery of different kinds, vehicles. Q. 13.

Is channelled iron commonly used in carriage-work; and if so, for what purpose? Ans. 13. Well, channelled iron has been used for years; dash-feet, dashes, tops, the bows on the tops, and for the tire on wheels. Q. 14. For how long a time have you known it to be used for these purposes? Ans. 14. Twenty years. Q. 15. What is the object in using channelled iron instead of solid bars? Ans. 15. Well, it's for the purpose of securing stiffness, lightness, and it is easy to work. It is easier to punch a hole through a light web than through a solid bar. It is economy to use it. Q. 16. Can you state any use to which channelled iron could be applied in mechanics where its use would be novel or would constitute an invention? Ans. 16. I don't know of any. Q. 17. Has or has not channelled iron been used in mechanics wherever it was desirable to combine lightness and strength? Ans. 17. Yes; we generally use it wherever we want to make that combination. Q. 18. For how long has its use in that way been common and familiar? Ans. 18. Ever since I have been in the business. Q. 19. State whether or not iron dealers keep in stock constantly various forms of channelled iron. Ans. 19. We never had any trouble to obtain channelled iron from most any of the stores. Q. 20. How many various forms is it kept in in stock? Ans. 20. Well, I could not say as to that. A great many forms — for bridge purposes, house-building, jail-work, safe-work, vehicle-work; it is generally kept constantly on hand. Parties who generally use large lots of it for building, bridge purposes, and other purposes, make contracts for large lots of it and have it rolled to order, and get it cheaper that way."

Mr. Brackett testifies as follows: "Q. 4. State whether or not channelled iron is a common form for mechanical uses; and, if so, some of the uses to which it is put. Ans. 4. It has been commonly used in all frame structures where stiffness and lightness is desired. I have known of its use since 1862, when I first took an active part in manufacturing. We use it in bridges, roof trusses, machine frames, floor beams, joists, tramways — in fact, hardly a frame structure but what it is used more or less. Then other classes of manufactories use it in numerous places, such as fence pickets, bottom rail of fences,

in stove manufacturing, furniture manufacturing, sewing-machine manufacturing, and in fact I hardly think there is any class of iron structures where lightness is required but that it could be used to advantage. Q. 5. How long have you known of these uses you have referred to? Ans. 5. Fifteen years or more. Q. 6. Should it be desirable to combine lightness and strength in the construction of vehicles or any parts of them, would it require any invention or would it be novel to apply channelled iron for that purpose? Ans. 6. No, sir; I think not, as channelled iron is in almost as common use as bar iron, and hardly any framed work is made where stiffness and lightness is required but that it is used, because it is the stiffest form in which iron can be used in carrying a load between two points, either suspended or in the form of a ——, and wherever a compressible strain occurs, or cross-strain, or any other strain than a purely tension strain, it is the cheapest iron to use, and it is in common use under such circumstances. Q. 7. What other advantages or advantage, if any, is obtained by the use of channelled iron which is also old and familiar? Ans. 7. Wherever two members running either at an angle or in the same direction, its greatest convenience is in the easy manner and strength with which such attachments and connections can be made, on account of the thinness of its web, it being readily drilled or punched, requiring a great deal less labor and expense than flat bar iron, and on this account it is in general use throughout the United States for the last fifteen to twenty years, that I know of. Q. 8. Can you give any instances in which channelled iron has been used as supports — that is, legs or feet — prior to 1875? Witness here asks whether counsel means channelled on one side or both. Q. Either. Ans. 8. Sewing-machine legs, stove legs, school-desk legs, steam-heater legs; that's all I think of just now. Q. 9. Do you know of any use of iron for feet or supports where these supports are not made channelled, as a rule? Ans. 9. No, sir; I do not, and as a question of economy of material, it should be done in every instance where practicable."

This testimony is uncontradicted, and in view of it the improvements covered by claims 1, 2, 3 and 11 of reissue No.

Statement of the Case.

9891, amount only to applications of old devices to new uses, not involving invention.

The decree of the Circuit Court is affirmed.

CITY NATIONAL BANK OF FORT WORTH *v.* HUNTER.

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

No. 116. Submitted December 10, 1888. — Decided March 5, 1889.

On the proofs which are reviewed at length in the case stated by the court, *Held*, that the agreements between the parties of March 20, 1880, were so far consummated that neither party to this suit can insist upon superiority of lien as between themselves; that no case of misrepresentation of facts as distinguished from matters of opinion is made out to warrant declaring the agreements null and void; that the execution and delivery of his note by Dawson and the delivery of the cattle to him, and O'Neal's bill of sale consummated the written agreement so far as he was concerned; that the action of appellants in commencing suit against Dawson and O'Neal, and in taking possession of the cattle was unjustifiable, and that Dawson may recover his damages thereby suffered by way of reconvention in this suit; that the original bill for foreclosure having been amended so as to be in the alternative, seeking the ascertainment of the indebtedness of O'Neal to complainants and the payment of their share of the proceeds of the cattle, the bill should be retained and go to decree; that the *pro rata* proportions of indebtedness were incorrect; that the appellant is not so situated as to be entitled to set up an estoppel in this respect; that the proportions in which the fund should be divided between the parties should be determined as of the date that Dawson paid the money into the bank; that the laws of Illinois govern as to the rate of interest; and that, as the decree was severable in fact and in law, and as O'Neal's estate (he having deceased) had no concern with the matters complained of by the bank and by Dawson, they were entitled to prosecute their appeal without joining O'Neal's administratrix, who did not think proper to question the judgment.

In equity. The Fort Worth Bank and Dawson, respondents, took an appeal from the final decree. The case, as stated by the court in its opinion, was as follows:

Statement of the Case.

In February, 1879, Hunter, Evans & Co. engaged in the live-stock commission business at East St. Louis, Illinois, made an arrangement with John O'Neal, who resided in Van Zandt County, Texas, and was buying and shipping cattle from different points in that State, by which they were to furnish O'Neal money to buy cattle during the spring and summer of that year, to be consigned to them for sale. The dealings between them resulted in an indebtedness to Hunter, Evans & Co. to a considerable amount, and on the 20th day of August O'Neal executed two notes for $11,000 each, payable to Hunter, Evans & Co., and as security for their payment gave them a bill of sale on his O N brand of cattle, further described as being his home stock of cattle, and on the same day and as part of the same transaction, Hunter, Evans & Co. executed and delivered to O'Neal a defeasance providing for the cancellation of the bill of sale when the notes were paid. It seems to be conceded that this chattel mortgage was never properly recorded in accordance with the statute of Texas, which provided that every chattel mortgage not accompanied by immediate delivery and followed by an actual and continued change of possession of the property mortgaged or pledged, should be absolutely void as against subsequent purchasers and mortgagees or lien holders in good faith, unless such instrument or a true copy thereof were forthwith filed in the office of the county clerk of the county where the property should then be situated. While O'Neal was conducting his business with Hunter, Evans & Co., he obtained money from the City National Bank of Fort Worth, which was repaid by drafts drawn on Hunter, Evans & Co. either by O'Neal or by Wm. Hunter, the agent of Hunter, Evans & Co., which were duly honored by the latter, except one draft dated November 15, 1879, for $9354.03, payment of which was refused, whereupon, on the 10th day of December, 1879, O'Neal gave his note to the bank for $9810.11, the amount of said draft and interest, and executed a mortgage as security on his home stock of cattle branded O N, subject to the bill of sale to Hunter, Evans & Co., and also of his cattle branded H, and H I, and one hundred head of horses, mares and colts branded O N,

which mortgage was recorded by the county clerk of Van Zandt County, December 16, 1879.

It is testified by the vice-president of the bank that the agent of Hunter, Evans & Co. agreed with the bank that if it would honor O'Neal's checks he would guarantee their payment, and settle O'Neal's accounts at any time by a draft on Hunter, Evans & Co., in case O'Neal was not in Fort Worth to give the draft himself, and that the credit was extended to O'Neal on the strength of said guaranty; that on the day the draft for $9354.03 was drawn he asked Hunter if it would be paid by Hunter, Evans & Co., and whether or not witness had better take a bill of lading, which would insure the payment of the draft, or hold the cattle, to which Hunter replied that Hunter, Evans & Co. were obliged to pay the draft, and would do it; and that, relying on that statement, witness did not take a bill of lading, but allowed the draft to take its course, and on that day left Fort Worth and was absent some weeks, and hence was not in Fort Worth when the draft was protested, nor present when the note and bill of sale were executed by O'Neal to the bank. William Hunter, the agent of Hunter, Evans & Co., denied that they bound themselves to pay O'Neal's indebtedness to the bank in any way whatever. Early in the year 1880, one John Dawson proposed to purchase a part of O'Neal's cattle and drive them to a place outside of Texas, to fill a contract of sale he had made with other parties to deliver cattle at the Ponca Agency in the Indian Territory, by the 20th day of June, 1880, and agreed with O'Neal upon the purchase; but before this trade could be consummated, it was necessary for Dawson to have the consent of the lien holders, and accordingly he consulted Hunter, Evans & Co. and the officers of the bank, who agreed that the sale might be made.

On the 20th of March, 1880, O'Neal and his attorney, William Hunter for Hunter, Evans & Co. and their attorney, the vice-president of the City National Bank and its attorney, and Dawson met at Fort Worth, Texas, and three different agreements in writing were executed between the parties. One was between John M. Dawson, Hunter, Evans & Co.,

and the bank, and recited the existence of indebtedness and liens, and the fact that O'Neal had contracted for the sale of the cattle to Dawson, as shown by a written contract, by the terms of which Dawson was to assume the payment of O'Neal's indebtedness to Hunter, Evans & Co. and the bank, provided sufficient cattle be delivered by O'Neal to Dawson for the purpose; that in the event that the cattle sold and delivered by O'Neal to Dawson should be insufficient to discharge the amount of the indebtedness in full, then Dawson assumed to pay off and discharge the indebtedness *pro rata*, to the extent of the cattle received, payment to be made by Dawson to Hunter, Evans & Co. and the bank by October 1, 1880; the sale was stated to be subject to the liens, and the cattle were to be held in trust for Hunter, Evans & Co. and the bank; that Hunter, Evans & Co. and the bank together should select a man to accompany Dawson from Texas to the point where the cattle might be sold, and this man was to have the legal possession of the cattle and receive the proceeds of the sale; if Dawson did not sell the cattle by the first of October, 1880, then Hunter, Evans & Co. and the bank might retake the cattle and dispose of them, and apply the proceeds thereof. Dawson was to have the handling, control, and disposition of the cattle, subject to the provisions of the agreement.

Another of the agreements was between Hunter, Evans & Co., the bank, and O'Neal, whereby Hunter, Evans & Co. and the bank agreed to the sale of the cattle by O'Neal to Dawson, provided O'Neal should, upon the delivery of the cattle to Dawson, surrender to Hunter, Evans & Co. and the bank the proceeds of the sale, consisting of Dawson's paper, together with the contract of sale; and Hunter, Evans & Co. and the bank agreed to receive such paper and contract in discharge of their respective claims upon O'Neal, provided such proceeds equalled the amount of the indebtedness to Hunter, Evans & Co. and the bank; and if such proceeds should be less than said indebtedness, Hunter, Evans & Co. and the bank agreed to divide the same *pro rata*. If there should be a deficiency, O'Neal obligated himself to make it good in cash or notes secured to the satisfaction of Hunter Evans & Co. and the

bank, by giving deeds of trust on real and personal property. If there arose a dispute as to the amount O'Neal owed either party, then the amount agreed to be due should be adjusted and discharged, and the amount in dispute should be secured by O'Neal as aforesaid; and when the dispute should be settled, the amount thereof should be paid from said proceeds of sale or said security furnished by O'Neal. Should there be a deficiency, it was to be "carried owned and held between the said Hunter, Evans & Co. and the said City National Bank, according to their respective claims, and the collection arising therefrom to be pro rated" between them. If the agreement, "from any cause whatever, fail to be carried out and consummated, then no statement or recital herein shall be construed to be an abandonment of any right, lien, or security held by any of the parties hereto."

It was further agreed by O'Neal that should there be a deficiency he would secure it in manner aforesaid, and it was to bear interest at the rate of twelve per cent per annum from date, and to mature on or before the first day of January, 1881, the deficiency to be secured at the time said cattle were delivered to Dawson.

The other agreement was between Dawson and O'Neal, reciting that whereas Hunter, Evans & Co. and the bank had liens on the cattle; and whereas O'Neal, Hunter, Evans & Co. and the bank had agreed to sell the cattle to Dawson at the prices in said agreement mentioned; and whereas Hunter, Evans & Co. and the bank had agreed with Dawson upon the time and place of payment for said cattle to the amount of their debt, or so much thereof as said cattle might bring, and also upon the manner aud amount of security for said payment by said Dawson; therefore O'Neal, in consideration of the enumerated agreements, "both of which bear even date herewith and are made parts hereof," and the further consideration of the release of said indebtedness to Hunter, Evans & Co. and the bank, agreed "to gather and deliver to the said John Dawson, at or near Will's Point in Van Zandt County, my stock of cattle, consisting of cows, calves, yearlings, and two, three and four year olds and upwards, upon which said

Hunter, Evans & Co. and said City National Bank have liens, together with such other of my cattle as I may want to put in said sale and as may be acceptable to said Dawson, at the following prices," giving them. Dawson bound himself to pay for the cattle at the rate fixed, " in such way and such manner as the said Hunter, Evans & Co. and the said City National Bank may require, and payable to them," as per agreement between Hunter, Evans & Co. and the bank and Dawson.

If the cattle should amount to more than the amount of the indebtedness to Hunter, Evans & Co. and the bank, then Dawson for the excess agreed to give O'Neal security payable not longer than October 1, 1880, with interest at twelve per cent. It was further agreed that the cattle were to be delivered to Dawson on or before May 20, 1880.

The papers having been executed, O'Neal proceeded to gather the cattle for delivery to Dawson, and Dawson prepared to receive them, both incurring considerable expense in so doing, and on the 22d day of May, 1880, the gathering of the cattle was completed near Will's Point, at which place, on that day, Dawson, O'Neal, L. W. Evans, agent of Hunter, Evans & Co., the attorney of that firm, the attorney of the bank, and the attorney of O'Neal, and Gen. Henry E. McCulloch, the agent who had been selected and appointed by the bank and Hunter, Evans & Co. to accompany the drive and receive from Dawson for them the proceeds of the sale of the cattle, assembled. The cattle consisted of 1741 head, mostly branded O N, and their value at the contract price was $19,033. Hunter, Evans & Co. claimed that O'Neal owed them about $18,000; O'Neal disputed all of said claim except $9915.74. The debt of the bank on that date was admitted to be $10,339.85. The attorney of Hunter, Evans & Co. wrote a note for Dawson to sign for the purchase money, which he did. It read as follows:

" $19,033. Will's Point, Texas, *May* 22, 1880.

" One day after date, for value received, I promise to pay to the order of Hunter, Evans & Co. and the City National Bank of Fort Worth, Texas, at Fort Worth, Texas, the sum

of nineteen thousand and thirty-three dollars, with interest at the rate of ten per cent per annum from date until paid. This note is to be paid according to the terms and stipulations contained in a written contract entered into by and between John Dawson, Hunter, Evans & Co., and the City National Bank of Fort Worth, and dated March 20, 1880.

"J. M. Dawson."

The note was handed, by direction of the bank and Hunter, Evans & Co., to General McCulloch.

The cattle were delivered to Dawson by O'Neal with the knowledge and consent of Hunter, Evans & Co. and the bank, and were driven by Dawson through Will's Point to a point three miles west of the town; and on the same day Dawson sold, for cash, cattle to the amount of $3419, which he paid over to McCulloch, who indorsed upon the note the following:

"Received on the within note three thousand four hundred and nineteen dollars, ($3419.) May 22, 1880.

"Henry E. McCulloch, Agent."

Upon the basis of the undisputed claims the attorneys of the bank and of Hunter, Evans & Co. figured out the proportions in which the amount of Dawson's note should be distributed, and ascertained that of said note the bank was entitled to receive $9715.78 and Hunter, Evans & Co. the remainder, $9317.22, and both of them instructed General McCulloch, that of every one thousand dollars paid in by Dawson he should send Hunter, Evans & Co. $482.52 and the bank $510.48. The $3419 were then and there divided and paid over to said parties in that proportion, and the bank's attorney indorsed O'Neal's note to the bank with a credit of $9715.78 as "assumed by John Dawson," while a receipt was given to O'Neal by the attorney of Hunter, Evans & Co. "showing that cattle to the amount of $9317.50 had been delivered to Dawson." There was no objection to the delivery of the cattle to Dawson, although before they were delivered there was a wrangle between O'Neal and the agent and the attorney of Hunter, Evans & Co. as to the true amount of the indebt-

edness of O'Neal to that concern, but, on the contrary, the attorneys of the parties told Dawson that the cattle were his and he could drive them to market; and it appears to have been understood that he was going to drive them through Northwestern Texas and the Indian Nation to Kansas. Dawson and McCulloch went on with the cattle, getting out of Van Zandt County on the 23d or 24th of May, 1880, and soon after leaving Will's Point Dawson sold another lot of the cattle for something over $2000, receiving in part payment therefor a draft payable to Hunter, Evans & Co. for $1842, for which McCulloch entered on Dawson's note the following credit:

"Received on the within note a draft drawn by Frank Houstan for eighteen hundred and forty-two dollars, payable on the 22d day of next month. May 25, 1880.

"Henry E. McCulloch, Agent."

This draft was sent by McCulloch to Hunter, Evans & Co., and at the same time McCulloch drew a draft upon them in favor of the City National Bank for its *pro rata* part of said payment, $939.88, but when the latter was presented to Hunter, Evans & Co. for their acceptance they declined to accept it and appropriated the whole of this payment.

On the 31st of May, 1880, Hunter, Evans & Co. began suit in the District Court of Montague County, Texas, by petition, against O'Neal and Dawson, claiming to have a lien upon the stock of cattle then in the possession of John Dawson in said county of Montague, which lien they charged existed by virtue of a mortgage given them upon said stock of cattle by O'Neal, and sued out a writ of sequestration by virtue of which the sheriff of Montague County took into his possession the property described in the petition and writ, to wit, fourteen hundred and seventy-eight head of cattle of the aggregate value of $15,614.

The seizure was made on the 2d day of June and the cattle retaken by Dawson under a replevin or forthcoming bond on the 6th day of June. The bank furnished Dawson the securi-

ties on his bond, and when he sold the cattle afterwards he paid the amount of his note and interest into the bank, which has ever since held the same to await the result of this suit.

On the 21st day of June, 1880, Hunter, Evans & Co. sued out a supplemental writ of sequestration directed to Van Zandt County, under which about 247 head of cattle were seized, and of these O'Neal replevied a few cows and calves valued at $110. On the 28th day of December, 1880, the cause was removed into the United States Circuit Court for the Northern District of Texas, at Dallas. O'Neal appeared first in the state court and pleaded to the jurisdiction, which plea was pending when the record was filed in the United States court. In 1881 the City National Bank of Fort Worth entered its appearance as a defendant. Both parties then, by leave of court, amended their pleadings. Hunter, Evans & Co. in their amended bill set up their dealings with O'Neal and the execution of the bill of sale and defeasance, and claimed that O'Neal owed them $18,616.49, February 1, 1880, on which they received during that month from the Texas and Pacific Railroad Company $625, and on the 22d day of May, 1880, from H. E. McCulloch, $1668.56; that O'Neal gave a mortgage to the bank subject to their lien, but the bank, in February, 1880, claimed that its lien was superior to that of Hunter, Evans & Co., and threatened to litigate said question; that at that time the O N stock of cattle could not be gathered except at ruinous expense and great trouble, and Hunter, Evans & Co. knew that, pending litigation about them, the cattle while on the range would become worthless by straying off and being stolen and sold by other parties, and to avoid such litigation, expense, and loss of said cattle, Hunter, Evans & Co. entered into two certain agreements dated March 20, 1880, the two being in fact but one, the substance of which they proceeded to state. Complainants then stated the meeting at Will's Point on May 22d, and said that, without notice to them, O'Neal delivered to Dawson stock of the value of $19,033, of which cattle to the amount of $3419 were sold and the proceeds paid to McCulloch, who had been selected by Hunter, Evans & Co. and the bank to accompany the cattle, of which

amount complainants received $1668.38 and the bank the balance; that after the cattle were delivered O'Neal for the first time disputed over $8700 of his indebtedness to complainants; that O'Neal made to Dawson a bill of sale for said cattle, and Dawson executed his note to complainants and the bank for $19,033, and complainants and the bank gave O'Neal a receipt for said amount; that O'Neal then failed and refused to secure the disputed amount of complainants' claim against him; that "thereupon the parties to said agreement were remitted to their original rights and liens, and the said agreements thereby became abrogated and were thereafter of no force or effect;" and that complainants had since "treated said agreement as abrogated, abandoned and of no effect." They charged that O'Neal, Dawson and the bank confederated to cheat them, and that O'Neal at the time of the agreement in March represented that he owned a large number of cattle included in the bank's lien but not in complainants', and that if complainants would enter into said agreement said cattle should be embraced therein and included in the delivery to Dawson; that complainants, relying on the representations which were adopted by the bank, were induced to enter into the agreement with O'Neal, Dawson and the bank, but the representations were false and known to be so by the parties; that O'Neal frequently acknowledged that $16,300 of complainants' claim was correct, and promised to meet complainants after said agreements and fix the amount of the indebtedness but did not do so, and after the cattle were delivered to Dawson, then for the first time disputed $8500 of complainants' claim; that he proposed to pay complainants something over $4000 in addition to the amount assumed by Dawson, but complainants rejected that proposition; and that complainants tried to obtain arbitration without effect, and O'Neal finally said that he had no property with which to secure his indebtedness to complainants, that his property was mortgaged, etc.; that O'Neal was hopelessly insolvent when he delivered said cattle to Dawson, and after said delivery owned no other cattle except about 300 head of said O N stock, not exceeding the value of $3000, and included

in complainants' bill of sale; that O'Neal's acts and representations, after the delivery to Dawson, were with the view to delay complainants while Dawson hurriedly proceeded to drive the cattle out of Texas with fraudulent purpose; that all the cattle delivered by O'Neal to Dawson belonged to the O N stock and were included in the complainants' bill of sale, and he did not deliver to Dawson any cattle of the other marks and brands mentioned in the bank's mortgage; that long after the execution of the bill of sale to complainants, O'Neal, without complainants' knowledge or consent, sold cattle to the amount of $3000 and converted the amount to his own use; that on account of the deceit and fraud of O'Neal, Dawson and the bank, the said agreements of March 20, 1880, are null and void; that Dawson failed to account to McCulloch for $218; that he disposed of part of the stock and received in exchange about thirty head of yearlings, and was proposing to dispose of them without accounting when stopped by the levy of the writ of sequestration; and that after Dawson replevied said cattle he sold them for $16,500, and now holds that amount.

Complainants prayed a decree against O'Neal for the full amount of their debt against him and for a foreclosure of their lien against O'Neal, Dawson and the bank; and, if mistaken as to their remedy, they prayed for a decree against Dawson and the bank for the amount of money coming to them from the proceeds of said cattle under and by virtue of said agreements, and for general relief.

O'Neal, in addition to his plea to the jurisdiction, answered by a general denial, and further, that the notes held by complainants were simply executed to secure a margin of credit from complainants; and that complainants' claims were full of incorrect items, which he specified and which amounted to many thousand dollars.

The bank and Dawson filed joint and several answers, setting up the execution by O'Neal to the bank, on the 10th of December, 1879, of his note for $9810.11, secured by mortgage on his home stock of cattle, branded H and O N, including horses, mares and colts; that the bills of sale to Hunter,

Evans & Co. and the bank were intended to be mortgages; that Hunter, Evans & Co. knew better than the officers of the bank what O'Neal's financial condition was, and in all their transactions relied on their own knowledge of him and his property; that it was at the special instance and request of complainants that the bank advanced O'Neal the money out of which his indebtedness to it grew, and complainants promised to pay the same; that the bank did intend to institute suit for the purpose of deciding the validity and priority of its own and complainants' liens; that they believe the motives of Hunter, Evans & Co., in entering into said agreements, were the knowledge that they had not in fact a debt against O'Neal of the amount claimed by them, and knew they were primarily liable to the bank for the payment of its debt against O'Neal, and because by entering into said agreements they would escape from responsibility to the bank and from a controversy with the bank as to the validity of their lien, and obtain an equal lien on property they had no lien upon before, and would without surrendering the disputed amount of their debt against O'Neal effect a collection without loss of the uncontested part; that the reservation in said agreement, that if it should fail to be carried out and consummated, then no statement or recital therein should be construed "to be an abandonment of any right, lien, or security held by any of the parties hereto," applied only to the consummation of the pending transaction; and that when the sale from O'Neal to Dawson was perfected by delivery, on the 22d of May, 1880, said agreement took final effect. The circumstances attending the execution of the agreements and the transactions at Will's Point, the execution of Dawson's note, payments made on it, etc., were set out, and defendants said that the objects of the two agreements between O'Neal, the bank and Hunter, Evans & Co., and Dawson, the bank and Hunter, Evans & Co., were double — one was to sell the cattle to Dawson free from every lien before existing against them, but charged with a new lien or trust, to be enforced through the agency of H. E. McCulloch; the other to obtain a settlement between some, but not all, of said parties, and therefore all of the provisions of one are not

Statement of the Case.

provisions of the other agreement; that by the agreement of March 20, 1880, and the purchase of the cattle by Dawson, the original liens of complainants and the bank on the cattle sold Dawson were extinguished, and said new lien substituted therefor; that complainants knew before the delivery of the cattle to Dawson the exact amount of their debt that was disputed by O'Neal; that Dawson used despatch in driving the cattle, because, as was known to complainants, he purchased them to fulfil contracts of sale previously made by him, and he commenced with the knowledge and consent of complainants to drive said cattle to their destination out of the State of Texas; that at the date of the delivery to Dawson, O'Neal owned a large number of cattle, not included in the sale and delivery to Dawson, which he offered to deliver upon the same terms and for the same purpose, if the time required for their being gathered was allowed, but complainants agreed that the cattle then gathered should be delivered; that at the time of the delivery to Dawson, O'Neal owned of the O N stock on the range in Van Zandt County, besides those delivered to Dawson, as many as 350 head, of the value of $5250, as complainants well knew, and which were seized a few days afterwards by a writ of sequestration, wrongfully sued out by complainants; that O'Neal was solvent at the time of the sale and delivery to Dawson, and offered to secure Hunter, Evans & Co. by mortgage, which was not executed, because they required a power of sale for cash in ten days after the amount in dispute had been settled; that O'Neal was always ready to give complainants security, but they refused to take it uncoupled with the authority to foreclose at once; that the cause of the failure of negotiations between complainants and O'Neal was that complainants had conceived the purpose of seizing Dawson's property under such circumstances as they believed would lead to its being surrendered to them by Dawson rather than suffer the damages, delays and losses which might otherwise ensue; that the officers of the bank and Dawson did nothing at any time with the view to deceive or injure complainants in any way; and if O'Neal had any such purpose he did not communicate it to either of them, but they believed

and had every reason to believe that O'Neal was acting with the utmost good faith towards complainants. They denied that the bank or its officers, previous to the date of the agreement, had any knowledge of the number, value, or situation of O'Neal's cattle other than O'Neal's statements to them. They said they never pretended or represented to complainants, or either of them, or any agent of theirs, that said bank, or any of its officers, or agents, had any such knowledge, and they denied that they, or either of them, deceived complainants, or either of them, or caused them to be deceived in any respect. They denied all collusion to get possession of the stock of cattle or to have said agreement executed before a final settlement between O'Neal and complainants. They denied that Dawson ever disposed of any of the cattle otherwise than he was authorized to do by said agreement and as the owner thereof, and that they had deceived McCulloch in any respect. They averred that complainants purposely failed to make the bank a party to their suit in Montague County, and brought said suit there in a court which had jurisdiction neither of the property nor of the persons of the defendants.

Defendant Dawson charged that complainants, by their wrongful seizure of said cattle by the writ of sequestration, subjected him to great expense, loss and damage, which he specified, and asked to have allowed by way of reconvention, and that he had been damaged by reason of the malicious suing out of said writ of sequestration in the further sum of $10,000, for which he asked punitive damages.

On the 18th day of May, 1885, the court overruled the defendants' exceptions and O'Neal's plea to the jurisdiction and entered a decree that Dawson's note be divided between complainants and the bank *pro rata* according to their actual demands against John A. O'Neal; that on May 22, 1880, O'Neal was indebted to the complainants in the sum of $18,333.68 and to the bank in the sum of $10,339.85; that complainants were entitled at said date, out of the Dawson note, to the sum of $12,169.64, less the sums received by them from the proceeds of said note, to wit, the sum of $1668.69, paid May 26, 1880, and the sum of $1842, paid June 26, 1880,

with interest from May 22, 1880; that Hunter, Evans & Co. recover from Dawson and his sureties the sum of $8659.15 principal and $4329.67 interest, making a total of $12,988.82, with interest from date of decree at the rate of ten per cent, and costs; that complainants had received the sum of $2424.56 in the value of cattle sequestered herein and replevied by complainants, of which sum the bank was entitled to $1311.50; and that the bank recover of complainants said sum, with execution. It further appearing that O'Neal replevied $110 worth of cattle sequestered on the 20th of July, 1880, it was decreed that complainants recover of Mary O'Neal, administratrix, and the sureties of O'Neal on the replevin bond, $110, with interest at eight per cent per annum from July 20, with execution, the proceeds of said collection to be distributed *pro rata* between complainants and the bank; that complainants recover of and from the estate of O'Neal, to be paid in the due course of administration, the sum of $4613.81 and costs, less any sum or sums received by complainants from the execution to be issued against O'Neal's sureties; and that in the meantime the costs of this suit be paid by complainants and the bank *pro rata.*

Mr. A. S. Lathrop for appellants.

Mr. Sawnie Robertson for appellees.

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

The action of the parties at Will's Point on the 22d day of May, 1880, so far carried out and consummated the agreements of March 20th, that neither the bank nor Hunter, Evans & Co. could thereafterwards insist upon superiority of lien as between themselves; and we are satisfied, upon a careful review of the evidence, that Hunter, Evans & Co. were not entitled to rescind the agreements or treat them as annulled on the ground of fraud in the obtaining of their execution.

Many circumstances are clearly made to appear which

rendered it natural for Hunter, Evans & Co. to desire to make just such agreements as they did make, and are inconsistent with the theory that they did not act with their eyes open.

Although they claimed a first lien upon the larger part of the cattle in question, yet this was contested by the bank on the ground of the invalidity thereof under the statute, as against its mortgage. And while it is denied on the part of Hunter, Evans & Co., the evidence of the vice-president of the bank is explicit to the effect that the line of credit extended to O'Neal by the bank was on the strength of the agreement of William Hunter to guarantee the payment of O'Neal's drafts; and that, as to the particular draft which created the indebtedness due the bank, the bank neglected to take a bill of lading because it relied on the statement of Hunter that the draft would be honored. Questions such as these demanded solution, and it is not to be wondered at that Hunter, Evans & Co., as they say in their bill, to avoid "litigation, expense and loss," entered into these contracts. Again, a portion of his alleged indebtedness to Hunter, Evans & Co. had always been disputed by O'Neal. O'Neal had more cattle than those named in the bill of sale to Hunter, Evans & Co.; was believed to have other property; and there is considerable evidence tending to show that his financial condition need not have been rendered as desperate as it subsequently apparently became. It was desirable that the cattle should be sold, and the sale to Dawson was agreeable to both Hunter, Evans & Co. and the bank, if an agreement could be made in respect to the proceeds.

In the light of these circumstances, it would require a strong case of definite misrepresentation as to facts, as distinguished from mere matters of opinion, to be made out before these agreements could be declared null and void.

Complainants aver, in substance, that O'Neal represented that he owned a large number of cattle not in the O N brand, then running in the range in Van Zandt County, which were not included in the bill of sale to Hunter, Evans & Co., but were included in the bank's mortgage, and which were "quite or very nearly sufficient in value to pay the said O'Neal's indebtedness to the said bank," and that they were induced to

enter into said agreements in reliance on said representations, which were false.

But we think the evidence fairly preponderates that no such statements were made, and certainly not to the bank's knowledge, and that the testimony to the contrary is given under a misapprehension arising from O'Neal expressing his belief that he had cattle enough in all to pay both debts. And this inference is heightened by the fact that the tendency of the evidence is to establish that William Hunter, the agent of Hunter, Evans & Co., was acquainted with O'Neal's cattle, and must have known that they were principally of the O N brand. If the contention that O'Neal fraudulently disputed so large a part of the claim of Hunter, Evans & Co. against him, and then fraudulently refused to secure the disputed amount, were sustained by the evidence, neither the bank nor Dawson should be held bound by such conduct on his part without convincing proof that they participated or acquiesced in such fraud. And it would have been the duty of Hunter, Evans & Co., if they designed to attempt to set up fraud in these particulars, to have refused to go forward in consummation of the agreements on the 22d day of May at Will's Point.

When the parties met there on that day, O'Neal and Dawson having been in the meantime put to a large expense on the strength of the agreements, in gathering and caring for the cattle when and as gathered, the amount due from O'Neal to Hunter, Evans & Co. had not been determined, and O'Neal insisted that their account was erroneous to the extent of between eight and nine thousand dollars. The undisputed portion of the claim was finally set at $9915.74. The debt due the bank was admitted to be $10,339.85, and the price to be paid for the cattle by Dawson, $19,033. The attorneys of the bank and Hunter, Evans & Co. proceeded to ascertain what the *pro rata* shares in the $19,033 of the bank and Hunter, Evans & Co. would be, and placed the bank's at $9715.78 and Hunter, Evans & Co.'s at $9317.22, these being the proportions that the undisputed debt due the bank of $10,339.85 and the undisputed debt of $9915.74 due to Hunter, Evans & Co. were respectively entitled to receive.

McCulloch had been selected as the party to accompany Dawson "in driving said cattle from Texas to any point said cattle may be sold," to "have the legal possession of said cattle," and to "receive the proceeds of the sale of said cattle from any and all purchasers of said cattle to the extent and amount of said indebtedness assumed by said Dawson," namely, inasmuch as the value of the cattle delivered to Dawson was not equal to the amount of the indebtedness, "*pro rata* to the extent of the cattle received." The undisputed debts due to Hunter, Evans & Co. and the bank, the price of the cattle and the proportions in which the proceeds were to be distributed, having been arrived at, Dawson signed and delivered the note for $19,033; O'Neal executed an absolute bill of sale to him; the cattle were delivered; and McCulloch and Dawson started on the drive, it being understood that the cattle were to be driven to market beyond the boundaries of the State. On the same day Dawson sold cattle to the amount of $3419, which was receipted for on the note by McCulloch, and which was divided *pro rata* between Hunter, Evans & Co. and the bank, as agreed upon by their representatives at the time; Hunter, Evans & Co. receiving $1668.56. On the 25th of May McCulloch received from further cattle sold a draft for $1842, payable June 22d, which, being payable to Hunter, Evans & Co., was remitted to them; but McCulloch at the same time drew a draft on Hunter, Evans & Co. in favor of the bank for the bank's share, according to the proportion agreed upon, namely, $939.88, McCulloch having been instructed by the attorneys that of every one thousand dollars received he should send Hunter, Evans & Co. $482.52 and the bank $510.48.

In our judgment the execution and delivery of his note by Dawson, and the delivery of the cattle to him, and O'Neal's bill of sale, constituted, under the circumstances, the consummation of the written agreement so far as he was concerned. The cattle belonged to Dawson, subject to being retaken by Hunter, Evans & Co. and the bank, if Dawson did not sell them by the first of October. All that remained for Dawson to do was to sell the cattle and pay over the proceeds to McCulloch until his note was extinguished.

Opinion of the Court.

It may be conceded that Hunter, Evans & Co. supposed on the 22d of May that O'Neal would be able to secure the balance due, but Dawson did not agree, as we view the transaction, that O'Neal should do so, nor was there any reason why he should, if he paid the price agreed upon for the cattle. The controversy, if any, between the other parties, would be transferred to the proceeds.

What they all desired and what they all agreed upon was a sale of the cattle for their value, and the collection of the proceeds of such sale, and this was effected in the manner stated by the arrangement with Dawson, who, however, was under no obligation after the cattle were delivered to him, except to account for their proceeds to the amount of the note he had given, or surrender them in case of failure to realize before October 1st.

We regard the action of Hunter, Evans & Co., in commencing suit on the 31st day of May, in the District Court of Montague County, against Dawson impleaded with O'Neal, and taking possession of Dawson's cattle by writ of sequestration, as unjustifiable, and hold that Dawson is entitled to recover such damages as he actually sustained, by way of reconvention, in this suit. We are asked to dismiss the bill altogether, and if it had remained, as originally filed, a bill for the foreclosure of the chattel mortgage given Hunter, Evans & Co., which mortgage had been in effect disposed of by the agreements of March 20th, that course might have been proper; but the parties repleaded, and the bill as amended being in the alternative, and seeking the ascertainment of the indebtedness of O'Neal to complainants, and the payment of their share of the proceeds of the cattle, we think it should be retained and go to decree, upon being remanded, in accordance with the views herein expressed. The agreement between Hunter, Evans & Co. and the bank, and O'Neal, provided that, in case of any difference or trouble about the amount of the indebtedness of O'Neal to Hunter, Evans & Co., or the bank, the disputed amount, when determined by agreement, suit, arbitration or otherwise, should be paid from the proceeds of the sale to Dawson, or from security furnished

by O'Neal, and the Circuit Court held that when the amount of the claim of Hunter, Evans & Co. was determined in the suit, they should participate *pro rata* in the fund derived from Dawson's note, and from property of O'Neal realized upon outside of that.

As it is clear that O'Neal was liable for very much the larger part of the amount disputed by him, so that the *pro rata* proportions arrived at at Will's Point were incorrect, and as we do not perceive that the bank is so situated as to be equitably entitled, under all the circumstances, to insist, upon the principles of estoppel or otherwise, that the proportions, as then estimated, must necessarily remain unchanged, we are not inclined to challenge the conclusion reached by the Circuit Court in this regard.

It appears from the evidence that after Dawson replevied the cattle he sold them, and paid the balance due upon his note into the bank to abide the result of this suit, but at what date this deposit was made, and the exact amount of it, does not appear. The sums of $3419 and $1842 had already been paid upon the note, leaving a principal sum of $13,772; but the note bore ten per cent interest, which must be added down to the date of the payment into the bank. Upon a supplementary writ of sequestration, dated June 21, 1880, and directed to the sheriff of Van Zandt County, 247 cattle belonging to O'Neal were taken, of which he replevied 21 cows and calves, worth $110, and gave bond therefor July 17, and on the 20th of July the remainder of said cattle were delivered to Hunter, Evans & Co., being valued by the sheriff at $2424.56; Hunter, Evans & Co. giving bond in the penal sum of $5000. These cattle, it is testified to by O'Neal and Allen, were worth $15 a head, with the exception of a few calves, which were worth about $7 a head. Hunter, Evans & Co. sold 196 of them for $2141.50. The Circuit Court found their value to be that fixed by the sheriff, namely, $2424.56, and with that we are content. In the view which we take of the conduct of Hunter, Evans & Co. they are to be held to have received this $2424.56 July 20, 1880, and to account also for $110 as of July 17, 1880, leaving them to pursue for their own

benefit the sureties on O'Neal's bond. The fund, therefore, to be divided *pro rata* consists of the amount of the Dawson note, with such interest as accrued thereon down to the date of the payment by Dawson into the bank, and of the $2424.56 and of the $110.

As of what date shall the proportions in which this fund is to be divided between Hunter, Evans & Co. and the bank be ascertained? We believe it most equitable that this *pro rata* division should be determined as of the date that Dawson paid the money into the bank.

In arriving at the amount actually due from O'Neal to Hunter, Evans & Co., for the purpose of distributing the fund, we think the account attached to the bill may be treated as sufficiently shown by the evidence to be correct, with the exception of some of the interest charges, which are calculated at ten per cent and which ought not to be compounded. The rate of interest in the State of Illinois in 1879–80 was six per cent, but in all written contracts it was lawful for the parties to stipulate or agree that eight per cent per annum should be paid, and it was provided that any person or corporation who should contract to receive a greater rate of interest or discount than eight per cent should forfeit the whole of said interest so contracted to be received, and be entitled only to recover the principal sum. Revised Statutes Illinois, 1881, c. 74, p. 650.

In the State of Texas the rate of interest when no specified rate was agreed upon was eight per cent, which applied to open accounts from the first day of January after the same were made. The parties to any written contract might agree to and stipulate for any rate of interest not exceeding twelve per cent per annum. Revised Statutes of Texas, 1879, p. 433.

We agree with appellees' counsel that the statutes of Texas do not apply, and are of opinion that Hunter, Evans & Co. are entitled to receive interest at no greater rate than that fixed by the laws of Illinois. As usury was not pleaded by O'Neal, we shall not disturb in the account the discounts of his notes and the fifty dollars interest charged as of August 20; but we

are not convinced that O'Neal acquiesced in any of the charges of interest after that. These charges up to February 20, 1880, amounted to $875.76. The balance shown February 20, 1880, was $17,871.34, and $875.76 being deducted, leaves $16,995.58. Taking this as a basis, interest may be calculated on the average monthly balances after August 20, 1879, at the rate of six per cent, down to the date at which Dawson paid the balance due on his note into the bank, and then added to the principal sum. This will give the amount due to Hunter, Evans & Co. as of that date if they had received no payments thereon in the intermediate time.

The bank's debt should be ascertained as of the same date, namely, the date when Dawson paid the balance on his note into the bank, by adding the interest to O'Neal's note held by it of $9810.11, dated December 10, 1879, according to its terms.

The proportion of the fund to go to each of the debts so ascertained can then be arrived at. From the *pro rata* amount to come to Hunter, Evans & Co. should be deducted the payments of $1668.56, May 22, and $1842, June 22, and the sum of $110, July 17, and of $2424.56 as of July 20, with interest, and the balance of the *pro rata* amount should be decreed to be paid out of the money deposited by Dawson as of the date of such deposit, the bank retaining the remainder, and at the same time provision should be made for the production and cancellation of Dawson's note, the discharge of the sureties upon his forthcoming or replevin bond, and the payment of his claim in reconvention.

While the case was pending in the Circuit Court, John O'Neal died and the cause was revived as to Mary O'Neal, his administratrix.

She did not appeal, and the bank and Dawson petitioned the court to be allowed an appeal as between themselves and Hunter, Evans and Buel, the complainants, which was ordered by the court as to said two defendants, who perfected their appeal accordingly.

This was proper, as with the matters complained of by the bank and by Dawson, O'Neal's estate had no concern. The

total balance of the indebtedness due from that estate, after all payments and money realized were applied, would be the same, irrespective of the proportion of such balance found due to each of the two creditors. The decree was severable in fact and in law, and the bank and Dawson were entitled to prosecute their appeal without joining their codefendant, who did not think proper to question the judgment.

And while, in order to a correct distribution of the fund, it becomes necessary to find the indebtedness of O'Neal to Hunter, Evans & Co. and to the bank, this is not a determination of the amount remaining due after the distribution is made, with intent to a decree over against O'Neal's estate therefor, as the decree originally entered, so far as relates to that, stands unappealed from by either of the parties concerned.

The decree of the Circuit Court is reversed, with costs, and the cause remanded with directions to proceed in conformity with this opinion.

UNITED STATES *v.* MARSHALL SILVER MINING COMPANY.

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

No. 17. Argued November 20, 1888. — Decided March 5, 1889.

When the United States retires from the prosecution of a suit instituted to vacate a patent of public land, without causing the appeal to be dismissed, and another party, claiming the same land under another patent, is in court to prosecute the appeal, this court will not dismiss it on the motion of the appellee as of right, but will look into the case, and if the circumstances require it, will hear argument on the case and decide it.

Errors and irregularities in the process of entering and procuring title to public lands should be corrected in the Land Department, so long as there are means for revising the proceedings and correcting the errors.

Silence for more than eight years after a party has abandoned a contest for a patent of mineral land, and has submitted to a decision of the question by the Land Department, however erroneous, is such laches as

Statement of the Case.

amounts to acquiescence in the proceedings and precludes a court of equity from interfering to annul them.

When the officers of the Land Department act within the general scope of their powers in issuing a patent for public land, and without fraud, the patent is a valid instrument, and the court will not interfere, unless there is gross mistake or violation of law.

A bill in chancery brought by the United States to set aside and vacate a patent issued under its authority, is not to be treated as a writ of error, or as a petition for a rehearing in chancery, or as if it were a mere retrial of the case before the land office.

The holder of a patent from the United States cannot be called upon to prove that everything has been done that is usual in the proceedings in the land office before its issue; nor can he be called upon to explain every irregularity, or even impropriety, in the process by which the patent was procured.

In equity. The bill was filed by the Attorney General of the United States to vacate letters patent for a tract of mineral land in Colorado. The case was reached on the calendar, October 12, 1888, when *Mr. Assistant Attorney General Maury* stated to the court, that the United States had no interest in the suit, and did not prosecute the appeal. *Mr. Simon Sterne*, on behalf of the appellees, then moved in open court to dismiss the appeal. *Mr. James K. Reddington* appeared for parties claiming a portion of the same tract under other letters patent, and objected to the dismissal, whereupon the case was passed.

On the following Monday, the 15th of October *Mr. Assistant Attorney General Maury* on behalf of the Attorney General presented the following statement, entitled in the cause.

"And now comes the Attorney General of the United States and gives the court to be informed that the United States has no interest in the subject matter of this suit, and that the controversy involved therein is one between private parties only; but the Attorney General makes no objection to the prosecution of this appeal in the name of the United States by the parties in whose interest it was taken, if, in the opinion of the court, the United States was under an obligation to such parties to bring this suit, or is under an obligation to them to prosecute this appeal."

"LETTER OF COMMISSIONER OF THE LAND OFFICE.

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 17, 1888.

"Hon. WILLIAM F. VILAS,
Secretary of the Interior:

"SIR: In the matter of the inquiry made in letter of the 15th instant from the honorable Attorney General whether the United States have any substantial interest in the matter involved in the case of *The United States* v. *The Marshall Silver Mining Company and the Colorado Central Consolidated Mining Company*, I have the honor to submit the following report in compliance with your instructions indorsed on said Attorney General's letter, which was received by your reference of the 16th instant.

"Patent for the Tunnel No. 5 lode claim, Central City, Colo., mineral entry No. 358, was erroneously issued June 8, 1874, and included the ground in conflict with the survey of the Cayuga lode claim.

"Patent for the Cayuga lode claim, Central City, Colo., mineral entry No. 1778, was issued January 31, 1882, and also included said ground in conflict.

"The ground in conflict rightly belongs to the Cayuga claimants, and is fully covered by their said patent.

"The government has no pecuniary interest in the ground in controversy.

"It is believed, however, (see report to your office in the case dated February 3, 1883,) that the Department is under obligation to inquire into the matter and see that the Cayuga claimants have a patent clear from interference and unclouded with controversy arising through official acts.

"The Attorney General's letter of the 15th instant is herewith returned. Letter from same referred to this office by you on the 8th instant, if received has been mislaid.

"Very respectfully,

"S. M. STOCKSLAGER,
Acting Commissioner."

Opinion of the Court.

Thereupon a motion to dismiss the appeal was presented and filed, and argument heard thereon, *Mr. R. S. Morrison* for the motion, and *Mr. James K. Reddington* opposing. On the 22d day of October, the court denied the motion, and ordered the case set down for hearing at the foot of the call on the 15th November.

The case was reached and argued on the 20th November.

Mr. James K. Reddington for appellant. *Mr. J. H. Hickcox, Jr.*, was with him on the brief.

Mr. Simon Sterne and *Mr. R. S. Morrison* for appellees.

Mr. Justice Miller delivered the opinion of the court.

The case before us originated in a bill in equity brought in the Circuit Court of the United States for the District of Colorado, in the name of the United States of America, by its Attorney General, and the District Attorney of the United States for that district, against the Marshall Silver Mining Company and the Colorado Central Consolidated Mining Company, defendants.

The purpose of the bill was to set aside and vacate a patent issued by the government to the Marshall Silver Mining Company, for a vein or lode of mineral deposit, lying in the Griffith Mining District, in the county of Clear Creek, Colorado, known as the "Tunnel Lode, No. 5," dated on the 8th day of June, 1874. Afterwards another patent, including a part of the same land covered by the one just referred to, was issued to McClellan, Rist and Webster, upon what was called the "Cayuga Lode," on the 31st day of January, 1882.

The grounds which are set up in the bill for vacating the first-mentioned patent are mainly such as go to show that its issue fraudulently deprived the holders of the second instrument of the right to the title of so much of the land as is covered by the conflicting boundaries described therein, so that the result of a decree annulling the first patent would be to give to the claimants under the second the paramount title.

The Circuit Court, after hearing the case on the bill, two different demurrers, answers, replication, and a large amount of testimony, dismissed the suit. From that decree the present appeal was taken by the United States.

At the beginning of this term the attorney for the government filed in this court a statement that the United States had no pecuniary interest in the suit, and the officers charged with the conduct of such matters on the part of the government declined to take any farther part in the argument of the case. They did not, however, dismiss the appeal, and made no objection to its prosecution by the private parties interested in the matter, who had conducted the case from its inception. Thereupon a motion was made by the appellees and argued before the court to dismiss the appeal, which was resisted by the counsel interested in the second patent. Under all the circumstances, the court determined to hear it, refused the motion, and, after thorough argument, the case is now before us for decision.

The charges which are made the basis for the relief sought here may be comprehended under two heads, although they are so mingled together in the bill that it seems doubtful whether they were intended to be considered and treated as separate propositions. The main ground is an allegation of fraud, practised upon the parties claiming the Cayuga Lode, by collusion between those having the management of the claim to Tunnel Lode, No. 5, and certain officers of the Land Department, and particularly the register and receiver of the land office located at Central City.

The material facts are, that the claimants to both of these lodes seem to have been prospecting in that vicinity, and discovered mineral in their different claims about the same time. They each had their claims staked out and surveyed by deputy surveyors of the United States, and about the same time they each made application to the land office for their entry, with a view of obtaining patents therefor. Upon the applications being made for a patent upon the Cayuga lode, the Marshall Silver Mining Company, discovering that it interfered with a portion of their claim, brought a suit in the local court of the

State, under the act of Congress on that subject, Rev. Stat. § 2326, against McClellan, Rist and Webster, asserting the superiority of their claim to a patent for the land in controversy. The statute provides that the judgment in such a suit shall govern the rights of the parties in the land office. This suit was on the docket of the court for some time, perhaps a year or more. In the mean time Rist, one of the parties in interest under the claim to the Cayuga lode, made a disclaimer in the local land office of the proceedings taken by his partners, in the name of McClellan, Rist and Webster, and, so far as he was interested in that claim, directed the proceedings to be dismissed. Accordingly, the register and receiver of that office made an entry dismissing the claim to the Cayuga lode and the application for a patent thereon, under the belief, as they expressed it, that such was the necessary result of the action of Rist.

One of the questions of fact which is disputed in this case is, whether McClellan and Webster had notice of these proceedings, which resulted in the dismissal of the application for a patent upon the Cayuga claim. This will be considered presently.

Not long after this order was made in the local land office the owners of the Tunnel lode, who had assumed the name, either by incorporation or as partners, of the Marshall Silver Mining Company, dismissed the suit which they had brought in the state court, contesting the right of the Cayuga claimants to a patent for the property in controversy. They obtained from the clerk of the court a certificate of such dismissal, and thereupon proceeded in the prosecution of their claim in the land office, *ex parte*. They procured from the surveyor of the United States, by his deputy, an amended survey of their claim, and it was then allowed by the local officials. It was forwarded by them to the Commissioner of the General Land Office, who, after a full consideration of the subject, occupying nearly a year, issued to the Marshall Silver Mining Company the patent which is now assailed by the bill of complaint in this case. They had before taken possession of the property, and they worked the lode now in dispute for about eight years

and a half, without any complaint being made by the claimants of the Cayuga lode. At the end of that time these parties appeared before the Land Department, denied the validity of the order dismissing their claim, and proceeding themselves *ex parte*, without notice, to the Marshall Silver Mining Company, procured the patent already referred to, dated January 31, 1882.

The main controversy arising out of this condition of affairs is upon the allegation that Rist was corruptly induced to apply to the register and receiver of the local land office for the dismissal of the claim in which he was an interested party, and that these officers were in collusion with him and the claimants of the Tunnel lode in making the order which they did.

It must be conceded that there is a total failure to establish any such corrupt motive or action on the part of either the officers or Rist. What the motives were which induced Rist to make his application to the officers of the land office is not very plain, but he acted through Mr. Butler, a lawyer of character and reputation, and no evidence is introduced showing that he was imposed upon, misled, or bought up. Still less is there any evidence that the register or receiver were bribed or influenced by any improper motives in the action which they took.

It is alleged in the answer that the legal view which these officers took of the matter, that a withdrawal on the part of one of the claimants who had a real interest in the claim required the dismissal of the whole claim, may have been the law of the case. We do not consider it necessary now to inquire whether such was the law.

It is also alleged in the answer that such had been the course of proceeding in similar cases before that time in the Land Department. We do not know that there is any evidence that such had been the ruling or that a contrary decision had ever been made. At all events, as the case presents itself to us, there is no corrupt or fraudulent motive on the part of these officers shown as a foundation for setting aside this patent. Whether or not there was a mistake made by them in regard to the law of the subject, we do not think it

necessary to decide now; nor are we satisfied that, if it was a clear mistake of law by these officers, it was so far an essential element in the final determination of the Commissioner of the General Land Office of the rights of the parties as to invalidate the patent issued as the result of those proceedings.

This point, in our opinion, is relieved of any difficulty by the subsequent conduct of McClellan, Rist and Webster, in regard to the matter, which amounted to an acceptance of the decision of the register and receiver, and an acquiescence in it, that forbids an assertion by them now of a claim which they might have asserted at a previous stage of the transaction. McClellan, and perhaps another of the claimants, lived at Georgetown, Colorado, about twenty miles from the land office at Central City, where all these proceedings were conducted, and some twenty-two miles from the locality where the lodes in question were situated. Although there is some dispute as to whether they received notice of the order dismissing their claim, we are of opinion that the evidence clearly preponderates in favor of the conclusion that they did receive such notice immediately after the order was made.

It appears from the testimony of Arnold, the receiver of the land office at Central City, which is supported by a press copy of a letter, that he notified McClellan and Webster, on April 30, 1873, of the dismissal of the Cayuga claim; and that this notice was given by mail, in conformity with the usual practice of the office at that time. Arnold also testifies that he knows that McClellan received the letter.

The suit in the state court was dismissed by the Marshall Silver Mining Company shortly after the order was made by the local land office dismissing the Cayuga claim. That was a suit in which McClellan and Webster were defendants; it had been progressing for some time, and it is impossible to believe they did not have notice of its dismissal; for ordinary attention to their own interests would have required them to know what was going on in regard to it.

The Marshall Silver Mining Company and the Colorado Central Consolidated Mining Company, to which the former conveyed their interest, continued working the mine upon

their lode from 1873 until 1882, without any interference on the part of McClellan or Webster; and the former admits that he knew those companies were so working; yet, during all this time, a period of some eight years and a half, they made no objection to such working, although they must have known all that was going on in regard to it. They acquiesced in the proceedings, and made no effort to set aside the patent, or to correct any injustice which had been done them in the proceedings upon which the patent had been issued, while the other parties had full and undisputed possession of the land.

It may be said that they could not help themselves, and that this silence and inaction on their part did not imply acquiescence. But they had the right to appeal to the Commissioner of the General Land Office from the order of the register and receiver dismissing their application. This was not done, and it never has been done. When parties are engaged in a contest, both before the courts and in the land office, with regard to their rights in a deposit of mineral or a lode, in both of which tribunals action has been taken, putting one party entirely out of court in the pending suit, and dismissing the same party's application for a patent, and there is a right of appeal, it would be a most inequitable rule to hold that, after he has acquiesced and remained silent for more than eight years, while the successful party is in possession of the lode in controversy, working out its mineral, right in the face of the unsuccessful party, the latter can resume the contest after this long interval, and after the legal title has passed from the United States. Under the decisions made by this court there is no doubt that the legal title to this mineral land did pass from the United States by the first patent. *United States* v. *Schurz*, 102 U. S. 378.

All the errors and irregularities which occur in the process of entering and procuring title to the public lands of the United States ought to be corrected within the Land Department, which includes the authority vested in the Secretary of the Interior, so long as there are means of revising the proceedings and correcting these errors. A party cannot be permitted to remain silent for more than eight years after he has

abandoned a contest and submitted to the decision of the matter at issue, although it may have been erroneous, and then come forward in a court of equity, after the title has passed from the United States, and seek to correct the errors which may have occurred during the progress of the proceedings in the land office. If the officers of that department of the government have acted within the general scope of their power, and without fraud, the patent which has issued after such proceedings must remain a valid instrument, and the court will not interfere, unless there is such a gross mistake or violation of the law which confers their authority, as to demand a cancellation of the instrument.

We see no such gross mistake in the present case, but do think there is such laches as amounts to acquiescence in regard to the proceedings before the Land Department, as to which error is charged, and precludes the interference of a court of equity to annul or set aside the patent issued in 1874.

We have recently had before us a number of this class of cases, in which the attempt has been made to invalidate by a decree of the court patents which have been issued by the government of the United States to private parties. There has been such frequent occasion to consider the subject that it would be only a repetition to go over the ground again. This whole question was very fully reviewed during the present term of the court in the case of *United States* v. *Iron Silver Mining Company*, 128 U. S. 673, in the opinion delivered by Mr. Justice Field, in which the various decisions were re-examined with care.

The more important of these cases are *Maxwell Land Grant Case*, 121 U. S. 325, and *Colorado Coal and Iron Co.* v. *United States*, 123 U. S. 307. To these may be added *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, and *United States* v. *Beebe*, 127 U. S. 338.

Some point is made, in the bill and in the argument, concerning the amended survey of the Tunnel Lode claim, and the manner of its presentation to the Commissioner of the General Land Office, with other irregularities which are suggested and pointed out; but we think it must be taken to be

the settled doctrine of this court that a bill in chancery, brought by the United States to set aside and vacate a patent issued under its authority, is not to be treated as a writ of error, or as a petition for a rehearing in chancery, or as if it were a mere re-trial of the case as it was before the land office, with such additional proof as the parties may be able to produce.

The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the proceedings had in the Land Department before its issue, nor can he be called upon to explain every irregularity or even impropriety in the process by which the patent is procured. Especially is it true that where the United States has not received any damage or injury, and can obtain no advantage from the suit instituted by it, the conduct of the parties themselves, for whose benefit such action may be brought, must itself be so free from fault or neglect as to authorize them to come, with clean hands, to ask the use of the name of the government to redress any wrong which may have been done to them.

One matter which has been much discussed before us is, whether the Colorado Central Consolidated Mining Company, one of the defendants in this suit, and the present owner of such title as passed to the Marshall Silver Mining Company by the patent sought to be vacated, is an innocent purchaser of the property in ignorance of any of the matters set up by the complainants. While it is not necessary to pass upon this subject in the view we have taken of the case, it is not improper to say that, as presented to us, the claim of that company to be an innocent purchaser presents a very formidable objection to the granting of the relief asked for in a court of equity.

The decree of the Circuit Court for the District of Colorado is

Affirmed.

Citations for Plaintiff in Error.

SHOTWELL *v.* MOORE.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 1030. Argued January 30, 1889. — Decided March 5, 1889.

A State may make the ownership of property subject to taxation, relate to any day or days or period of the year which it may think proper; and the selection of a particular day on which returns of their property for the purpose of assessment are to be made by taxpayers does not preclude the making of assessments as of other periods of the year.

Section 2737 of the Revised Statutes of Ohio, which requires the taxpayer to return to the assessor, as of the day preceding the second Monday in April in each year, among other things a statement of "the monthly average, amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within that time invested in or converted into, bonds or other securities of the United States or of this State, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April, and any indebtedness created in the purchase of such bonds or securities shall not be deducted from the credits under the fourteenth item of this section" does not tax the citizen for the greenbacks or other United States securities which he may have held at any time during the year, but taxes him upon the money, credits, or other capital which he has had and used, according to the average monthly amount so held, and is not in conflict with § 3701 of the Revised Statutes of the United States exempting the obligations of the United States from taxation under State, municipal or local authority.

This was an action brought by the defendant in error as treasurer of Harrison County, Ohio, against the plaintiff in error in the Court of Common Pleas for that county to recover the amount of a tax assessed against him. Judgment in the Common Pleas for the defendant, which was reversed by the Circuit Court, and the judgment of reversal was affirmed by the Supreme Court of the State. This writ of error was sued out to the latter judgment. The case is stated in the opinion.

Mr. Richard A. Harrison and *Mr. T. D. Lincoln* for plaintiff in error cited: *Otis* v. *Boston*, 12 Cush. 44; *Ogden* v. *Walker*, 59 Indiana, 460; *Montgomery County* v. *Elston*, 32 Indiana, 27; *Stillwell* v. *Corwin*, 55 Indiana, 433; *McCulloch*

v. *Maryland*, 4 Wheat. 316; *Bank of Commerce* v. *New York*, 2 Black, 620; *Bank Tax Case*, 2 Wall. 200; *Banks* v. *New York*, 7 Wall. 16; *Weston* v. *Charleston*, 2 Pet. 449; *Bank* v. *Supervisors*, 7 Wall. 26; *People* v. *Ryan*, 88 N. Y. 142; *Savary* v. *Georgetown*, 12 Met. (Mass.) 178; *Greene* v. *Mumford*, 5 R. I. 472; *S. C.* 73 Am. Dec. 79; *Kellogg* v. *Ely*, 15 Ohio St. 64; *Exchange Bank of Columbus* v. *Hines*, 3 Ohio St. 1; *Latimer* v. *Morgan*, 6 Ohio St. 279; *Champaign County Bank* v. *Smith*, 7 Ohio St. 42; *Payne* v. *Watterson*, 37 Ohio St. 121.

Mr. David K. Watson, Attorney General of Ohio, and *Mr. D. A. Hollingsworth* (with whom was *Mr. John M. Garven* on the brief) for defendant in error cited: *Bank of Commerce* v. *New York*, 2 Black, 620; *Banks* v. *New York*, 7 Wall. 16; *Bank* v. *Supervisors*, 7 Wall. 26; *Mitchell* v. *Leavenworth County*, 91 U. S. 206; *Holly Springs Co.* v. *Marshall County*, 52 Mississippi, 281; *Jones* v. *Seward County*, 10 Nebraska, 154; *Dixon County* v. *Halstead*, 23 Nebraska, 697; *Exchange Bank* v. *Hines*, 3 Ohio St. 1; *People* v. *Ryan*, 88 N. Y. 142; *Witherspoon* v. *Duncan*, 4 Wall. 210; *State Railroad Tax Cases*, 92 U. S. 575; *Games* v. *Dunn*, 14 Pet. 322; *Pelton* v. *National Bank*, 101 U. S. 143; *Cummings* v. *National Bank*, 101 U. S. 153; *National Bank* v. *Kimball*, 103 U. S. 732; *Corwall* v. *Todd*, 38 Connecticut, 443; *Olmsted* v. *Barber*, 31 Minnesota, 256; *Poppleton* v. *Yamhill County*, 8 Oregon, 337.

Mr. Justice Miller delivered the opinion of the court.

This writ of error to the Supreme Court of the State of Ohio brings up for review a judgment of that court concerning the taxation by the state authorities imposed upon the plaintiff in error, Stewart B. Shotwell, as the owner of a certain amount of United States legal-tender Treasury notes, commonly called "greenbacks." The case was tried in the Court of Common Pleas of Harrison County, Ohio, by the court, without a jury, by consent of parties; and that court found the following conclusions of fact and law, under the provision of the state statute, upon which all the subsequent proceedings have been based:

"The parties to this cause having waived a jury, the same came on for trial to the court, and the parties with a view of excepting to the decision of the court upon the questions of the law involved in the trial, having requested the court to state in writing the conclusions of fact found separately from the conclusions of law, and the testimony having been heard, the court finds as conclusions of fact as follows:

"That the defendant is and for many years has been a resident of Harrison County, Ohio; that on the Saturday preceding the second Monday of April, in the years 1881, '82, '83, '84, and '85, the defendant had on deposit in bank, at the town of Cadiz, in said county, to his credit as a general depositor, the following sums: In 1881, $30,900; in '82, $26,900; in '83, $29,550; in '84, $18,560; in '85, $4700; that on said Saturday in each of said years he checked out the said balance so standing to his credit and at his request the same was paid to him in United States securities commonly called 'greenbacks;' that on each occasion after counting the money so paid to him he enclosed the same in a package, wrote his name thereon, and returned the same to the officer of the bank, requesting him to place the same in the bank's safe for him, which was done. On no occasion did the defendant carry the money out of the bank building; and in the early part of the next week in each of said years he returned to the bank and demanded his package, which was given him, and he opened the same and delivered it to an officer of the bank, asking that the amount should be placed to his credit as a general depositor, which was done; that on each occasion the defendant drew out the balance due him with intent to obtain non-taxable securities, and thereby evade taxation on such balance; but that on each occasion during the time which intervened between the withdrawal and the subsequent deposit as a general depositor he was *bona fide* the absolute owner of the money so withdrawn, and the same was subject to his disposal; that he did not in either of said years list for taxation any part of the money so paid to him nor did he list the monthly average amount or value, for the time he held or controlled the same within the preceding year, of any moneys, credits, or other

effects within that time invested in or converted into the said securities so by him drawn out of bank, and that said monthly average amount so invested by the defendant in such securities within the years, respectively, preceding the drawing out of said moneys was the amount so drawn out at the end of the year; that the auditor of said county placed said several sums upon the duplicate of said county for the year 1885, except for the year '85 he erroneously placed $4949, with fifty per cent added thereto, making $7420, whereas the data before him and by which he should have been controlled authorized only $4700, which with fifty per cent added, would make $7050; and the court further finds that the amount of taxes chargeable upon the aggregate of said several sums, if the same are subject to taxation, is $2317.05, and that said duplicate was delivered to the treasurer of said county for collection.

"And the court being of opinion that, upon the facts so found, the law of this case is with the defendant, it is thereupon considered that the defendant recover of the plaintiff his costs herein expended, taxed at $20.60; to which ruling of the court as to the law of the case and to the judgment so rendered the plaintiff excepts."

The case was taken by appeal to the Circuit Court of the State, where the decision of the Court of Common Pleas was reversed, and judgment rendered for the amount of the tax sued for against Shotwell. This was carried to the Supreme Court of the State, in which the decision of the Circuit Court was affirmed. To review that judgment this writ of error is prosecuted.

The error assigned is that the tax levied and enforced by this judgment was upon notes of the United States, which is forbidden by the Revised Statutes of the United States in the following language:

"Sec. 3701. All stocks, bonds, Treasury notes and other obligations of the United States shall be exempt from taxation by or under state or municipal or local authority."

And that the Supreme Court of Ohio erred in holding that § 2737 of the Revised Statutes of the State, passed June 20,

1879, to take effect January 1, 1880, is not in violation of, nor repugnant to, the section above quoted.[1]

It is not controverted by counsel for defendant in error that under the United States law the greenbacks were not subject to taxation, or that if the Ohio statute, when properly construed, authorizes such taxation it is to that extent invalid. But

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[1] Sections 2736 and 2737 are as follows:

"SEC. 2736. Each person required to list property shall, annually, upon receiving a blank for that purpose from the assessor, or, within ten days thereafter, make out and deliver to the assessor, a statement, verified by his oath, of all the personal property, moneys, credits, investments in bonds, stocks, joint stock companies, annuities, or otherwise, in his possession, or under his control, on the day preceding the second Monday of April of that year, which he is required to list for taxation, either as owner or holder thereof, or as parent, husband, guardian, trustee, executor, administrator, receiver, accounting officer, partner, agent, factor, or otherwise. . . .

"SEC. 2737. Such statement shall truly and distinctly set forth, first, the number of horses, and the value thereof; second, the number of neat cattle, and the value thereof; third, the number of mules and asses, and the value thereof; fourth, the number of sheep, and the value thereof; fifth, the number of hogs, and the value thereof; sixth, the number of pleasure carriages (of whatever kind), and the value thereof; seventh, the total value of all articles of personal property, not included in the preceding or succeeding classes; eighth, the number of watches, and the value thereof; ninth, the number of piano-fortes and organs, and the value thereof; tenth, the average value of the goods and merchandise, which such person is required to list as a merchant; eleventh, the value of the property which such person is required to list as a banker, broker, or stock-jobber; twelfth, the average value of the materials and manufactured articles which such person is required to list as a manufacturer; thirteenth, moneys on hand or on deposit subject to order; fourteenth, the amount of credits as hereinbefore defined; fifteenth, the amount of all moneys invested in bonds, stocks, joint stock companies, annuities, or otherwise; sixteenth, the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into, bonds or other securities of the United States or of this State, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April; and any indebtedness created in the purchase of such bonds or securities shall not be deducted from the credits under the fourteenth item of this section; but the person making such statement may exhibit to the assessor the property covered by the first nine items of this section, and allow the assessor to affix the value thereof, and in such case the oath of the person making the statement shall be in that regard only that he has fully exhibited the property covered by said nine items."

the question presented to us for consideration is whether the tax levied in this case by the authorities of the State was a tax upon the legal-tender notes issued by the government in the hands of Shotwell.

It is conclusively shown by the finding of facts that prior to the day to which the assessment of property for taxation relates by the laws of Ohio, Shotwell had in his bank, on general deposit, subject to his order, at the town of Cadiz, in the county of Harrison, in the previous years of 1881, 1882, 1883, 1884, and 1885, the sums of money on which the taxes here in controversy were assessed; but it is claimed by him that, a day or two previous to that fixed by statute, he had, in each of those years, drawn out the balance of his general deposit account on a check, and, in each case receiving the amount of it in legal-tender notes, had put them into a package, which he enclosed in an envelope, and placed with the bank as a special deposit, writing his name thereon, and requesting the bank to put it in its safe for him, which was done.

Arguing from the proposition that the assessment for an entire year, under the laws of Ohio, must be made on the particular day mentioned in the statute, and that these greenbacks were his property on that day, it is insisted, with great earnestness by counsel, that the amount of the package thus on special deposit on that day could not be taxed by the state authorities. To this general proposition there does not appear to be any valid objection if the thing done had been in the ordinary course of business, and the conversion of his general deposit in the bank into a private package of greenbacks, exempt from taxation, were free from illegal purpose or fraudulent motive. But since it is found as a matter of fact that the whole transaction was made for the purpose of evading taxation on the amount of his general deposit on the day it was exchanged for greenbacks, and that there was no purpose of permanently changing the amount of the deposit in the bank subject to his order, and, as such, liable to taxation, it is argued by counsel that it was a fraud upon the revenue laws of the State of Ohio.

For all of the years mentioned the same process was gone

through with, and in every instance, within a week after the assessment, the plaintiff in error took the same greenbacks which he had placed on special deposit and immediately restored them to the bank as a general deposit, subject to his order; in other words, he remanded the amount to the condition in which it would have been liable to taxation if the period of assessment were not limited to the particular day mentioned in the statute.

It does not need the finding of the court below as a fact to show that this was an evasion, and a discreditable one, of the taxing laws of the State, if it could be made successful. It is, therefore, urged that on this ground alone — the illegal purpose for which the transactions were made in the bank — the court should hold the plaintiff in error liable to taxation for the amount thus converted. Several decisions on this subject by state courts, holding this view, are cited in the brief of counsel. They are directly in point, and relate to attempts of precisely the same character to effect a similar evasion of taxation on property otherwise liable thereto. Among these are *Holly Springs Savings and Ins. Co.* v. *Marshall County*, 52 Mississippi, 281; *Jones* v. *Seward County*, 10 Nebraska, 154; and *Poppleton* v. *Yamhill County*, 8 Oregon, 337. From the latter case we quote the following language:

"If a taxpayer, having a large amount of notes and mortgages, in order to escape the payment of taxes on the same, borrows a sum of money of a person residing out of the county, and deposits with his creditor such notes and mortgages, for the purpose of avoiding the payment of taxes on the same, such notes are taxable in the county where such taxpayer resides; and such deposit or transfer is a fraud on the revenues of the county."

And this court in *Mitchell* v. *Commissioners of Leavenworth County*, 91 U. S. 206, denounces conduct precisely similar to that of the plaintiff in error in this case, in the following language:

"United States notes are exempt from taxation by or under state or municipal authority; but a court of equity will not knowingly use its extraordinary powers to promote any such

scheme as this plaintiff devised to escape his proportionate share of the burdens of taxation. His remedy, if he has any, is in a court of law."

The circumstances of that case are precisely like those in the case before us. The taxpayer converted, in the same manner as Shotwell did, about nineteen thousand dollars in current funds on general deposit in his bank into the same value in greenbacks, and placed them in a package which he put in the vault of the bank for safekeeping. This was on February 28. On March 3, following, he withdrew this package, and deposited the notes to his general credit. This was done for the sole purpose of escaping taxation upon his money on deposit in the bank. That case only differs from the one at bar in the fact that the revenue officer proceeded to collect the tax assessed by distress, which compelled the defendant to resort to a court of equity to enjoin the proceedings; but this court held that the transaction was so inequitable that it would not be sustained in a court of chancery.

Instead of pursuing that method of collecting the tax in the present case, as the treasurer of the county had a right to do under the laws of Ohio, he brought an action at law against the taxpayer. It is now asserted that although the opinion of this court in *Mitchell* v. *Commissioners of Leavenworth County* holds that the party assessed can have no relief in a court of equity, still he might have, when sued at law, or in any manner where the issue could be heard in a court of law as distinguished from a court of equity.

All these decisions show that the courts look upon this transaction as indefensible, and consider it an improper evasion of the duty of the citizen to pay his share of the taxes necessary to support the government which is justly due on his property.

Waiving the question whether these equitable considerations would constitute a defence in an action at law to collect the tax in suit, we proceed to inquire whether the statute of Ohio made all assessments for taxes relate by an iron rule to the day preceding the second Monday in April, and to property possessed on that particular day, and that only. Is such a construction of the law of the State of Ohio a proper one?

It is to be conceded that a State may make the ownership of property subject to taxation relate to any day, or days, or period of the year, it may think proper, and that the selection of a particular day on which returns are to be made by taxpayers of their property for the purposes of assessment does not necessarily preclude the making of assessments as of other periods of the year. The State of Ohio, like many and perhaps most of the other States, collects from the business and property subject to taxation for the year preceding the specified date, the elements of an assessment of a tax to be paid by the taxpayer for the year succeeding that date, and it has in several instances recognized the fact that an assessment which assumed that all property should only be assessed to those who were the owners of it on the precise date named was not a just apportionment. Assessments of land are made once in ten years, with such additions every year as the value of improvements justifies. So in the case of merchants engaged in buying and selling goods, the stock on hand on that day might be either the largest or the smallest of any period during the year preceding. If it were either, a tax intended to be governed by the amount of property owned or held by them during such year would be evidently unjust either to them or to the State.

To avoid this evil the statute in Ohio provides for the ascertainment of the monthly average amount or value of the property or goods in which such parties were dealing, and for the assessment for taxation on that basis. Many kinds of business must be of this character.

The legislature, perceiving the facility with which negotiable securities and other rights and credits which were liable to taxation might be exchanged for greenbacks at the time the assessment for taxation was made, and after the assessment was over replaced in the form in which they had been, applied this principle, by special provision of the statute, to that form of property. In this they showed a wise forecast. So far as we can see, the statute which does this does not tax the citizen for the greenbacks which he may have held at any time during the year, but taxes him upon the money, credits, or other

capital which he has had and used, according to the average monthly amount he has so held.

Such we understand to be the purpose and effect of the section complained of by counsel, to wit, subdivision sixteen of § 2737 of the Revised Statutes of Ohio. We do not see any objection to that State endeavoring to arrive at the average monthly amount or value of the moneys, credits, or other effects of the citizen subject to taxation within the preceding year, and ascertaining in a similar manner the average amount of his securities, either state or national, for the same period, not subject to taxation, in order to fix a basis for assessment. It is certainly a much more equitable mode of determining how much of his property for the year preceding the assessment is liable to taxation, and how much is exempt, and more nearly effects the purpose of the Federal statute as well as that of the State of Ohio, to exempt the one and to tax the other, than a rule which assumes that the condition of the means and property of the taxpayer at a certain hour of a particular day in the year shall constitute the basis of his taxation for the entire year.

It needs no other evidence that the rule adopted by the State of Ohio is the better one than the case before us, by which a possessor of large means subject to taxation during every day in the year but one may escape the payment of any tax on all of his property if the trick resorted to in the present case be successful; and the cases which we have cited from the other state courts, as well as the opinion referred to of this court, clearly show the wisdom of the legislature of Ohio in protecting itself against the effects of the rule here contended for.

Section 2737 of the Ohio statutes, which prescribes the character of the statement to be made by persons holding moneys, credits, or investments, such as are described, and which are subject to taxation, declares that such statement shall truly and distinctly set forth, among other things, "moneys on hand or on deposit subject to order," and "the amount of credits as hereinbefore defined." Subdivision 16 requires a statement of "the monthly average amount or value,

for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects within that time invested in, or converted into, bonds or other securities of the United States or of this State, not taxed, to the extent he may hold or control such bonds or securities, on said day preceding the second Monday of April; and any indebtedness created in the purchase of such bonds or securities shall not be deducted from the credits under the fourteenth item of this section."

Of the right of the State of Ohio to make this provision we have no doubt. Its purpose is not to enable that State to tax the securities of the United States, but to permit it to tax other investments, moneys on hand and on deposit subject to order, while it combines in the same exemption the securities of the general government and those of the State. We know of no principle which forbids that State from taking the whole period of a business year already past as the best means of ascertaining how much the taxpayer shall be required to pay on property which is admitted to be taxable, and how much he shall deduct for the non-taxable securities of the State and of the United States.

As this was the method under which the plaintiff in error in this case was taxed, and as he was charged with no more than he was liable to pay under a wise and equitable law, we do not see any error in the judgment of the Supreme Court of Ohio, and it is accordingly

Affirmed.

Mr. Justice Bradley: I dissent from the judgment. I do not defend Mr. Shotwell; but it is a question of law, and the law of Ohio seems to me repugnant to the act of Congress which exempts the securities of the United States from taxation.

The law is this: The property that a man has on the second Monday in April is the amount of property which he is to return for taxation that year. Now, if a man chooses to buy United States securities one month or one day before that time, he has a perfect right to do it, and as the act of Con-

gress declares that United States securities shall not be taxed, the State has no right to tax him for them. But the legislature of the State of Ohio undertook to get around that law in this way; they say that a man shall be exempted from taxation for United States securities owned by him on the second Monday in April, only in proportion to the time that he has held them, so that if he has held them only one day he would be exempted only one 365th part of the amount; whilst, if the man of whom the taxpayer bought them, held them 364 days, he would get no exemption at all; he would be taxable for the consideration which he received for the securities and which he held on the second Monday in April. Therefore, in Ohio United States securities are only exempted from taxation in a limited manner, that is, in proportion to the time they have been held. All other property is treated differently. If anything is unconstitutional, it seems to me that this is.

GOODWIN *v.* FOX.

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

No. 168. Argued January 18, 21, 1889. — Decided March 5, 1889.

By a written agreement between two parties, one acknowledged that he was indebted to the other in the sum of $70,000. "over and above all discounts and set-offs of every name and nature;" and it was stated that the latter was to take up and satisfy certain other indebtedness of the former, and that the former had conveyed to the latter a stock of goods, and store-fixtures, notes, books and accounts, and a piece of land, "with power forthwith, at such times and in such manner as" the latter should "deem best, to convert the said goods," "fixtures, notes, accounts and premises into money, and apply the proceeds to the payment of said indebtedness," with interest, and also a certain farm; and it was agreed that if the former should, within six months from date, pay said indebtedness, the latter would reconvey the farm, but, in default of such payment, might foreclose "the certain mortgage comprised in" the conveyance of the farm and the agreement. The conveyances mentioned in the agreement were made, and the title to the piece of land and the farm and the right to the indebtedness, came into the hands of the plaintiff, who sold the land, and

brought this suit in equity against the original debtor for an account of the amount due on the security of the farm, and for a foreclosure of the debtor's equity of redemption in the farm: *Held*,

(1) The debtor could not go behind the agreement fixing the debt at $70,000, because there was no sufficient evidence to impeach it, on the ground that his signature was obtained by fraud or duress, or without his full knowledge of its provisions and consent to its terms;

(2) The debtor was entitled to be credited only with the sums realized by the creditor from the sale of the personal property and piece of land, and not with sums estimated, by testimony, as their value at the time of the agreement;

(3) Under the statute of Illinois, where the transaction took place, the creditor was entitled to interest on the $70,000 from the expiration of the six months, and on the amount paid by him on the other indebtedness from the time of paying it;

(4) The amount of a mortgage given by the creditor on the farm was to be credited to the debtor and paid by the farm.

Section 858 of the Revised Statutes in regard to the exclusion of a party to a suit as a witness, makes every party a competent witness except in cases covered by the proviso to the section.

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

Mr. Charles H. Wood for Kate W. Goodwin and Charles S. Goodwin, appellants.

Mr. John N. Jewett filed a brief for Sarah E. R. Smith and Charles M. Smith, appellants.

Mr. William C. Goudy for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

On the 20th of February, 1869, a written agreement was executed by Samuel H. Fox and I. Willard Fox, to which was appended a memorandum signed by Samuel H. Fox, the papers being as follows:

"Whereas I. Willard Fox is indebted to Samuel H. Fox and Henry W. Fox, partners doing business under the firm name and style of Fox & Co., in the sum of seventy thousand dollars, ($70,000,) over and above all discounts and set-offs of every name and nature; and whereas said Fox & Co., at the request of said I. Willard Fox, have taken up and satisfied, or [are]

about to take up and satisfy, certain other of the indebtedness of said I. Willard Fox, some of such indebtedness, and to the amount of about sixteen thousand dollars, ($16,000,) more or less, being satisfied by payment thereof, and to the amount of about thirty thousand dollars, ($30,000,) more or less, being so satisfied by payment at the rate of fifty cents on the dollar, whereby the said I. Willard Fox has become further indebted to said Fox & Co.; and whereas the said I. Willard Fox has sold and conveyed to the said Samuel H. Fox all and singular the stock of goods, wares and merchandise with the store fixtures, in the city of Chicago, including therewith his notes, books and accounts of every name, nature and description, and also the premises known as No. 376 North La Salle Street, being lot two (2) in block twenty (20), in Bushnell's Addition to Chicago, Illinois, in said city of Chicago, with power forthwith, at such times and in such manner as he, said Samuel H. Fox, shall deem best, to sell and collect and convert the said goods, wares, merchandise, fixtures, notes, accounts and premises into money, and apply the proceeds to the payment of said indebtedness to said Fox & Co., both said original indebtedness and that so taken up by them, at the rate paid therefor, with such interest added thereto as the said Samuel H. Fox or Fox & Co. shall have to pay thereon, or on any portion thereof, and has also conveyed to said Samuel H. Fox his farm in Lake County, Illinois, known as the Lake Zurich farm: Now, therefore, the said Samuel H. Fox agrees, that if the said I. Willard Fox shall and will, within six months from the date hereof, pay the entire amount of each name and kind of said indebtedness, or such portion thereof as remains at that time unpaid, then he, said Samuel H. Fox, shall and will reconvey the said Lake Zurich farm to said I. Willard Fox, but in default of such payment it is hereby agreed by the parties hereto that the said Samuel H. Fox may immediately foreclose the certain mortgage comprised in said conveyance of said Lake Zurich farm and this agreement.

"And the said I. Willard Fox hereby agrees, that, in case proceedings for such foreclosure be commenced, that he will interpose no defence thereto, nor attempt, by injunction, bill in equity, or in any other way, to hinder or defeat the same.

"Witness the hands and seals of the said Samuel H. Fox and I. Willard Fox, this twentieth day of February, A.D. 1869.

"SAMUEL H. FOX. [SEAL.]

"I. WILLARD FOX. [SEAL.]

"And the said Samuel H. Fox hereby agrees to release a certain mortgage which he has on a portion of said Lake Zurich farm, the indebtedness secured by said mortgage having become merged in said debt of seventy thousand dollars.

"SAMUEL H. FOX."

By deeds in fee simple, I. Willard Fox and his wife conveyed to Samuel H. Fox the North La Salle Street lot and the Lake Zurich farm, mentioned in the above agreement, simultaneously with its execution.

On the 17th of February, 1877, Kate W. Fox brought a suit in equity, in the Circuit Court of the United States for the Northern District of Illinois, against I. Willard Fox and his wife. Kate W. Fox was the widow of Henry W. Fox, who, with Samuel H. Fox, composed the firm of Fox & Co. Henry W. Fox had died in 1876, and by his will Kate W. Fox was made his sole executrix and sole devisee. In her bill she set forth the contents of the above agreement, without stating that it was in writing. The bill averred that, in pursuance of the agreement, Fox & Co. paid the $16,000 and the $30,000 of the indebtedness of I. Willard Fox, named in it; that I. Willard Fox and his wife executed and delivered to Samuel H. Fox deeds in fee simple of the Lake Zurich farm and the La Salle Street lot; and that I. Willard Fox assigned to Samuel H. Fox the goods, wares and merchandise, store fixtures, notes and accounts, mentioned in the agreement.

The bill also alleged that it was then further agreed between I. Willard Fox and Fox & Co., that the former should carry on his business, which was at Chicago, Illinois, in connection with the said stock of goods, wares and merchandise, notes and accounts, as though no such assignment thereof had been made to Samuel H. Fox; that Fox & Co., who were manufacturers of glass, in the State of New York, should advance and

furnish to I. Willard Fox goods in the way of his business, from time to time, as he should need and they should be able; that the price or value of the goods so furnished should be added to the indebtedness so due from I. Willard Fox to Fox & Co., and the former should apply the proceeds and avails of the business, as he should realize the same, to the payment of such indebtedness, until such future time as should be agreed upon by the parties, at which time he should turn over and deliver to Samuel H. Fox the merchandise which should then be on hand, the store fixtures, and the notes and accounts then uncollected, the proceeds and avails of which should then be applied by Samuel H. Fox towards the payment of the indebtedness which should then be due from I. Willard Fox to Fox & Co.; and that the original agreement should in all other respects remain binding.

The bill further averred, that, in pursuance of the last-mentioned agreement, I. Willard Fox continued to carry on his business until about February 20, 1870, that is, for about one year, in connection with the said stock of goods, store fixtures, and notes and accounts; that, during that period, Fox & Co. furnished to him merchandise, in the way of his business, to the amount of about $24,000; that, at the expiration of that period, he, in pursuance of that agreement, turned over and delivered to Samuel H. Fox the stock of goods, store fixtures, notes and accounts, then on hand, of the value of $27,343.07, which amount was then credited to him and applied on his indebtedness then due to Fox & Co.; that, after the making of the last-mentioned agreement, and while I. Willard Fox was so carrying on business, he paid out of its avails, upon his indebtedness to Fox & Co., the sum of about $10,000; that Samuel H. Fox, some time before September 1, 1875, sold the La Salle Street lot and realized from it about $14,000, which amount was credited upon the indebtedness of I. Willard Fox to Fox & Co.; that the said sums of $27,343.07, $10,000, and $14,000, were all that had ever been paid on said indebtedness; and that there was due to the plaintiff, at the time of filing the bill, on account of said indebtedness, about $70,657, besides interest.

The bill further alleged that, on or about September 1, 1875, Samuel H. Fox and Henry W. Fox dissolved their partnership, and it was agreed that the debt due from I. Willard Fox to Fox & Co., and all securities therefor, should thereafter belong to Henry W. Fox; that Samuel H. Fox executed and delivered to Henry W. Fox a deed in fee simple of the Lake Zurich farm, a description of which by metes and bounds was given in the bill; and that there was due to the plaintiff, as such executrix and devisee, from I. Willard Fox, $103,600, principal and interest.

The bill waived an answer on oath, and prayed for an account of the amount due to the plaintiff for principal and interest on the security of the Lake Zurich farm; that the defendants be decreed to pay that amount, the plaintiff offering to reconvey the premises to them on such payment; and that, in default of such payment, the defendants be barred and foreclosed of all equity of redemption in and to such mortgaged premises. The bill contained a prayer for general relief, although it did not pray specifically for the sale of the Lake Zurich farm; nor did it treat the La Salle Street lot as being subject to a like mortgage with the Lake Zurich farm, but only as being subject to be sold by the grantee under the power contained in the agreement, the proceeds of sale to be applied upon the indebtedness.

On the 21st of April, 1877, I. Willard Fox and his wife put in an answer to the bill. It denies the indebtedness of $70,000, but admits that a paper drawn up at the instance of Samuel H. Fox stated the indebtedness at that amount. It also avers, that, prior to February 20, 1869, I. Willard Fox had been engaged at Chicago for several years in selling paints, oils and window glass; that during that time he had sold for Fox & Co. large quantities of window glass made by them, such sale being upon commission; that he never regarded himself as purchasing the glass in the ordinary way; that a short time prior to February 20, 1869, he became embarrassed; that then Fox & Co., under the pretence of making a favorable settlement with some of his creditors, forced him to enter into an agreement, wherein he was apparently made to say that he

owed Fox & Co. the $70,000, but which did not state truly such indebtedness, the amount being made up for a specific purpose on the part of Fox & Co., without his consent; that, in making up the $70,000, interest was, without his consent, calculated for several years back on all pretended balances apparently due to Fox & Co., every three months during each year, thereby compounding interest; that the amount of such interest was $20,000 or $30,000; that after the agreement was signed, Fox & Co. allowed him to go on in business, using his own name, for about the period of one year, but the business was really theirs, and he turned over to them his store and its contents, and all the debts due to him, on or about February 20, 1869, the contents of the store being then of the value of over $60,000; that, in equity, under such arrangement, that property ought to go to the cancellation of the indebtedness stated in the agreement, and Fox & Co. ought to be charged in the accounting with the property so delivered to them, at its fair value; that Fox & Co. pretend that the business was conducted by him after February, 1869, and, because there were losses in it to the amount of $15,000, he ought to suffer that loss, when the business was really that of Fox & Co., and the adjustment ought to be made at the time of the turning over of the store and its contents, and of his property, to Fox & Co., and he ought to be allowed to set off against any indebtedness of his to Fox & Co. the amount of property so turned over to them; that he was the owner in fee simple absolute of the land described in the bill; that whatever debt is due to Fox & Co. is a lien upon the same, including the La Salle Street lot, in the nature of a mortgage, and the land ought in equity to be subjected to such lien, if any indebtedness is proved to exist in favor of Fox & Co.; and that the plaintiff stands in no different relation to him, in regard to such indebtedness, from that occupied by Fox & Co., and has only the same rights and interest in and to such security which Henry W. Fox or Fox & Co. had.

The answer asks that an accounting may be had between the parties before a master, and avers that all indebtedness from I. Willard Fox to Fox & Co. has been paid; and that

both the Lake Zurich farm and the La Salle Street lot are free from any lien in favor of Fox & Co. or of the plaintiff. It avers that the goods furnished by Fox & Co. to I. Willard Fox, after the 20th of February, 1869, were the goods of Fox & Co., and he conducted the business for them; that the indebtedness held against him by other persons, and which was settled by Fox & Co., amounted to $24,000, and was settled for about $12,000 by Fox & Co.; that he also owed the First National Bank about $15,000, which was paid out of the proceeds of a loan of $6000 made on the La Salle Street lot, and the rest of it out of the collections, etc., due to I. Willard Fox; and that, such indebtedness having been so settled out of the La Salle Street lot and a portion of the property turned over by him to Fox & Co., he ought to have the Lake Zurich farm free from encumbrance, because of the large surplus which was left in the hands of Fox & Co. after paying such outstanding debts. The answer also avers that he will rely upon the statute of Illinois in regard to usury.

A replication was filed to this answer.

On the 26th of October, 1877, the plaintiff filed an amended bill, under an order made on that day, giving her leave to do so, and requiring the defendants to answer within thirty days. The amended bill is a full and complete bill in itself. It contains mainly the same averments as the original bill, but has some variations and additions. One addition is a statement of the contents of the memorandum signed by Samuel H. Fox, appended to the agreement, which was not contained in the original bill. There is also added a statement that Samuel H. Fox did, on the 5th of October, 1869, release and discharge of record the mortgage so held by him on a portion of the Lake Zurich farm. It states the amount of goods furnished by Fox & Co. to I. Willard Fox, during the time from February 20, 1869, until some time in December, 1869, at $12,999.64, instead of $24,000; and that the property, amounting to $27,343.07, was turned over and delivered to Fox & Co. in December, 1869, instead of in February, 1870. It also states that the indebtedness mentioned in the agreement as $16,000 was in fact only $15,000, and was due to the First National Bank of Chi-

cago; that, after the making of the agreement and the conveyance of the La Salle Street lot to Samuel H. Fox, he, with the knowledge of I. Willard Fox, raised, by mortgage on that lot, about $6000, which was handed over to I. Willard Fox and paid by him on the indebtedness to the bank, and that afterwards, and during the time that he carried on the business after February 20, 1869, he paid to the bank the remainder of the debt due to it, out of the avails of the business and of collections of the notes and accounts; that the indebtedness estimated in the agreement at about $30,000, due to other parties, was only about $24,000 or less, and Fox & Co. compromised and paid it in full by paying altogether the sum of about $10,971.39; that, about the time that Samuel H. Fox mortgaged the La Salle Street lot for $6000, he effected an insurance upon the improvements upon it for the same amount, and afterwards the improvements were destroyed by fire, and the insurance was applied in discharge of the mortgage; that, on the 25th of September, 1875, Samuel H. Fox conveyed the La Salle Street lot to Henry W. Fox for the sum of $8000, which amount was then credited upon the indebtedness of I. Willard Fox to Fox & Co.; that the $27,343.07, which was the value of the stock of goods, store fixtures, notes and accounts, turned over to Samuel H. Fox in December, 1869, and the $8000 realized from the sale of the La Salle Street lot, is all that has ever been received by Fox & Co. on the debt from I. Willard Fox to them; and that there was due to the plaintiff at the time of the filing of the amended bill, on account of such debt, about $60,000, besides interest.

The amended bill states the amount due to the plaintiff, as executrix and devisee, from I. Willard Fox, at about $100,000, principal and interest, instead of $103,600. It waives an answer on oath, and its prayer is the same as that of the original bill, and it does not treat the La Salle Street lot as subject to a lien in favor of the plaintiff.

No answer to such amended bill appears in the record, nor is there any stipulation that the answer to the original bill shall stand as the answer to the amended bill.

On the 10th of September, 1878, an order was made refer-

ring the cause to Mr. Henry W. Bishop as a master, to take proofs and report the same to the court, together with the amount due to the plaintiff.

On the 11th of February, 1880, an order was made, modifying such order of reference, by directing the master to report the testimony taken by him, and not his conclusions thereon.

Plenary proofs were taken in the cause, in July, 1877, November, 1878, September, 1879, November, 1879, December, 1879, and February, 1880. Samuel H. Fox gave a deposition in July, 1877, a second in September, 1879, and a third in December, 1879. I. Willard Fox gave a deposition in November, 1878, a second in November, 1879, and a third in February, 1880. Robert B. Merritt, who had been the book-keeper and cashier of I. Willard Fox from May, 1867, till the summer of 1869, gave a deposition in September, 1879, and a second in December, 1879.

In July, 1880, the cause was heard on pleadings and proofs; but before any decision was made, and on November 13, 1880, the plaintiff, by leave of the court, amended her bill by inserting an averment to the effect that the agreement of February 20, 1869, contained a recital that I. Willard Fox had sold and conveyed to Samuel H. Fox the La Salle Street lot, the proceeds thereof to be applied towards payment of the indebtedness from I. Willard Fox to Fox & Co.; that by such agreement that lot was not in any event to be reconveyed to I. Willard Fox; that the plaintiff had sold and conveyed the lot; and that, being willing to do what was just and equitable, she offered to credit and allow to I. Willard Fox the amount for which she had sold the lot, or otherwise its value, in reduction of the sum due to her from I. Willard Fox.

On the 23d of November, 1880, the defendants filed an answer to the amended bill as amended on November 13, 1880. This appears to be a full answer, not only to the amendments of November 13, 1880, but to the amended bill filed October 26, 1877. This answer avers that, on February 20, 1869, I. Willard Fox and his wife executed to Samuel H. Fox a deed conveying the Lake Zurich farm, and another deed conveying

the La Salle Street lot; and that at the same time the agreement of February 20, 1869, was executed by Samuel H. Fox and I. Willard Fox, and the memorandum appended was executed by Samuel H. Fox. The answer also avers, that prior to 1857, Samuel H. Fox and I. Willard Fox were partners in business in the manufacture of glass, in the State of New York; that I. Willard Fox sold out his interest in the business to Henry W. Fox and retired; that, thereupon, Samuel H. Fox and Henry W. Fox, who were brothers of I. Willard Fox, became partners and conducted the business under the name of Fox & Co., and I. Willard Fox removed to Illinois; that the affairs of the firm in which I. Willard Fox was such partner, and his business transactions with the new firm, had never been settled; that in the year 1865, I. Willard Fox, at the request of Fox & Co., undertook to act as their agent for the sale of glass in Chicago, and was to receive as compensation a certain commission; that he received from them large amounts of glass and remitted the proceeds to them from time to time, and the business was thus conducted until about the 1st of January, 1869, when he became embarrassed, and, under a judgment and execution against him in favor of the First National Bank of Chicago, his goods, and the glass then on hand, belonging to Fox & Co., for sale on commission, were seized, and the store was closed; that Samuel H. Fox then came to Chicago and acted for Fox & Co.; that by agreement with I. Willard Fox, Fox & Co. assumed the payment of the debt to the First National Bank, and the goods were released, and Samuel H. Fox, for Fox & Co., took possession of the goods belonging to I. Willard Fox, and of those belonging to Fox & Co.; that Samuel H. Fox also undertook to satisfy the other creditors of I. Willard Fox; that the latter was unable to pay more than fifty cents on the dollar, and, for the purpose of doing so, and also of placing Fox & Co. in a situation whereby they could make it appear to their creditors that they had large assets in Illinois, Samuel H. Fox prepared a statement of the account of Fox & Co. against I. Willard Fox, showing an apparent indebtedness of about $68,000, besides an apparent mortgage of $15,000 from him to them, and de-

manded of him that he should make an absolute conveyance of the Lake Zurich farm and the La Salle Street lot; that he denied the correctness of such account and at first refused to make the conveyances, but was induced to execute them, provided Samuel H. Fox would execute the instrument of February 20, 1869, as a condition of defeasance, and upon the verbal assurance of Samuel H. Fox that Fox & Co. would not insist upon the payment of the $70,000 named in it, or of any sum other than that which should be found to be due from I. Willard Fox to Fox & Co., on a just, fair and equitable settlement; that the defendants asserted at the time that there was nothing due on the transactions covered by the account; that, after the deeds and the agreement were made, Samuel H. Fox, for Fox & Co., retained possession of the goods, store fixtures, notes and accounts, and conducted the business in the name of I. Willard Fox until December, 1869, and during that time received the proceeds arising from the collections of the notes and accounts, as well as the goods; that at the time of such transfer to Fox & Co., there was in the store glass belonging to them, of the value of over $30,000, besides other goods of over the value of $30,000, and notes and accounts, good and collectible to the amount of about $15,000, belonging to I. Willard Fox; that, during the time the business was so being conducted by Fox & Co., in 1869, they paid the debt to the First National Bank, partly from the proceeds arising from the conduct of the business and partly from money borrowed upon the La Salle Street lot, which was afterward refunded to them by insurance money collected upon the building standing upon the lot, and which had been destroyed by fire; that they also paid to the other creditors of I. Willard Fox, in full satisfaction of the debts due to them, $10,971.40; that there had been no settlement of the matters between Fox & Co. and I. Willard Fox since February 20, 1869; that there is nothing due from him to Fox & Co.; that the La Salle Street lot was conveyed, like the Lake Zurich farm, as security; that, if such lot has been sold pending the suit, its purchaser has taken it with notice of the equitable rights of the defendants; that they claim a reconveyance of the Lake Zurich farm and the

La Salle Street lot upon the payment of the amount, if any, due to Fox & Co. from I. Willard Fox; and that Samuel H. Fox is a necessary party to the litigation.

On the 8th of December, 1880, the defendants, by leave of the court, filed a cross-bill against the plaintiff, who had then become Kate W. Goodwin by her intermarriage with Charles S. Goodwin, and against her husband, and against Sarah E. R. Smith, who had become the purchaser of the La Salle Street lot, and her husband, Charles M. Smith. The cross-bill sets forth the prior proceedings in the original suit, and prays that the original bill and the answer to it, and the amended bill filed October 26, 1877, and the amendment to it filed November 13, 1880, and the answer filed November 23, 1880, may be taken as a part of such cross-bill.

The cross-bill contains, in substance, the material averments of the answers before filed, with the further statement, that, in December, 1869, the remainder of the stock on hand in the store of I. Willard Fox was sold for the sum of about $28,000, and the money received by Fox & Co.; that the money received during the time the store was conducted by Fox & Co., from the time they took possession to the time it was closed in December, 1869, amounted to more than $50,000; that Fox & Co. were liable to I. Willard Fox for the amount of the glass returned to Fox & Co. at the time they took possession of the store, and also for the money received from the notes and accounts and the sale of glass during the time the business was conducted by Fox & Co.; that such amounts would more than pay any charges of Fox & Co. against I. Willard Fox; that, about the 1st of September, 1875, Samuel H. Fox and Henry W. Fox dissolved partnership, and the former conveyed to Henry W. Fox the said real estate, but the latter had full notice of the rights and equities of the cross-plaintiffs in the premises, and was not a *bona fide* purchaser thereof; that Kate W. Goodwin and her husband, on the 7th of April, 1880, conveyed the La Salle Street lot to Sarah E. R. Smith; and that she received the conveyance of it with notice of the rights and equities of the cross-plaintiffs to the premises, and pending the suit.

The cross-bill waives an answer on oath, and prays for an account of all matters between Fox & Co. and I. Willard Fox, and between Samuel H. Fox as surviving partner of Fox & Co. and I. Willard Fox, and for a decree against Samuel H. Fox as the surviving partner of Fox & Co., for the amount that may be due from him as such surviving partner to I. Willard Fox, and also for a decree against Kate W. Goodwin, requiring her and her husband to reconvey the Lake Zurich farm, and for a decree against Sarah E. R. Smith requiring her and her husband to reconvey the La Salle Street lot, and that, if it shall appear that there is any sum due from I. Willard Fox to Samuel H. Fox as surviving partner of Fox & Co., or to Kate W. Goodwin, a decree be entered requiring a reconveyance of such real estate on the payment of the amounts found to be due from I. Willard Fox; and for general relief.

On the 20th of December, 1880, Kate W. Goodwin and her husband answered the cross-bill. Their answer contains the material averments found in the original bill and the amended bills, and in addition alleges, that the defendants in the cross-suit were not parties to the agreement of February 20, 1869, or to the transactions out of which the same arose; that it is incompetent for I. Willard Fox to show either a want of consideration or a failure of the consideration upon which such agreement was founded; that, as I. Willard Fox wholly failed to comply with the terms of such agreement, by making payment within the six months therein limited, and the property was thereafter conveyed to Henry W. Fox in consideration of his interest in the assets of Fox & Co. and the same was thereafter devised to Kate W. Goodwin, I. Willard Fox is estopped from denying that the $70,000 recited in the agreement was due at its date; that, when I. Willard Fox retired from his partnership with Samuel H. Fox, in August, 1857, he left the concern largely in debt, and left Samuel H. Fox to close up the old business, collecting what he could and paying the debts; that, in the meantime, the new firm advanced money to I. Willard Fox, until April, 1862, when the old matters were settled up, and I. Willard Fox acknowledged in writing an indebtedness to Fox & Co. of $5584.82, on his personal account,

besides between $7000 and $8000, which that firm had then advanced or were to advance to him, on security to be given on the Lake Zurich farm; that the glass shipped to I. Willard Fox by Fox & Co., in 1865, and for several years afterward, was sold to him, and was not shipped to him on commission; that, in 1869, I. Willard Fox was indebted to Fox & Co. in nearly $100,000 for glass sold to him by them, from 1865 to 1869; that there was no dispute about the amount due to Fox & Co. by I. Willard Fox, which was stated at $70,000 in the agreement of February 20, 1869; that, in fact, $20,000 more was due from him to them at that time, but which was given up to him; that he did not then dispute the amount due Fox & Co., and was not coerced into making the deeds and agreement; that Samuel H. Fox did not give at the time the reasons for making them alleged in the cross-bill; that the accounts of Fox & Co. were examined, and the amount agreed upon, and the deeds and agreement made, and six months allowed for I. Willard Fox to redeem, because he represented that he could do thenceforth a prosperous business by regaining his stock and store; that, between January and December, 1869, Fox & Co. shipped to him more than $12,000 worth of glass; that it was amicably agreed, in December, 1869, that the business should be closed; that $50,000 was not received from a sale of the stock of I. Willard Fox, between January and December, 1869, and whatever sum was received, was received and used by him; that the stock of goods was turned over to and taken possession of by Fox & Co., in December, 1869, and not before; that the best was done with it that could be done, and they realized from it only $27,343.07, which had been fully accounted for by glass furnished to and debts paid for I. Willard Fox by Fox & Co. between January and December, 1869; that such transaction did not materially reduce the amount due on the agreement; that when the store was finally closed no part of the glass was returned to Fox & Co., but the whole was sold and the total amount received is included in the sum before named; that I. Willard Fox is not entitled to be credited with any more money than the credit he has already received; that Sarah E. R. Smith paid full value for the La Salle Street

lot, and is entitled to be protected as a *bona fide* purchaser for value, without notice; that as Kate W. Goodwin has offered, by her amended bill, to allow to I. Willard Fox, upon her claim against him, the amount she received from the sale of the lot, the title should not be drawn in question in the suit; and that the lot was not involved in the pleadings at the time Sarah E. R. Smith purchased it, and therefore she was not a purchaser of it *pendente lite*.

On the 23d of December, 1880, a replication was filed to the answer to the amended bill.

On the 3d of January, 1881, Sarah E. R. Smith and her husband filed their answer to the cross-bill, averring that Sarah E. R. Smith took the conveyance of the La Salle Street lot, on her purchase of it from Kate W. Goodwin and her husband, without any notice of any rights or equities of the plaintiffs in the cross-bill, and paid therefor $6625 in cash, which was its reasonable value, and paid it before the cross-bill was filed, and before any notice that any one else than Kate W. Goodwin claimed any interest in it; that the title to the lot was in no way involved in the pleadings in the cause at the time of such purchase, nor was the agreement of February 20, 1869, set forth in the cross-bill, nor did she or her husband have any notice thereof; and that they cannot be compelled to reconvey the lot, nor can they be in any manner affected by the state of accounts between I. Willard Fox and Fox & Co.

Replications to the two answers to the cross-bill were filed on the 5th of January, 1881.

On the 7th of January, 1881, an order was made in the original and cross-suits, referring the cause to Mr. Henry W. Bishop, as a master, to take evidence, and to make and state an account between Fox & Co. and I. Willard Fox, and to report the same, with his findings, to the court.

Under this order of reference, the master took proofs in February, 1881, May, 1881, and July, 1881, a third deposition of Robert B. Merritt being taken in May, 1881, and a fourth deposition of I. Willard Fox in July, 1881.

On the 30th of November, 1881, the master filed his report, as follows:

Opinion of the Court.

"This proceeding is brought for the foreclosure of a mortgage executed by I. Willard Fox upon certain real estate known as the Lake Zurich farm, in the county of Lake and State of Illinois, and lot two (2), in block twenty (20), in Bushnell's Addition to Chicago, which was given for the purpose of securing the payment of sums of money therein mentioned, which it is alleged had become due the firm of Samuel H. Fox & Co. as the result of certain business relations between them extending through a number of years, and which are set forth in detail in the bill.

"The answer of the defendant admits the execution of the mortgage and the agreement supplemental to it, but undertakes to explain the circumstances under which they were made, and denies that at the time of their execution any such sum as is therein claimed was due and owing from him, and that, by reason of what has since occurred, any such indebtedness whatever exists against him, and avers that, upon a proper settlement of account, there will be shown to be a balance in his favor.

"It is for the purpose of examining and stating this account that a reference was made to me by the court.

"It is not necessary for me to review the earlier relations between the parties, culminating in the establishment of the separate business of I. Willard Fox in Chicago, or to examine their accounts prior to their attempted adjustment in February, 1869, showing the sum of nineteen hundred and twenty-three and fifty-three hundredths dollars due upon the individual account of I. Willard Fox, and the sum of sixty-eight thousand two hundred and seventy-seven and fifty-eight hundredths dollars due upon the glass account.

"These debit sums are conceded to be correct, as well as the payment by Fox & Co. to the creditors of I. Willard Fox of the sum of ten thousand nine hundred and seventy-one dollars and thirty cents, making at that date a total sum of eighty-one thousand one hundred and seventy-two and forty-one hundredths dollars ($81,172.41) due from I. Willard Fox to Fox & Co.

"This was the state of the account in February, 1869, when

I. Willard Fox became embarrassed in business. The First National Bank, his largest creditor, having obtained a judgment against him, levied upon his stock of goods and closed his store, an arrangement was made between him and Fox & Co., resulting in the settlement by them of all the claims against him, except their own, at a compromise rate, and the business was resumed, with Ethan Allen Fox, the uncle of the defendant, and I. Willard Fox, in charge. After the settlement made with the creditors of I. Willard Fox, and the restoration of the property from the seizure of the First National Bank, and the resumption of the business, and between March 23d and November 5th, 1869, additional shipments of glass were made, amounting in the aggregate to the sum of twelve thousand nine hundred and ninety-nine dollars and sixty-three cents ($12,999.63); and it is insisted that these consignments were also made to I. Willard Fox, and that this amount should be added as a further indebtedness against him.

"Upon the other hand, it is contended that, in February, 1869, and before the receipt of these shipments, all the business and property was turned over to Fox & Co., and I. Willard Fox and Ethan Allen Fox placed in its management, under the direction of Fox & Co. and their control. Samuel H. Fox swears that these shipments were made to I. Willard Fox and formed part of his stock, the remnant of which was turned over to him in December following, at which time he insists that the final adjustment was made, while Ethan Allen Fox and I. Willard Fox, who were in charge and remained there until the stock was all disposed of, swear that the goods received after February were not billed to I. Willard Fox and not purchased by him; and I can find no entries in the books of Fox & Co. showing that they were ever charged to him, but they do show they were consigned to Samuel H. Fox.

"A. St. John Campbell and Robert B. Merritt, book-keepers and clerks at and after the change of possession, swear that it occurred in February, Samuel H. Fox assuming general charge and conduct of the business from that time; and there is no testimony contradicting it except that of Samuel H. Fox himself, who swears that the change did not take place until December following.

Opinion of the Court.

"The fact that an inventory was made of the stock in January preceding, and that none was made afterwards, seems to me to be a strong circumstance tending to show, in connection with the conduct of the parties and the testimony of Ethan Allen Fox and Merritt, that it was in February and not in December that the property was turned over.

"I can find nothing in the record, outside of the testimony of Samuel H. Fox, to justify any other conclusion, and I therefore disallow that item of complainant's claim, leaving due from I. Willard Fox at this date — February 1st, 1869 — the sum of eighty-one thousand one hundred and seventy-two and forty-one hundredths dollars ($81,172.41), subject to such deductions as shall hereafter appear as proper to be made.

"In this amount is included the sum of seven thousand seven hundred and eighty dollars and eighty cents ($7780.80) interest, which it is claimed was erroneously charged, and which I deduct from the amount stated, for the reason that the testimony does not, in my estimation, justify its allowance. It does not appear that there was any arrangement by which interest was to be charged, and the four entries of interest which appear upon the books of Fox & Co. are shown to have been made after the accounts were closed, and do not harmonize with the statements of S. H. Fox in respect to this matter.

"This charge seems to me also not to have been in contemplation with the parties, in view of their personal relations and the history and general character of their business, which, although not appearing to me to have been strictly of a commission character, seemed to partake somewhat of that nature, Fox & Co. all along making use of I. Willard Fox to dispose of the goods sent him, without such regard to the orders sent them as would prevail with persons dealing together under different circumstances and relieved of their peculiar relations.

"Throughout all this time, also, the business of I. Willard Fox seemed to be limited to the supply furnished him from this firm, and I can refer to but one or two instances where he resorted to other sources to enable him to meet the demands of his trade.

"During the entire period of this account I find no evi-

dence of any settlements having been made or anything done between the parties out of which any claim for interest could have arisen, and it does appear to me that, in view of the fact of I. Willard Fox having been limited, in the supply sent him by Fox & Co., to such kind and sizes of glass as they chose from time to time to ship, it could not have been expected of him to pay interest upon the necessary delay and vexation to which he is shown to have been subjected in disposing of goods selected to suit the convenience of Fox & Co., and not necessarily demanded by this trade; and there is no evidence tending to show that this was expected of him.

"In addition to this credit I have allowed one of ten per cent for breakage of glass, and for stained glass, and cutting down glass into smaller sizes. While the testimony very clearly establishes an allowance in favor of this item, the witnesses are not united upon the amount proper to be deducted under this head. It is, however, clear to me that, the consignors having sent glass to the defendant all along without reference to the kind ordered, making it necessary for him to constantly cut down to suit his trade, a credit should be made to this extent in his favor, and this is the smallest amount justified by the evidence. Upon this item of account a credit of seven hundred and fifty-five dollars and eighty-two cents ($755.82) appears upon the books of Fox & Co. to have been made, leaving the sum of eighty-four hundred and forty-three dollars and thirty cents ($8443.30) to be deducted from the amount already reported.

"In addition to this an allowance should be made for the property turned over to Fox & Co. by I. Willard Fox when the latter is shown to have entered into possession of the store, with Ethan Allen Fox and I. Willard Fox in charge.

"This property consisted of glass, evidences of indebtedness, paints, oils, etc., and fixtures, together with what is known as the Merritt mortgage, amounting to a complete transfer of the entire stock and business of I. W. Fox.

"Samuel H. Fox conducted the negotiations for Fox & Co., and says that it was a 'mutual' arrangement between the parties, and there is no evidence tending to show that it was

not one entirely satisfactory. No inventory, however, was then taken of the goods and no appraisement of the bills receivable.

"The fact that none was made inclines me to believe that the one taken in January previous was relied upon as all that was necessary for this purpose, and the testimony of the witnesses in charge of the store at that time, and by whom the only inventory was taken, tends to establish that as the basis upon which the parties must have proceeded. It is hardly possible that I. Willard Fox, having at last been relieved from all the pressing demands upon him aside from the claim of Fox & Co., should have finally surrendered this large amount of goods and securities to be credited in return for whatever it might bring in other hands.

"There is nothing in the testimony of Samuel H. Fox to show the value of this property, and all the information which we have upon this point is the testimony of the defendant himself, supported by the evidence of Ethan Allen Fox, Robert B. Merritt, the book-keeper, A. St. John Campbell, and other witnesses having relations to the business, and to a greater or less extent of the same import.

"All of these witnesses concur in fixing the amount of the inventory of goods and accounts at between sixty and seventy thousand dollars, no one of them placing it less than the former sum, and it is shown that the accounts were all collectible.

"The division made by the witnesses, taking the lowest respective amounts, shows the glass to have been worth thirty thousand dollars ($30,000); the paints, oils, etc., fifteen thousand dollars ($15,000); notes collectible, fifteen thousand dollars ($15,000); the fixtures, fifteen hundred dollars ($1500) (at which they were sold); and the Merritt mortgage, twenty-one hundred and one and sixty-one hundredths dollars ($2101.61).

"If this testimony is to be relied upon, and assuming that the stock was taken possession of, as all the defendant's witnesses agree in stating, on the 1st day of February, 1869, then, in the absence of other preponderating evidence, these figures must be adopted in estimating these credits, except in the

single item of paints and oils, where I think a reduction from fifteen to twelve thousand dollars should be made.

"It is contended that the books of I. Willard Fox and the inventory made by him would exhibit still larger credits than these even, and their destruction by fire is a misfortune which must always be felt in determining the exact relations between these parties, but it is a fortunate circumstance that the witnesses and parties to these transactions still survive, furnishing, as far as they do, the information upon which this account must be stated.

"On the other hand there is absolutely no testimony whatever offered as to the value of the property when it is claimed to have been turned over. Samuel H. Fox swears that he had no knowledge whatever as to it, and the only information coming from the complainant upon this subject is derived from the account upon the books of Fox & Co., with I. Willard Fox, showing that from the stock, fixtures and notes and accounts there was realized the gross sum of twenty-seven thousand three hundred and forty-three and no hundredths dollars.

"An examination of this account, however, shows that it is but a partial one, and does not fully account for all that was turned over to Fox & Co., and is essentially wanting in the specific information to which the defendant would be entitled if he was bound by such independent disposition of the property as Fox & Co. chose to make of it.

"It is contended upon the part of the defendant, that he is not so bound, and that the complainant must account for all the property he received, at the prices which they were then shown to be worth.

"It seems to me that this is peculiarly a case where that rule should be applied, and the careless and incomplete manner in which the accounts were kept by Fox & Co., after their receipt of the property, renders such application absolutely necessary in stating this account. I can see no other course left to adopt, and have therefore credited the defendant with those five items modified in the way stated, which leaves a balance due the complainant of four thousand three hundred and

forty-six and seventy one-hundredths dollars ($4346.70), ending with December, 1869.

"I append hereto a statement, marked Exhibit 'A,' which shows the account stated:

"Exhibit 'A.'

"I. Willard Fox to Fox and Company.

"Dr.

"To due on personal account		$1,923 53
" " " " glass account		68,277 58
" " paid in settlement with creditors		10,971 30
		$81,172 41

"Cr.

"By interest included in glass account improperly	$7,780 80	
"Damages from breakage, stained glass, and cutting down (less $755.82, already allowed), and estimated at ten per cent . .	8,443 30	
"Notes shown to have been collectible	15,000 00	
"Paints, oils, etc.	12,000 00	
"Fixtures sold	1,500 00	
"Merritt mortgage	2,101 61	
"Glass returned at date of settlement	30,000 00	
		76,825 71
"Leaving a balance due complainant . .		$4,346 70

"I further find, from the evidence, that, on the fifth day of November, A.D. 1875, Henry W. Fox, his wife joining, executed a mortgage upon the 532 acres of the land included in the mortgage sought to be foreclosed in this proceeding, and known as the Lake Zurich farm, to secure the payment to one Loring Monroe, of the State of New York, in six years, with interest semi-annually, and at the rate of seven per cent, and which is a subsisting lien upon said property.

"It is agreed between the counsel that the full amount of

said loan is due from Henry W. Fox, with interest from the 5th day of May last, leaving due at this date, as a charge upon said property, the sum of twelve thousand dollars for the principal, and four hundred and sixty-nine dollars for interest thereon, or a total sum of twelve thousand four hundred and sixty-nine dollars ($12,469)."

That report was made in the original suit.

On the 21st of December, 1881, the plaintiff in the original suit filed the following exceptions to the report of the master:

"First exception. For that the said master refused to suppress the depositions of the defendants, I. Willard Fox and Eleanor Fox, but, on the contrary, treated their testimony as competent and relied upon it in making his findings in this case.

"Second exception. For that the said master refused to allow in favor of complainant, and against I. Willard Fox, the sum of $12,999.63, being the amount of glass shipped by Fox & Co. to I. Willard Fox, and received by him, between March 26th and November 5th, 1869.

"Third exception. For that the said master improperly disallowed the sum of $7780.80 in interest which had accrued before February, 1869, and failed to allow to complainant any interest since that time.

"Fourth exception. For that the said master disregarded the contemporary documentary writings and agreements made by the parties, and the oral testimony confirmatory thereof, and upon the mere opinions of witnesses improperly allowed to defendant, I. Willard Fox, credit for the following amounts, to wit:

"1. The sum of $8443.30, damages from breakage, stained glass and cutting down, estimated at ten per centum.

"2. The sum of $15,000 for notes shown to have been collectible.

"3. The sum of $12,000 for paints, oils, etc., turned over to Fox & Co.

"4. The sum of $1500 for fixtures sold.

"5. The sum of $2101.61 for the Merritt mortgage.

"6. For $30,000 for glass returned at the date of settlement.

"Fifth exception. For that the said master, while charging

the firm of Fox & Co. with the whole value of the stock in the store of I. Willard Fox, makes no allowance of any part of the sum of $23,970.99, being the amount of the account of Fox & Co. against I. Willard Fox between February and December, A.D. 1869."

On the 3d of January, 1884, the cause was heard on such exceptions, and on the pleadings and proofs. Before any decision was made, and on the 9th of June, 1884, the cause was referred to the same master, to take proof and ascertain and report "the present value of the La Salle Street lot," and also to take evidence as to the amount due on the mortgage for $12,000, executed by Henry W. Fox to Loring Monroe.

In June, 1884, the master took testimony as to the matters so referred to him, and on the 11th of July, 1884, he filed his report, finding the then value of the La Salle Street lot to be $250 per front foot, and the value of the entire property, of fifty feet front, to be $12,500. The report says:

"The testimony of the witnesses upon this point varies from $225 to $300 per foot. The average value as established by the defendants' witnesses would be $285 per foot, and the average value as established by all the witnesses would be $230 per foot; but in estimating this value I have taken more into consideration the opinions of witnesses who have shown a larger familiarity with this property and that adjacent to it, and whose dealings in connection with the property have been more extensive and of a more recent date, and as the result of this I have come to the conclusion stated."

The report also found that there was due, June 9, 1884, on the mortgage of May 5, 1881, executed by Henry W. Fox and his wife to Loring Munroe, on the Lake Zurich farm, $15,059, being for principal $12,000, and for interest $3059.

The plaintiff in the original suit filed exceptions to the last named report, as follows:

"1st exception. And now comes the said complainant, Kate W. Fox, by Charles H. Wood, her solicitor, and excepts to the finding of the said master that the said La Salle Street lot is of the value of $12,500, and for cause of exception showeth

that the said finding is wholly insufficient upon which to found a decree for the reasons.

"(1) That the agreement between the defendant, I. Willard Fox, and Fox & Co. of February, 1869, and the deed of this lot made by the former in pursuance thereof, were absolute and unconditional, and no right of redemption attached to that property;

"(2) That I. Willard Fox having conclusively admitted that he owed at the time of said agreement the sum of seventy thousand dollars, as the court has found, the lot was fully paid for at that time, and to charge the complainant with the present value of the lot is to cause her to lose the interest on its value from that time to the present, as well as all taxes that she has paid.

"2d exception. For that the master should have found the value of the lot in February, 1869, when the deed to it was made, or at least in February, 1875, when the complainant acquired it, for otherwise, although fully paid for, the complainant would have the burden of carrying the property, while the defendant, I. Willard Fox, would get the whole benefit of it.

"3d exception. For that the said master should not have found the present value of the lot without also having found the interest on its value since February, 1869, and the taxes thereon since paid by the complainant, and deducted the same from its present value.

"4th exception. For that the master erred in finding the amount due upon the Monroe mortgage, because that mortgage cannot in any form be made a basis of any decree under the issues in this case, and because it does not appear who is the owner of said mortgage, nor is the owner a party to this proceeding, and because, if paid by this decree, the court cannot prevent the owner from foreclosing it in any proper form, since he is in no manner bound by this decree."

On the 29th of July, 1884, a decree was made, entitled in the original and cross-suits, and which found as follows: (1) That I. Willard Fox is indebted to Kate W. Goodwin, as the legatee and devisee of Henry W. Fox, deceased, in the sum of

$15,971.30; (2) that on the 20th of February, 1869, I. Willard Fox and his wife conveyed to Samuel H. Fox, by deed, the Lake Zurich farm and the La Salle Street lot; (3) that both of said deeds were made to secure said indebtedness, and are in the nature of a mortgage; (4) that on the 25th of September, 1875, Samuel H. Fox conveyed the farm and the lot to Henry W. Fox, who took the same with full knowledge of all the rights and equities of I. Willard Fox in the premises, and to whom the debt was at the same time transferred; (5) that, on the 5th of November, 1875, Henry W. Fox executed a deed of trust or mortgage on the Lake Zurich farm, to secure the payment of $12,000 which had been borrowed by him from Loring Monroe; (6) that there is now due on that loan $15,059; (7) that on the 1st of June, 1876, Henry W. Fox died testate and by his will bequeathed and devised the indebtedness and the farm and the lot to his wife, Kate W., who, since the commencement of the suit, has married Charles S. Goodwin; (8) that on the 7th of April, 1881 [1880], Kate W. Goodwin and her husband conveyed the La Salle Street lot to Sarah E. R. Smith, wife of Charles W. Smith, who acquired no better title or right, as against I. Willard Fox, than Kate W. Goodwin had; and (9) that there had been paid on the La Salle Street lot, for taxes, $565.33, which is chargeable to I. Willard Fox.

The decree then provided as follows: (1) That I. Willard Fox should pay into the registry of the court for Kate W. Goodwin, by the 1st of September, 1884, $16,536.63, with interest thereon at the rate of six per cent per annum, provided Kate W. Goodwin, or some one for her, should procure the release of the premises described in the deed of trust or mortgage to secure the debt of Loring Monroe, from all incumbrance created thereby; (2) that, in default of such payment, I. Willard Fox and his wife should be barred and foreclosed of all right and equity of redemption "in said premises," and the master should sell the same; that, in case a release of the lands described in the trust deed or mortgage should not be procured by the 1st of September, 1884, then I. Willard Fox should pay into the registry of the court, for Kate W. Goodwin, $1477.63, by the 1st of November 1884, with interest

thereon, at the rate of 6 per cent per annum, and, in default of such payment, the master should sell "the said lands," and I. Willard Fox and his wife should be barred and foreclosed of all equity of redemption "in said lands and lot;" and, in case I. Willard Fox should pay the $1477.63, he should also save and keep harmless the estate of Henry W. Fox from all liability on the debt to Loring Monroe, and should assume the payment of the indebtedness secured by the Monroe mortgage; (3) that, in case either the $16,536.63 or the $1477.63 should be paid, Kate W. Goodwin and her husband should convey, on or before November 1, 1884, to I. Willard Fox "the lands first hereinbefore described," subject to the Loring [Monroe] incumbrance, and Sarah E. R. Smith and her husband should convey to I. Willard Fox the La Salle Street lot; (4) that, in case of a failure to make such conveyances or either of them, the master should make them on behalf of Kate W. Goodwin and her husband, and of Sarah E. R. Smith and her husband, respectively; (5) that Sarah E. R. Smith might, if she elected, pay into court or to I. Willard Fox, $11,500, with interest at the rate of six per cent from July 29, 1884, by or before October 15, 1884, the sum of $11,500 being found by the court "to be the present cash value" of the La Salle Street lot; and that, in case of such payment, Sarah E. R. Smith should be decreed to hold the lot thenceforward discharged from all equity of redemption of I. Willard Fox and all persons claiming under him. The decree charged I. Willard Fox with the costs of the cause.

On the 29th of September, 1884, an order was entered amending the decree by inserting provisions (1) that the first exception to the master's report be sustained, so far as it relates to the testimony of Eleanor Fox, and be overruled so far as it relates to the testimony of I. Willard Fox; (2) that the second exception be overruled; (3) that the third exception be sustained; (4) that the fourth exception be sustained so far as it relates to the item of $8443.30, damages for breakage of glass; (5) that the finding of the master as to the value of the glass, paints, oils, store fixtures and notes and accounts, turned over to Fox & Co. by I. Willard Fox, be modified and changed,

so that the value of the same be fixed at the sum of $65,000 instead of $60,601.60, as found by the master; (6) that the fifth exception be overruled; and (7) that the reports and findings of the master, except as so overruled or modified, be confirmed.

It appears by the record, that I. Willard Fox died on the 29th of August, 1884, leaving a widow and six children as his heirs at law, and a will by which he devised all his real estate to his widow for life, with remainder to his children; that, on February 26, 1883, he and his wife conveyed to William C. Goudy and Louie P. McDaid the La Salle Street lot; that no release was procured by Kate W. Goodwin, or any one for her, of the Lake Zurich farm from the mortgage to Loring Monroe; that Sarah E. R. Smith had not paid the $11,500 with interest; that there had been paid into court, by and before November 1, 1884, the $1477.63, for Kate W. Goodwin; that all the costs of the suit had been paid on behalf of the estate of I. Willard Fox; and that deeds had not been made by Kate W. Goodwin and her husband, and by Sarah E. R. Smith and her husband, as required by this decree.

On these facts, the court, by an order made January 13, 1885, substituted the widow and children of I. Willard Fox as parties in his place, and ordered that the master execute a deed, on behalf of Kate W. Goodwin and her husband, of the Lake Zurich farm, and also a deed to Goudy and McDaid of the La Salle Street lot. The master, on the 26th of January, 1885, reported that he had executed those deeds, the deed of the Lake Zurich farm being a deed to the widow of I. Willard Fox for her life, and a deed to his children in remainder; and the court, by orders made the same day, approved and confirmed those deeds. It also appears that, on the 4th of March, 1885, the court made an order granting a writ of assistance to put Goudy and McDaid in possession of the La Salle Street lot.

On the 20th of June, 1885, Kate W. Goodwin and her husband, and Sarah E. R. Smith and her husband, perfected an appeal to this court from the decree in the original suit and the cross-suit.

It is assigned here by the appellants for error, that the Circuit Court erred in overruling the first exception to the report of the master, of November 26, 1881, in so far as it relates to the competency of I. Willard Fox as a witness; in overruling the second exception to that report; in refusing to sustain the fourth exception to that report, as to the amount of assets of I. Willard Fox properly chargeable to Fox & Co., and in increasing the amount of the same as found by the master; in failing and neglecting to allow interest upon the sum due to the plaintiff in the original bill, subsequently to February 20, 1869; in overruling the first, second and third exceptions to the master's report of July 11, 1884, and in confirming that report; in overruling the fourth exception to that report; and in deducting by its decree the amount of the Monroe mortgage from the amount due to the plaintiff in the original bill.

As to the exception that the master refused to suppress the depositions of I. Willard Fox, and treated his testimony as competent, and relied upon it in making his findings, it nowhere appears by the record that any objection was made before the master to that testimony, or that any motion was made before him to suppress such depositions, or that any motion was made before the court to suppress them; and, as the only ruling of the court in regard to them was that the first exception should be overruled, so far as it related to the testimony of I. Willard Fox, it may very well be that the court overruled such exception because, it being an exception that the master refused to suppress the depositions, the court could not find as a fact that the master had refused to suppress them.

Irrespective of this, § 858 of the Revised Statutes of the United States does not apply to the present case. It reads as follows: "In the courts of the United States, no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: *Provided*, That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the

testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty." This section only provides that in actions by or against executors, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, unless called to testify thereto by the opposite party, or required to testify thereto by the court. Subject to this restriction, the section provides that, in the courts of the United States, no witness shall be excluded, in any civil action, because he is a party to, or interested in, the issue tried. I. Willard Fox, although a party to, and interested in, the issues tried in these suits, cannot be excluded as a witness on that account, unless the case is one covered by the proviso. The last clause of the section, which makes the laws of the State the rules of decision as to the competency of witnesses in the courts of the United States, in trials in equity, "in all other respects" means "in all other respects" than those provided for in so much of the section as precedes the word "*Provided*," and does not qualify the clause which forms the proviso. *Potter* v. *National Bank*, 102 U. S. 163.

In the present case, although Kate W. Goodwin was executrix of the will of her deceased husband, Henry W. Fox, she did not ask for a decree in her favor as executrix but she claimed an interest in the Lake Zurich farm and in the La Salle Street lot only as devisee of that real estate under her husband's will; and the final decree finds that I. Willard Fox is indebted to her, "as the legatee and devisee" of her husband, in the sum of $15,971.30. Moreover, the material transactions about which I. Willard Fox testified, namely, those relating to the instrument of February 20, 1869, and what took place after that date, were transactions between himself and Samuel H. Fox, and not between himself and Henry W. Fox.

Before considering any of the other questions raised in the case, it is proper to determine whether either party can go behind the statement of existing indebtedness set forth in the agreement of February 20, 1869. That agreement was made between I. Willard Fox and Fox & Co., and is signed by Samuel H. Fox on behalf of Fox & Co. In it both parties state that I. Willard Fox is indebted to Fox & Co. in the sum of $70,000, "over and above all discounts and set-offs of every name and nature." It leaves uncertain the amounts paid or to be paid by Fox & Co., to cancel the other debts of I. Willard Fox, but it agrees upon the sum of $70,000 as the then existing indebtedness of I. Willard Fox to Fox & Co. It goes on to speak of that indebtedness as "said original indebtedness," and the supplemental paper signed by Samuel H. Fox speaks of "said debt of seventy thousand dollars." It must be held, that the parties to the agreement deliberately fixed upon that sum of $70,000, because the agreement states that, in making it up, the parties took into consideration "all discounts and set-offs of every name and nature." There is no sufficient or satisfactory evidence to impeach the agreement, as respects I. Willard Fox, on the ground that his signature to it was obtained by fraud or duress or without his full knowledge of its provisions and consent to its terms.

There is a great deal of testimony in the record bearing upon the question of the damages claimed by I. Willard Fox for the breakage of glass, and for "stained" glass, and for cutting down glass into smaller sizes, prior to February 20, 1869. The master allowed against Kate W. Goodwin the sum of $8443.30 for such damages; and also added to the credit side of the account of I. Willard Fox $7780.80, for interest which he found had been improperly included in the glass account, as a charge for interest accruing against I. Willard Fox prior to February 20, 1869. Kate W. Goodwin excepted to the allowance to I. Willard Fox of the $8443.30, and the court sustained the exception and excluded that item. She also excepted to the disallowance to herself of the $7780.80, and the court sustained that exception also. This was, in effect, a ruling by the court that the parties could not go behind the

settlement of February 20, 1869, as to the $70,000. As the heirs and representatives of I. Willard Fox have not appealed from the decree, the action of the court in sustaining the exceptions as to those two items must, of course, stand. But it is rendered immaterial by the general view we take of the case.

It is contended by the appellants that the Circuit Court erred in overruling the second exception to the master's report, which was, that the master refused to allow, in favor of Kate W. Goodwin and against I. Willard Fox, the sum of $12,999.63 [$12,999.69], the same being for the amount of glass shipped to I. Willard Fox by Fox & Co., and received by him, between March 26, 1869, and November 5, 1869. The date of March 26, 1869, is stated by the master in his report to be March 23, 1869. The master disallowed that claim of Kate W. Goodwin, on the view that, in February, 1869, and before any of such glass was shipped, all the business and property were turned over to Fox & Co., and they afterwards managed and controlled it; that the glass was not charged by Fox & Co. to I. Willard Fox as sold to him; but that the books of Fox & Co. show that it was consigned to Samuel H. Fox.

There is nothing inconsistent with the agreement of February 20, 1869, in the fact that the stock of goods in Chicago was turned over by I. Willard Fox to Samuel H. Fox, representing Fox & Co., in February, 1869, and that Fox & Co., from that time until December, 1869, carried on the business of the store at Chicago, I. Willard Fox representing them in the business as their agent. The agreement of February, 1869, states that I. Willard Fox "has sold and conveyed" to Samuel H. Fox the stock of goods and the store fixtures, notes, books and accounts, "with power forthwith, at such times and in such manner" as Samuel H. Fox should deem best, to sell and collect and convert into money, the goods, fixtures, notes and accounts, and apply the proceeds to the payment of the indebtedness to Fox & Co. This transfer being then made, and the business being afterwards carried on by Fox & Co. for themselves until December, 1869, it would have been entirely inconsistent with this arrangement that Fox & Co. should sell to I. Willard Fox the glass they sent him afterwards, prior to

the final discontinuance of the business in December, 1869. The weight of the evidence is also to the same effect. The master, therefore, on his view of the case, properly refused to allow in favor of Kate W. Goodwin the $12,999.69; and the exception to such disallowance, being the second exception to the master's report, was properly overruled by the court. But as this $12,999.69 of glass was represented by notes and accounts finally turned over by I. Willard Fox to Fox & Co., and the proceeds of which form part of the $27,343.07 credited to I. Willard Fox in the account hereinafter contained, it is proper to put the $12,999.69 on the debit side of that account.

The master disallowed the $7780.80 of interest which accrued before February, 1869, as having been improperly included in the glass account, for the reason that, in his judgment, the testimony did not justify its allowance, it not appearing that there was any arrangement by which interest was to be charged, and the four entries of interest which appeared upon the books of Fox & Co. being shown to have been made after the accounts were closed, and not harmonizing with the statements of Samuel H. Fox in respect to the matter; that the business between I. Willard Fox and Fox & Co., prior to February 20, 1869, partook somewhat of a commission character; that such business was mainly and substantially limited to the supply of glass furnished to I. Willard Fox by Fox & Co.; that during that time no settlements were made, nor was anything done, between the parties, out of which a claim for interest could have arisen; that the glass sent to I. Willard Fox by Fox & Co. was limited, as to kinds and sizes, to such as Fox & Co. chose from time to time to send; that, under such circumstances, it could not have been expected that he would pay interest for the time occupied in disposing of the glass; and that there was no evidence tending to show that Fox & Co. expected he would pay interest. As Kate W. Goodwin, by her third exception to the master's report, objected to his disallowance of the $7780.80 of interest, and the court sustained that exception and allowed that item of interest to her, and the heirs and representatives of I. Willard Fox have not appealed from the decree, the sustaining of that exception

must stand, but it is made of no importance by the disposition we make generally of the case. If interest were properly chargeable against I. Willard Fox on the items of his account prior to February 20, 1869, it must be regarded as having been included in the $70,000.

The third exception also objects that the master failed to allow to Kate W. Goodwin any interest since February, 1869. The court sustained the third exception as to that branch of it also; and it is assigned here by Kate W. Goodwin for error, that the Circuit Court erred in failing to allow such interest. The effect of the ruling of the court, in sustaining the third exception, was to hold that the master improperly failed to allow to Kate W. Goodwin any interest after February, 1869. The court, however, in its decree, allowed nothing to her as interest for the time after February, 1869, or on any amount, or for any time. The master says nothing in his report about the question of interest after February, 1869. It is now contended, on the part of Kate W. Goodwin, that, as the agreement of February 20, 1869, admitted the sum of $70,000 to be due, and it was a liquidated demand at that time, it should draw interest either from that time or from the 20th of August, 1869, the expiration of the six months named in that agreement.

The statute of Illinois, § 2, c. 74, Revised Statutes of Illinois of 1874, which has been the law of Illinois since 1845, provides as follows: "Creditors shall be allowed to receive at the rate of six per centum per annum, for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing; on money lent or advanced for the use of another; on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance; on money received to the use of another, and retained without the owner's knowledge; and on money withheld by an unreasonable and vexatious delay of payment."

We think that, under this statute, Kate W. Goodwin is entitled to be allowed the legal Illinois rate of interest from August 20, 1869, on the $70,000 named in the agreement of that date, and like interest, from the proper dates, on the

amounts paid by Fox & Co. to take up and satisfy the other indebtedness of I. Willard Fox, from the time they paid such several amounts, and on the other debit items in the skeleton account hereinafter set forth; and that I. Willard Fox is entitled to be allowed like interest from the proper dates on the credit items in that account.

It is also assigned by Kate W. Goodwin for error, that the Circuit Court erred in refusing to sustain her fourth exception to the master's report, as to the amount of assets of I. Willard Fox, properly chargeable to Fox & Co., and in increasing the amount of the same as found by the master. The master found such amount to be $60,601.61, consisting of the items of $15,000 for notes shown to have been collectible, $12,000 for paints, oils, etc., turned over to Fox & Co., $1500 for fixtures sold, $2101.61 for the Merritt mortgage, and $30,000 for glass returned at the date of settlement. The court, in disposing of the fourth exception, modified the finding of the master, and fixed the value of the above-named five items, amounting to $60,601.61, at the gross sum of $65,000. It arrived at the amount of $15,971.30, stated in its decree as the indebtedness of I. Willard Fox to Kate W. Goodwin, by the following calculation:

Indebtedness fixed by the agreement of February 20, 1869	$70,000 00
Add the amount found by the master as paid by Fox & Co. to the creditors of I. Willard Fox	10,971 30
	$80,971 30
Deduct the value of the assets of I. Willard Fox	65,000 00
Balance	$15,971 30

To this sum of $15,971.30 the court added the $565.33 found by the master as having been paid by Kate W. Goodwin for taxes on the La Salle Street lot, making a total of $16,536.63, with which sum, and interest thereon at the rate of 6 per cent per annum from the date of the decree, July 29, 1884, it charged I. Willard Fox. The court did not charge to I. Wil-

lard Fox, the $1923.53 found by the master to have been due on his individual and personal account; nor did it credit him with the $7780.80 item of interest, or the $8443.30 for damages for breakage of glass, and for "stained" glass, and cutting down glass into smaller sizes. The debit item against I. Willard Fox, which the court put at $80,971.30, the master had put at $81,172.41.

We think it clear that the Circuit Court erred in giving credit to I. Willard Fox for the value of his assets as having been turned over to Fox & Co. in February, 1869, at the gross sum of $65,000. The terms of the agreement of February 20, 1869, were only that the goods, wares, merchandise, fixtures, notes, accounts and La Salle Street lot should be sold, collected and converted into money, and the proceeds be applied to the payment of the $70,000 and of the amount which Fox & Co. had paid or should pay to the creditors of I. Willard Fox. Therefore, I. Willard Fox is entitled to be credited only with the proceeds of the property mentioned in the agreement as having been sold and conveyed to Samuel H. Fox. The business of the store in Chicago, after February 20, 1869, must be considered as having been carried on by and on behalf of, and for the benefit of Fox & Co., through I. Willard Fox as their agent, with the stock of goods turned over to Fox & Co. at that date, and the goods which thereafter, and prior to December, 1869, they sent to I. Willard Fox for sale on their behalf. The credit by the master to I. Willard Fox of the $60,601.61, and the credit by the court to him of the $65,000, both of them proceed upon the erroneous view, that the value of the collectible notes, paints, oils, etc., fixtures, Merritt mortgage and glass were to be deducted as of the date of February 20, 1869, the date of the settlement, without regard to the sale or collection of them, or their conversion into money, or their proceeds. Fox & Co. were not chargeable with the value of the property turned over in February, 1869, but its proceeds were to be credited by Fox & Co. when they should be realized, the property to be disposed of at such times and in such manner as Samuel H. Fox should deem best. They did not agree to take the property at a fixed price, in February, 1869,

or at any other time, aside from its proceeds. Therefore, all the testimony as to the value of the property in February, 1869, must be rejected. There is no evidence to show that Fox & Co. received any proceeds which they did not credit.

No specific error is assigned in regard to the overruling of the fifth exception to the report.

It is also assigned for error, that the Circuit Court erred in overruling the fourth exception to the report of July 11, 1884, and in confirming that report. The master, in his report of July 11, 1884, found that there was due, on the 9th of June, 1884, upon the mortgage made by Henry W. Fox and his wife to Loring Monroe, covering the Lake Zurich farm, for principal and interest, $15,059. The decree of the court was that the $16,536.63 should be paid by I. Willard Fox, provided Kate W. Goodwin should procure a release of such mortgage; but, in case the release should not be obtained, then I. Willard Fox might pay into court, for Kate W. Goodwin, $1477.63, being the difference between $15,059 and $16,536.63. Kate W. Goodwin excepted to such report, as to the finding of the amount due upon the Monroe mortgage, because that mortgage could not, in any form, be made the basis of any decree under the issues in the case; and because it did not appear who owned the mortgage, nor was its owner a party to the suit; and because, if it were paid under the decree, the court could not prevent its owner from foreclosing it. It is assigned by Kate W. Goodwin for error that the Circuit Court erred in overruling such exception, and in deducting, by its decree, the amount of the Monroe mortgage from the amount due to Kate W. Goodwin. We think this assignment of error is not well taken, and that the exception to the report in that particular was properly overruled.

It is further assigned for error, that the Circuit Court erred in overruling the first, second and third exceptions to the master's report filed July 11, 1884, and in confirming that report. Those exceptions relate to the La Salle Street lot, and to the fixing of its value at $12,500, as of the 9th of June, 1884.

We think that the Circuit Court, in charging Kate W. Good-

win and Sarah E. R. Smith, with $11,500, as "the present cash value" of the La Salle Street lot, committed an error. By the agreement of February 20, 1869, the conveyance of the lot to Samuel H. Fox, for Fox & Co., was absolute and unconditional, with no right of redemption attached to it, and it was in the same category with the personal property, and not merely subject to a lien, as was the Lake Zurich farm. It was conveyed to Samuel H. Fox, in February, 1869, by an absolute deed, and he and his wife conveyed it to Henry W. Fox on the 25th of September, 1875, for $8000. Under the agreement, Fox & Co. were not bound to apply the value of the lot, or its proceeds, until it was sold. By the amendment made to the bill November 13, 1880, Kate W. Goodwin offered to credit to I. Willard Fox the amount for which she had sold the lot. She had sold it on the 27th of April, 1880, to Sarah E. R. Smith, for $6625. But I. Willard Fox was entitled to a credit, as of the 25th of September, 1875, of the $8000 for which it was then sold to Henry W. Fox, and which the evidence shows was the full value of the lot at that time; and that credit must be allowed. That being done, of course Sarah E. R. Smith will retain the lot; and thus the appeal of herself and her husband in this case is disposed of. The decree provided that she might pay into the court $11,500, with interest, as "the present cash value" of the lot, and that, in case she should do so, she should hold the lot free from all equity of redemption by I. Willard Fox and all persons claiming under him; but that, otherwise, she and her husband should convey the lot to I. Willard Fox, or, on their failure to do so, the master should execute the conveyance instead. All the provisions of the decree in regard to Sarah E. R. Smith and her husband were erroneous, and her title to the La Salle Street lot must be confirmed.

On the foregoing views, we are of opinion that the proper mode of stating the account between the parties is as follows:

I. WILLARD FOX in account with Fox & Co.

Dr.

Amount found due by the agreement of February 20, 1869		$70,000 00
Glass furnished by Fox & Co. to I. Willard Fox, between March 23, 1869, and November 5, 1869, and represented by notes and accounts turned over to Fox & Co.		12,999 69
Amount paid the First National Bank of Chicago, out of the proceeds of the property turned over to Fox & Co.		10,000 00
Amount paid the same bank, raised by a mortgage given on the La Salle Street lot		6,000 00
Amount paid by Fox & Co. in settlement of other debts of I. Willard Fox		10,971 30
		$109,970 99

Cr.

Amount of proceeds received, and debited above as paid to First National Bank of Chicago	$10,000 00	
Amount received as insurance money on the building on the La Salle Street lot, which amount was applied to pay off the mortgage, above mentioned, on the lot	6,000 00	
Proceeds of the sale of the La Salle Street lot, to Henry W. Fox	8,000 00	
Proceeds of sales of goods and other property by Fox & Co., and collection of notes and accounts turned over to Fox & Co.	27,343 07	
		51,343 07
Balance due by I. Willard Fox to Fox & Co.		$58,627 92

Proper provision must be made to carry out our decision that the fourth exception to the report of July 11, 1884, was

properly overruled. To this end the amount of $12,000, as the principal of the mortgage to Monroe on the Lake Zurich farm, with the interest due upon it, must be deducted from the balance found due to Fox & Co., on the principle of the above account. In that event the Lake Zurich farm will be charged with, and will pay, the amount due on such mortgage.

The above items of debit and credit are principal sums, and interest must be calculated and added, at the proper rate, from the proper dates, as before stated. It may be, also, that there will be some items of taxes paid, to be adjusted.

It is manifest, that the Circuit Court credited I. Willard Fox with the gross sum of $65,000, as representing the collectible notes, the paints, oils, etc., the fixtures, the Merritt mortgage, and the glass in the store, February 20, 1869, instead of crediting him merely with the proceeds of those assets, when realized. The $10,000 paid to the First National Bank by Fox & Co. was paid out of such proceeds. The $12,999.69 of glass furnished by Fox & Co., after February 20, 1869, was represented by some of the $15,000 of collectible notes credited to I. Willard Fox by the master, and forming part of the $65,000 credited to him by the court; and yet no allowance was made to Fox & Co. for the $12,999.69 of glass so furnished.

It was proper that I. Willard Fox should pay the costs of the Circuit Court.

The decree of the Circuit Court is reversed, and the case is remanded to that court with a direction to take such further proceedings as may be in accordance with law, and not inconsistent with this opinion.

INSURANCE COMPANY OF NORTH AMERICA *v.* GUARDIOLA.

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

No. 159. Argued January 9, 1889. — Decided March 5, 1889.

Letters of a shipping agent to his principal are incompetent evidence, either in themselves, or in corroboration of the agent's testimony, of the quantity of goods shipped, against third persons.

This was an action on a policy of insurance upon a cargo of sugar shipped at Sagua in Cuba for New York. After verdict and judgment for the plaintiffs, the defendant sued out this writ of error.

Mr. John L. Cadwalader for plaintiff in error.

Mr. George F. Edmunds and *Mr. William W. Goodrich* for defendants in error.

Mr. Justice Gray delivered the opinion of the court.

The principal controversy at the trial was whether the cargo shipped consisted of 531 hogsheads, or of 368 hogsheads only.

Upon this question there was much conflicting evidence, and the plaintiffs introduced a number of depositions, taken under commission at Sagua, including those of the plaintiffs themselves as to what took place at their warehouse, and those of their shipping agents as to what took place at the port some twenty miles below. Annexed to the deposition of one of the plaintiffs were letters written to them by their shipping agents, at the time of the successive shipments, stating the number of hogsheads shipped. Upon these letters being offered in evidence by the plaintiffs, the defendant objected that they were irrelevant and incompetent, and duly excepted to the ruling of the court admitting them.

It is too clear for discussion, that these letters, written to

the plaintiffs by their own agents, were no part of the transaction of shipping the sugar, but were mere reports by the agents to their principals, and were incompetent, either in themselves, or in corroboration of the testimony of the agents, to prove the facts recited in the letters, against third persons. *Freeborn* v. *Smith*, 2 Wall. 160, 176; *Dwyer* v. *Dunbar*, 5 Wall. 318; *United States* v. *Corwin*, *ante*, 381.

Upon the exceptions to other rulings we give no opinion, because they may be presented in a different aspect upon another trial. To avoid misapprehension, it may be added that, according to the rule heretofore laid down by this court, objections to copies of documents or memoranda, embodied in or annexed to the depositions, might perhaps more properly have been made by motion to suppress them before the trial, so as to afford opportunity to produce the originals, when those would be competent evidence. *York County* v. *Central Railroad*, 3 Wall. 107; *Blackburn* v. *Crawfords*, 3 Wall. 175, 191.

But the letters to the plaintiffs from their own agents were absolutely incompetent, and their admission in evidence clearly tended to prejudice the defendant with the jury. Upon this ground

The judgment of the Circuit Court must be reversed, and the case remanded with directions to set aside the verdict and to order a new trial.

WOODSTOCK IRON COMPANY *v.* RICHMOND AND DANVILLE EXTENSION COMPANY.

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

No. 180. Argued February 1, 1889. — Decided March 5, 1889.

The Richmond and Danville Extension Company contracted with the Georgia Pacific Railway Company to construct that company's road by the nearest, cheapest and most suitable route from Atlanta to Columbus, for a con-

Statement of the Case.

sideration of $20,000 a mile. J., who was a director in and vice-president of the Extension Company, and also a director in the Railway Company, negotiated and concluded on behalf of the Extension Company a contract with an Iron Company that had a large plant and extensive mines at Anniston, by which the Railway Company agreed to deflect its road to Anniston, thereby lengthening it about five miles, and the Iron Company agreed to give a right of way through its property, and to convey to the Extension Company certain tracts of land, valued at $20,000, and to pay to it $30,000 in money. Among the motives for making the contract, urged upon the Iron Company by the Extension Company, was the statement that if it was not entered into, the railroad would be constructed by way of a rival establishment at Oxford, about three miles distant. The Extension Company fully complied with the terms of its contract. The Iron Company failed to comply in part with its undertakings, whereupon this suit was brought. *Held*,

(1) That the contract was void as immoral in conception and corrupting in tendency; it being nothing less than a bribe offered by the Iron Company to the Extension Company to disregard its agreement with the Railway Company to construct the road by the shortest, cheapest and most suitable route;

(2) That the threat to construct the road by the rival town of Oxford did not excuse, much less justify it.

It is the duty of a railroad company towards the public not to impose a burden upon it by unnecessarily lengthening its road; and any agreement by which directors, stockholders or other persons may acquire gain by inducing a company to disregard this duty is illegal, and will not be enforced by the courts.

Agreements upon pecuniary considerations, or the promise of them, to influence the conduct of officers charged with duties affecting the public interest, or with duties of a fiduciary capacity to private parties, are against the policy of the State to secure fidelity in the discharge of all such duties, and are void.

THE case, as stated by the court in its opinion, was as follows:

This case comes from the Circuit Court of the United States for the Northern District of Alabama. The complaint, which was filed in June, 1884, is as follows:

"The plaintiff, which is a corporation created by and under the laws of the State of New Jersey, claims of the defendant, a corporation created by and under the laws of the State of Alabama, and located and having its principal place of business in the county of Calhoun, in the State of Alabama, thirty thousand dollars for the breach of an agreement entered into

by it on, to wit, the 18th day of November, 1881, whereby and wherein said defendant agreed and promised that if said plaintiff would locate and construct, or cause to be located and constructed, the railroad of the Georgia Pacific Railroad Company (or of the new consolidated company then being formed and to be known as the Georgia Pacific Railway Company) by way of the town of Anniston, it, the said defendant, would donate and pay to the said plaintiff, or as it might direct, the cash sum of thirty thousand dollars, to be paid in money as to one half — that is, fifteen thousand dollars — when the said Georgia Pacific Railroad Company connected its line with the line of the Alabama Great Southern Railroad Company at or above Birmingham, Alabama, and the other half — that is, fifteen thousand dollars — when said line was connected with the line of the Louisville and Nashville Railroad Company (the North and South Alabama Railroad Company) at or above said city of Birmingham, provided said connections be made within three years from date of said contract. And plaintiff avers that it did cause to be located and constructed the railroad of the said Georgia Pacific Railway Company by way of the town of Anniston; that the said Georgia Pacific Railroad Company connected its line with the line of the Alabama Great Southern Railroad Company at or above said Birmingham on, to wit, the 1st day of June, 1883, and with the line of the Louisville and Nashville Railroad Company at or above said city on, to wit, the 1st day of July, 1883; yet although the said plaintiff has complied with all the provisions of said contract on its part, the said defendant has failed to comply with the following provisions thereof, viz.: It has failed and refused and still fails and refuses to pay, though often requested so to do, any part of said sum of thirty thousand dollars, except the sum of six thousand three hundred and twenty-five dollars, whereby it has become and is indebted to said plaintiff as aforesaid; wherefore this suit.

"The said plaintiff claims of the said defendant the further sum of thirty thousand dollars for the breach of an agreement entered into by him on, to wit, the 18th day of November, 1881, in words and figures in substance as follows:

Statement of the Case.

'ANNISTON, CALHOUN CO., ALABAMA,
'*November* 18*th*, 1881.

'The Woodstock Iron Company makes to the Richmond and Danville Extension Company the proposition following — that is to say:

'First. If the Richmond and Danville Extension Company will locate and construct, or cause to be located and constructed, the railroad of the Georgia Pacific Railroad Company (or of the new consolidated company now being formed, to be known as the Georgia Pacific Railway Company) by way of the town of Anniston, the Woodstock Iron Company will donate and convey, or cause to be donated and conveyed, by good and sufficient deeds, to the Richmond and Danville Extension Company, or as it may direct: 1. Strips or parcels of land each one hundred feet wide — that is to say, fifty feet on each side of the centre line of the location to be fixed for said railroad in, over and through all and sundry the tracts and lots of lands now owned and to be owned by the Woodstock Iron Company, wheresoever situated, on and along the line of said location outside of the corporate limits of the town of Anniston, and the Woodstock Iron Company will, upon request of said Extension Company, at any time, proceed to clear the said strips or parcels of land from timber thereon, allowing, however the said Extension Company to have and take therefrom all that part of timber useful to it for the purpose of construction and for cross-ties.

'2. A strip or parcel of land in, over and through the entire corporate limits of the town of Anniston, so far as owned by the Woodstock Iron Company, as follows — that is to say, on the left or west side of the centre line of the location to be fixed for said railroad, from the point of entering to the point of leaving said corporate limits, a width of fifty feet, measuring from said centre line, and on the right or east side of the centre line of the location to be fixed for said railroad a width of fifty feet, measuring from said centre line from the point of entering said corporate limits to a point nineteen hundred and six and eight-tenths feet short of a point agreed, at or about the near foot of a hillock situated in a field in a west-

erly direction from the depot of the Selma, Rome and Dalton Road; thence for a length of thirteen hundred six and eight-tenths feet to said point agreed a width of one hundred and fifty feet, measuring from said centre line, and thence to a point of leaving said corporate limits a width of fifty feet, measuring from said centre line. Appended hereto is a tracing showing said strip or parcel of land.

'3. All such additional strips or parcels of land within and adjoining the town of Anniston as the experimental location about to be made may show to be reasonably necessary for sidings and other tracks for the advantageous and convenient transaction of the business of the Georgia Pacific Railroad or Railway Company, and especially for siding or spare track along and to the right or east of the Selma, Rome and Dalton line, for convenient approach to the furnaces and for sidings or spare tracks from the main line, at or above the place of greatest width, for convenient approach to the cotton factory and to the presently to be established car-wheel and car works.

'The Woodstock Iron Company will aid the work of construction, and especially so of the sidings or spare tracks for the furnace, by the judicious wasting of the furnace cinder and other material; and the said company will in a general way do all it can to facilitate the work and advance the business of the railroad company whose location it invites; and the Woodstock Iron Company will donate and pay to the Richmond and Danville Extension Company, or as it may direct, the cash sum of thirty thousand dollars, paying the same in money as to one half — that is, fifteen thousand dollars — when the Georgia Pacific Railroad or Railway Company connects its line with the line of the Alabama Great Southern Railroad Company at or above Birmingham, Alabama; and as to the other half — that is to say, fifteen thousand dollars — when the Georgia Pacific Railroad or Railway Company connects its line with the line of [the] Louisville and Nashville Railroad Company (the North and South Alabama Railroad Company) at or above Birmingham, Alabama, the above to be paid only provided the Georgia Pacific Railroad or Railway Company is so far completed as to make the connections above within three years from this date.

'In case the Richmond and Danville Extension Company accepts the terms proposed above, this instrument shall have the effect of a binding contract upon the Woodstock Iron Company; but such acceptance must be in writing and addressed to the president and secretary and treasurer of the Woodstock Iron Company at Anniston, Alabama, within four months from the date thereof, and, if the Richmond and Danville Extension Company shall desire hereafter to build machine shops for the Georgia Pacific Railroad or Railway Company at the town of Anniston, will donate and convey to said Extension Company, or as it may direct, by good and sufficient deeds for that purpose, at least five acres of land at a convenient distance from the crossing of the Selma, Rome and Dalton Road. If, however, this land is accepted for shops, the land shall be appropriated and the shops built within four years from this date.

'In testimony whereof witness the signature of the president and secretary and treasurer and the corporate seal of the Woodstock Iron Company, this 18th day of November, 1881.

'[SEAL.] 'ALFRED L. TYLER, *President.*

'SAMUEL NOBLE, *Sec'y and Treas.*'

"And the plaintiff avers that it did accept the terms proposed by said instrument above set out, in a writing, addressed to the president and secretary and treasurer of said Woodstock Iron Company, at Anniston, within four months from the date of said agreement and instrument, which said writing was delivered to said president and secretary and treasurer on, to wit, the 18th day of January, 1882, and is in words and figures in substance as follows:

'ATLANTA, GA., *Jan'y 17th*, 1882.

'Messrs. Alfred L. Tyler, President, and Samuel Noble, Secretary and Treasurer of Woodstock Iron Company, Anniston, Ala.

'GENTLEMEN: The Richmond and Danville Extension Company hereby notifies you that it accepts the proposition in writing made by you on behalf of the Woodstock Iron Com-

pany to said Extension Company regarding the location and construction of the Georgia Pacific Railway by the town of Anniston, the date whereof is Anniston, Calhoun County, Alabama, November 18th, 1881, and a copy of which is hereto appended. Respectfully,

'JOHN W. JOHNSTON,
'*Vice-President Richmond and Danville Extension Company.*'

"And plaintiff avers that said defendant was at that time engaged, among other things, in the business of making pig-metal and other products from iron ores, and making sales of the same; that its works were located in said town of Anniston, and that it owned large quantities of valuable property therein, and that the said railroad referred to in said contract was a road, then in the process of construction, to be run from Atlanta, Georgia, through the State of Alabama to Columbus, in the State of Mississippi; and plaintiff avers that it did locate and construct the railroad of the said Georgia Pacific Railway Company by way of the town of Anniston, by, to wit, the 1st day of January, 1883; that it did connect the line of said railway company with the line of the Alabama Great Southern Railroad Company, at or above said city of Birmingham, by, to wit, the 1st day of June, 1883; and that it did connect the line of said railway company with the line of the Louisville and Nashville Railroad Company, at or above the said city of Birmingham, by, to wit, the 1st day of July, 1883; and has in all things fully complied with all the terms and stipulations of said agreement undertaken upon its part. Plaintiff further avers that said defendant has complied with the terms and stipulations of said agreement to this extent, and no further. It has donated and conveyed by good and sufficient deeds to the Georgia Pacific Railway Company, as directed and requested by the plaintiff, the several strips and parcels of land for right of way and sidings of the railroad of said company, as stipulated and agreed in said agreement, and has paid to the said plaintiff on account of said cash payment of thirty thousand dollars agreed and undertaken to be made

by said agreement the sum of six thousand three hundred and twenty-five dollars, paid in cars furnished and advanced by defendant to the Georgia Pacific Railroad Company, on account of said cash payment, at the request of plaintiff. But plaintiff further avers that although it has fully complied with all the terms and stipulations of said agreement to be done and performed on its part, that although it located and constructed said railroad of the Georgia Pacific Railway Company by the way of the town of Anniston and connected the line of said railroad with the respective lines of the Alabama Great Southern Railroad Company and the Louisville and Nashville Railroad Company within the time and at the points agreed on, as is hereinabove fully set out and shown, the defendant has wholly failed and refused, and still fails and refuses, although often requested to do so, to pay to said plaintiff said sum of twenty-three thousand six hundred and seventy-five dollars, the balance due and unpaid upon said cash sum of thirty thousand dollars donated and agreed to be paid to plaintiff by said defendant upon the making of said connections as aforesaid, and by reason of the several matters and things set out and alleged herein the said defendant became, and is, indebted to the plaintiff in said sum of twenty-three thousand six hundred and seventy-five dollars, with interest thereon from date of the making of such connections, but has failed and refused, and still fails and refuses, to pay the same: wherefore this suit."

To the complaint the defendant filed a demurrer and also several pleas. The demurrer was to the effect that the contract set forth as the foundation of the action was without consideration and was contrary to public policy and void. The demurrer was overruled, and leave given to the defendant to file additional pleas. The original pleas were five in number, and to these six more were added. Of the original pleas one amounted to the general issue, denying the promise and undertaking in the manner and form alleged in the complaint; and one amounted to a plea of *ultra vires*, setting forth the charter of the defendant, showing the object of its incorporation to be the manufacture of pig-metal and other products of iron ore, and their sale, connecting with that business all

such operations as are usual and incidental thereto, and denying authority, under the charter, to make the agreement mentioned in the complaint. A demurrer to this last plea was sustained by the court.

Of the additional pleas two only require notice — the 10th and 11th. The 10th plea is given in full below, and so much of the 11th plea as is necessary to its comprehension.

"Plea 10. And the said defendant, for further answer to the complaint, says that at the time of the making of the alleged agreement stated and set forth in the complaint, plaintiff was engaged in locating and constructing the Georgia Pacific Railroad under a contract with the Georgia Pacific Railroad Company, under and by which plaintiff agreed with said Georgia Pacific Railroad Company to locate and construct said railroad by the nearest, cheapest and most suitable route, from Atlanta, Georgia, through Alabama to Columbus, in the State of Mississippi, for a consideration to wit, twenty thousand dollars per mile for each and every mile of said road so located and constructed.

"That John W. Johnston, who negotiated and executed said contract with the defendant for plaintiff as vice-president, was, at the time said agreement was made, a stockholder and director of the Richmond and Danville Extension Company, and was also a stockholder and director and officer of the Georgia Pacific Railroad Company; that the Georgia Pacific Railroad Company was at said time, and is now, a separate and distinct company, and in nowise connected with plaintiff, except that some of the stockholders of said Georgia Pacific Railway Company, were also stockholders in said Richmond and Danville Extension Company, and plaintiff was locating and constructing said road under its contract with said company as aforesaid.

"That in causing said road to be built *via* Anniston it was necessary to deflect the same from its nearest, cheapest and most natural route from Atlanta to Columbus a great number of miles, to wit, five miles, at a great additional cost to said Georgia Pacific Railroad Company, to wit, one hundred thousand dollars, and defendant avers that said alleged agreement

on defendant's part to influence the location of said railroad and to donate and pay to said plaintiff, among other things, the cash sum of thirty thousand dollars if plaintiff would locate and construct, or cause to be located and constructed, the railroad of the Georgia Pacific Railroad Company by way of the town of Anniston, was and is contrary to public policy and void, and ought not to be enforced against defendant or in favor of plaintiff."

Plea No. 11, after repeating the first paragraph of plea No. 10, alleges "that John W. Johnston, who negotiated and executed said contract with defendant for plaintiff as vice-president, was, at the time a stockholder, director and officer of the Georgia Pacific Railway Company; and that he went to Anniston where defendant resided and did business, and represented to defendant that he was a director and officer of the Georgia Pacific Railway Company, and also a stockholder, director and officer of the Richmond and Danville Extension Company, and could control and induce the location and construction of said Georgia Pacific Railroad *via* the town of Anniston, and would do so if the defendant would donate and pay to plaintiff the said sum of thirty thousand dollars in cash, and deed to plaintiff, or as it might direct, the large quantity of real estate described in the complaint, which defendant avers was of value, to wit, twenty thousand dollars, and that said Johnston then and there informed the defendant that unless defendant acceded to his said demand to pay plaintiff said sum of money, and convey to plaintiff, or as it might direct, the large quantity of valuable real estate aforesaid, said road would not be constructed by the town of Anniston, but would be constructed by way of the town of Oxford, which said town is within three miles of the town of Anniston, and is a rival market to said town of Anniston, and thence direct to Birmingham, along the line of a preliminary survey already made; and to secure the location and construction of said road *via* the said town of Anniston, and to prevent the locating and building of said road by way of the rival town of Oxford, to the exclusion of the town of Anniston, defendant was forced to agree, and did agree, to pay the said sum

Citations for Defendant in Error.

of thirty thousand dollars in cash, and to convey to plaintiff, or as it might direct, the large quantity of valuable lands described in the complaint, as aforesaid."

To these pleas a demurrer was filed by the plaintiff and sustained by the court. The case was then tried upon the general issue by a jury, which rendered a verdict in favor of the plaintiff, assessing its damages at $27,067.42, upon which judgment was entered with costs, to review which the case is brought here on writ of error.

Mr. John B. Knox, for plaintiff in error, on the point on which the opinion turns, cited: *Fuller* v. *Dame*, 18 Pick. 472; *Holladay* v. *Patterson*, 5 Oregon, 177; *Pacific Railroad Company* v. *Seely*, 45 Missouri, 212; *S. C.* 100 Am. Dec. 369; *Bestor* v. *Wathen*, 60 Illinois, 138; *Linder* v. *Carpenter*, 62 Illinois, 309; *Marsh* v. *Fairburg &c. Railroad Co.*, 64 Illinois, 414; *St. Louis &c. Railroad Co.* v. *Mathers*, 71 Illinois, 592; *Dudley* v. *Cilley*, 5 N. H. 558; *Dudley* v. *Butler*, 10 N. H. 281; *Davison* v. *Seymour*, 1 Bosworth, 88; *Cook* v. *Sherman*, 4 McCrary, 20; *Western Union Tel. Co.* v. *Union Pacific Railroad*, 3 Fed. Rep. 1; *Elkhart County* v. *Crary*, 98 Indiana, 238; *Noel* v. *Drake*, 28 Kansas, 265; *Byrd* v. *Hughes*, 84 Illinois, 174; *Smith* v. *Applegate*, 23 N. J. Law (3 Zabr.) 352; *Callagan* v. *Hallett*, 1 Caines, 103; *Providence Tool Co.* v. *Norris*, 2 Wall. 45; *Wardell* v. *Union Pacific Railroad*, 103 U. S. 651; *Koehler* v. *Hubby*, 2 Black, 715.

Mr. H. C. Tompkins, for defendant in error, cited: *Rives* v. *Missouri &c. Railroad*, 30 Alabama, 92; *Wilks* v. *Georgia Pacific Railway*, 79 Alabama, 180; *Cedar Rapids and St. Paul Railroad* v. *Spafford*, 41 Iowa, 292; *McClure* v. *Missouri River &c. Railroad*, 9 Kansas, 373; *Chicago and Atlantic Railway* v. *Derkes*, 103 Indiana, 520; *Spartanburg &c. Railroad* v. *DeGraffenried*, 12 Richardson (Law) 675; *S. C.* 78 Am. Dec. 476; *McMillan* v. *Maysville &c. Railroad*, 15 B. Mon. 218; *S. C.* 61 Am. Dec. 181; *Rhey* v. *Ebensburg &c. Plank Road Co.*, 27 Penn. St. 261; *Jewett* v. *Lawrenceburg &c. Railroad*, 10 Indiana, 539; *Martin* v. *Pensacola &c. Railroad*, 8 Florida, 370; *S. C.* 73 Am. Dec. 713; *Taggart* v.

Western Maryland Railroad, 24 Maryland, 563, 581, 582; *S. C.* 89 Am. Dec. 760; *Des Moines Valley Railroad* v. *Graff*, 27 Iowa, 99; *First National Bank* v. *Hurford*, 29 Iowa, 579; *Detroit &c. Railroad* v. *Starnes*, 38 Michigan, 698; *Buckspor &c. Railroad* v. *Brewer*, 67 Maine, 295; *International &c. Railroad* v. *Dawson*, 62 Texas, 260; *Chapman* v. *Mud River &c. Railroad*, 6 Ohio St. 119; *Pixley* v. *Gould*, 13 Bradwell (Ill.) 565; *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587; *Thomas* v. *Brownsville Railroad*, 109 U. S. 522; *Pneumatic Gas Co.* v. *Berry*, 113 U. S. 322; *Union Pacific Railroad* v. *Crédit Mobilier*, 135 Mass. 367; *Kitchen* v. *St. Louis &c. Railroad*, 69 Missouri, 224; *Ashurst's Appeal*, 60 Penn. St. 290; *European &c. Railway* v. *Poor*, 59 Maine, 277.

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

As appears from the pleadings, which are set forth in the above statement, some time previous to November, 1881, the plaintiff below, the Richmond and Danville Extension Company, a corporation created under the laws of New Jersey, entered into a contract with the Georgia Pacific Railway Company, a corporation created under the laws of Georgia, to locate and construct for the latter company, by the nearest, cheapest and most suitable route, a railroad from Atlanta in Georgia through Alabama to Columbus in Mississippi, at the rate of $20,000 a mile, to be paid in whole or part in the bonds of the railroad company; and in November, 1881, it was engaged in locating and constructing the road under the contract. At that time the defendant below, the Woodstock Iron Company, a corporation created under the laws of Alabama for the manufacture and sale of products of iron ore, was doing business at the town of Anniston in that State; and it then made a formal proposition in writing to the Extension Company that if it would locate and construct, or cause to be located and constructed, the railroad by way of the town of Anniston, then the Iron Company would donate and convey, or cause to be donated and conveyed, to the Extension Company sundry parcels of land both within and without the corporate limits of

the town, for the location of the road, and which might be necessary for sidings or spare tracks; and would also donate and pay to the Extension Company $30,000, one half when the road made a connection with the line of the Alabama Great Southern Railroad Company at Birmingham, Alabama, and the other half when the road made a connection with the line of the Louisville and Nashville Railroad Company at that place; the payments to be made provided the road should be so far completed as to make the connections designated within three years. The proposition was formally accepted in writing by the Extension Company, through its vice-president, John W. Johnston.

Pursuant to this contract the Extension Company located and constructed the railroad by way of the town of Anniston by the first of January, 1883, and made the connections specified, within the period designated, and complied in every respect with its terms.

The Woodstock Iron Company complied with the contract only in part. At the request of the Extension Company it conveyed to the railroad company the several parcels of land mentioned, and also upon like request furnished it with cars to the value of $6325. For the balance, amounting to $23,675, the present suit was brought, and the principal question presented to the court below, and to this court, is whether the contract is obligatory upon the defendant, or whether it is void as being against public policy.

In determining this question, it must be borne in mind that the contract of the Extension Company with the Georgia Pacific Railway Company was to locate and construct the road "by the nearest, cheapest and most suitable route from Atlanta, Georgia, through Alabama to Columbus in Mississippi," for the consideration of $20,000 a mile, and that it is averred in the pleadings and admitted by the demurrer, that in causing the road to be located by way of Anniston, it was necessary to deflect the same from the nearest and cheapest and most natural route between the designated termini, a distance of five miles, at an additional cost of $100,000. In the light of these facts there can be but one answer given to the

question presented respecting the contract between the Iron Company and the Extension Company, namely, that it was a void contract, immoral in its conception and corrupting in its tendency. It was a contract by an employé of a railroad company with a third party, for a consideration to be received from that third party, to violate its engagement with its employer in the important business of locating and constructing a railroad, and instead of selecting the shortest, cheapest and most suitable route, to locate the road by a longer route, and thus impose an unnecessary and heavy burden upon its employer. The proposition of the Iron Company, which was accepted, was to pay the Extension Company for a breach of its duty. In plain language, it was nothing less than the offer of a bribe to the latter company to be faithless to its engagements, and to do with reference to the business in which it was engaged what would amount to little less than robbery of its employer. The transaction on the part of the Iron Company was none the less offensive, because of the threats of the Extension Company, made by its vice-president, who was also a director and stockholder of the railroad company, that, if the land and money mentioned were not donated, it would cause the road to be located away from Anniston by the rival town of Oxford. The threats did not excuse, much less justify, the offer.

We have thus far considered the case as one only between private parties, where an employé has agreed, for a money consideration, to violate his obligation to his employer; but there are other circumstances which add to the offensiveness of the transaction. The business of the Extension Company was one in which the public was interested. Railroads are for many purposes public highways. They are constructed for the convenience of the public in the transportation of persons and property. In their construction without unnecessary length between designated points, in their having proper accommodations, and in their charges for transportation, the public is directly interested. Corporations, it is true, formed for their construction are private corporations, but whilst their directors are required to look to the interests of their stock-

holders, they must do so in subordination to and in connection with the public interests, which they are equally bound to respect and subserve. All arrangements, therefore, by which directors or stockholders or other persons may acquire gain, by inducing those corporations to disregard their duties to the public are illegal and lead to unfair dealing, and thus being against public policy will not be enforced by the courts. In this case the Extension Company, to which the duty of locating and constructing the railroad between its termini was entrusted, in agreeing, for a consideration offered by a third party, to disregard that duty and locate and construct the road by a longer route than was required, not only committed a wrong upon the railroad company by thus imposing unnecessary burdens upon it, to meet which larger charges for transportation might be called for, but also a wrong upon the public.

The case of *Fuller* v. *Dame*, 18 Pick. 472, 483, is instructive on this head. It there appeared that Dame, the defendant, was the owner of a large tract of land and flats situated on Sea Street, and between it and Front Street, on the south side of Boston, which would be greatly enhanced in value if the Boston and Worcester Railroad Company would locate one of its depots between those streets and easterly of Front Street. To induce the company to make such location it was supposed to be necessary to form an association, which would pay to it a large sum of money and furnish a large tract of land for the depot, besides making other donations; and to provide the money and land, also to form a company to purchase the flats and land between the streets named, to be held as joint stock and laid out in due form and shape for sale. Fuller agreed to aid Dame in getting up such company, and in inducing the railroad company to fix its termination and principal depot between those streets, Fuller being himself of opinion that the railroad ought, from a view of the public good and the good of its stockholders, to enter the city on the southerly side and have its principal depot there. In consideration of such agreement Dame gave his note for $9600, payable to Fuller in three years, the note being deposited with third parties, to be de-

livered to him when the principal depot of the railroad company for merchandise was constructed between the streets mentioned. Fuller was at the time of the agreement a stockholder in the railroad company. The road having been completed, and the principal depot located between the streets mentioned, and the note not being paid, suit was brought upon it. It was adjudged that the contract was contrary to public policy, and that the note given in consideration of it was therefore void. In coming to this conclusion the court considered somewhat at large the ground upon which contracts of this character were avoided, and held that it was because they tended to place one under wrong influences, by offering him a temptation to do that which might injuriously affect the rights and interests of third persons, and that the case before it was within the operation of this principle, the contract tending injuriously to affect the public interest in establishing the fittest and most suitable location for the termination of the Boston and Worcester Railroad for the accommodation of the public travel. It is true the road was constructed and located by the corporation at the expense of private parties under the sanction of the legislature, incorporated for that purpose, who were to be remunerated by a toll levied and regulated by law; and it was left to its directors to fix the termination and place of deposit. But the court added: "In doing this a confidence was reposed in them, acting as agents for the public, a confidence which, it seems, could be safely so reposed, when it is considered that the interests of the corporation as a company of passenger and freight carriers for profit was identical with the interests of those who were to be carried, and had goods to be carried, that is with the public interest. This confidence, however, could only be safely so reposed under the belief that all the directors and members of the company should exercise their best and their unbiased judgment upon the question of such fitness, without being influenced by distinct and extraneous interests, having no connection with the accommodation of the public or the interests of the company. Any attempt, therefore, to create and bring into efficient operation such undue influence has all the injurious effects of

a fraud upon the public, by causing a question which ought to be decided with a sole and single regard to public interests, to be affected and controlled by considerations having no regard to such interests. It is no answer to say that, by the act of incorporation, the executive authority was vested in a board of directors, and Mr. Fuller was not a director. He was a member of the company and might be chosen a director. He was an elector of the directors, and they were directly responsible to the stockholders. The immediate act of location was with directors, but the efficient authority was with the members and stockholders of the corporation, who elect the directors. The election may depend upon the known views and opinions of candidates upon this very question of location. They had a right to his disinterested judgment and advice upon the question of location; and this could not be exercised whilst he held and relied on a promise for a large sum of money, the payment of which depended upon this decision of the question by the directors."

The case before us is much stronger than the one thus decided by the Supreme Judicial Court of Massachusetts. There the contract was held invalid because made with a stockholder of the company, by which he promised, for a pecuniary consideration, to endeavor to procure the company to locate one of its depots at a particular place in the city. Here the contract was with an employé of the company to induce it to disregard its obligations, and the principal person making that contract on the part of the employé was a director and stockholder of the company which was to be thus seriously affected.

The principle, which is so clearly and forcibly stated in *Fuller* v. *Dame*, has been applied in numerous instances by the highest courts of different States, to avoid contracts made to influence railroad companies in selecting their routes and locating their depots and stations, by donations of land and money to some of its directors or stockholders or agents. Thus, in *Bestor* v. *Wathen*, 60 Illinois, 138, it appeared that in 1849 the legislature of Illinois incorporated a company to build a railroad from a point on the Mississippi River to Peoria, and that in 1852 the charter was amended so as to authorize the extension

of the road from Peoria eastward to the state line. In 1855 the company made a contract with the firm of Cruger, Secor & Company, by which the latter undertook the construction and equipment of the road. In 1856, whilst engaged upon this work, the members of the firm, together with Bestor, the president of the railroad company, Sweat, one of its directors, and Smith, its construction agent, entered into a contract with Wathen and Gibson, the defendants, by which the latter, being the owners of 160 acres of land, agreed, in consideration that the road then in process of construction should cross the Illinois Central Railroad where their land was situated, the land would be laid out into town lots and sold, and after proceeds amounting to $4800 had been received, which were to be retained by Wathen and Gibson, a conveyance of an undivided half of the residue should be made to the other parties. The only consideration for this agreement, aside from the location of the road, was that the other parties should assist and contribute to the building up of the town on the land. The road was constructed across the Illinois Central, and Wathen and Gibson laid out the land into lots and proceeded to sell the same, and the town of El Paso was built on the land and an adjoining tract. In 1863 the plaintiffs filed their bill against Wathen and Gibson for an account of the sales and a conveyance of the undivided half of the lots unsold. The court held the contract void as against public policy, and dismissed the suit, and the decree in this respect was affirmed by the Supreme Court of the State, that court observing that when the people through their legislature grants to a company the right of eminent domain for the purpose of constructing a railroad it is upon the supposition that the road will bring certain benefits to the public, and that when subscriptions are made to its stock, the money is subscribed upon the understanding that the officers, entrusted with the construction of the road, will so locate its line and establish its depots as to bring the highest pecuniary profit to the stockholders compatible with a proper regard for public convenience; that these alone are the considerations which should control officers of the road, and so far as they permit their official action to be swayed by

their private interests they are guilty of a breach of trust towards the stockholders, and a breach of duty to the public at large; and it added: "A court of equity will not enforce a contract resting upon such official delinquency or even tending to produce it. Such is the character of the contract before us. If we enforce it we lend the sanction of the court to a class of contracts, the inevitable tendency of which is to make the officers of these powerful corporations pervert their trust to their private gain, at the price of injury at once to the stockholders and to the public. Rendered into plain English, the contract in this case was a bribe on the part of Wathen and Gibson to the president and other officers of the railway company, and to the contractors who were building the road, of an undivided half of one hundred and sixty acres of land, in consideration of which the road was to be constructed on a certain line and a depot built at a certain point. Now if this was the best line for crossing the Illinois Central considered with reference to the interest of the stockholders and of the public, then it was the duty of the officers of the company to establish it there; and if they intended so to do because it was the proper line, but professed to be hesitating between this and another line in order to secure to themselves the contract under consideration, as is somewhat indicated by the evidence, then they were practising a species of fraud upon the defendants, and using a false pretext in order to acquire defendants' property without consideration. If on the other hand this line was not the best, but was adopted because of this contract, the case is still stronger against the complainants. If such was the fact they are asking the court to enforce the payment of a bribe, the promise of which induced them to sacrifice their official duty to their private gain. If, as a third contingency, the choice lay between this line and another equally good, but not better, and they were influenced by this contract to adopt this line, then, although neither the company nor the public has been injured, yet the defendants have made their official power an instrument of private emolument in a manner which no court of equity can sanction. In this particular case no wrong may have been done, and yet public policy plainly forbids the sanc-

tion of such contracts because of the great temptation they would offer to official faithlessness and corruption." The doctrine of this case was approved by the Supreme Court of Illinois in *Linder* v. *Carpenter*, 62 Illinois, 309, and in *St. Louis, Jacksonville and Chicago Railroad* v. *Mathers*, 71 Illinois, 592.

Holladay v. *Patterson*, decided by the Supreme Court of Oregon, 5 Oregon, 107, is also in harmony with *Fuller* v. *Dame* and *Bestor* v. *Wathen*, the court following a similar course of reasoning to that adopted in those cases. That doctrine and reasoning are also often applied where the reward or money consideration for taking a particular route or establishing a station or depot at a particular place is offered directly to the railroad company instead of to its directors, stockholders, or agents. But we do not refer to them, because there are exceptions or qualifications in the application of the doctrine in such cases requiring explanation, as where a subscription is conditioned upon the adoption of a particular route, or the construction of a station or depot at a particular place. *Pacific Railroad Co.* v. *Seely*, 45 Missouri, 212; *Racine County Bank* v. *Ayers*, 12 Wisconsin, 512 (Vilas and Bryant's ed. 570); *Fort Edward and Fort Miller Plank Road Co.* v. *Payne*, 15 N. Y. 583. There is no exception in any decision called to our attention as to the character of a contract when for a pecuniary consideration directors, stockholders, or agents of a company undertake to influence its conduct in these matters. Indeed, the law is general that agreements upon pecuniary considerations, or the promise of them, to influence the conduct of officers charged with duties affecting the public interest, or with duties of a fiduciary character to private parties, are against the true policy of the State, which is to secure fidelity in the discharge of all such duties. Agreements of that character introduce mercenary considerations to control the conduct of parties, instead of considerations arising from the nature of their duties and the most efficient way of discharging them. They are, therefore, necessarily corrupt in their tendencies. As we said in *Tool Company* v. *Norris*, 2 Wall. 48, 56, "that all agreements for pecuniary considerations

to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution," so we say of agreements like the one in this case; they are against public policy because of their corrupt tendency, whether lawful or unlawful means are contemplated or used in carrying them into execution. "The law," as said in that case, "looks to the general tendency of such agreements; and it closes the door to temptation by refusing them recognition in any of the courts of the country." *Oscanyan* v. *Arms Co.*, 103 U. S. 261, 274.

From the views expressed it follows that the court below erred in sustaining the demurrers to the special pleas above mentioned, and it is not necessary, therefore, to consider the other pleas. The judgment must be

Reversed and the cause remanded with instructions to overrule the demurrers to the above pleas, and take further proceedings not inconsistent with this opinion.

Mr. Justice Miller and Mr. Justice Bradley dissented.

RALSTON *v.* TURPIN.

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

No. 98. Argued November 26, 27, 1888. — Decided March 5, 1889.

An agent is bound to act with absolute good faith towards his principal, in respect to every matter entrusted to his care and management. In accepting a gift from his principal he is under an obligation to withhold no information in his possession respecting the subject of the gift, or the condition of the estate in his hands, which good faith requires to be disclosed, or that may reasonably influence the judgment of the principal in making the gift. All transactions between them whereby the agent derives advantages beyond legitimate compensation for his services will be

closely examined by Courts of Equity, and set aside if there be any ground to suppose that he has abused the confidence reposed in him.

When the proof is conflicting upon the point of undue influence exerted upon one making provision by deed in favor of the person alleged to have exerted the influence, and it appears that the contestant, having full knowledge of all the circumstances, made no averment in his original bill of the incapacity of the grantor, and did not raise that issue until an amended bill was filed a year later, that fact is entitled to weight in determining the case.

When incapacity caused by drunkenness is alleged as a cause for annulling a deed, the vital inquiry is as to the capacity of the grantor when the deeds were executed, and not as to his capacity when drunk.

Section 2666 of the Code of Georgia, relating to gifts made to a guardian by a minor just after arriving at majority does not apply to the case of a deed or will in favor of his guardian made by a person some years after arriving at his majority; but even if it did apply, such a deed would be good if made with a full knowledge of the facts, and without any misrepresentation or suppression of material facts by the guardian.

As the record in this case discloses nothing impeaching the final settlement made between the guardian and his ward, § 1847 of the Code of Georgia does not apply to it.

Section 3177 of the Code of Georgia, relating to gifts from one party to another where there are confidential relations arising from nature, or created by law, or resulting from contracts where one party is so situated as to exercise a controlling influence over the other, is only a statement of a general rule, governing all courts of equity.

BILL IN EQUITY. Decree dismissing the bill, from which complainant appealed. The case is stated in the opinion.

Mr. W. Dessau and *Mr. Clifford Anderson* for appellant.

Mr. A. O. Bacon and *Mr. John C. Rutherford* for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

This suit was brought by the widow of the late James A. Ralston, Jr., to obtain a decree cancelling certain deeds of gift of real estate, executed by her husband to the appellee, George B. Turpin, as trustee for his children. The original bill, filed August 7, 1883, sought this relief upon the ground that Turpin obtained the execution of the deeds by undue influence exercised by him over the grantor while the latter was in declining health, with a constitution seriously impaired by dis-

sipation, and by the suppression of facts that were within his knowledge, and which, in view of his relations to the grantor, he was under obligation to disclose. In an amended bill, filed May 6, 1884, the grounds for cancellation were enlarged by an averment that at the time of signing the deeds the grantor was mentally incapable of comprehending and did not comprehend what he was doing, and that plaintiff gave her apparent consent to their execution, because, knowing Turpin's power "over her husband, she feared to offend him lest he might either work a separation between her and her said husband, or render their relations with each other insecure and unhappy;" and that "she and her husband were both overreached and deceived by the said Turpin, and yielded because they were in effect powerless to resist." By a subsequent amendment, made May 29, 1885, the plaintiff alleged as to the first deed that neither she nor her husband knew, at the time of its execution, whether it was a will or a deed, or what its legal effect was, and that both of them were so completely under Turpin's influence, and so anxious to conciliate and gratify him, that they did not stop to consider its character or effect, and had no opportunity to consult counsel with reference thereto. The answer put in issue all the material averments of the bill and amended bills.

The Circuit Court dismissed the suit, placing its decision upon two grounds: first, that when the deeds were made the grantor was capable of disposing of his property as he thought proper; second, that its disposition was in conformity with the long settled and cherished purpose of his life, and was not brought about by a betrayal of trust or any improper influence upon the part of the grantee. 25 Fed. Rep. 7.

The relations between the grantor and Turpin will appear from the following facts, some of which are conceded, while the others are established by a clear preponderance of evidence.

James A. Ralston, Sr., died in 1864, possessed of considerable property, principally real estate in Macon, Georgia, which passed, in equal parts, to his widow, and sole surviving child, James A. Ralston, Jr. During the lifetime of the father, Tur-

pin attended to a large part of his business, and held towards him relations of close friendship and confidence. After his death the management of the estate was committed by the legal representative of the father to Turpin, who collected rents, leased property and directed necessary repairs. In 1867, the son, then about nineteen years of age, and having the right, under the laws of Georgia, to select his guardian, chose Turpin, without his solicitation, for that position. The latter qualified on the 2d of August, 1867. In the same year Mrs. Ralston, the mother, intermarried with Dr. Bozeman of New York.

On the 3d of May, 1869, Turpin, having made a final settlement of his accounts as guardian before the proper court, and turned over to his ward, who had then reached his majority, the property and assets belonging to the latter, received from that court a formal letter discharging him from the guardianship. Immediately after the relations of guardian and ward were thus severed, Turpin and his partner Ogden, composing the firm of Turpin & Ogden, were employed by young Ralston to take charge of his real estate, and to collect rents, make repairs, etc. In addition to the relations between him and Turpin, arising out of this employment, there existed between them a warm personal affection.

In 1873 the mother of Ralston died, leaving a will by which a considerable part of her estate was devised to him; and this, also, was committed by him to the management of Turpin & Ogden. By her will Turpin was made executor. He qualified, and, in 1878, having fully administered her estate, was discharged as executor. In this connection it may be stated that Mrs. Bozeman told Turpin that he was not remembered in her will, because "Jimmie had or would do so in his," she observing, at the time, that he had been a good friend to the family. This is stated by Turpin, in his deposition, and there is no reason to doubt the truth of his statement.

On the 11th of May, 1874 Ralston, being about twenty-six years of age and then competent to dispose of his property, and having an estate yielding him an annual income of about $15,000, made, at Macon, Georgia, and without suggestion by

Turpin, his will and testament whereby he directed that a monument, suitable to his condition and circumstances of life, be erected over his grave, and requested that his "friend, George B. Turpin, and his children after him," would see to it that his "monument and grave shall always during their lives be suitably kept and cared for." By that will he also directed, that after the payment of his debts his entire estate be divided into two equal parts; one part to go to George B. Turpin, in trust for the sole benefit and use of the testator's aunt, Mrs. Laura B. Smith, and her children, James, Annie, Daisy and Charles, during her natural life, and after her death, for the joint and sole use and benefit of those children, and their respective descendants, during the life of the child longest surviving, and upon the death of the last survivor, to the heirs at law of his aunt. The other part was devised to Turpin for the sole benefit and use of himself and children (born, and to be born) for and during his life; the trust to cease at his death and the property to vest in his children then in life, the descendants of any deceased child to share in the division *per stirpes*. Turpin and Ogden were constituted his executors.

On the 15th of December, 1879, Ralston, then nearly thirty-two years of age, made, at the city of New York, a second will, revoking all other wills, and devising to Turpin, "in trust for his children, William C. Turpin, Frank M. Turpin, George R. Turpin, Lizzie Turpin and Walter H. Turpin," the building at the corner of Cherry and Third Streets, in Macon, known as Ralston Hall, together with the adjoining lots, 66, 68 and 70, subject only to such liens and incumbrances as might be created thereon during his lifetime. This property is variously estimated to have been worth between $40,000 and $50,000, and constituted, at that time, according to the weight of the evidence, less than one half in value of his estate. He then devised to "Ida Blanchard, by which name she is now known, and whose original name was Sarah or Sally J. Harten, formerly of Philadelphia, Pa.," four stores in Macon, and all the watches and jewelry of which he should die possessed. To his aunt Mrs. Smith, during her natural life, and at her death to her children in fee simple, he bequeathed his undivided one

half interest in the Ralston mansion house in Macon. To his grandmother, during her natural life, he devised all of the family pictures of which he should die possessed, and at her death "to my friend, George B. Turpin, of Macon, Ga., having enjoyed his friendship for a long course of years. I feel that they will be safe and kept intact in his hands." To Ogden he devised all of the household furniture in the Ralston mansion house.

It is here necessary to state that the plaintiff, under the name of Ida Blanchard, went to Macon in 1869, and lived continuously in houses of public prostitution. While prosecuting that mode of life, young Ralston made her acquaintance, and for several years, without intermission, and much to the grief of relatives and friends, held improper relations with her. They often quarrelled and had drunken broils with each other in different places of bad repute where they met. During her residence in Macon, Turpin used every effort to induce Ralston to abandon the reckless and immoral life he was leading, and to cease the use of strong drink. But his efforts and warnings were unattended with success, except for brief intervals. No change occurred in the relations of Ralston and the plaintiff while in Macon. She states that he intended to marry her as far back as 1876. In the fall of 1879 they went to New York; and on the 23d of January, 1880, within less than three weeks after the will of 1879 was made, they were married. The fact of their marriage was not known in Macon until some months afterwards. In April, 1880, they removed to Stamford, Conn. In the summer of that year, Turpin, while at Saratoga Springs, received information of the marriage, and that they were living in Stamford. He went to the latter place in August, 1880, to ascertain if such were the fact, and, if it were, to inform Ralston that his marriage had, by the laws of Georgia, revoked the will made in favor of Turpin's children, and to suggest the propriety, if he still desired to do something for them, of making a formal deed for their benefit. There is some conflict between the statements of the plaintiff and Turpin as to what occurred at Stamford. But it is evident that nothing was said or done by Turpin, on that occasion, calculated to influence

Ralston or his wife to take any course not entirely in accordance with their wishes. Nor is there any ground to suppose that the plaintiff acquiesced in what her husband did from fear that Turpin might expose her course of life, or effect a separation between herself and husband. It does not appear that she stood in fear of anybody. It is clearly shown that, as the result of the interview at Stamford, Ralston and wife went to New York, and, before a commissioner of the State of Georgia, freely and voluntarily executed and acknowledged a deed, in fee simple, dated August 26, 1880, conveying to Turpin, as trustee for his children, William, Frank, George, Lizzie and Walter the identical property devised to him as trustee by the will of 1879, subject, however, to the condition that Ralston should receive annually its rents, uses and profits, after deducting taxes and insurance thereon, and expenses for collecting the rents and making repairs, and subject to a mortgage of $5000 made by Ralston to Ross, on one of the stores conveyed to Turpin as trustee. Two days afterwards, August 28, 1880, another deed, covering the same property and containing the same conditions, was executed and acknowledged by Ralston; the first deed having been discovered, or being supposed, to be informal in some respects. On the day of the execution of each of these deeds the plaintiff executed and acknowledged, before the same commissioner, a separate instrument in writing, stating that she freely and voluntarily ratified and confirmed the deed made by her husband.

In the year 1881, Turpin, having been advised by counsel that the former deeds for the benefit of his children were defective, in that their clauses, or some of them, were of a testamentary character, enclosed another deed for Ralston to execute, which the latter did on the 19th of April, 1881; the plaintiff executing on the same day a separate writing ratifying and confirming that deed, and renouncing and conveying to the trustee for the uses therein named all her right of dower and other interests in the property conveyed. This deed conveyed to Turpin in trust for his children named in those instruments the same property as that described in the will of 1879, and in the deeds of August 26, 1880, and August 28, 1880.

In this connection it may be stated that prior to the making of the will of 1879, Ralston became unfriendly to the husband of one of the daughters of Turpin, and, for that reason, she was omitted from that will as well as from all the deeds subsequently executed. He died at Montclair, New Jersey, on the 4th of July, 1883.

We must examine each of the principal grounds upon which the plaintiff bases her claim for relief, for, if, as contended, Ralston was in such condition, mentally and physically, when the deeds of 1880 and 1881 were executed, that he could not or did not comprehend the nature of the transactions, or if their execution was obtained by means of undue influence exercised over him by Turpin, in either case, the plaintiff would be entitled to relief. It would be granted upon the principle laid down in *Harding* v. *Handy*, 11 Wheat. 103, 125, which was a suit by heirs at law to set aside conveyances obtained from their ancestor. Chief Justice Marshall there said: "If these deeds were obtained by the exercise of undue influence over a man whose mind had ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside." *Allore* v. *Jewell*, 94 U. S. 506, 511. On the contrary, if it does not appear that he was incapable, by reason of physical or mental debility, of exercising a discriminating judgment in respect to the disposition of his property, or was driven to make the gifts in question against his own wishes, and under some influence that he was unable, no matter from what cause, to resist, the relief asked must be denied. "The undue influence for which a will or deed will be annulled," this court said in *Conley* v. *Nailor*, 118 U. S. 127, 134, "must be such as that the party making it has no free will, but stands *in vinculis*."

In a case of conflicting proof, as here, it is a circumstance not without weight, that the plaintiff, who, more than any one else, was cognizant of the grantor's condition during the entire period in question, makes no averment in the original bill of the husband's want of capacity to dispose of his prop-

erty. The averment was that when the deeds were made he was in a declining state of health, and his constitution greatly weakened by dissipation. Such a condition does not, however, necessarily imply an absence of sufficient capacity to dispose of property, by gift or otherwise. Nearly a year passed after the institution of this suit, before she distinctly made the issue that the deeds were void for the want of capacity upon the part of her husband to make them. The proof does show, beyond question — indeed, it is admitted — that for many years prior to the execution of the deeds, and thenceforward until his death in 1883, he was intemperate in his use of ardent spirits. He was often intoxicated, and, when in that condition, was incapacitated to transact business. But for many years prior to his death there were intervals, some of them quite long, during which he avoided excessive indulgence in strong drink. His capacity, when sober, to transact business is abundantly shown. The vital inquiry is as to his capacity, not when he was intoxicated, but when the deeds were executed. *Conley* v. *Nailor*, 118 U. S. 127, 131. The evidence leaves no room to doubt that, at those particular dates he fully comprehended the character of those instruments. If it satisfactorily appeared that, from habitual dissipation or other cause, he was in such enfeebled condition of mind or body, immediately before or immediately after their execution, as to render him incompetent to transact business, the presumption might arise that he was unable, at the time, to understand what he was doing, and thus the burden of proof, as to his capacity, at those particular dates, to dispose of his property, be imposed upon the grantee. Even in that view, the plaintiff would not be entitled to a decree cancelling the deeds, on the ground of the grantor's mental incapacity; for it appears that, on each occasion when the respective deeds were executed, he was perfectly sober, and possessed sufficient capacity to dispose of his property with an intelligent understanding of what he was doing. He knew, at the time, that each deed conveyed certain property to Turpin in trust for the children named, and that they were substantially in execution of his settled purpose to make provision

out of his estate for the children of the man who had been for years the fast friend and confidential adviser of his parents and of himself. That purpose was based upon motives entirely creditable to him, and, so far as the record discloses was originally formed without any suggestion by Turpin or his children. Prior to his leaving Macon in 1879, and before making the will of that year, he often said to companions or acquaintances that he intended to make, or had made, such provision out of his estate.

If he executed the deeds of 1880 without knowing what he was doing, he would, naturally, at some subsequent time, have expressed dissatisfaction with what he had done, and taken steps to have them set aside. But no expression of dissatisfaction was ever made by him. On the contrary, upon receiving the deed of 1881, accompanied by the request that he would execute it, he promptly complied with that request, and returned the deed duly acknowledged by himself and wife to Turpin. His correspondence with the latter during 1880 and 1881 furnishes persuasive, if not conclusive, evidence that he had accurate knowledge of the condition of his property and its management by Turpin & Ogden, under the direction of Turpin, and was in the enjoyment of good health. On July 28, 1880, within less than a month before making the first deed of gift, he wrote to Turpin from Stamford, Connecticut, stating, among other things, that he was "enjoying good health." On April 18, 1881, the day preceding the last deed of gift, he wrote from the same place to Turpin, "my health is splendid, but Ida has been ill all winter and is so still." The body of each of these letters is in the handwriting of the complainant. They are inconsistent with her present contention that, not only at the time, but both before and after, the deeds of gift were executed, her husband's mind and body had been so wrecked by dissipation that he did not intelligently comprehend what he did, or possess sufficient will to resist the importunities or persuasion of others. To these considerations we may add the significant fact that in no one of the letters that passed between Turpin and the plaintiff, after the latter left Macon, is there any intimation that she disapproved of the

provision made for Turpin's children. We concur entirely with the conclusion reached upon this issue by the court below.

It remains to consider whether the deeds of gift were the result of undue influence exercised by Turpin over Ralston. In discussing this question counsel for the plaintiff call attention to § 2666 of the Code of Georgia, which provides that "a gift by any person just arrived at majority, or otherwise peculiarly subject to be affected by such influences, to his parent, guardian, trustee, attorney, or other person standing in a similar relationship of confidence, shall be scrutinized with great jealousy, and upon the slightest evidence of persuasion or influence towards this object, shall be declared void, at the instance of the donor or his legal representative, at any time within five years after the making of such gift." We do not perceive that this provision has any direct bearing upon this case. There was here no gift by the ward just after he arrived at his majority. If the deeds in question had been made immediately upon Ralston's arriving at full age, or shortly after he came into possession of his estate, they would, in view of the then recent relation of guardian and ward, have been more difficult to sustain. Still they would have been sustained if it had appeared that they were freely and voluntarily made, upon full knowledge of the facts, without misrepresentation or suppression of material facts by the guardian. In *Hylton* v. *Hylton*, 2 Ves. Sen. 547, 549, Lord Chancellor Hardwicke said: "Undoubtedly, if after the ward or *cestui que trust* comes of age, and after actually put into possession of the estate, he thinks fit, when *sui juris*, and at liberty, to grant that or any other reasonable grant by way of reward for care and trouble, when done with eyes open, the court could never set that aside; but the court guards against doing it at the very time of accounting and delivering up the estate, as the terms; for the court will not suffer them to make that the terms of doing their duty." In the case before us more than eleven years elapsed after Ralston attained full age, and after Turpin finally settled his accounts as guardian, before the first of the deeds of gift was made.

In respect to that settlement it may be observed that by

§ 1847 of the Georgia Code it is declared that "no final settlement made between the guardian and ward shall bar the ward, at any time within four years thereafter, from calling the guardian to a settlement of his accounts, unless it is made to appear that the same was made after a full exhibit of all the guardian's accounts, and with a full knowledge by the ward of his legal rights." Nothing is disclosed by the record that impeaches the entire accuracy of the guardian's final settlement; nothing that suggests any want of intelligence or integrity in his administration of the ward's estate; nothing to show that he ever realized anything from the position of guardian, except such compensation as the law permitted him to receive. When, therefore, the relation of guardian and ward was severed, Ralston had every reason to confide in Turpin's integrity, and to feel grateful, not only for his uniform kindness, but for faithful devotion to his interests.

But it is contended that the relations subsequently existing between them were such as are described in § 3177 of the Georgia Code, which declares that "any relations shall be deemed confidential arising from nature or created by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct and interest of another; or where, from similar relations of mutual confidence the law requires the utmost good faith, such as partners, principal and agent, etc." Undoubtedly, the relation of principal and agent existed between Ralston and Turpin after the relation of guardian and ward had been severed, and up to the death of Ralston. The section of the Georgia Code quoted is an expression of a general rule that has always governed courts of equity. The agent is bound to act with absolute good faith toward the principal in respect to every matter entrusted to his care and management. In accepting a gift from his principal he is under an obligation to withhold no information in his possession respecting the subject of the gift, or the condition of the estate in his hands, which good faith requires to be disclosed, or that may reasonably influence the judgment of the principal in making the gift. All transactions between them whereby the agent derives advantages beyond

legitimate compensation for his services will be closely examined by courts of equity, and set aside if there be any ground to suppose that he has abused the confidence reposed in him. It is for the common security of mankind, Mr. Justice Story well says, "that gifts procured by agents, and purchases made by them, from their principals, should be scrutinized with a close and vigilant suspicion." 1 Story's Eq. Jur. § 315. An instructive case upon this point is *Harris* v. *Tremenheere*, 15 Ves. 34, 38, which was a suit to cancel leases to a party who, at the time, held the relation of steward, agent, and attorney to the lessor. Some of the leases were pure gifts by the employer. Lord Chancellor Eldon disclaimed any jurisdiction to annul such gifts, when based upon the generosity of the donor, or to weigh the value or amount of the consideration, as if it had been the subject of barter, but said, that if he could find "in the answer or the evidence the slightest hint" that the defendant had laid before his employer an account of the value of the premises that was not perfectly accurate, he would set aside such leases. He would do this, he said, without regard to the intention of the parties, "upon the general ground that the principal would never be safe if the agent could take a gift from him upon a representation that was not most accurate and precise."

We do not intend to qualify or weaken, in any degree, these salutary doctrines. Their recognition, however, does not determine the present case, unless it be held that a principal cannot, under any circumstances whatever, make a valid gift to his agent of property committed to the latter's care or management. No such doctrine has ever been established, nor could it be, without impairing the natural right of an owner to make such disposition of his property as he may think would best subserve his interest and comfort or gratify his feelings. That Turpin held such relations, personal and otherwise, to young Ralston, as would enable him to exercise great influence over the latter in respect to the mode in which his property should be managed for purposes of revenue; that Ralston trusted Turpin's judgment as to matters of business more than the judgment of any other man; and that he had an abiding con-

fidence in Turpin's integrity, as well as in his desire to protect his interests, are conceded. But we are satisfied that Turpin did not improperly use the influence he had over, or abuse the confidence reposed in him by, young Ralston. It was the latter's own thought, induced, no doubt, by his friendly feeling for Turpin and gratitude for the latter's fidelity to his interests, to make some provision for Turpin's family. This thought was first formally expressed in the will of 1874, when he was capable of making a disposition of his property. It was substantially repeated in the will of 1879, drawn in precise conformity with his directions. The circumstances detailed by the plaintiff's counsel to show that the deeds of 1880 and 1881 were procured by undue influence upon the part of Turpin, lose most of their force in view of the fact that they covered the same property and name the same beneficiaries that are described in the will of 1879. That Turpin caused the first deed to be prepared, and requested Ralston to execute it, are facts of but little weight. Turpin had been informed of the will of 1879, and it was his right, if not his duty to his children, to inform Ralston that his marriage had revoked that will, and to suggest that, if he was so minded, the execution of a deed was an appropriate mode to give effect to his intention in respect to those children. Nor was the presence in Stamford, when the deeds of 1880 were executed, of Ogden, the partner of Turpin, a suspicious circumstance. The correspondence between Ralston and Turpin, prior to that time, shows that the former was aware of Ogden's purpose to visit the North during the summer of 1880, and desired Ogden to visit him at Stamford.

Upon a careful examination of the record, we concur with the court below in holding that the plaintiff has failed to show that the deeds of 1880 and 1881 were obtained by undue influence. On the contrary, it appears, by the great preponderance of evidence, (to state the case made by the defendants in no stronger language,) that, although their execution may have been induced, not unnaturally, by feelings of friendship for, and gratitude to, the defendant Turpin, the grantor acted upon his own independent, deliberate judgment, with full

knowledge of the nature and effect of the deeds. It was for the donor, who had sufficient capacity to take a survey of his estate, and to dispose of it according to an intelligent, fixed purpose of his own, regardless of the wishes of others, to determine how far such feelings should control him when selecting the objects of his bounty.

In respect to the allegation that Turpin suppressed facts touching the condition of Ralston's estate, as affected by the claim of Mrs. Smith, it is sufficient to say that it is not sustained by the proof.

Other facts than those we have mentioned are disclosed by the record, and other questions were discussed at the bar, but as they do not, in our judgment, materially affect the decision of the case, we need not specially refer to them.

Decree affirmed.

CHAPMAN *v.* BARNEY.

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

No. 150. Submitted January 8, 1889. — Decided March 5, 1889.

Amendments are discretionary with the court below and are not reviewable by this court: this rule applies to an amendment substituting a new sole plaintiff for the sole original plaintiff.

When there has been an appearance and no plea, or when, on account of amendments and changes of pleading the declaration remains without an answer, it is error to call a jury and to enter a verdict unless for assessment of damages merely.

It is error to proceed to trial and enter a verdict and render judgment against a defendant on an amended declaration in which the party plaintiff is changed, when he has no notice of the order giving leave to amend, or opportunity to plead to the amended declaration, or day in court to answer to the suit.

An allegation that the plaintiff is a joint stock company organized under the laws of a State is not an allegation that it is a corporation; but, on the contrary, that it is not a corporation, but a partnership.

An allegation that a joint stock company plaintiff is a citizen of a State different from that of the defendant, will not give this court jurisdiction on the ground of citizenship.

It is again decided that this court will of its own motion take notice of questions of jurisdiction presented by the record, although not raised by the parties, and that when the jurisdiction of a Federal court is sought on the ground of diversity of citizenship, the facts conferring the jurisdiction must either be distinctly averred in the pleadings or must clearly appear in the record.

When the judgment below is reversed in this court for want of jurisdiction in the Circuit Court, the plaintiff in error is entitled to his costs in this court.

THE case is stated in the opinion.

Mr. Robert T. McNeal and *Mr. Frank Baker*, for plaintiff in error, cited: (1) To the first point stated in the opinion. *Davis Avenue Railroad* v. *Mallon*, 57 Alabama, 168; (2) To the second point *Huckvale* v. *Kendall*, 3 B. & Ald. 137; *Marion Machine Works* v. *Craig*, 18 West Virginia, 559, 565; *Baltimore & Ohio Railroad* v. *Christie*, 5 West Virginia, 325, 328; *McMilleon* v. *Dobbins*, 9 Leigh, 422; *Armstrong* v. *Barton*, 42 Mississippi, 506; *Porterfield* v. *Butler*, 47 Mississippi, 165, 170; *Garland* v. *Davis*, 4 How. 131; (3) To the third point, Freeman on Judgments, § 540.

No appearance for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

In its original form, this was an action of assumpsit, brought in the court below, by the United States Express Company, alleged to have been organized under and by virtue of the laws of the State of New York, and a citizen of that State, against Heman B. Chapman, a citizen of Illinois, to recover the sum of $14,000, in money, alleged to have been entrusted to him for delivery to a certain company at La Salle, Illinois, and converted by him to his own use.

At the same term of the court in which the declaration was filed, Chapman answered, setting up two defences, viz.: (1) *non assumpsit;* and (2) *nul tiel* corporation. On the 8th of August, 1869, upon statutory affidavit filed on behalf of the company, a writ of attachment was issued, under which writ

the marshal of the district levied upon certain personal property and effects of the plaintiff in error.

At the succeeding term of the court, upon motions made by the company for that purpose, leave was given it to file an amended declaration, and to change its action from assumpsit to trover; and the plaintiff in error was ruled to plead to the amended declaration within ten days after service of a copy thereof upon his attorneys. In conformity with such order, at the December Term, 1879, of the court, the plaintiff amended the declaration so as to make it, in lieu of the original, read as follows:

"Ashbel H. Barney, president of the United States Express Company, a joint stock company organized under and by virtue of a law of the State of New York, and which said company is authorized by the laws of the State of New York to maintain and bring suits, in the name of its president, for or on account of any right of action accruing to said company, and a citizen of the State of New York, the plaintiff in this suit, by E. F. Bull and James W. Duncan, its attorneys, complains of Heman B. Chapman, a citizen of the State of Illinois," etc.

After the leave to amend the declaration was given, but before the amended declaration was filed, the plaintiff in error was convicted of perjury in the Circuit Court of La Salle County, Illinois, and sentenced to imprisonment in the Joliet Penitentiary, for the term of seven years, under which sentence he was, on January 2, 1880, removed to said penitentiary, and there imprisoned until October, 1884. Without any proof of service of a copy of the amendment, or any order for the default of the plaintiff in error for want of plea to the amended declaration, and without any plea thereto having been filed by him, the case was called for trial, and the record shows the following proceedings to have been had:

"Said cause having been called for trial, plaintiff appeared, and defendant and his attorney failing to appear, thereupon, upon issue joined, comes a jury (naming them) who were sworn well and truly to try said issue, and who, after hearing the evidence, returned the following verdict: 'We, the jury,

find the issue for the plaintiff, and assess his damages at fourteen thousand dollars;'" and then follows judgment, on March 27, 1880, in usual form, on the verdict, for $14,000, and costs.

On the 8th of October, 1885, plaintiff in error filed in the court below his bond for the prosecution of a writ of error to reverse said judgment, and the same was duly approved by the Circuit Judge. The mittimus under the sentence above referred to, the certificate of the warden of the penetentiary, and the affidavit of plaintiff in error, were all filed in the case and made part of the record; and they show that plaintiff in error was imprisoned in the Joliet Penitentiary from January 2, 1880, to October 4, 1884; and another affidavit of the plaintiff in error, also filed in the case and made part of the record, shows that on his discharge from the penitentiary, October, 1884, he was at once arrested on a *capias ad satisfaciendum*, issued upon the judgment above mentioned, and from that time until the issue of the writ he had been imprisoned in the county jail of Cook County, Illinois, upon such *capias*. His case is thus brought within the provisions of § 1008 Rev. Stat., which provides that, in case a party entitled to a writ of error is imprisoned he may prosecute such writ within two years after judgment, exclusive of the term of such imprisonment.

The assignments of error relied upon are three in number, and are substantially as follows:

(1) The court erred in permitting a new sole plaintiff to be substituted for, and in the place of, the sole original plaintiff.

(2) The court erred in submitting to the jury the cause as it stood after the amendments aforesaid, as upon issue joined between said parties, in entering the verdict of the jury in said cause, and in rendering judgment thereon in favor of the defendant in error, when there was no issue joined between said parties.

(3) The court erred in proceeding to trial and entering a verdict and rendering judgment against plaintiff in error when he had no notice of the order giving leave to amend, or of such amendment, and had had no time or opportunity to plead to the amended declaration, nor any day in court to answer to, or defend against, the suit of the new plaintiff.

Opinion of the Court.

We do not think the first assignment of error well taken. Amendments are discretionary with the court below, and not reviewable by this court. *Mandeville* v. *Wilson*, 5 Cranch, 15; *Sheehy* v. *Mandeville*, 6 Cranch, 253; *Walden* v. *Craig*, 9 Wheat. 576; *Chirac* v. *Reinicker*, 11 Wheat. 280; *Wright* v. *Hollingsworth*, 1 Pet. 165; *United States* v. *Buford*, 3 Pet. 12; *Matheson* v. *Grant*, 2 How. 263; *Ex parte Bradstreet* 7 Pet. 634.

We think the second point for plaintiff in error is well taken. Where there has been an appearance and no plea, or where, on account of amendments and changes of pleadings, the declaration remains without an answer, the plaintiff may move for a judgment for the want of a plea, as upon *nil dicit*. But no such motion was made. Certainly a jury should not be called, and verdict entered where no issue is joined, unless for assessment of damages, merely. The court erred in rendering judgment thereon. In addition to the authorities cited by counsel for plaintiff in error, see *Hogan* v. *Ross*, 13 How. 173. We also think the third point well taken. The plaintiff was not entitled to judgment without conforming to the conditions imposed by the court in the very order giving leave to amend the declaration; and, under such circumstances, the court erred in rendering judgment against defendant.

But aside from all this, we are confronted with the question of jurisdiction, which, although not raised by either party in the court below or in this court, is presented by the record, and under repeated decisions of this court must be considered. *Sullivan* v. *Fulton Steamboat Co.*, 6 Wheat. 450; *Jackson* v. *Ashton*, 8 Pet. 148; *Grace* v. *American Central Ins. Co.*, 109 U. S. 278; *Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237; *Cameron* v. *Hodges*, 127 U. S. 322, and authorities there cited. The ground upon which the jurisdiction of the Federal court is invoked is that of diverse citizenship of the parties. In *Robertson* v. *Cease*, 97 U. S. 646, 649, it was said that "where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively, and with equal distinct-

ness, in other parts of the record," citing *Railway Co.* v. *Ramsey*, 22 Wall. 322; *Briges* v. *Sperry*, 95 U. S. 401; and *Brown* v. *Keene*, 8 Pet. 112. See also *Menard* v. *Goggan*, 121 U. S. 253; *Halsted* v. *Buster*, 119 U. S. 341; *Everhart* v. *Huntsville College*, 120 U. S. 223.

On looking into the record we find no satisfactory showing as to the citizenship of the plaintiff. The allegation of the amended petition is, that the United States Express Company is a joint stock company organized under a law of the State of New York, and is a citizen of that State. But the express company cannot be a *citizen* of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was *organized* under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is, that the company is *not* a corporation, but a joint-stock company — that is, a mere partnership. And, although it may be authorized by the laws of the State of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in a Federal court.

The company may have been organized under the laws of the State of New York, and may be doing business in that State, and yet all the members of it may not be citizens of that State. The record does not show the citizenship of Barney or of any of the members of the company. They are not shown to be citizens of some State other than Illinois. *Grace* v. *American Central Ins., Co. supra*, and authorities there cited.

For these reasons we are of the opinion that the record does not show a case of which the Circuit Court could take jurisdiction. The judgment of that court must therefore be reversed at the costs, in this court, of the defendant in error. *Hancock* v. *Holbrook*, 112 U. S. 229; *Halsted* v. *Buster*, *supra*; *Menard* v. *Goggan*, *supra*.

The judgment is reversed and the cause remanded, with directions to set aside the judgment, and for such further proceedings as may not be inconsistent with this opinion.

BÉNÉ *v.* JEANTET.

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

No. 167. Argued January 18, 1889. — Decided March 5, 1889.

The reissued letters patent No. 8637, granted to John Béné March 25, 1879, for an improvement in the process of refining and bleaching hair, is limited to the second claim and is to be construed as a patent for a process of refining hair by treating it in a bath composed of a solution of chlorine salt dissolved in an excess of muriatic acid; but within that limit it is a pioneer invention and is entitled to receive a liberal construction.

The testimony of two experts in a patent suit being conflicting, and the evidence of one being to facts within his knowledge which tended to show that there was no infringement, while that of the other, who was called to establish an infringement, was largely the assertion of a theory, and the presentation of arguments to show that facts testified to by the other could not exist; *Held*, that no case of infringement was made out.

In equity, to restrain an alleged infringement of letters patent. Decree dismissing the bill without prejudice to the right of complainant to bring an action at law. Complainants appealed. The case is stated in the opinion.

Mr. Samuel T. Smith for appellants.

Mr. William P. S. Melvin for appellee.

Mr. Justice Lamar delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Southern District of New York, by John Béné and Adolph Grünberg against Emile Jeantet, praying an injunction, accounting, and damages for an alleged infringement of reissued letters patent No. 8637, granted to Béné, March 25, 1879, on an application filed March 4, 1879, for an improvement in the process of refining and bleaching hair.

Counsel for complainant stated in the record that no claim

is made in this suit for the bleaching of hair except so far as the bleaching may result incidentally from the process of refining; and the only issue presented by the pleadings, therefore, relates to the question of infringement so far as the process of refining hair is concerned, there being no issue raised as to the validity of the patent in any respect.

The nature and object of the invention are set forth in the specification as follows:

"This invention relates to the treatment of all kinds of coarse hair, which, in its natural state, has little commercial value, and is entirely unfit for toilet uses and purposes. The said treatment serves, mainly, to refine the hair or reduce the diameter of the hairs and to render them more pliable and glossy; but it also serves to partially bleach the hair or lighten its color or tint and fit it to pass through any of the ordinary dyeing processes, whereby it may be given any shade or color desired or possible. In carrying out my invention, for the purpose of producing from the coarse, harsh hair above mentioned, a soft, pliable hair of fine texture, I treat the said coarse hair to a bath composed of such chemicals or chemical substances as will dissolve away a portion of the surface of each hair, and thus reduce its diameter. I find that a solution of a chlorine salt dissolved in an excess of muriatic acid serves my purpose as a bath for this refining treatment. I claim as my invention:

"(1) The method of refining all grades of coarse hair, which consists in subjecting it to the action of chemicals, whereby the surface of each hair is corroded or dissolved away and its diameter reduced, substantially as set forth.

"(2) The method of refining coarse hair, which consists in subjecting it to the action of a bath composed of muriatic acid, in which is dissolved a chlorine salt, substantially as set forth.

"(3) The method of refining and bleaching all kinds and grades of coarse hair, which consists, first, in bathing and manipulating the same in a chemical bath, composed of acid and a chlorine salt, and then in a bleaching bath, composed of acids and bichromate of potash, substantially as and for the purpose set forth.

"(4) The method of refining and bleaching all kinds and grades of coarse hair, which consists, first, in bathing and manipulating the same in a bath composed of acid and a chlorine salt, which refines the hair; second, subjecting the refined hair to a bath composed of acids and bichromate of potash; and, third, subjecting the hair thus refined and bleached to the proper shade to a fixing bath composed of warm water, solution of muriate of tin, bisulphate of soda and muriatic acid, which sets the color, substantially as set forth.

"(5) The method of refining and treating hair, which consists in first passing it through a refining bath composed of an acid and a chlorine salt; then, if desired or necessary, through bleaching and fixing baths, as above described; and, finally, treating the hair so refined to a bath composed of water and ammonia, to remove all of its impurities, substantially as specified.

"(6) As a new article of commerce and manufacture, hair of fine texture produced from any grade of coarse hair, either animal or human, by the method of refining, substantially as herein described."

The court below held that were it not for the latter part of this description the specification would fail to comply with the statute, and would be void for uncertainty. It therefore limited the patentee to his second claim, and accordingly ruled that under this specification "the patent is to be construed as one for a process of refining hair by treating it in a bath composed of a solution of chlorine salt dissolved in an excess of muriatic acid, and the claims are to be limited accordingly."

The court further found from the evidence produced in the case that the alleged infringement, the sole issue presented by the pleadings, had not been proven, and, therefore, dismissed the bill without prejudice to the right of the complainants to bring an action at law if they were so advised. An appeal from this decree brings the case here.

Under § 4888 Rev. Stat. the specification must describe the invention and the manner and process of "making, constructing, compounding and using it in such full, clear, concise and exact terms as to enable any person skilled in the art or science

to which it appertains . . . to make, construct, compound and use the same." Tested by this requirement, the patent in suit cannot receive the broad construction for which complainants contend. Except as applicable to the second claim, the specification is not full and clear enough to give one skilled in chemistry such an idea of the particular kinds and character of the chemicals, or combination of chemicals, with the relative proportions of each, as would enable him to use the invention without having to resort to experiments of his own to discover those ingredients. The broad construction claimed for this patent as a pioneer and foundation invention in the art of refining hair cannot extend the rights of the patentee beyond the compositions of matter and processes which, as stated in the patent, embody his real invention. It is true, as appears upon the pleadings, that the appellant Béné was the first discoverer of a process of refining hair, and his patent, therefore, is entitled, within the limits just indicated, to a liberal construction. If, therefore, it was proved that the hair dealt in by the defendant was refined by substantially the same chemical action as that set forth in the second claim, the fact of infringement was established, and the complainants were entitled to the decree prayed for.

Upon the trial no direct testimony was offered by plaintiffs to show that the articles dealt in by the defendant were treated or refined by the patented process. The only fact upon which the plaintiffs relied was, the correspondence of the articles proved to have been sold by defendant, in respect of smoothness, lustre and pliability, with the hair produced according to the patented process; which correspondence, it was contended, showed that both products resulted from the same method or equivalent method of preparation; and it was farther insisted that the court was bound from that fact to conclude that refined hair, like that in question, could not be produced except by treating it in a bath composed of a solution of chlorine salt dissolved in an excess of muriatic acid, or a solution of their (chemical) equivalents.

To support this contention the plaintiff introduced an expert, Nathaniel S. Keith, who states that, whilst he had never at-

tended any lectures on the subject of chemistry, he had pursued his studies in the chemical laboratory of his father, a practising physician and a manufacturing chemist. He had given hair special consideration during three or four years past, and had made experiments upon the processes of refining and bleaching hair with reference to this suit and another legal controversy. In his testimony he asserts, substantially, that the defendant's article cannot be produced, except by a treatment in a solution of chlorine salt and muriatic acid, or their (chemical) equivalents. In response to the question, "What other substance is there, if any, except chlorine and its compounds, which will corrode or dissolve away the surface of the hair so as to reduce the size or diameter without essentially destroying the hair?" he answers: "I have no knowledge of any other." Again: "My opinion is, that any method under which, by the action of chemicals, the surface of hair is dissolved or corroded away so as to reduce its diameter comes within the province, or falls within one or more of the claims, of the said patent."

To repel this contention the defendant called as an expert witness one Charles Marchand, who stated that he had been engaged in chemical studies for twenty-four years, having graduated at a school of arts and manufactures in Paris in 1871, from which time his business had been that of a manufacturing chemist, to which, after he came to this country in 1878, he added the occupation of analytical chemist. He testifies that in his studies and business he has had much to do with bleaching and refining human hair, and other hair; has known for many years oxidizing agencies for bleaching or refining hair; first saw hair reduced in diameter by the use of chemicals twelve years ago in Paris by a chemist; and that he had made a number of experiments in the treatment of hair by subjecting it to a refining process entirely different from that described in the patent; and in corroboration of his testimony he produced several samples of refined hair, which he stated he had refined by the use of different chemicals from those mentioned in the patent.

The first was treated by a chlorine gas solution in pure water, and then by a solution of peroxide of hydrogen.

The second was a solution of permanganate of potash in water with sulphuric acid and muriatic acid in proper proportions.

The third was a solution of sulphurous acid in water, and also a solution of permanganate of potash.

The fourth was treated by one of the same methods. Another specimen was treated by a concentration of peroxide of hydrogen.

To break the force of this testimony, Keith was recalled, and, upon many points, contradicted Marchand's statements. He testified that he had made experiments according to the methods described by Marchand, and found them failures, and the hair subjected to them worthless and unrefined.

The testimony of these two witnesses is conflicting. But the testimony of Marchand relates to facts declared to be within his knowledge and experience; whilst that of Keith is largely the assertion of a theory and a presentation of arguments to show that the facts testified to by Marchand cannot exist. The experiments which Keith said he had made according to Marchand's formula, and which failed to produce refined hair, were, as he admitted, his first experiments for that purpose; whilst those made by Marchand were the results of twelve years of practice, and attested themselves by the specimens produced.

We think the complainants did not make out a case of infringement. There is not a preponderance of evidence in their favor.

The decree of the Circuit Court is therefore

Affirmed.

SCHRAEDER MINING AND MANUFACTURING COMPANY *v.* PACKER.

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

No. 118. Argued December 10, 11, 1888. — Decided March 5, 1889.

In Pennsylvania, after a survey of a tract of public land, whether a chamber survey or an actual one, has been returned more than twenty-one

years, the presumption that it was actually and legally made is conclusive, and cannot be controverted by a party claiming under a junior survey.

Clement v. *Packer*, 125 U. S. 309, explained and distinguished.

A consent by coterminous proprietors of real estate to mark a boundary line supposed to run according to the marking between undisputed tracts, given by both in ignorance of the real facts and of the existence of a conflict, does not estop either from claiming his rights when the mistake is discovered; nor can it be construed as a license from the one party to the other, to cut timber on the disputed tract up to the mistaken boundary line.

A petition for removal of a cause from a state court to a Circuit Court of the United States, on the ground of diversity of citizenship, filed after a judgment therein has been reversed by the Supreme Court of the State, and the remand of the case for a new trial, is in time.

The plaintiff below was entitled to recover for the cutting and carrying away up to the time that he sold.

TRESPASS QUARE CLAUSUM. Verdict for plaintiff, and judgment on the verdict. Defendant sued out this writ of error. The case is stated in the opinion.

Mr. John F. Sanderson (with whom was *Mr. William T. Davies* and *Mr. Edward Overton* on the brief) for plaintiff in error.

Mr. D. C. De Witt for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

This is an action of *trespass quare clausum fregit* for timber felled and carried away, originally brought in the Common Pleas Court of Bradford County, Pennsylvania, where, after certain amendments of the record with respect to the parties thereto, the case stood as *Elisha A. Packer, Plaintiff*, v. *The Schraeder Mining and Manufacturing Company.* A judgment of that court, on a verdict in favor of the defendant, having been reversed by the Supreme Court of the State, and the case remanded for a new trial, (97 Penn. St. 379,) and three other verdicts having been set aside by the trial court, the case was, on application of the plaintiff, removed into the Circuit Court of the United States for the Western District of

Pennsylvania on the ground of diverse citizenship of the parties.

The declaration averred that the defendant, by its agents and employés, entered upon plaintiff's lands in the years 1867, 1868 and 1869, and cut down and took therefrom over two millions of feet of timber, amounting in value to $15,000.

The defences pleaded to the action were (1) that defendant did not commit any of the trespasses complained of on plaintiff's land; (2) that the land on which the alleged trespass was committed did not belong to the plaintiff, but was the property of the defendant itself. It was also contended by the defendant that the plaintiff, through his agent, had aided, by consent and acquiescence, in establishing a boundary between the two contiguous tracts of the parties, up to which he, the plaintiff, agreed that defendant's agents and officers could cut and carry away as much timber as they pleased. Issue having been joined upon these pleas, the case was tried by a jury, resulting in a verdict in favor of the plaintiff for the sum of $8000, upon which judgment was rendered. The defendant sued out this writ of error.

Upon the trial the plaintiff, in support of his claim to the land in dispute, introduced evidence deducing his title from a warrant granted by the Commonwealth of Pennsylvania to one George Moore, for a tract of 375 acres of land. The official return shows that the warrant was issued on the 27th of April, 1792, and that the survey was made for the said George Moore on the 21st of November, 1792. The survey is thus described in the official return:

"A certain tract situated on the waters of Towanda Creek, Luzerne County, beginning at a post; thence by land of Joseph Betz and Henry Betz north twenty-nine degrees east, three hundred and eighteen perches to a hemlock; thence by vacant land north sixty-one degrees west, two hundred perches to a post; thence by the same and land of General Brodhead south twenty-nine degrees west, three hundred and eighteen perches to a post; and thence by land of Samuel Cooley south sixty-one degrees east, two hundred perches to the beginning, containing three hundred and seventy-five acres and allowance of six per cent for roads," etc.

As evidence to show that the land in dispute is part of this George Moore tract, the plaintiff produced copies of the returns of these surveys, called for as adjoinders, the location of which, it is claimed, was fixed by the evidence beyond dispute. And in connection with that evidence he called several surveyors, who gave testimony, with maps and other returns, tending to show, by identifying the hemlock northeast corner, and other marks on the ground corresponding with the survey, that the Moore tract, located according to its calls, embraced the land in dispute.

The defendant, on his part, introduced evidence to show that the land in dispute was a portion of a tract of about 409 acres, surveyed March 24, 1794, in the warranty name of Andrew Tybout. He introduced a copy of a warrant and return of the Tybout tract and a patent from the State to one Daniel Brodhead for that tract. Evidence was also given by defendant showing that original marks were found on certain trees on the north, east and south lines of the Tybout survey, and that the hemlock northeast corner, the sugar southeast corner, and the hemlock sapling southwest corner, called for in the return, were marked respectively as corners in 1794. The hemlock sapling had disappeared, but the defendant's surveyor determined the age of the corner by a witness found there, and by other signs.

Defendant also introduced evidence of certain surveyors, tending to show that no marks upon the ground had ever been found for the Moore survey on the line north from the hemlock sapling corner, or on the line west from the hemlock northeast corner thereof, which bore the date of such survey. In this connection, it put in evidence certain official maps from the land office of Pennsylvania, showing the location of what is known as the General Brodhead lands, lying west of the west line of the Moore survey extended southerly; and also produced evidence tending to show that a line bearing marks dating 1792 was found from the sugar tree, the southeast corner of the Tybout tract, to the hemlock sapling corner mentioned, and that the sugar tree was marked as a corner of 1792, and that a corner of 1792 was found at the hemlock sap-

ling corner. Other evidence was introduced by the defendant designed to show the non-existence of an actual survey of the Moore warrant according to the official return thereof, the details of which need not be stated here.

In connection with this contention the defendant offered to give further evidence, founded upon examinations made upon the ground by surveyors, to show that the Moore warrant was not actually surveyed on the ground according to its return of survey, but was surveyed, together with the Cooley and other warrants to the south of it, in one block, of which the Moore was the northern member; that the north line of that block, if actually surveyed upon the ground in 1792, was run between the hemlock sapling and sugar corners, corresponding to what was claimed by the defendant to be the south line of the Andrew Tybout tract; that no line of 1792 was surveyed on the ground for the Moore warrant north from the hemlock sapling corner, nor west from the hemlock northeast corner of the Tybout tract; and that the line south from the hemlock northeast corner aforesaid was run for warrants to the east of said line, and was merely adopted by the return of the Moore survey. To this evidence the plaintiff objected on the ground that twenty-one years and upwards having elapsed from the date of the Moore survey, there was a presumption *juris et de jure* that the said survey had been made as returned, and that the evidence was, therefore, inadmissible. The court sustained this objection and excluded the evidence so offered, to which ruling the defendant excepted.

The defendant also contended on the trial of the case that the plaintiff was estopped from setting up any claim to the land in dispute, by reason of certain alleged acts and declarations of his, and of his duly authorized agent, one Jacob DeWitt.

The evidence which it produced on this subject tended to establish the following facts: Prior to the year 1866, the plaintiff, at that time a resident of New York City, purchased a large amount of lands lying east of and adjoining those of the Schræder Land Company, the predecessor of this defendant, and including the tract in controversy, none of which lands he

had ever seen. Soon after that purchase he employed Jacob DeWitt as his agent and attorney in the management and protection of said lands from depredations, etc., and gave him full power and authority to carry out the purposes of his agency.

The land company having in contemplation the erection of a saw-mill and extensive lumbering operations, and being desirous of painting a boundary line of its lands as a guard against trespassing upon the lands of adjoining owners, informed DeWitt of its intentions; and, upon his assent thereto, as plaintiff's agent, the company employed on its own responsibility one Z. F. Walker to run and paint such line. Walker knew nothing of any conference having taken place between DeWitt and the company upon the subject of the painted line. He was paid for his work by the company alone, and his instructions to paint the boundary line of the Schræder lands were received from it.

Having in his possession certain old maps of the lands in that neighborhood, including both the Moore and Tybout tracts, some of which showed the interference between these two tracts, and certain old field notes made by a surveyor in 1828 while surveying the Brodhead lands, Walker went upon the lands and painted a line on the north, east and south sides of the Tybout tract, according to its location claimed by the defendant.

Afterwards, DeWitt having examined certain portions of this painted line, assented to it as a correct boundary line between the lands of the company and those under his management and control.

This occurred in the summer of 1866. In the following fall two members of the executive committee which had charge of the affairs of the land company, went to New York City to see the plaintiff and assure themselves of DeWitt's authority for establishing the painted line. They saw plaintiff and informed him of the transaction that had taken place with regard to the running of the painted line. He replied to them that he had never been on the lands, but that DeWitt was his attorney and agent in the matter, and what DeWitt did met

his approval. In 1869, after most of the cutting had been done, DeWitt again expressed himself as satisfied with the painted line.

A question also arose in the progress of the trial as to the time to which the plaintiff was entitled to claim damages, it being contended by the defendant that he had sold and conveyed the lands in question to Jacob DeWitt on the 2d of November, 1869, by an absolute deed of general warranty, a copy of which was introduced in evidence. The plaintiff, however, claimed that that deed was to be considered not alone but in connection with a certain other agreement between the parties thereto, which was also introduced in evidence, and that when so considered, it showed that title to the lands embraced in it did not pass to DeWitt until October 1, 1870. Plaintiff's oral evidence on this point was also to the same effect.

So far as the record shows, there was no serious dispute between the parties as to the cutting down, removal and appropriation of the timber complained of, or as to the amount and value thereof, or as to the fact that all of the alleged trespasses had been committed within a certain boundary marked by a line of trees blazed, and painted white, known as the painted line, which was claimed to have been established by consent of the parties.

It also appears from the record that the hemlock northeast corner tree, called for in the George Moore return of survey, was identical with the hemlock northeast corner called for by the Andrew Tybout return of survey, and that the said surveys, by running from this common corner, according to their respective returns, would overlap and include within the same boundaries about 325 acres, being the tract on which the cutting, etc., complained of occurred.

The first and decisive question is, who owned this overlapped land at the time the timber was cut? The plaintiff who holds title to the Moore warrant and survey of 1792, or the defendant holding title under the Tybout warrant and survey of 1794? As we have seen, it was clearly established that the adjoinders to the location of the ground corresponded

exactly with the adjoinders named in the official return, so that the latter was a photograph of the former. It was also proved that the hemlock northeast corner, called for in the Moore survey, was identified; that that hemlock was the northwest corner called for in the Henry Betz return of survey, which adjoined the George Moore survey on the east for about two thirds of the length of its line, and was separated therefrom by an old line marked as early as 1784, and remarked in 1792 and subsequent years, extending several miles southerly; that south of the Henry Betz survey and George Moore survey on the east is the Joseph Betz tract; and that both of these Betz tracts were surveyed on the 4th of July, 1793, and were returned into the land office on the 16th of April, 1794, at the same time the return of the Moore survey was made, their location being undisputed.

It is shown that along the southern portion of its western line the George Moore is bounded on the west by a tract in the warranty name of Robert Irwin, surveyed November 22, 1792, and returned into the land office the same day as the Moore survey. This Irwin tract was a part of a large body of lands, known as the General Brodhead lands, whose eastern line extended southerly, identified by the surveyors by marks bearing date 1792; and that on the south the George Moore adjoins the Samuel Cooley survey, whose location is not disputed.

We concur with the Circuit Court that the Moore survey, if located according to its calls as made in the official return in the land office, would include within its limits the tract where the timber was cut by the defendant and its agents. The question then is presented, why should it not be located according to these calls? That the Moore warrant is older than the Tybout warrant is indisputable. That it was regularly and legally granted on the 24th of April, 1792, to Moore is not questioned; and that it was legally surveyed in the same year appears on the face of the official return duly certified. All the presumptions favor the regularity, fairness and legality of a survey thus authenticated. The calls for adjoining surveys are regarded by the law of Pennsylvania as high and important evidence in determining the true location

of a survey, superior in character to the courses and distances therein described, and next in conclusiveness to living monuments and original marks upon the ground. Upon what ground, then, can it be contended that the adjoining surveys, a living monument, and many of the marks upon the ground, called for in the official return, should not determine the location of the George Moore surveys? The only conceivable ground is the one asserted by the defendant below, that there was, as matter of fact, no such actual survey as the one exhibited in the official return; that, in other words, the Moore warrant was never actually surveyed on the ground according to its return of survey. In support of this contention the defendant offered evidence to show that the official return was a chamber location, never having been made in fact. The evidence was rejected by the court, upon the ground, as stated in its charge to the jury, that "an old survey like that of the George Moore cannot be questioned at this late day by any parties claiming under a junior title, whether that title took its origin within twenty or twenty-one years of the older survey, or after that time." This action and ruling form the basis of numerous assignments of error. We think the court did not err, either in rejecting the testimony or in the charge. Many of the authorities cited by the counsel for plaintiff in error, carefully examined, support the principle laid down by the court with reference to chamber surveys in Pennsylvania.

At an early day in that State great abuses crept into the administration of its land-office system, growing out of the illegal acts of the surveyors, who, instead of going into the field and establishing the lines and marking corners upon the ground, would make drafts on paper of pretended surveys, and return them into the land office as duly certified. These false, fraudulent pretences of surveys never made, were called chamber surveys. Owing to the confusion and uncertainty of titles arising from the numerous patents issued, and the large quantities of land purchased in good faith under these fabricated surveys, the courts found it expedient, for the common good and the promotion of peace and quiet in the community, to hold that when a warrant was returned as regularly sur-

veyed, and this official return allowed to remain unchallenged for twenty-one years, it was strong presumptive evidence of the regularity and legality of the survey. Many of the earlier decisions in Pennsylvania, cited by the counsel for plaintiff in error, held this presumption to be *prima facie* only, and subject to rebutting proofs. But the later adjudications are in harmony with the doctrine announced by the Circuit Court. Such was the decision of the Supreme Court in the case of *Packer* v. *The Schraeder Mining and Manufacturing Company*, 97 Penn. St. 379.

There is nothing in the case of *Clement* v. *Packer*, 125 U. S. 309, contrary to this view. The decision in that case had no application to the subject of chamber surveys. The controversy arose as to the location of one line of a tract, the actual survey of which was admitted and insisted on by both parties. The only question was as to the true mode of ascertaining the location of the disputed line, the plaintiff below contending that the survey as marked upon the ground would properly define its position, whilst the defendant contended that the location should be determined by the courses and distances described in the survey, disregarding the marks called for and said to be found on the ground.

The court decided that the true mode of ascertaining the lines of a survey was to run them according to the marks and monuments on the ground made by the surveyor at the time of the survey, along with the lines and distances in the official return, when these latter corresponded with such marks and monuments; but in case of a conflict and variance, the original marks and monuments were to prevail and determine the location of the line in dispute. It also held that after the lapse of twenty-one years from the return of a survey, the presumption is that the warrant was located as returned by the surveyor of the land office; and that in the absence of rebutting facts, the official courses and distances will determine the location of the disputed line or corner; but that this presumption is not conclusive, and may be rebutted by the proof of original marks and monuments tending to show that the actual location on the ground was different from the official

courses and distances. The whole issue in the case was as to the relative weight to be attached to these two classes of evidence in case of a discrepancy between them, and whether the period of prescription could be invoked in behalf of the one class as conclusive against the other. The contention, as in this case, that no survey was actually made, and that the official return of the survey relied on was a chamber survey, presents a different question, and involves the application of a different principle. And it may now be regarded as settled by the latest adjudications of the Supreme Court of Pennsylvania that, after a survey has been returned more than twenty-one years, the presumption that it has been actually and legally made is conclusive, and cannot be controverted by a party claiming under a junior survey.

The specifications of error, from eight to fifteen inclusive, are based upon the charge of the circuit justice with reference to the alleged consent of Jacob DeWitt, the agent of Packer, to the establishment of what is known as the painted line, up to which it was understood that the Schraeder Company might cut the timber.

The court charged the jury that the evidence relating to this painted line, and to the assent given to it by DeWitt, and afterwards approved by Packer, could have no influence on the question of title under the plea of *liberum tenementum;* that the assent was given not to settle a dispute but to acquiesce in the running of a line about which no dispute had then arisen, and upon the supposition that the person engaged in running it knew where the true lines were; that it was an acquiescence resulting from a pure mistake and error, which should not bind the plaintiff or estop him from claiming his rights when he discovered the mistake. We think the court in its charge brought out clearly and fairly before the jury the distinction between a mutual undertaking to adjust and settle a doubtful and disputed dividing line, in case of conflicting titles, on the one hand, and, on the other, the consent of parties to mark a boundary supposed to run between undisputed tracts, but in ignorance and mistake of both as to the existence of any conflict.

Opinion of the Court.

Upon the claim of the plaintiff in error that the consent of Packer to the running of the painted line amounted to a leave and license to cut the timber up to that line, the court charged that the adoption of a boundary line by mistake had no element of license in it, and does not necessarily indicate intention on the part of either Packer to give, or of the Schraeder Company to receive, a license to cut and appropriate timber on Packer's lands.

We cannot discover any error in this part of the charge to the jury.

The Pennsylvania decisions cited by counsel in support of the assignments of error vary very much from the case at bar. Most of them are cases in which the boundary was agreed upon as a settlement of a dispute. In the others, the party setting up the estoppel had been misled as to a material fact by the false or mistaken representation of the party making a claim inconsistent with such representation. In the case of *Perkins* v. *Gay*, 3 S. & R. 327, 331, the remarks of Mr. Justice Gibson, quoted by plaintiff in error, apply expressly and solely to "a settlement of a disputed right." In the next paragraph he says:

"If the parties, from misapprehension, adjust their fences and exercise acts of ownership in conformity with a line which turns out not to be the true boundary, or permission be ignorantly given to place a fence on the land of the party, this will not amount to an agreement or be binding as an assent of the parties; and I agree it is a principle of equity that the parties to an agreement must be acquainted with the extent of their rights and the nature of the information they can call for respecting them, else they will not be bound. The reason is, that they proceed under an idea that the fact which is the inducement to the agreement is in a particular way, and give their assent, not absolutely, but on conditions that are falsified by the event;" citing *Turner* v. *Turner*, 2 Rep. in Ch. 81; *Bingham* v. *Bingham*, 1 Ves. Sen. 126; *Gee* v. *Spenser*, 1 Vern. 32; *Pusey* v. *Desbouverie*, 3 P. Wms. 316.

The decisions in the other States generally support the rule that owners of adjacent tracts of land are not bound by con-

sent to a boundary which has been defined under a mistaken apprehension that it is the true line, each claiming only the true line, wherever it may be found, and that in such case neither party is precluded or estopped from claiming his own rights under the true one, when it is discovered. Nor can such consent in an action of trespass *quare clausum fregit*, upon the theory of leave and license given, operate as an estoppel upon the claim of a plaintiff to recover damages to the extent of the value of the timber taken, any more than it can under the plea of *liberum tenementum* divest his title to land on which the alleged cutting and removal were committed.

There remain three other assignments of error not yet disposed of, which do not call for any extended notice. First, in relation to the refusal of the Circuit Court to remand this cause to the state court in which it originated. The reply to this is, the petition for removal into the Circuit Court was filed before the final hearing of the case, and therefore in time. *Hess* v. *Reynolds*, 113 U. S. 73. Second, as to the alleged refusal of the court to allow the defendant to plead the statute of limitations. The record shows no such order. The sixteenth and seventeenth assignments of error, relating to the time to which plaintiff was entitled to claim damages, are fully covered by the charge of the court that the plaintiff, if entitled to recover at all, was entitled to recover damages for all cutting and carrying away of timber from the disputed premises up to the time he actually sold, etc.

The judgment of the Circuit Court is *Affirmed.*

APPENDIX.

AMENDMENT TO RULES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

ORDER.

It is now here ordered by the Court that Rule 59 of the Rules of Practice for the Courts of Equity of the United States be, and the same is hereby, amended by adding at the end thereof the words "or before any notary public."

(Promulgated March 5, 1889.)

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CONSTITUTIONAL LAW.

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1. The provision in the Code of Iowa, § 1289, which authorizes the recovery of "double the value of the stock killed or damages caused thereto" by a railroad, when the injury took place at a point on the road where the corporation had a right to erect a fence and failed to do so, and when it was not "occasioned by the wilful act of the owner or his agent," is not in conflict with the Fourteenth Amendment to the Constitution of the United States, either as depriving the company of property without due process of law, or as denying to it the equal protection of the laws. *Minneapolis and St. Louis Railway* v. *Beckwith*, 26.
2. Corporations are persons within the meaning of the clauses in the Fourteenth Amendment to the Constitution concerning the deprivation of property, and concerning the equal protection of the laws. *Santa Clara County* v. *Southern Pacific Railroad*, 118 U. S. 394, and *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, followed. *Ib.*
3. The Fourteenth Amendment to the Constitution does not limit the subjects in relation to which the police power of the State may be exercised for the protection of its citizens. *Barbier* v. *Connolly*, 113 U. S. 27, *Soqn Hing* v. *Crowley*, 113 U. S. 703, and *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512, considered and followed. *Ib.*
4. The statute of West Virginia, (§§ 9 and 15, c. 93, 1882,) which requires every practitioner of medicine in the State to obtain a certificate from the State Board of Health that he is a graduate of a reputable medical college in the school of medicine to which he belongs; or that he has practised medicine in the State continuously for ten years prior to March 8, 1881; or that he has been found upon examination to be qualified to practise medicine in all its departments, and which subjects a person practising without such certificate to prosecution and punishment for a misdemeanor, does not, when enforced against a person who had been a practising physician in the State for a period of five years before 1881, without diploma of a reputable medical college in the school of medicine to which he belonged, deprive him of his estate or interest in the profession without due process of law. *Dent* v. *West Virginia*, 114.
5. The State, in the exercise of its power to provide for the general welfare of its people, may exact from parties before they can practise medicine a degree of skill and learning in that profession upon which the community employing their services may confidently rely; and, to ascertain whether they have such qualifications, require them to obtain a certificate or license from a Board or other authority competent to judge in that respect. If the qualifications required are appropriate to the profession, and attainable by reasonable study or application, their validity is not subject to objection because of their stringency or difficulty. *Ib.*

CONTRACT.

conclusion. She, considering the proposition for an exchange of lands accepted, took possession of the 25¼ acre tract with her husband, and made valuable improvements upon it, and has remained in possession ever since. The railway company, who had previously been permitted to lay a track across the land for temporary use, took possession of the $2\frac{70}{100}$ acres and made improvements thereon. In June, 1878, at a meeting of the directors of the company, the president presented a form of deed to Mrs. M. of 25¼ acres in exchange for the $2\frac{70}{100}$ acres at the landing, and asked for instructions. It was then resolved that an exchange of said lands be made and the deed executed to Mrs. M. whenever the land to be conveyed by her was released from a tax claim thereon. A deed from her and her husband of the $2\frac{70}{100}$ acres had previously been executed to the company and sent to its officers. After this resolution of the board, proceedings were taken by her for the release of the tax claim mentioned in it, which was accomplished, under the advice of the attorney of the company, by purchasing in the property upon the sale made for such alleged tax. A deed was then demanded of the company for the 25¼-acre tract, and being refused, the present suit was brought for the enforcement of the contract. On the 24th of January, 1880, the Kansas Pacific Railway Company had become consolidated with the Denver Pacific Railway and Telegraph Company, and the Union Pacific Railway Company, under the name of the latter. By the articles of consolidation all the property of the constituent companies was conveyed to the new company, with a declaration that the assignment and transfer were made "subject to all liens, charges and equities pertaining thereto." Previous to this transfer and consolidation, and in May, 1879, a mortgage was made by the Kansas Pacific Company of its property, including the 25¼-acre tract, to Gould and Sage as trustees; *Held*, (1) That the resolution of the Board of Directors of June 28, 1878, was a ratification in part of the negotiations for the exchange of the two tracts, and Mrs. M. having accepted this action, it is not valid ground of objection by the Kansas Pacific Company to the enforcement of the contract that it called for less than was originally agreed upon; (2) that the taking possession of the tracts by the parties pursuant to the contract and continuing in possession and making improvements thereon constitute part performance of such contract sufficient to take it out of the Statute of Frauds and authorize a decree for full performance; (3) that the obligation of the Kansas Pacific Company to execute a conveyance to Mrs. M. passed to the defendant company upon the consolidation mentioned and the transfer to it of the property of the Kansas Pacific Company; (4) that the trustees under the mortgage of 1879 took the property with notice of the rights of Mrs. M., and subject to their enforcement. *Union Pacific Railway Co.* v. *McAlpine*, 305.

3. Prior to the expiration, June 30, 1877, of a written contract with a railroad company for carrying the mails, the Postmaster General, acting

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EJECTMENT.

EQUITY.

4. On the proofs which are reviewed at length in the case stated by the court; *Held*, that the agreements between the parties of March 20, 1880, were so far consummated that neither party to this suit can insist upon superiority of lien as between themselves; that no case of misrepresentation of facts as distinguished from matters of opinion is made out to warrant declaring the agreements null and void; that the execution and delivery of his note by Dawson and the delivery of the cattle to him, and O'Neal's bill of sale consummated the written agreement so far as he was concerned; that the action of appellants in commencing suit against Dawson and O'Neal, and in taking possession of the cattle was unjustifiable, and that Dawson may recover his damages thereby suffered by way of reconvention in this suit; that the original bill for foreclosure having been amended so as to be in the alternative, seeking the ascertainment of the indebtedness of O'Neal to the complainants, and the payment of their share of the proceeds of the cattle, the bill should be retained and go to decree; that the *pro rata* proportions of indebtedness were incorrect; that the appellant is not so situated as to be entitled to set up an estoppel in this respect; that the proportions in which the fund should be divided between the parties should be determined as of the date that Dawson paid the money into the bank; that the laws of Illinois govern as to the rate of interest; and that, as the decree was severable in fact and in law, and as O'Neal's estate (he having deceased) had no concern with the matters complained of by the bank and by Dawson, they were entitled to prosecute their appeal without joining O'Neal's administratrix, who did not think proper to question the judgment. *City Bank* v. *Hunter*, 557.

See CONTRACT, 2, 6; ESTOPPEL; JURISDICTION, B, 2. LOCAL LAW, 2; MASTER IN CHANCERY.

ESTOPPEL.

A consent of coterminous proprietors of real estate to mark a boundary line supposed to run, according to the marking between undisputed tracts, given by both in ignorance of the real facts and of the existence of a conflict, does not estop either from claiming his rights when the mistake is discovered; nor can it be construed as a license from the injured party to the other, to cut timber on the disputed tract up to the mistaken boundary line. *Schraeder Mining Co.* v. *Packer*, 688.

See MANDAMUS, 2, 3.

EVIDENCE.

1. A ruling, in the trial court, that the showing that an original deed of a tract of land to a party in a suit pending in New Mexico is in the office of that party in New York lays a foundation for the admission

EXCEPTION.

FIDUCIARY RELATION.

FOREIGN LAW.

FRAUD.

LONGEVITY PAY.

The act of March 3, 1883, c. 97, 22 Stat. 473, relating to longevity pay, deals with credit for length of service and the additional pay which arises therefrom, and not with the matter of regular salary; and it has no reference to benefits derived from promotions to different grades, but is confined to the lowest grade having graduated pay. *Barton* v. *United States*, 249.

MAILS.

MANDAMUS.

1. Mandamus lies to compel a party to do that which it is his duty to do; but it confers no new authority, and the party to be compelled must have the power to perform the act. *Brownsville* v. *Loague*, 493.
2. If the petitioner for a writ of mandamus to compel the levy of a tax to pay a debt evidenced by a judgment recovered on coupons of bonds of a municipal corporation, is obliged to go behind the judgment in order to obtain his remedy, and it appears that the bonds were void, and that

amend, or opportunity to plead to the amended declaration, or say in court to answer to the suit. *Ib.*

See APPEAL BOND; COSTS; EVIDENCE, 1; MOTION TO DISMISS; MOTION TO DISMISS OR AFFIRM.

PRINCIPAL AND AGENT.

1. A stock-broker received orders by telegraph from his principal to sell certain securities belonging to the principal in his hands and invest the proceeds in certain other securities, named in the order, at a fixed limit. When the telegram arrived the order might have been executed that day, and the securities ordered could have been bought within the limit. The principal was in the habit of dealing with the agent in that way, the agent executing the orders, making advances when necessary and charging the principal with commissions and interest. At the time when this order was received the principal was indebted to the agent for advances, commissions and interest about $4000 more than the value of the securities in his hands. The broker did not execute the order, did not notify the principal by telegraph that he declined to do so, and made no demand for further advances; but notified him of his refusal by a letter written on the day when the order was received, but received by the principal two days later. The securities which had been ordered sold depreciated below the prices at which they could have been sold on that day, and those which had been ordered bought advanced, so that they could have been sold at a large profit. The broker sued the principal for advances on an open account current and interest and commissions. The principal set up as a counter-claim the losses from these sources: *Held*, (1) That the broker was bound to follow the directions of his principal or give notice that he declined to continue the agency; (2) That this notice should have been given by telegraph, and that the delay caused by using the mail alone was inexcusable under the circumstances; (3) That in the absence of a special agreement to the contrary, it was the principal's judgment, and not the broker's, that was to control; (4) That the broker was liable for all the damages which the principal sustained by the refusal to change the stock, both on the stocks ordered sold, and those ordered purchased. *Galigher* v. *Jones*, 193.
2. An agent is bound to act with absolute good faith toward his principal in respect to every matter entrusted to his care and management. In accepting a gift from his principal he is under an obligation to withhold no information in his possession respecting the subject of the gift, or the condition of the estate in his hands, which good faith requires to be disclosed, or that may reasonably influence the judgment of the principal in making the gift. All transactions between them whereby the agent derives advantages beyond legitimate compensation for his services will be closely examined by courts of equity, and set

RAILROAD.

See COMMON CARRIER, 1, 5;
CONTRACT, 2;
FRAUD, 3, 4;
JURISDICTION, A, 9.

RECEIVER.

See JURISDICTION, A, 9.

REMOVAL OF CAUSES.

A petition for removal of a cause from a state court to a Circuit Court of the United States, on the ground of diversity of citizenship, filed after a judgment therein has been reversed by the Supreme Court of the State, and the remand of the case for a new trial, is in time. *Schraeder Mining Co.* v. *Packer*, 688.

RES JUDICATA.

See MANDAMUS, 2.

SALE UNDER A DECREE IN EQUITY.

See EQUITY, 1, 2.

SHIP.

See COMMON CARRIER, 2, 3, 5;
CONTRACT, 5.

STATUTE.

A. CONSTRUCTION OF STATUTES.

The repeal or modification by Congress of clauses in a legislative act of the District of Columbia, which are separable and separably operative, is no ratification of another clause in it, equally separable and separably operative, which it was beyond the delegated or constitutional power of the legislature of the District to enact. *Stoutenburgh* v. *Hennick*, 141.

B. STATUTES OF THE UNITED STATES.

See BANKRUPTCY, 1, 2;
CONSTITUTIONAL LAW, A, 8;
CUSTOMS DUTY, 1;
JURISDICTION, A, 2, 4;
LONGEVITY PAY;
NATIONAL BANK, 1, 2, 3;
PATENT FOR INVENTION, 8, 9;
PUBLIC LAND, 1, 7;
TAX AND TAXATION, 2;
WITNESS.

C. STATUTES OF STATES AND TERRITORIES.

Arizona. *See* LOCAL LAW, 2;
District of Columbia. *See* CONSTITUTIONAL LAW, A, 8;
Georgia. *See* DEED, 4, 5;
Illinois. *See* ASSIGNMENT FOR THE BENEFIT OF CREDITORS;
CONTRACT, 6 (3);

STATUTE OF FRAUDS.

On the whole proof in this case, some of which is referred to in the opinion of the court; *Held*, (1) That the appellant's intestate intended that the property in dispute should belong to the appellee, that he bought it for her, and that he promised her orally that he would make over the title to her upon the consideration that she should take care of him during the remainder of his life, as she had done in the past; (2) that there had been sufficient part performance of this parol contract to take it out of the operation of the Statute of Frauds, in a court of equity, and to render it capable of being enforced by a decree for specific performance; (3) that the appellee had been guilty of no laches by her delay in commencing this suit. *Brown* v. *Sutton*, 238.

See CONTRACT, 2.

STOCKBROKER.

See DAMAGES, 2.
PRINCIPAL AND AGENT, 1.

SUBROGATION.

See INSURANCE, 4.

TAX AND TAXATION.

1. A State may make the ownership of property subject to taxation, relate to any day or days or period of the year which it may think proper; and the selection of a particular day on which returns of their property for the purpose of assessment are to be made by taxpayers does not preclude the making of assessments as of other periods of the year. *Shotwell* v. *Moore*, 590.

2. Section 2737 of the Revised Statutes of Ohio, which requires the taxpayer to return to the assessor, as of the day preceding the second Monday in April in each year, among other things a statement of "the monthly average, amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within that time invested in or converted into, bonds or