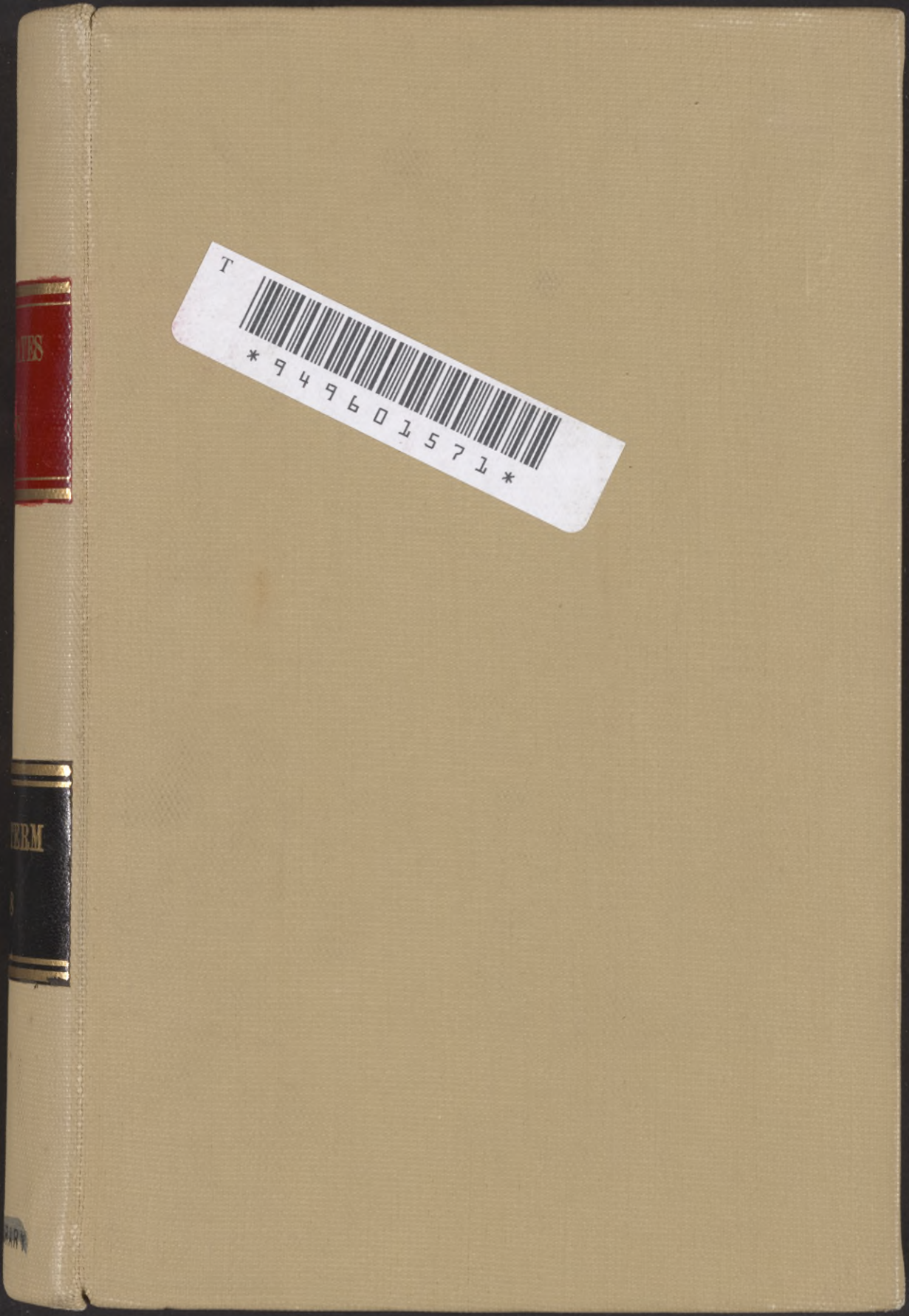

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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1888

J. C. BANCROFT DAVIS

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1889

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.
HORACE GRAY, Associate Justice.
SAMUEL BLATCHFORD, Associate Justice.
LUCIUS QUINTUS CINCINNATUS LAMAR,
Associate Justice.
———— ————, Associate Justice.

WILLIAM HENRY HARRISON MILLER, Attorney General.
GEORGE AUGUSTUS JENKS, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

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CITED IN OPINIONS.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1888.

UNITED STATES *v.* JONES.
UNITED STATES *v.* TAUBENHEIMER.
UNITED STATES *v.* MONTGOMERY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

Nos. 1103, 1102, 1482. Argued January 28, 29, 1889. Decided May 13, 1889.

The act of March 3, 1887, "to provide for the bringing of suits against the government of the United States," 24 Stat. 505, c. 359, does not confer upon the District or Circuit Courts of the United States, or upon the Court of Claims, jurisdiction in equity to compel the issue and delivery of a patent for public land.

THESE cases were suits in equity brought against the United States under the recent act of March 3d, 1887, 24 Stat. 505, c. 359, extending the jurisdiction of claims against the government to the District and Circuit Courts of the United States. They were suits for specific performance, seeking to compel the United States to issue and deliver to the plaintiffs respectively patents for timber land, alleged to have been taken up and purchased by them under the act for the sale of timber lands in the States of California, Oregon, etc., passed June 3d, 1878, 20 Stat. 89, c. 151.[1] The petitions contained averments

[1] The material parts of this statute will be found in the opinion of the court, *post*, 15, 16.

of performance of the conditions required by said act, the payment of the price of the lands to the receiver of the land office, the giving of his certificates and receipts therefor, and the refusal of the government to issue patents to the petitioners as entitled thereto. They prayed, in each case, for a decree, 1st, that the petitioner is owner of the land by virtue of the purchase; and, 2d, that the United States issue and deliver, or cause to be issued and delivered, in accordance with law, a patent granting and conveying the land purchased. The United States by its attorney demurred to the several petitions. The Circuit Court overruled the demurrers and rendered decrees for the plaintiffs. From these decrees the present appeals were taken.

Mr. Assistant Attorney General Howard for plaintiff in error.

Mr. James K. Kelly for Jones, defendant in error.

Mr. James C. Carter for Jones, defendant in error.

Jurisdiction to hear and determine a claim for a conveyance of public land was conferred upon the court below by the act of March 3d, 1887, in the plainest terms. No ground is left for construction or doubt. (1) The claim is upon a contract with the government of the United States. (2) It is a claim in respect of which the petitioner would be entitled to redress against the United States in a court of equity if the United States were suable. Nothing remained to be done by the purchaser, nor by the government, except the performance by the latter of the duty, wholly ministerial, of executing and delivering the patent. (3) No claim can be imagined which falls more completely within the class described in the act over which jurisdiction to hear and determine is conferred upon the courts therein named.

It would be to no purpose to say that this act should be strictly construed. As already observed, no case for interpretation is presented; and no rule, even of the most rigid con-

struction, would suffice to exclude this claim from the class of cases over which jurisdiction is conferred.

Whoever undertakes to exclude this claim from the class defined by the act must start with an assumption as broad as the following, namely: That the proposition that a court should be permitted to hear and determine a claim against the United States for equitable relief, such as the execution of a conveyance of lands, is of such an extraordinary character, and so doubtful in point of expediency, that Congress must be presumed not to have authorized such action by any *general* language, however clearly that language may embrace it, and that the authority can be held to have been given only when conferred by express language *specifically* describing such relief. It is respectfully submitted that such an assumption would be an error too gross for any indulgence.

On the contrary, the just method of treating this act is to view it as one calling (if that were at all necessary) for a liberal interpretation.

An obvious distinction should be noticed between declaring justice and enforcing it. In suits between private persons both these functions are discharged by the court, but the first only is its true and proper one. The second is an executive or administrative office, being the exercise of mere power, and might well enough be performed by independent officers. Reasons of convenience have led to the placing of such officers under the authority of the court. "The judiciary has no influence over either the sword or the purse; no direction either of the strength or the wealth of society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment, and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of its judgments." The Federalist, No. 78 (Hamilton); Story Const., § 1600.

The circumstance that these two functions have, in the practice of governments, been intrusted to the same hands has led to the rule, in cases between individuals, that a court will not assume jurisdiction where it has not the power to enforce its decrees. The offices of declaring and enforcing justice are

thus further tied together, but this is not in consequence of any inherent difficulty in an independent discharge of the function of declaring justice.

In the case of the sovereign, whether under democratic or monarchical rule, justice cannot be enforced against him, "for who shall command the king?" And there is precisely the same difficulty in commanding the head of a democratic State. The freedom of his person and action is essential to the existence of the State. No compulsion can be employed against him, except to depose him and seat another in his place. The same reasons go far towards precluding the exercise of force at the instance of a citizen, to compel the principal officers of State to submit to the compulsion of a court. The immortal judgment of Marshall in *Marbury* v. *Madison*, 1 Cranch, 137, stopped with the declaration that a writ of *mandamus* might go against a cabinet officer to compel the performance of a mere *ministerial* duty imposed by law.

It follows as a consequence that whenever the citizen seeks redress for an injury proceeding from the State, the office of declaring justice must, in general at least, be exercised independently, for the office of enforcing it does not exist. This, however, furnishes no reason why justice in such cases should not be ascertained and declared; for we cannot, or should not, suppose any necessity for enforcing it. To know what justice requires from the State to one of its citizens is all that is requisite. That it will be done no doubt should be entertained. The law "presumes that to know of any injury and to redress it are inseparable in the royal breast." 3 Bl. Com. 255.

The act under consideration, and indeed, all prior legislation, conferring jurisdiction and power upon the Court of Claims, are based upon a recognition of the foregoing views. Nowhere is any attempt made to render the judgments of that tribunal judicially enforceable. An independent discharge of the function of declaring justice is alone provided for. Performance of the decree is left to the legislative and executive departments. To give the judiciary the power of

compelling those departments, would destroy their independence and reduce them to subjection, a result wholly at war with our constitutional system.

It is true that the seventh section of the act of March 3d, 1863, directs that judgments of the Court of Claims "shall be paid out of any general appropriation made by law, for the satisfaction of private claims;" and the obligation to make such payment is imposed upon the Secretary of the Treasury; but this obligation is imposed upon him by Congress, not by the court. The court has no authority to adjudge that it be so paid, still less, any authority to enforce such payment by compulsory process. The legislation in this respect simply consists of an appropriation by Congress to pay such claims as the Court of Claims may allow.

Nor is the decision of this court in the case of *Gordon* v. *The United States*, 2 Wall. 561, opposed in any degree to this view. The decision in that case did not proceed upon the ground that the determination by a tribunal of a controversy, when it had no power to execute its determination, was not an exercise of judicial power, but upon the ground that when it was still left to an executive department to review the determination of the Supreme Court (as the act of 1863 did leave it), such determination, although an exercise of judicial power, was not a final one, and, therefore, not of the character which marks the jurisdiction of this court. See *United States* v. *Alire*, 6 Wall. 577; *United States* v. *Klein*, 13 Wall. 128, 144; *United States* v. *O'Grady*, 22 Wall. 641, 647.

In the opinion of Mr. Justice Nelson, in the case of *United States* v. *Alire*, *supra*, an observation is found which may tend to create misapprehension. The court, in that case, held that the Court of Claims had no jurisdiction; and in assigning the reasons, the learned judge said: "We find no provision in any of the statutes requiring a judgment of this character to be obeyed or satisfied." But, certainly, this could be no just ground for the inference that no power was conferred to render such a judgment. For the reasons already indicated, no power could be conferred upon the court, to compel obedience to or satisfaction of its judgments; nor was it necessary, in

order to render such judgments as complete and effective as they can be made, nor in any statute has any attempt been made to enable the court to enforce any of its judgments, of whatever description, whether adjudging the petitioner entitled to a recovery of money or other relief.

The other reason assigned by the learned judge for the decision, was the true ground upon which the court proceeded, namely, that inasmuch as the statute had made provision, in pursuance of which payment or satisfaction of some of its judgments might be obtained (not indeed, by process of the court, but by congressional appropriation), and had made no such provision for judgments awarding equitable relief, the inference was justified, that power to render judgments of the latter description was not intended to be conferred. Nothing is said concerning the soundness of this inference.

It is unnecessary to argue that injuries proceeding from the State should be redressed as certainly and promptly as those inflicted by private persons. Justice is no respecter of persons. Its obligations are universal and absolute. The ancient maxim that "the king can do no wrong" was never really effective to defeat justice, except in the case where a wrong could not be imputed to ministers or officers, and then only for the purpose of guarding the person of the sovereign.

The government in the transaction in question was exercising no function of sovereignty, but simply engaging in the ordinary business of selling property, of which it was the owner. It simply made a contract with one of its citizens. It cannot do this without consenting to be bound by the ordinary rules which govern the conduct of individuals in such transactions. Were it necessary for the government to enforce such contract, it could enter the courts and have the agreement ascertained and declared by judicial methods. To deny the same privilege to the party with whom it deals is a plain denial of justice. How would this comport with the "*nulli negabimus justitiam*" of the Great Charter? "When a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of

a moral agent, with the same rights and obligation as an individual." 3 Hamilton's Works, 518.

Nor is the practical recognition of the obligation of the State to redress the injuries it may inflict on its citizens, a recent development of civilization. Centuries ago in England the law had provided a forum and a procedure well calculated to afford redress in all cases which were likely to arise. The petition of right (*petition de droit*) and the plea of right (*monstrans de droit*) were modes of redress at common law always open to the subject, and which could be prosecuted in the court of chancery on its common law side, or in the Court of Exchequer. 3 Bl. Com. 256. The procedure in such cases has, by legislation in recent times, been assimilated to that in cases between subject and subject (23–24 Vic. c. 34); but the jurisdiction was complete before. The seventh section of the act referred to declared that it shall not be construed as giving to the subject a remedy against the Crown in cases where none before existed. *The Banker's Case*, 14 Howell's St. Tr. 1; *Thomas* v. *The Queen*, L. R. 10 Q. B. 31; *Smith* v. *Upton*, 6 M. & G. 252, note *a*.

It was, indeed, for a long time the reproach of the government of the United States, and still is, if the contention of the appellant is well founded, that it furnished its citizens with no judicial methods by which they could assert just claims against it, and left them with no other means of redress than supplication to executive or legislative power, neither of these agencies having the time, the knowledge, or the means to prosecute the inquiries necessary in order to ascertain justice, and too apt to be moved by caprice or favor.

To support the necessity or propriety of the jurisdiction for which we are contending by an appeal to prudential considerations seems almost a surrender of the high ground of positive right upon which the argument more properly rests. Such considerations, however, would of themselves suffice to sustain the views for which we are contending.

When courts in which a citizen can assert his claims against the government are denied, and Congress entertains his petition for redress, the nature of the task which has to be performed

(if Congress discharges its duty) is not thereby changed. It is still a judicial function which is to be performed. The facts must be ascertained, and the law declared. The execution of this function by Congress is a usurpation defensible only on the ground that, unless the public duty is thus performed, it will not be performed at all. It involves all the mischiefs which usually attend the exercise of usurped powers, superadded to those which always accompany private legislation — erroneous conclusions arising from haste and neglect, and the injustice of caprice, favor or corruption. A right which must be sought by petition to a legislative body, because there is no court in which it can be asserted, is but too likely to become the subject of purchase. It requires the agency, not of a bar, but of a lobby.

We must add to this catalogue of mischiefs the others not less flagrant which arise from the neglect of proper legislative duties. The true business of legislation will never be successfully performed, when the time and talents of the legislators are devoted to attention to private claims. This latter consideration was undoubtedly the most influential one which led to the original establishment of the Court of Claims.

Seeing, therefore, that the purely judicial function of ascertaining facts and pronouncing the law thereon is separable and independent from the office of enforcing justice; that whatever of theoretical or practical difficulty which would arise from allowing compulsory process is attached only to the latter function, and not to the former; seeing that the exercise of the former is the plain duty of every civilized State; that it has been clearly recognized from an early period, and provision made for it; that our own government was long under the just reproach of neglect and failure in the performance of this necessary duty; that the practical mischiefs resulting therefrom had become so flagrant as to move Congress to an endeavor to provide a remedy by establishing the Court of Claims; and that the act under consideration is an obvious effort to enlarge that remedy and make it more effective, we need no longer delay the conclusion that this act should be construed, should any occasion for construction be found, not

with rigid parsimony, but with the liberality which is usually and properly extended to remedial legislation. When Congress endeavors to perform its duty, and to supply great defects in administration, and to cure the most crying evils, it is the duty of courts to second the endeavor. When a new and beneficial jurisdiction is conferred, the maxim "*boni judicis est ampliare jurisdictionem*" is most applicable. Sedgwick on Stat. & Con. Law, 359 *et seq.*

In a celebrated case in the British courts concerning the extent of the remedial power which could be exercised under the ancient proceeding of the Petition of Right, the objection was taken that, although relief could be had in cases of dispute concerning lands or chattels, recoveries of money in cases *ex contractu* could not be adjudged. The court, by placing its decision upon another ground, avoided this objection ; but it gave a worthy expression to the spirit of exposition in which such a question should be approached. "We may observe that there is nothing to secure the crown against committing the same species of wrong, unconscious and involuntary wrong, in respect of money, which founds the subject's right to sue out his petition when committed in respect to lands, or specific chattels ; and there is an unconquerable repugnance to the suggestion that the door ought to be closed against all redress or remedy for such a wrong." *Baron de Bode's Case*, 8 Q. B. 208, 273. In the light of this rule of interpretation some objections which the appellants may raise are to be briefly considered.

(*a*) It will not, of course, be now insisted that jurisdiction is not conferred upon the courts named in the act over claims founded upon equitable considerations. That view was taken by this court in interpreting the original act establishing the Court of Claims. *Bonner* v. *United States*, 9 Wall. 156. In the opinion in this case the observation is made in respect to rights in equity that "Congress wisely reserved to itself the power to dispose of them." The justice of this observation is (with deference) not fully perceived. If it be proper that justice should be ascertained and declared by judicial methods in respect to legal claims against the government, why is it

not equally proper that the same course should be pursued in respect to equitable claims? Ought not justice to be done in the one case as well as in the other? Is Congress better fitted to try a suit in equity than a suit at law? Are the evils which are likely to flow from the usurpation of judicial functions by Congress of less magnitude in the case of equitable claims?

But whatever may have been the propriety of such an observation in relation to the original act creating the Court of Claims, it is certainly not applicable to the legislation under notice. After the decision above referred to had been made, Congress reforms the phraseology of the first section of its original act, and exhausts the language of extension so as to make the jurisdiction broad enough to embrace every claim against the United States which can be made the subject of judicial cognizance, with the express and sole exception of pensions. It seems impossible to resist the conclusion that it was the intent of the later act to remove the objection which the courts had allowed in respect to the earlier one, and to make the discharge of governmental duty in this respect coextensive with governmental obligation.

(*b*) It may be urged that suits in equity frequently require that several parties be made defendants, and that the act makes no provision for this. But this objection has no application to equitable claims against the government alone, and it would be difficult, if not impossible, to make provision for the joining of other defendants in the Court of Claims. It is but a limited jurisdiction which is conferred upon other tribunals. But this obstacle, in most cases at least, is not of great magnitude. The courts upon which jurisdiction is conferred may separately determine what equitable duty the government owes to the party before the court, leaving the rights of that and other parties, as between themselves, to be determined by other tribunals. The case in which some proper defendants cannot be brought into court is familiar to Courts of Equity, and it often proceeds in the absence of such defendants.

(*c*) In a case already referred to (*United States* v. *Alire*, 6 Wall. 573) an appeal was taken from a determination of the

Court of Claims allowing equitable relief. The court then possessed such powers only as were bestowed by the acts of 1855 and 1863, and it was held that under those acts no power was conferred to render other judgments than for money.

It may be urged that under the act of 1887 there is no express power to render other judgments than for money, and that the provisions in the act last referred to, relating to interest on judgments, apparently assume that all judgments are to be for money, and consequently that it must still be held that the power of the court is limited to the rendition of judgments of that character. Although it is not at all necessary, in answer to this argument, to draw in question the decision in that case, yet it may be suggested whether the rule of construction adopted was not somewhat too rigid. The act of 1863 confirmed and enlarged the jurisdiction created by the act of 1855; and that described a certain class of claims, and authorized the court "to hear and determine" them. If the claim was for relief equitable in its nature, the determination of it authorized by the act, authorized a judgment allowing the claim if the title to such relief was otherwise made out. How can a claim for equitable relief be heard and determined unless it be possible to declare that the claimant is entitled to it? And where general jurisdiction to hear and determine is given, it would seem that authority must necessarily be deemed to have been given, to render such judgment as the law requires, unless, by some express and unequivocal language, the court is limited in its award of relief. It would seem as if in the case referred to, the court first by implication alone reached the conclusion that relief was limited, and then employed that implication to qualify the otherwise unqualified grant of power.

(*d*) But the act we are now interpreting is of a wholly different character. The terms of the grant of jurisdiction are as broad and emphatic as they can be made. It is impossible not to believe that it proceeded upon the full recognition of the truth that the furnishing of redress by the government in cases of just claims upon it by individuals was a plain governmental obligation, which could not be discharged except by providing judicial methods by which justice should be ascer-

tained and declared; that the creation and furnishing of such methods was at the same time dictated by a prudential regard for the government's own interests in relieving Congress from burdens which it could not carry and which greatly tended to disable it from the discharge of its proper duties; and that the determination was to frame a measure of relief which should be co-extensive with the obligation.

If these were the views which induced the adoption of the measure, how is it possible by distant and doubtful implication to limit the jurisdiction by the line which separates judgments for money from those for other relief? Is the obligation to furnish other relief, when the case requires it, less strong? Is Congress better fitted to mould and shape equitable relief than it is to reckon how much money is due? Is the work of determining equitable relief a less inappropriate or burdensome office for the legislative power to perform? Is it accompanied with any greater hazards to the interests of the government? The proper answer to all these questions is wrapped up in the just proposition that when Congress has conferred authority upon the Court of Claims "to hear and determine . . . all claims founded upon the Constitution of the United States, or any law of Congress except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable;" the plain intention is to render justice in all cases, save the few excepted ones, by judicial methods and in the ordinary judicial forms, and that where the government would be bound to furnish redress to an individual, if the government were suable, it shall be at least declared that it is bound to furnish that same redress whatever the nature of it may be.

But in the resort to interpretation and construction, were this allowable, it will be found that the above conclusion will only be supported and confirmed. (*a*) The broad signifi-

cance of the word "*claim*" should be noted. It is the largest term known to the law in describing the redress to which a party may be entitled. Worcester's Unabridged Dic. *sub* "*verb;*" *United States* v. *Wilcox*, 4 Blatchford, 385, 388; *Prigg* v. *Pennsylvania*, 16 Pet. 539, 614, 615; 1 Burrill's Law Dic. 296. (*b*) And to broaden, rather than limit its already extensive meaning, it is made indifferent whether the claim is one for which a party is entitled to redress in a court of law, equity, or admiralty. (*c*) And to make it co-extensive with right or cause of action, it is made to embrace every form of redress which could be asserted against the United States, "if the United States were suable." (*d*) Surely in the face of this manifest effort to embrace all forms of redress, the suggestion that those only were intended which consist in demands for money, must be promptly rejected. (*e*) But, more than this, the requirement is made that the petition shall, *inter alia*, set forth "the money or other thing claimed." Will it be suggested that the law requires the petition to set forth a demand which it does not intend shall be considered? (*f*) Sec. 7 requires that a judgment shall be rendered in every case, and if the suit be "in equity or admiralty the court shall proceed with the same according to the rules of such court." (*g*) Nor should the significance of the title be lost sight of, "An act to provide for the bringing of suits against the United States."

In the face of these indications of intent, the single circumstance that money judgments only are directly mentioned is of no significance. It was necessary to mention these for the purpose of securing to claimants the right to interest. This does not follow as of course in the case of government claims. It was wholly unnecessary to mention other judgments, or to point out any way in which they should be obeyed or satisfied. In the case of a money judgment the function of the *court* was fully performed when it was rendered. It could not be paid without the action of Congress in making an appropriation. No executive officer could otherwise apply a dollar of the public money to its satisfaction. The raising and appropriation of money is the exclusive function of Congress.

In respect to other things to be done, that is, other forms of relief, Congress would have no concern. Such matters would concern the executive departments alone. It was enough that the court should declare what the government should do. The government was charged with full notice of the declaration, for it is one of the parties to the suit. The doing of the act could not, at least in most instances, be compelled, and there was no intention to furnish means of compulsion in any instance.

Thus there is ground for the particular mention of money judgments, while there is silence in respect to others. Obedience to the latter is an immediate duty of the executive departments, without any intervention of Congress; but there is no duty to obey the former until an appropriation is made by Congress. Where such an appropriation is made, money judgments stand precisely like the others. The execution of both are alike an executive duty; but the execution of neither can be enforced.

Mr. John Paul Jones, by permission of court, filed a brief for all the appellees.

Mr. Solicitor General closed for appellants.

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

The question involved is, whether the act of March 3d, 1887, which is entitled "An act to provide for the bringing of suits against the government of the United States" (24 Stat. 505), authorizes suits of the kind like the present, which are brought not for the recovery of money, but for equitable relief by specific performance, to compel the issue and delivery of a patent. In the case of *United States* v. *Alire*, 6 Wall. 573, we distinctly held that the acts of 1855 and 1863, which established the Court of Claims and defined its jurisdiction, did not give it power to entertain any such suits as these; and that case was followed by *Bonner* v. *United States*, 9 Wall. 156, and has been approved in subsequent cases. *United*

States v. *Gillis*, 95 U. S. 407, 412; *United States* v. *Schurz*, 102 U. S. 378, 404. It is argued, however, that the new law has extended the jurisdiction of the Court of Claims and the concurrent jurisdiction of the Circuit and District Courts, or at least the latter, so as to embrace every kind of claim, equitable as well as legal, and specific relief, or a recovery of property, as well as a recovery of money. If such is the legislative will, of course the courts must conform to it, although the management and disposal of the public domain, in which the newly claimed jurisdiction would probably be most frequently called into exercise, has always been regarded as more appropriately belonging to the political department of the government than to the courts, and more a matter of administration than judicature. A careful examination of the statute, and a comparison of its terms with those of the acts of 1855 and 1863, can alone settle the question.

By the first section of the act of February 24, 1855, 10 Stat. 612, c. 122, it was enacted that a court should be established, to be called the Court of Claims, the jurisdiction of which was defined as follows: "The said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to it by either house of Congress." The act of March 3d, 1863, passed to amend the act of 1855, 12 Stat. 765, c. 92, added: "That the said court . . . shall also have jurisdiction of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government against any person making claim against the government in said court." Jurisdiction was subsequently given of claims for the proceeds of property captured or abandoned during the rebellion, and of claims of paymasters and other disbursing officers for relief from responsibility on account of capture of government funds or property in their hands. These latter branches of jurisdiction need not be considered here.

Turning now to the act of March 3d, 1887, which reënacted

or revised the previous laws as to the jurisdiction of the Court of Claims, and conferred concurrent jurisdiction for limited amounts on the ordinary courts, we find the following language used:

"The Court of Claims shall have jurisdiction to hear and determine the following matters:

"First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable." . . .

"Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court."

"SEC. 2. That the district courts of the United States shall have concurrent jurisdiction with the court of claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars."

The jurisdiction here given to the Court of Claims is precisely the same as that given in the acts of 1855 and 1863, with the addition that it is extended to "damages . . . in cases not sounding in tort" and to claims for which redress may be had "either in a court of law, equity, or admiralty."

"Damages in cases not sounding in tort" — that is to say, damages for breach of contract — had already been held to be recoverable against the government under the former acts. *United States* v. *Behan*, 110 U. S. 338; *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645; *Hollister* v. *Benedict & Burnham Manfg. Co.*, 113 U. S. 59, 67.

"Claims" redressible "in a court of law, equity, or admi-

ralty," may be claims for money only, or they may be claims for property or specific relief, according as the context of the statute may require or allow. The claims referred to in the original statute of 1855, as described in the first section thereof, above quoted, might have included claims for other things besides money; but various provisions of that act and of the act of March 3, 1863, were inconsistent with the enforcement of any claims under the law except claims for money. Thus, in the 5th section of the act of 1863, the right of appeal was limited to cases in which the amount in controversy exceeded $3000, and in the 7th section it was provided that if judgment should be given in favor of the claimant, the *sum* due thereby should be paid out of any general appropriation made by law for the payment of private claims; and if a judgment was affirmed on appeal, interest was to be allowed thereon, etc. In the case of *United States* v. *Alire*, 6 Wall. 573, Mr. Justice Nelson speaking for the court, said: "It will be seen by reference to the two acts of Congress on this subject that the only judgments which the Court of Claims is authorized to render against the government, or over which the Supreme Court has any jurisdiction on appeal, or for the payment of which by the Secretary of the Treasury any provision is made, are judgments for money found due from the government to the petitioner. And although it is true that the subject matter over which jurisdiction is conferred, both in the act of 1855 and of 1863, would admit of a much more extended cognizance of cases, yet it is quite clear that the limited power given to render a judgment necessarily restrains the general terms and confines the subject matter to cases in which the petitioner sets up a moneyed demand as due from the government." The decree of the Court of Claims in that case was that the claimant recover of the government a military land warrant for 160 acres of land, and that it be made out and delivered to him by the proper officer. This court said: "We find no provision in any of the statutes requiring a judgment of this character, whether in this court or in the Court of Claims, to be obeyed or satisfied."

The sections of the act of 1863 referred to in this opinion are

still in force, not being repealed by the act of 1887, which only repeals "all laws and parts of laws inconsistent" therewith. Section five, relating to appeals, is transferred to § 707 of the Revised Statutes, giving an appeal to this court "where the amount in controversy exceeds $3000;" and section seven, relating to the mode of paying judgments out of a general appropriation, and allowing interest where a judgment is affirmed, is contained in §§ 1089, 1090 of the Revised Statutes. These sections are still the law on the subjects to which they relate, being necessary to the completion of the system, and not being supplied by any other enactments. Indeed, they are expressly retained. The fourth section of the act of 1887 declares that "the jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act," and the ninth section declares, "that the plaintiff or the United States, in any suit brought under the provisions of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained." These provisions undoubtedly include the Court of Claims as well as the District and Circuit Courts. So, in relation to interest, section ten declares that "from the date of such final judgment or decree interest shall be computed thereon, at the rate of four per cent per annum, until the time when an appropriation is made for the payment of the judgment or decree." It seems, therefore, that in the point of providing only for money decrees and money judgments, the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal demands. We do not think that it was the intention of Congress to go farther than this. Had it been, some provision would have been made for carrying into execution decrees for specific performance, or for delivering the possession of property recovered in kind. The general scope and purport of the act is against any farther extension than that here indicated. The expression in the fifth section, refer-

ring to "money or any other thing claimed, or the damages sought to be recovered," on which so much reliance is placed by the appellees, cannot outweigh the considerations referred to, and operate to introduce entirely new fields of jurisdiction. It is one of those general expressions which must be restrained by the more special and definite indications of intention furnished by the context.

We cannot yield to the suggestion that any broader jurisdiction as to subject matter is given to the Circuit and District Courts than that which is given to the Court of Claims. It is clearly the same jurisdiction — "concurrent jurisdiction" only — within certain limits as to amount; and the language in which those limits are expressed furnishes an additional argument in favor of the conclusion which we have reached. It is declared "that the District Courts of the United States shall have concurrent jurisdiction with the Court of Claims . . . where the amount of the claim does not exceed $1000," etc. This language is properly applicable only to a money claim. Had anything but money been in the legislative mind the language would have been, "where the amount or value of the thing claimed does not exceed $1000," etc.

Of course, our province is construction only; the policy of the law is the prerogative of the legislative department. But notwithstanding the glowing terms in which able jurists have spoken of the progress of civilization and enlightened government as exhibited in subjecting government itself, equally with individuals, to the jurisdiction of its own courts, we should have been somewhat surprised to find that the administration of vast public interests, like that of the public lands, which belongs so appropriately to the political department, had been cast upon the courts — which it surely would have been, if such a wide door had been opened for suing the government to obtain patents and establish land claims, as the counsel for the appellees in these cases seems to imagine. We are satisfied that the door has not yet been thrown open thus wide.

The decrees of the court are reversed in all the cases, and the causes are respectively remanded with instructions to dismiss the original petitions or bills.

MR. JUSTICE MILLER (with whom concurred MR. JUSTICE FIELD) dissenting.

I find myself unable to concur with the majority of the court in the construction given by it, in the opinion just read, to the provisions of the act of March 3, 1887. This act was evidently intended to confer a new and important jurisdiction upon the Court of Claims, and a concurrent jurisdiction to a limited extent, in the same class of cases, upon the Circuit and District Courts of the United States. I can see no other possible object in that part of the statute which confers this new jurisdiction by the use of language which for the first time in the history of that court authorizes it to take cognizance of claims where the party would be entitled to redress, against the United States either in a court of law, equity or admiralty, if the United States were suable, than to make them suable in such cases. To hold that the distinct grant of power here provided for is controlled by the fact that this court has under former statutes decided that it did not then exist, is simply to nullify this new grant of power.

The manifest purpose of this new act was to confer power which the Court of Claims did not previously have, and to authorize it to take jurisdiction of a class of cases of which it had not cognizance before. To say that under such circumstances the new statute is to be crippled and rendered ineffectual in the only new feature which it has, in regard to the jurisdiction of that court, is in my mind a refusal to obey the law as made by Congress in the matter in which its power is undisputed.

It is clear to me that Congress intended by this act to enlarge very materially the right of suit against the United States, to facilitate this right by allowing suits to be brought in the Circuit and District Courts where the parties resided, and that it also designed to enlarge the remedy in the Court of Claims to meet all such cases in law, equity, and admiralty, against the United States, as would be cognizable in such courts against individuals.

I am authorized to say that MR. JUSTICE FIELD agrees with me in this dissent.

UNITED STATES *v.* DREW.

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

No. 1061. Argued January 28, 29, 1889. — Decided May 13, 1889.

United States v. *Jones*, *ante*, 1, affirmed and applied to this case.

THE case is stated in the opinion.

Mr. Solicitor General for plaintiff in error.

Mr. James L. Bradford for defendant in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is a suit in equity brought against the United States to establish the claim of the plaintiff to have land warrants or certificates of location for one thousand and fifteen acres of land made out and delivered to him by way of indemnity and satisfaction for a certain concession or grant of land made by the Spanish governor to one Francisco Adante, in 1788, the land itself having been surveyed as public land by the United States and disposed of to purchasers. The claim is made under the provisions of the act of June 2d, 1858, entitled "An act to provide for the location of certain confirmed private land claims of the State of Missouri, and for other purposes," 11 Stat. 294, the claim in question having been confirmed by act of Congress passed February 28, 1823, 3 Stat. 727. The suit is subject to the same objections which exist in relation to the suits of Carrie Jones and others, just disposed of, and the same decree must be made as in those cases.

The decree of the Circuit Court is reversed, and the cause remanded, with instructions to dismiss the original petition or bill.

MR. JUSTICE MILLER and MR. JUSTICE FIELD dissented, for the reasons stated in their dissent in *United States* v. *Jones*.

KENNON *v.* GILMER.

GILMER *v.* KENNON.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

Nos. 178, 203. Argued January 30, 31, 1889. — Decided May 13, 1889.

The denial of a change of venue, moved for on the affidavit of the party's agent to the state of public opinion in the county in which the action is brought, is not reviewable by this court on error to the Supreme Court of a Territory, even if a subject of appeal to that court from the trial court under the territorial statutes.

In an action against the proprietors of a stage coach, for an injury caused to a passenger by the misbehavior of one of the horses, evidence of subsequent similar misbehavior of the horse is admissible, in connection with evidence of his misbehavior at and before the time of the accident, as tending to prove a vicious disposition and fixed habit.

In assessing damages for a personal injury caused by negligence, the jury may rightly be instructed to take into consideration the plaintiff's bodily and mental pain and suffering, taken together, and necessarily resulting from the original injury.

In an action at law for a personal injury, in which damages have been assessed by a jury at an entire sum, the court is not authorized, upon a motion for a new trial for excessive damages and for insufficiency of the evidence to justify the verdict, to enter an absolute judgment, according to its own estimate of the damages which the plaintiff ought to have recovered, for a less sum than assessed by the jury; and either party is entitled to a reversal of such a judgment by writ of error.

THE case is stated in the opinion.

Mr. Martin F. Morris for Kennon.

Mr. J. Hubley Ashton (with whom was *Mr. Nathaniel Wilson* on the brief) for Gilmer.

MR. JUSTICE GRAY delivered the opinion of the court.

This action was brought April 4, 1882, in a district court of the county of Deer Lodge and Territory of Montana, against Gilmer and others, common carriers of passengers for hire by stage coaches between the towns of Deer Lodge and Helena,

by Kennon, a passenger in one of those coaches, to recover damages for personal injuries sustained by him on June 30, 1879.

The complaint alleged that the defendants were guilty of negligence in failing to provide a safe and competent driver and safe and well broken horses, by reason of which, and of the negligence and mismanagement of their servants, the horses became unmanageable, broke the pole of the coach and took fright, so that it was apparently unsafe for the plaintiff to remain in the coach, and he jumped to the ground and in so doing broke his leg, and it became necessary to amputate it, whereby he sustained damages in the sum of $25,000, and was obliged to pay $750 for necessary medical and surgical expenses. The answer denied these allegations.

Before a jury had been called, the defendants moved for a change of venue, on the ground that an impartial trial could not be had in the county of Deer Lodge; and in support of the motion filed an affidavit of one Riddle, deposing "that he is agent of defendants in the above entitled cause; that he resides in the county of Deer Lodge, where said action is depending; that he is acquainted with and knows the general sentiments and opinions of the public in reference to said action and the parties thereto, and from his knowledge of such public opinion has reason to believe and does believe that the defendants cannot have a fair and impartial trial of said cause in the county of Deer Lodge; that the general sentiment of the public in said county is prejudicial to the defendants, as far as concerns said action; that one trial has already been had of said cause in this county, in which heavy damages were awarded to the plaintiff by the jury which tried said cause; that said verdict and the judgment rendered thereon have been generally canvassed and commented upon by the public in a manner favorable to the plaintiff and unfavorable to the defendants, and thereby has [been] produced a general prejudice against the defendants which cannot fail to have an influence on the second trial of said cause."

The court withheld its decision on the motion until a jury had been called and examined on their *voir dire*, and then denied it, and the defendants excepted to the denial.

At the trial, the defendant took exceptions to evidence introduced by the plaintiff, and to instructions given to the jury at his request. The jury returned a verdict for the plaintiff, assessing his damages at "the sum of $20,000 for general damages, and also the sum of $750 for medical expenses and surgical operations."

The defendants moved for a new trial, for excessive damages appearing to have been given under the influence of passion or prejudice, for insufficiency of the evidence to justify the verdict, and for errors of law in the rulings excepted to. The motion was denied, and judgment entered on the verdict; and the defendants appealed to the Supreme Court of the Territory, which ordered the judgment to be reduced to the sum of $10,750, and affirmed it for this amount. Its opinion is reported in 5 Montana, 257.

Writs of error were sued out by both parties, by the defendants on January 1, 1885, and by the plaintiff on May 1, 1885, both returnable at October term, 1885; and the plaintiff's writ of error was docketed first in this court.

The questions arising out of the exceptions taken by the defendants to the rulings of the inferior court present no difficulty.

By the statutes of the Territory, "the court may, on good cause shown, change the place of trial, when there is reason to believe that an impartial trial cannot be had therein;" and an appeal lies to the Supreme Court of the Territory from an order granting or refusing a new trial, or from an order granting or refusing to grant a change of venue. Montana Code of Civil Procedure of 1879, §§ 62, 408; Act of Amendment of February 23, 1881, § 7.

But the statutes of the Territory cannot enlarge the appellate jurisdiction of this court. The granting or denial of a change of venue, like the granting or refusal of a new trial, is a matter within the discretion of the court, not ordinarily reviewable by this court on writ of error. *McFaul* v. *Ramsey*, 20 How. 523; *Kerr* v. *Clampitt*, 95 U. S. 188; *Railway Co.* v. *Heck*, 102 U. S. 120. And the refusal to grant a change of venue on the mere affidavit of the defendants' agent to the

state of public opinion in the county clearly involves matter of fact and discretion, and is not a ruling upon a mere question of law.

The only objection to the admission of evidence, relied on in argument, is that the plaintiff, who introduced evidence tending to support the allegations of his complaint, as well as evidence that one of the leading horses in the defendants' coach had been fractious and vicious on former occasions, was permitted to introduce evidence that in March, 1881, twenty months after the accident, this horse, when being driven in a buggy, kicked and broke the pole and tried to run away.

But evidence of subsequent misbehavior of the horse might properly be admitted, in connection with evidence of his misbehavior at and before the time of the accident, as tending to prove a vicious disposition and fixed habit, and to support the plaintiff's allegation that the horse was not safe and well broken. The length of time afterwards to which such evidence may extend is largely within the discretion of the judge presiding at the trial.

As observed by Chief Justice Bigelow, delivering the judgment of the Supreme Judicial Court of Massachusetts, overruling exceptions to the admission of evidence of the conduct of a horse as long after the accident as in the case at bar: "The objection to the evidence relating to the habits of the horse subsequent to the time of the accident goes to its weight rather than its competency. The habit of an animal is in its nature a continuous fact, to be shown by proof of successive acts of a similar kind. Evidence having been first offered to show that the horse had been restive and unmanageable previous to the occasion in question, testimony that he subsequently manifested a similar disposition was competent to prove that his previous conduct was not accidental or unusual, but frequent, and the result of a fixed habit at the time of the accident." *Todd* v. *Rowley*, 8 Allen, 51, 58. To the same effect are *Maggi* v. *Cutts*, 123 Mass. 535, and *Chamberlain* v. *Enfield*, 43 N. H. 356.

The defendants' exceptions to the instructions on the question of their liability to the plaintiff are based upon some

expressions in the fifth and sixth instructions given at the plaintiff's request, considered separately, and disregarding subsequent and perfectly definite instructions, which put it beyond doubt that the jury could not have been misled. The qualification supposed to be omitted in the sixth instruction is distinctly stated in the seventh, and the supposed implication in the fifth instruction is absolutely refuted by the twelfth instruction given at the request of the defendants themselves. It would therefore be a waste of time and space to state or to comment upon those instructions at greater length.

The remaining exception taken at the trial is to the instruction on the measure of damages, by which the jury were directed that they should assess the general damages claimed "in such sum as will compensate the plaintiff for the injury received, and in so doing may take into consideration his bodily and mental pain and suffering, both taken together, but not his mental pain alone, the inconvenience to him of being deprived of his leg, and loss of time and inconvenience in attending to his business generally, from the time of the injury to the present time, such as the plaintiff may have proved, and the jury are satisfied, to a reasonable certainty, inevitably and necessarily resulted from the original injury."

The defendants object to this instruction, that the jury were permitted to assess damages for mental suffering. But the instruction given only authorized them, in assessing damages for the injury caused by the defendants to the plaintiff, to take into consideration "his bodily and mental pain and suffering, both taken together," ("but not his mental pain alone,") and such as "inevitably and necessarily resulted from the original injury." The action is for an injury to the person of an intelligent being; and when the injury, whether caused by wilfulness or by negligence, produces mental as well as bodily anguish and suffering, independently of any extraneous consideration or cause, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded. The instruction was in accord with the opinions of this court in similar cases.

In *Railroad Co.* v. *Barron*, decided at December term,

1866, Mr. Justice Nelson, delivering judgment, in giving the reasons why the damages in an action brought against a railroad corporation by a person injured by its negligence must depend very much on the good sense and sound judgment of the jury upon all the facts and circumstances of the particular case, said: "There can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time and care in business, or the permanent injury to health and body." 5 Wall. 90, 105.

The case of *McIntyre* v. *Giblin*, decided at October term, 1879, is directly in point. That was an action to recover damages for the careless and negligent shooting and wounding of Giblin by McIntyre, and the jury were instructed that in computing damages they might take into consideration "a fair compensation for the physical and mental suffering caused by the injury." It was argued in behalf of McIntyre that the action being for a negligent injury, and not for a wilful and malicious one, the instruction was erroneous, because the words "and mental" were included. But the Supreme Court of the Territory of Utah held otherwise. 2 Utah, 384. And this court affirmed its judgment, Chief Justice Waite saying: "We think, with the court below, that the effect of this instruction was no more than to allow the jury to give compensation for the personal suffering of the plaintiff caused by the injury, and that in this there was no error." *Post*, Appendix, clxiv; *S. C.* 25 L. C. P. Co. ed. 572.

The most serious question arises upon the judgment of the Supreme Court of Montana, reducing the judgment of the inferior court from $20,750 to $10,750, and affirming it for this amount. Both parties contend that this judgment was erroneous and should be reversed, but they are not agreed as to the result of a reversal. The plaintiff contends that it must be to affirm the judgment of the inferior court, in accordance with the verdict, for the larger sum, while the defendants contend that a new trial of the whole case must be ordered.

The judgment of the Supreme Court of the Territory, reducing the amount of the verdict and the judgment of the inferior court thereon, without submitting the case to another

jury, or putting the plaintiff to the election of remitting part of the verdict before rendering judgment for the rest, was irregular, and, so far as we are informed, unprecedented; and the grounds assigned for that judgment in the opinion sent up with the record, as required by the rules of this court, are far from satisfactory.

Those grounds were, in substance, that the court, applying the rule that the verdict of a jury will not be disturbed if there is evidence to support it, unless it seems to have been the result of passion or prejudice, was satisfied that the clear weight of the testimony strongly favored the defendants' position that there was no negligence on their part and the plaintiff's injury was the result of unavoidable accident, and that "this large verdict comes from something outside of the testimony;" as well as that "if the case had been between two strangers unknown to the jury and tried on this evidence, if there had been a verdict at all for the plaintiff, it would have been for a very much less sum," and "the evidence does not support this verdict;" — the legitimate inference from all which would seem to be that the whole verdict was tainted by passion or prejudice — yet the court, because it could not "say that there is no evidence to support a verdict for such an amount as the plaintiff ought to recover," forthwith proceeded to adjudge that the verdict and the judgment thereon be reduced to what in its opinion was such an amount, without apparently considering the question of its power to do this. 5 Montana, 273, 274.

The Seventh Article of Amendment of the Constitution declares that, "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law." This article of the Constitution is in full force in Montana, as in all other organized territories of the United States. Act of May 26, 1864, c. 95, § 13, 13 Stat. 91; Rev. Stat. § 1891; *Webster* v. *Reid*, 11 How. 437. In accordance therewith, the Code of Civil Procedure of Montana provides that "an issue of fact

must be tried by a jury, unless a jury trial is waived, or a reference is ordered by consent of the parties." § 241.

That code authorizes the court in which a trial is had, or the Supreme Court of the Territory on appeal, to set aside a verdict and grant a new trial "for excessive damages appearing to have been given under the influence of passion or prejudice," or "for insufficiency of the evidence to justify the verdict." §§ 285, 408; Act of Amendment of 1881, § 7. And by § 428 of that code, "upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties;" "and may, if necessary or proper, order a new trial." But this section does not authorize the appellate court to render a judgment which the lower court could not have rendered.

Under these statutes, as at common law, the court, upon the hearing of a motion for a new trial, may, in the exercise of its judicial discretion, either absolutely deny the motion, or grant a new trial generally, or it may order that a new trial be had unless the plaintiff elects to remit a certain part of the verdict, and that, if he does so remit, judgment be entered for the rest. *Hopkins* v. *Orr*, 124 U. S. 510; *Arkansas Cattle Co.* v. *Mann*, 130 U. S. 69. And if the pleadings and the verdict afforded the means of distinguishing part of the plaintiff's claim from the rest, this court might affirm the judgment upon the plaintiff's now remitting that part. *Bank of Kentucky* v. *Ashley*, 2 Pet. 32.

But this court has no authority to pass upon any question of fact involved in the consideration of the motion for a new trial. And, in a case in which damages for a tort have been assessed by a jury at an entire sum, no court of law, upon a motion for a new trial for excessive damages and for insufficiency of the evidence to support the verdict, is authorized, according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury.

By the action of the court in entering an absolute judgment

for the lesser sum, instead of ordering that a judgment for that sum should be entered if the plaintiff elected to remit the rest of the damages, and that if he did not so remit there should be a new trial of the whole case, each party was prejudiced; and either, therefore, is entitled to have the judgment reversed by writ of error. The plaintiff was prejudiced, because he was deprived of the election to take a new trial upon the whole case. The defendants were prejudiced, because if the judgment for the lesser sum had been conditional upon a remittitur by the plaintiff, the defendants, if the plaintiff had not remitted, would have had a new trial generally; and if the plaintiff had filed a remittitur, and thereby consented to the judgment, he could not have sued out a writ of error, and the defendants would have been protected from the possibility of being obliged in any event to pay the larger sum. Whereas upon the absolute judgment entered by the court, without any election or consent of the plaintiff, the plaintiff had the right to sue out a writ of error; and he availed himself of that right, and docketed his writ of error in this court before the defendants docketed their writ of error. The defendants were thus put in the position of being obliged to contest the plaintiff's writ of error, in order to defend themselves against being held liable for the larger sum, as the plaintiff contended that they must be upon this record.

The erroneous judgment of the Supreme Court of the Territory being reversed, the case will stand as if no such judgment had been entered; and that court will be at liberty, in disposing of the motion for a new trial according to its view of the evidence, either to deny or to grant a new trial generally, or to order judgment for a less sum than the amount of the verdict, conditional upon a remittitur by the plaintiff.

Judgment reversed, and case remanded to the Supreme Court of Montana for further proceedings in conformity with this opinion; each party to pay one half the expense of printing the record and other costs in this court.

ALLMAN *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 214. Argued March 19, 1889. — Decided May 13, 1889.

The "fifty per centum on the contract as originally let," to which the power of the Postmaster General to expedite service under a contract for carrying the mails is restricted by the proviso in § 2 of the act of April 7, 1880, c. 48, 21 Stat. 72, is fifty per cent on the compensation for all the service, both as originally stipulated and as increased by additional service, which is to be determined by the rates fixed in the original contract.

Decisions of the Postmaster General, imposing forfeitures on contractors for failure to carry the mails according to their contracts, are not subject to review by this court.

THE appellant, George Allman, on the 31st of January, 1885, filed a petition in the Court of Claims against the United States asking judgment for the sum of $3607.13, which he alleged was the balance due for services rendered by him under two contracts for carrying the United States mail from July 1, 1878, to July 1, 1882.

It appears from the statements of the petition that the appellant carried the mails for four years over each of two routes, No. 46,210 and No. 46,211, under these contracts entered into with the Postmaster General, and in conformity to the orders subsequently issued by him. Whilst the services were being rendered, the Postmaster General, in the exercise of authority expressly reserved in these contracts, by successive orders, increased the number of trips per week on both routes; on the first by raising the number from six to seven trips per week, (afterwards reduced back to six,) and on the second by raising the number from one to seven trips per week. For this increase he allowed the contractor a *pro rata* increase of compensation; raising the pay on the first route to a rate of $5238.33 per annum for increasing the trips from six to seven a week, and on the second route $4893 for the increase from one to seven trips a week. This increased compensation was paid by the department, and is not involved in this litigation, except as incidental to another demand hereinafter stated. On both these routes the Postmaster General increased the rate of

speed by shortening the running time between the termini; on the first, from 36 to 28 hours per trip, and on the second, from 34 to 18 hours per trip. In consideration of this increased expedition, additional pay was allowed the contractor on the first route, $2619.16 per annum, and on the second route $2446.50 per annum, for the additional stock and carriers thus rendered necessary. This allowance was computed at the rate of 50 per cent of the annual sum paid, in accordance with the contract, for the services expedited, and was less than the proportionate increase of the cost of the service demanded by the changes in the schedule, according to the sworn statements of the contractor.

On the 1st of August, 1881, the Postmaster General promulgated an order reducing all the allowances for the increased expedition heretofore recited; and directed that the 50 per cent paid to the contractor for such service should be computed upon the service rendered at the time the contracts were entered into before any additional trips had been ordered on either route, and not upon the service as actually expedited. This order making the reduction did not change the number of trips on either of the routes. The contractor was still required to make daily trips on the second route, and to make these trips upon the expedited schedule. The effect of the order was simply to reduce his compensation in the case of the first route to fifty per cent upon the pay of six trips only, instead of seven per week; and in the case of the second route, its effect was to allow him the compensation at the rate of 50 per cent upon the pay for one trip per week, although he continued to make daily trips in accordance with the expedited schedule.

The difference between the amounts paid to the claimant under this last order and the amount he would have received under the allowance fixed by the former orders, according to the stipulation of the contracts, constitutes the principal demand in the present suit. A short time after the number of trips was increased on the first route from six to seven per week it was reduced back to six, and one month's extra pay allowed to the contractor as indemnity for the discontinuance. The petition sets up a demand for the 50 per cent thereon, which has been withheld by the Postmaster General.

Another claim set up in the petition is for the amount deducted, as forfeitures alleged to be wrongfully imposed by the Postmaster General, for failures by the contractor to cause the mail to be carried within the time prescribed. The petition was demurred to, and this appeal is from the judgment of the court sustaining the demurrer.

Mr. A. J. Willard (with whom was *Mr. Samuel M. Lake* on the brief) for appellant.

Mr. Assistant Attorney General Howard for appellee.

Mr. Justice Lamar, after making the above statement of the case, delivered the opinion of the court.

The contracts in question were made in conformity with the provisions of §§ 3960 and 3961 of the Revised Statutes. Section 3960 is as follows:

"Compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to the original service; and when any such additional service is ordered, the sum to be allowed therefor shall be expressed in the order, and entered upon the books of the department; and no compensation shall be paid for any additional regular service rendered before the issuing of such order."

Section 3961 provides:

"No extra allowance shall be made for any increase of expedition in carrying the mail unless thereby the employment of additional stock and carriers is made necessary, and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution."

All the orders made by the Postmaster General, subsequent to the execution of these contracts, and whilst the service was in course of performance, were made after the act of Congress of April 7, 1880, which contained this proviso:

"*Provided*, That the Postmaster General shall not hereafter

have the power to expedite the service under any contract either now existing or hereafter given to a rate of pay exceeding fifty per centum upon the contract as originally let." 21 Stat. 72.

The Attorney General, construing the provision last quoted, in a letter to the Postmaster General, dated July 20, 1881, held that "the original letting, and not any subsequent increase of service and pay," was made "the standard of limitation." It was in conformity with this opinion that the Postmaster General withheld from the appellant the 50 per cent on the expedited service under his contract.

We think it is clear that the language of the proviso may be interpreted in accordance with the original orders of the Post-Office Department and pursuant to the terms of the contracts sued on. Those orders allowed the contractor, for expedition, 50 per cent additional upon the sum paid, for the service actually performed. These allowances did not exceed 50 per cent of the rate of compensation fixed by the contracts as originally let, though they did exceed 50 per cent of the sum named in those contracts. The proviso in express terms refers to the "rate of pay" established in the contracts as originally let; and it is the rate of pay, not the amount expressed in the first contract, which is manifestly intended to be the unit of computation.

Our construction of this legislation, considered in *pari materia* with the provisions of §§ 3960 and 3961, is this: Section 3960 treats the rate of pay for additional service as definitely fixed by the original contract, and under its provisions the compensation, which the contractor is to receive for each extra trip placed upon his route, is to bear an exact proportion to the additional service performed; that is, it is to be based upon the rate established by the original contract. Section 3961 has direct reference to the compensation to be paid for the expedited service, and expressly provides that, in computing such compensation, the rate of pay fixed in the original contract is to be taken as the standard of limitation, which shall not be exceeded. These two sections left it within the discretion of the Postmaster General to expedite the service

to an indefinite extent, and to allow a *pro rata* compensation therefor. The proviso added in 1880 was clearly intended to limit that discretion by providing that thereafter he should not have authority to expedite the service, under any contract, beyond 50 per cent of the rate fixed in the original contract. The circumstances under which contracts for the transportation of the mails are awarded, we think, sustain this construction. Such awards are made after public advertisement, and upon competitive bids; and it is presumed that the contract price is at as low a rate as can be made consistently with a proper performance of service. In the present case, it appears from the record that the actual cost of the expedition ordered upon the single one of the seven weekly trips upon the second route was more than 50 per cent of the aggregate sum named in the original contract. The interpretation on which the last order is based assumes that Congress intended to leave with the Postmaster General the power to exact from a contractor seven times the service stipulated in the contract as originally let, and to allow but 50 per cent compensation on the amount named in that contract.

The construction contended for by the appellant is in harmony with the previous legislation on the subject, and the established policy of the mail service, and is entirely equitable.

As to so much of the demand as is claimed in the petition to be due to the petitioner under the contracts, and as to the 50 per cent of one month's extra pay, we hold and decide that the Court of Claims erred in sustaining the demurrer.

But with regard to the claim for the amount deducted as forfeitures imposed by the Postmaster General, because the contractor failed to cause the mail to be carried between the termini within the time prescribed, it is considered that these forfeitures were made by virtue of the power conferred upon the Postmaster General by the statutes, and also recognized by the terms of the contracts to be within his discretion, and are not subject to review by this court. *Chicago Railway Company* v. *United States*, 127 U. S. 406, 407; *Eastern Railroad Co.* v. *United States*, 129 U. S. 391, 396.

As far as the claim for the deduction of the amount of these forfeitures is concerned, the demurrer was properly sustained.

The judgment is reversed, and the case remanded for action in accordance with the principles of this decision.

UNITED STATES *v.* DAVIS.

UNITED STATES *v.* SCHOFIELD.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Nos. 1425, 1426. Submitted April 1, 1889. — Decided May 13, 1889.

An appeal lies to this court from a judgment against the United States rendered under the jurisdiction conferred on District Courts by the act of March 3, 1887, 24 Stat. 505, c. 359, without regard to the amount of the judgment.

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

Mr. Charles C. Lancaster for the motion.

Mr. Assistant Attorney General Howard opposing.

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

On the 3d of March, 1887, an act of Congress was approved, entitled "An act to provide for the bringing of suits against the government of the United States," 24 Stat. 505, c. 359, of which the first, second, ninth and tenth sections are as follows:

"That the Court of Claims shall have jurisdiction to hear and determine the following matters:

"First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the government of the

United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however*, That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, department, or commission authorized to hear and determine the same.

"Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court: *Provided*, That no suit against the government of the United States, shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

"SEC. 2. That the District Courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the Circuit Courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury."

"SEC. 9. That the plaintiff or the United States, in any suit brought under the provisions of this act shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes.

"SEC. 10. That when the findings of fact and the law applicable thereto have been filed in any case as provided in section six of this act, and the judgment or decree is adverse to the government, it shall be the duty of the district attorney to transmit to the Attorney General of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same; whereupon the Attorney General shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the district attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same: *Provided*, That no appeal or writ of error shall be allowed after six months from the judgment or decree in such suit. From the date of such final judgment or decree interest shall be computed thereon, at the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree."

Under that act Schofield filed his petition against the United States in the District Court of the United States for the District of Maryland, August 20, 1887, and judgment was rendered in his favor on the 6th day of October, 1887, in the sum of twenty-five dollars and costs. On the 16th day of January, 1888, an appeal was prayed by the United States to this court and allowed, and the transcript filed in the clerk's office, October 27, 1888.

Davis filed his petition in the same court, September 2, 1887, and recovered judgment November 18, 1887, in the sum of twenty-five dollars and costs, from which an appeal was prayed to this court, January 16, 1888, and the transcript filed in the clerk's office October 27, 1888.

A motion to dismiss is filed in each of these cases on behalf of the appellees, respectively, upon the ground that an appeal will not lie to this court from a District Court performing the appropriate duty of a District Court, and that this court has not jurisdiction to re-examine judgments of Circuit or District Courts since the act of February 16, 1875, 18 Stat. 315, c. 77, in such actions, unless the matter in dis-

pute shall exceed the sum or value of five thousand dollars, exclusive of costs, and "that the United States are not entitled to a writ of error or appeal if the same remedy would not be afforded under similar circumstances to a private party."

By the act under which these suits were brought the District Court was given concurrent jurisdiction with the Court of Claims as to matters of which that court had jurisdiction, "where the amount of the claim does not exceed one thousand dollars," and the same right of appeal was given to the plaintiff or the United States as "now reserved in the statutes of the United States in that behalf made."

Section 707 of the Revised Statutes reads:

"An appeal to the Supreme Court shall be allowed, on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court, as provided in section one thousand and eighty-nine."

By § 708 such appeals must be taken within ninety days after the judgment is rendered, but this period is enlarged to six months by § 10 of the act in question.

Inasmuch as the object of the latter act was to enable the District and Circuit Courts to exercise concurrent jurisdiction with the Court of Claims in respect to suits against the United States, as therein provided, in our judgment the right of appeal reserved to the government "in the statutes of the United States in that behalf made," before the enactment of this act, was the right of appeal reserved in the statutes relating to the Court of Claims, and as that right could be exercised by the United States in the instance of any judgment of the Court of Claims adverse to the United States, it follows that the same right can be exercised by the United States in any case of the prosecution of a claim in the District or Circuit Courts of the United States under said act. The result is that

The motions to dismiss in these cases must be overruled.

TERRY *v.* SHARON.

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

No. 1462. Submitted April 8, 1889. — Decided May 13, 1889.

In a bill in equity in a Circuit Court of the United States to revive, in the name of the executor of the plaintiff, a suit in equity which had gone to final decree, a decree of revival, entered after due notice to defendants, and after their appearance and pleading to the bill, is a final decree, from which an appeal lies to this court.

When a cause in equity in a Circuit Court, from which an appeal would lie to this court, has gone to final decree, and the executor of the plaintiff files his bill in that court to revive the suit in his name, and his prayer is granted, and an appeal is taken from the decree granting it, this court will not, on the hearing of that appeal, consider the merits of the original case, nor the jurisdiction of the court below over it if there is sufficient in the record to give an apparent jurisdiction.

This was a motion to dismiss for want of jurisdiction, because the order or decree from which the appeal was taken was not a final decree.

To this motion was also added, under rule 6, (108 U. S. 575,) a motion to affirm on the ground that, although the record in the said cause might show that this court had jurisdiction in the premises, yet it was manifest that said appeal was taken for delay only, and that the question on which such jurisdiction depends was so frivolous as not to need further argument.

The case was stated by the court as follows:

This is an appeal from the Circuit Court of the United States for the Northern District of California, and is now before us upon a motion on the part of the appellee to dismiss the appeal or to affirm the decree below.

The appeal, which was the subject of this dual motion, is from an order of the Circuit Court, reviving a suit in equity after a final decree in the case had been made and after the death of William Sharon, the plaintiff in that suit. Sharon

died after the case had been submitted to the court but before its decision, and the court, finding in his favor, ordered the decree to be entered *nunc pro tunc*, as of the date of submission. The object of the original suit was to have a decree, declaring the nullity and invalidity of a certain instrument in writing purporting to be a declaration of marriage between the complainant, William Sharon, and Sarah Althea Hill, the defendant. The decree which was rendered in that case declared that said instrument was false, fabricated, forged, fraudulent, and utterly null and void, and directed that it be cancelled and set aside. It further decreed, that upon twenty days' notice of the decree to the respondent, or to her solicitors, the instrument be delivered by the respondent to and deposited with the clerk of the court to be indorsed "Cancelled;" and the defendant was perpetually enjoined from alleging its genuineness or validity, or making any use of the same in evidence or otherwise to support any right or claim under it. The decree itself was rendered on November 23, 1885, and was entered as of September 29 of that year, the date of submission.

On March 12, 1888, Frederick W. Sharon, as executor of William Sharon, deceased, filed his bill of revivor in the cause, setting forth the fact of the death of William Sharon, and that he left a will, which was duly probated, and on which letters testamentary had issued to him as executor; that the so-called declaration of marriage had not been delivered for cancellation, as ordered by the decree; and that the plaintiff feared the defendant would claim and seek to enforce property rights as the wife of William Sharon, by virtue of said written declaration of marriage. The bill of revivor further stated that on January 7, 1885, the defendant, Sarah Althea Hill, had intermarried with David S. Terry, and he was accordingly made a defendant with her to the bill of revivor. It prayed, therefore, that the suit might be revived in his name as executor, and that the defendants be required to show cause why the original suit and proceedings should not stand revived against them.

To this bill of revivor the defendants interposed a demurrer which stated, among other things, that the court had no juris-

diction of the subject matter of the suit, and no jurisdiction to grant the relief prayed for in the bill, or any part thereof, and that the bill did not contain any matter of equity whereon the court could ground any decree or give to the plaintiff any relief against the defendants, or either of them.

The Circuit Court entered an order overruling the demurrer, and reviving the suit in the name of Frederick W. Sharon, as executor of William Sharon, and against Sarah Althea Terry and David S. Terry, her husband, and ordering that the executor have the full benefit, rights and protection of the decree, and full power to enforce the same against the defendants, and each of them, in all particulars. It is from this order that the present appeal is taken.

Mr. Henry E. Davis and *Mr. Samuel M. Wilson* for the motions.

Mr. Samuel Shellabarger and *Mr. J. M. Wilson* opposing.

I. When a court renders a judgment in a proceeding where it is absolutely without jurisdiction, the whole proceeding being a nullity, is open to attack collaterally. *Mansfield &c. Railway* v. *Swann*, 111 U. S. 379; *In re Sawyer*, 124 U. S. 220; *Elliott* v. *Piersol*, 1 Pet. 328; *Wilcox* v. *Jackson*, 13 Pet. 498; *Hickey* v. *Stewart*, 3 How. 750; *Thompson* v. *Whitman*, 18 Wall. 467; *Rose* v. *Himely*, 4 Cranch, 241; *Griffith* v. *Frazier*, 8 Cranch, 9; *Thompson* v. *Tolmie*, 2 Pet. 157; *Voorhies* v. *Bank of United States*, 10 Pet. 449; *Wilcox* v. *McConnell*, 13 Pet. 498; *Shriver* v. *Lynn*, 2 How. 43; *Williamson* v. *Berry*, 8 How. 495.

II. The relief prayed for in the original bill is that it be decreed that the defendant "is not and never was the wife of" the complainant. Conjugal relations, the existence, the continuance or the dissolution of marital relations are not the subjects of Federal jurisdiction. Suits directed to the determination of the existence or non-existence of these relations are not "suits of a civil nature" as that term is used in the acts conferring jurisdiction upon the Circuit Courts of the United

States. *Barber* v. *Barber*, 21 How. 582; *Frasher* v. *State*, 3 Texas App. 263; *Ex rel. Hobbs*, 1 Woods, 537; *Green* v. *The State*, 58 Alabama, 190; *State* v. *Gibson*, 36 Indiana, 389; *Lonas* v. *The State*, 3 Heiskell, 287; *Johnson* v. *Johnson*, 13 Fed. Rep. 193.

The court will observe that this bill is not directed to the cancellation of any instrument which conveys or which directly affects any property rights cognizable either at law or equity; that it does not seek either directly or otherwise, any decree for any property, or securing any interest therein or title thereto, or demanding any right cognizable in any court of law or equity — unless the right to destroy said instrument be one within the jurisdiction of United States courts of equity; that, on the contrary, the real substance and effect of such pretended equity suit is nothing more than one seeking to put out of the way, and prohibit from being used in state courts or otherwise, a mere item of proof, bearing upon the existence of an alleged marriage relation, such proof being made competent under the laws of California for said purpose; that said item of proof, to wit, the written marriage contract, is not one which, in any way, nearly or remotely, affects any property right of the plaintiff, unless it remotely affects property rights through its tendency to prove complainant's marriage.

These things being carefully observed, and being palpably undeniable, it results from them: (1) That said written contract of marriage is not such an instrument as courts of chancery ever have undertaken to cancel; and to so undertake is no less absurd than for the court to undertake to abolish the knowledge and recollection of such marriage possessed by living witnesses; and (2) that this being the character of the said suit in equity, it is clearly not "a suit of a civil nature at law or in equity" within the sense of these words defining the jurisdiction of the Circuit Court as found in § 629 of the Revised Statutes.

III. Since the courts of the United States have no jurisdiction either over divorce, or over alimony, or over any rights springing out of the relation of marriage, and since such courts

cannot intermeddle with this relation or its rights, can the courts of the United States indirectly decide upon, control, or abolish the existence, the enjoyment, or the dissolution of such marriage relation by a judgment which determines that the relation does not exist, and that the alleged wife shall not be permitted to use, in any court or anywhere else, the evidence of the lawfulness of her alleged marriage?

In other words, the law being that the courts of the United States have no jurisdiction over the marriage relation and rights, can such courts take jurisdiction of, abolish and cancel the evidence of marriage which is provided by, and made legal under, the laws of the States, and do this in such way and sense as that the decree of the court shall, in legal effect, operate as a divorce of the wife, by prohibiting her from using or asserting in any court, or anywhere, the evidence provided by such laws for establishing her marriage?

With very great and unfeigned respect for the learning of the judges who made the decision in question, it seems to us that the answer to this question plainly must be in the negative.

This attempt to deprive the alleged wife, by decree of a United States Court, of the evidence of her marriage, and to deprive her of the right to use such evidence in the state courts which alone have jurisdiction of the question of marriage or no marriage, divorce or no divorce, is in substance, and almost without disguise, an attempt to accomplish in such court the divorce of the wife, and her deprivation of all rights of alimony, and other marital rights. It is plainly and palpably an attempt to accomplish, by indirection, what the court below, by means of the limitations above named, which it gave to its decree, confessed it had no jurisdiction over, to wit, prohibiting her from having, claiming, or asserting that she was a lawful wife.

It is an attempt, by slightly disguised indirection, to accomplish a divorce which the court recognized it had no power to accomplish directly. If the court had power to cancel this written evidence of marriage and prohibit its being used anywhere, then so, also, and equally, and for the same reason, could the court abolish all other evidences of the marriage.

IV. The decree was final and appealable. The following changes in the status of the parties took place after the original decree against Mrs. Hill. (1) Sharon died and thereby devolved on Mrs. Sharon whatever property, if any, came through his death. (2) The Superior Court rendered the decree establishing the validity of the marriage and Mrs. Terry's rights of alimony. (3) The defendant Hill had married Judge Terry, and his rights and interests in his wife's estates, whatever they were, attached after the original decree, and after the death of Sharon. These changes rendered it indispensably necessary that the bill of revivor, so called, should be something else, or more than a technical bill of revivor, such as is resorted to where no change has occurred except an abatement by death. On the contrary, it presents a case where, owing to the death of Sharon and the marriage of his alleged wife to Terry, new property rights had attached in favor of a new and indispensable party to the suit, Judge Terry, whose interest in his wife's estate, as affirmed by the Supreme Court of California, or otherwise established, could not be cut off or affected except by the means of being made party, as was here done. That a decree such as is prayed for in this bill of revivor, so called, is a decree on an original bill, as distinguished from a decree under a technical bill of revivor, is confidently submitted.

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

The motion to dismiss the appeal is based upon the proposition that the order reviving the suit is not such a final order or decree as can be brought to this court for review. The principal argument on that subject is, that like the proceedings subsequent to a judgment at law for its enforcement by execution or otherwise, it is merely ancillary to the original decree, and a mode of carrying it into effect. But we are not satisfied that this is a sound argument, and if the case before us rested alone upon the question of dismissing the appeal, or overruling the motion to do so, we should feel compelled to overrule the motion.

The idea cannot be sustained that when a judgment or decree is rendered against a defendant, and it remains wholly unexecuted, *anybody*, without any right, authority, or interest in the matter can come in, and, by filing a bill of revivor, or by making a motion, have himself substituted for the plaintiff who has deceased, with all the rights which that plaintiff would have had to enforce the judgment or decree. Two questions must always present themselves in such a case, or at least may be presented; the one is, whether the decree is in condition that any further action can be had, or any right asserted under it by those who succeed the plaintiff as heirs, devisees, executors or otherwise; and the other is, whether the party who thus asserts the right to the benefit of the decree is entitled to such right, and is by law the person who can claim its enforcement, or should, in any action or matter arising out of the decree, represent the rights of the original plaintiff. Both of these questions are matters which interest the defendant in the original decree, and in regard to which he must have a right to a hearing before the Circuit Court; and the order of the Circuit Court on that subject is so far final, and may so far affect the rights of the defendant, that we think he is entitled to an appeal from such an order, if, in other respects, it is one within the jurisdiction of the Supreme Court. If the defendant had not this right of resistance, he might be harassed by suits to revive the judgment by any number of parties claiming in different or opposing rights, and he surely must have some power to protect himself from this; and the order which the court makes in such a case is so essentially decisive and important that we do not doubt that it is appealable. The motion, therefore, to dismiss the appeal must be overruled.

Turning to the alternative branch of this motion, which claims that the order of the court, reviving the suit in the name of Frederick W. Sharon, executor, should be affirmed, because the appeal is frivolous and unwarranted by the facts of the case, we think it should be granted. This order does no more than place before the court in connection with the case a person occupying the position of plaintiff in that suit in

the place of the deceased complainant, with such authority to avail himself of all the rights determined in favor of Sharon by the original decree as may be essential to the protection of the estate of Sharon, or the interests of his heirs or devisees, as they may be affected by that decree. That some one should be substituted in the place of Sharon, the complainant in that suit, who should be able to obtain the fruits of that litigation for the benefit of those who may be entitled to them, is so much a matter of course that it is difficult to conceive of a reason why such a substitution, through a bill of revivor, the usual proceeding in chancery cases, should not be had. If any objection had been made to the character in which Frederick W. Sharon asked to be made the representative of his father, to his fitness for the place, or that some one else was the proper person in whose name the suit should be revived, there might be some ground for a full hearing on the merits of the order. But no attempt is made to dispute the will of William Sharon, the disposition which it makes of his property or rights, or the validity of the appointment of Frederick W. Sharon as executor of that will. There is no pretence, and there was no effort to show in the court below, that if the suit should be revived at all in the name of any person whatever, Frederick W. Sharon was not that person.

The broad ground taken, the only one worthy of consideration, and the one argued with great earnestness in the brief of counsel for appellants, is that the court which rendered the original decree was without jurisdiction; and that on the motion to revive, that question should be considered, and if the court was without jurisdiction in the original case, it can have no jurisdiction to appoint an executor. This matter is very fully argued in the briefs of counsel, and it is the only point made in opposition to the motion to affirm the judgment below. We have given it full consideration, and because it is the only point, and because it has been fully and ably argued, we have the less reluctance in passing in this mode upon the merits of the order reviving the suit. We are satisfied that a later, and even more full, oral argument would throw no additional light upon the subject we are called upon to consider.

It would be a very anomalous proceeding for this court now, on the mere review of the order reviving the suit and appointing a new party to conduct it on the part of the plaintiff, to go back and decide upon the whole question which was passed upon by the Circuit Court in the original decree. That decree was open to appeal when it was rendered. If the defendant, Hill, was dissatisfied with it or believed it was erroneous, or made without jurisdiction, she had the right to appeal to this court. It was not only open to her, but it was the proper remedy if she desired to test it further. The order substituting the executor as plaintiff in that suit grants no new rights, does not enlarge that decree, and does not change its status, its construction or its validity. All the rights which she would have had against William Sharon, the plaintiff in that suit, she has against Frederick W. Sharon, who is substituted for him in the case. It would be productive of innumerable evils and delays if, on this proceeding to supply the defect in the original suit, arising out of the death of the plaintiff, everything that had been done in that suit, although there was a final decree in the case, should be reconsidered and become the subject of renewed litigation.

If the jurisdiction of the Circuit Court in the original suit were in any respect open to question on this appeal or on this motion, we think that the record below presents so much of the elements of jurisdiction as to need no further inquiry in that direction *in this proceeding*. It appears by the record that Sharon, the plaintiff in that suit, describes himself as a citizen of the State of Nevada, and the defendant, Hill, as a citizen of the State of California. This is sufficient to have given jurisdiction of the parties, and the object of the suit, the cancellation of a forged instrument, is one of the common heads of equity jurisdiction. A general demurrer was filed to the bill, which the Circuit Court overruled. The defendant then pleaded in abatement that she had brought an action against the plaintiff in the state court of California, which she alleged involved the same matter as that on which Sharon's bill against her was founded. She also, as a further proposition in that plea, alleged that Sharon, the plaintiff, was not a

citizen of the State of Nevada, but was a citizen of the State of California. This plea, in both its branches, was denied by Sharon, and, on a hearing, it was held to be bad and overruled, as the court said in its decision, because no testimony was taken to support it. Thus it appears that this matter of the jurisdiction of the Circuit Court was pleaded and relied on in that suit, and the court overruled it.

We have not made this reference to the proceedings in the court below with a view of reconsidering the soundness of those decisions. It is sufficient to say that, as presented to us, it is at least a *prima facie* case of jurisdiction as between the parties, and that the question of the soundness and correctness of the decision of that court on the merits cannot be inquired into in the present proceeding.

Let us suppose for a moment that the Circuit Court was at liberty to make an order reviving this decree in the name of a proper person, and it had refused to do so. Whatever injury had been committed by the Circuit Court against Mr. Sharon could not, on the theory of the appellants, be reviewed in this court, because there would be no party to take an appeal, and even the error of the court, in holding that it had no jurisdiction, could not be reviewed for want of somebody to do so. Especially would this be so if the doctrine insisted on by the appellee be sound, that the order is not an appealable order.

On the other hand, let it be supposed that the defendant, Hill, in that suit desired to take an appeal, as she had a right to do, from the decree against her, she could only take such an appeal and prosecute it by reviving the suit against some party who must represent the Sharon interest.

The objection that the original suit and decree were without jurisdiction would be as valid against an application by Miss Hill to have some one substituted as plaintiff, in order that she might take an appeal, as it can be in the case of the present application by the plaintiff below. It is, we think, too clear for any serious argument that the representatives of Sharon had a right to supply the defect in the suit, created by the death of the plaintiff, by a bill of revivor substituting a party in the place of Sharon.

Counsel for Parties.

It is averred in this bill of revivor that the decree has not been complied with by the defendant, Hill; that she has not delivered up the instrument to be cancelled; and that she is using it in other ways to the prejudice of Sharon's estate and that of his devisees. Somebody capable of putting the decree into effect in those particulars is essential to its utility and to its execution.

We have not been able to find any precedent exactly representing the case before us. The ingenuity of counsel has been unable to supply us with any; but we think the decree of the court below, reviving the suit in the name of Frederick W. Sharon, is so clearly right that we feel bound to affirm that decree on this motion.

Mr. Justice Field took no part in the decision of this case.

Motion to dismiss denied.
Motion to affirm granted.

UNITED STATES *v.* HALL.

CERTIFICATE OF DIVISION IN OPINION FROM THE DISTRICT OF CALIFORNIA.

No. 1084. Argued April 9, 1889. — Decided May 13, 1889.

The statutes of the United States confer upon notaries public no general authority to administer oaths.

No statute of the United States authorizes notaries public to administer an oath to a deputy surveyor of the United States in regard to the manner in which he fulfilled a contract for surveying public land.

Certificates of division in opinion which present no clear and distinct propositions of law, but which, on the contrary, split up the case into fragments for the purpose of obtaining the opinion of this court before a trial or decision in the court below, are insufficient to invoke its jurisdiction.

The case is stated in the opinion.

Mr. Solicitor General for plaintiffs in error.

Mr. Walter H. Smith for defendant in error. *Mr. Frank H. Hurd* was with him on the brief.

Mr. William M. Stewart also filed a brief for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

This case comes before us on a certificate of division of opinion between the judges of the Circuit Court of the United States for the District of California.

The record presents an indictment against John D. Hall for making a false oath as to his services as deputy surveyor of the United States in regard to the manner in which he had fulfilled a contract for surveying several townships of land in California. The indictment is diffuse and obscure, but it can perhaps be sufficiently ascertained from it that the offence charged against Hall is the false oath, intended to be used in procuring pay for services which the indictment charges were never rendered.

It is alleged that the oath set forth in the affidavit was made before T. T. Tidball, a notary public, duly appointed, commissioned and qualified as such, in and for the county of Monterey, California; and one of the questions certified to us, on which the judges were divided in opinion, is, whether a notary public is authorized to administer oaths and certify affidavits of the character and purpose for which that affidavit is alleged to have been prepared.

There was a demurrer to the indictment, in which eighteen distinct grounds of demurrer are set out; and upon the hearing of this demurrer the judges certified to this court six matters on which they were divided in opinion. They are as follows:

"1. Do the facts set forth in this indictment constitute an offence under section 5418 of the Revised Statutes of the United States?

"2. Do the facts alleged in this indictment constitute an offence under section 5438 of the Revised Statutes of the United States?

"3. Are the words 'falsely makes' in section 5418, Revised Statutes, limited to forged instruments or instruments in the nature of forged instruments?

"4. Does the making of a genuine writing or instrument, signed by the party making it or purporting to make it with his own name, which instrument is false only in its statement of facts, for the purpose of defrauding the United States, constitute the 'falsely making' of a writing or instrument within the meaning of section 5418 of the Revised Statutes?

"5. Is it necessary that an instrument 'falsely made,' purporting to be an affidavit, and actually, knowingly used for the purpose of defrauding the United States, contrary to the statute, should be sworn to before a person authorized to administer oaths for such purposes in order to constitute an offence under section 5418 Revised Statutes?

"6. Is a notary public authorized to administer oaths and take and certify affidavits of the character and for the purposes for which the affidavit set out in the indictment is alleged to have been prepared or used?"

Most of these are, by the settled doctrine of this court, insufficient to invoke its jurisdiction. They seem eminently liable to the objection that they are designed to split up the case before the court into fragments upon which, before a trial or decision by that court, it is intended to obtain the opinion of this court. There are none of them, except the last one we have mentioned, which present, in the manner that we have frequently pointed out, clear and distinct propositions of law to which this court can respond. *Fire Insurance Association* v. *Wickham*, 128 U. S. 426; *Dublin Township* v. *Milford Savings Institution*, 128 U. S. 510. But they require, if they should be answered at all, an examination of this very voluminous and loose statement of facts found in the indictment before an answer could be made, and even then there is no certainty that the answers would turn upon any difficulty existing in the minds of the court which framed them for our consideration.

It is apparent, however, that the question we have suggested, the last of the series of six, is a distinct and clear proposition of law, which may be necessary, and probably is essential, to a decision of the demurrer. It can hardly be supposed that a defendant indicted for perjury can be held to be guilty, unless the oath, in regard to which the perjury is charged, was taken

before an officer of some kind having due authority to administer the oath. We proceed, therefore, to inquire whether notaries public have authority to administer an oath, such as is required by the act of Congress, in the matter in regard to which the defendant was sworn. It is a little singular that there is no general statute designating any class of persons or officers who may in all cases administer the oaths required to be taken by the laws of the United States. There are many statutes regulating the administration of oaths in particular classes of cases, and specifying the person before whom the oath shall be made, but the persons are not always the same. These oaths can be taken in the cases pointed out by the law before the courts, judges of the courts, clerks of the courts, notaries public, commissioners of the Circuit Court, and various other officers, but in all these instances the class of cases in which the oath can be taken before such officer, or any of them, is defined. We have been unable to find any statute authorizing the oath required to be taken by Hall, in reference to the manner in which he had discharged his duties as deputy surveyor under the contract which is made part of the indictment, to be administered by a notary public.

In the case of *United States* v. *Curtis*, 107 U. S. 671, this court, after very careful examination of the statutes on the subject of the powers of notaries public to administer oaths, declared that no such general power existed, and that up to the act of February 26, 1881, c. 82, 21 Stat. 352, a notary public had no authority under any law of the United States to administer the oath to an officer of a national bank in the declaration or statement in a report required by § 5211 of the Revised Statutes. This examination, as found in the opinion of the court by Mr. Justice Harlan, seems to have been very thorough at the time the opinion was delivered in April, 1883. We are not now able to find any statute giving such authority to a notary public, in regard to the manner in which the oath was taken in the present case, nor any general authority to administer oaths under the laws of the United States.

A fair specimen of the manner in which Congress has dealt with the subject of oaths and affidavits, under its laws, may

be seen by reference to chapter 82 of the statutes of 1881, before mentioned. That act was undoubtedly passed to meet the difficulty which had occurred in the lower courts in the case of *United States* v. *Curtis*, where the question was raised whether or not the oath required to be taken by bank officers, in making their reports to the Comptroller of the Currency, could be taken before a notary public. This new statute on that subject reads as follows:

"That the oath or affirmation required by section fifty-two hundred and eleven of the Revised Statutes, verifying the returns made by national banks to the Comptroller of the Currency, when taken before a notary public properly authorized and commissioned by the State in which such notary resides and the bank is located, or any other officer having an official seal, authorized in such State to administer oaths, shall be a sufficient verification as contemplated by said section fifty-two hundred and eleven: *Provided*, That the officer administering the oath is not an officer of the bank."

The act limits itself exclusively to the case, then before the courts, of officers of national banks in regard to verifying the returns made by those banks to the Comptroller of the Currency, and it simply declares that it shall be sufficient if they are made before a notary public. The statutes are full of such partial and special enactments about notaries public, commissioners of the Circuit Courts, clerks of the courts and various others by whom oaths may be administered; but there is no general definition; and we have been unable to find, after a most careful and protracted examination, any statute which gives a general authority to any officer, or any person whatever, to administer oaths in all cases where, by the laws of the United States, they are required.

It is, therefore, certified to the Circuit Court that

This question is answered in the negative.

UNITED STATES *v.* PERRIN.

CERTIFICATE OF DIVISION IN OPINION FROM THE DISTRICT OF CALIFORNIA.

No. 1035. Submitted April 9, 1889. — Decided May 13, 1889.

There is no general right of appeal to this court in criminal cases.
United States v. *Hall*, *ante*, 50, affirmed and applied to the certificates of division in opinion in this case.

The case is stated in the opinion. This cause coming on to be heard next after *United States* v. *Hall*, *ante*, 50, the court declined to hear argument upon it.

Mr. Attorney General and *Mr. John T. Carey* for plaintiff in error.

Mr. Walter H. Smith, *Mr. Frank H. Hurd* and *Mr. William M. Stewart* for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

This case also comes before us by virtue of a certificate of division in opinion between the judges holding the Circuit Court of the United States for the District of California, upon an indictment against George H. Perrin, John McNee and John H. Benson for conspiracy. The indictment consists of three counts. They set out, so far as we can gather from the confused statement, that the three defendants entered into a conspiracy with some one else, to the jurors unknown, to defraud the United States of a large sum of money, to wit, $492; that in pursuance of said conspiracy they procured a contract to be made between George H. Perrin, then a deputy United States surveyor, and William H. Brown, surveyor general for the State of California, for the survey of certain township lines; that said Perrin produced a fraudulent, fictitious and pretended survey of the lands described in that contract, and caused fictitious and fraudulent field-notes of said pretended survey to

be made and returned to the United States surveyor general; whereas, in point of fact, no such surveys had been made, and said field-notes were utterly false and fictitious. Wherefore it is alleged that in this manner the said Perrin, McNee and Benson fraudulently and corruptly conspired and agreed together to defraud the United States of the sum of money aforesaid.

The second count attempts to recite the same contract and the same pretended survey and field-notes, and that by these false documents and pretences William H. Brown, the United States surveyor general, was deceived and induced to certify the sum accrued to and earned by said Perrin.

The third count, in addition to these charges, adds that the false and corrupt field-notes were accompanied by a wilful and corrupt oath and affidavit that they were all true, and that Perrin had marked said corners and established said lines in the specific manner described in said field-notes, when in truth and in fact he had not in his own proper person made any actual survey of these lines at all.

To each of these counts there was filed a demurrer setting up thirty grounds for its support. Upon the argument of this demurrer the judges certified seven questions as regards each of these counts, upon which they differed in opinion. As these are the same in regard to each count, those relating to the first count will be stated, as follows:

"1. Do the facts stated in the first count of the indictment constitute an offence under section 5440 of the Revised Statutes as amended in 1879, 1 Supl. Rev. Stat. 484, and section 5438 of the Revised Statutes?

"2. Are sufficient facts stated in the first count of the indictment to make a good count under sections 5440 and 5438 Revised Statutes; or under section 5440 alone; or under section 5440 in connection with any other provision of the statutes?

"3. Does the first count of the indictment sufficiently describe an offence under sections 5440 and 5438, or any other provision of the Revised Statutes, or under section 5440 alone?

"4. Are the means by which the parties conspired and

agreed to defraud the United States set forth with sufficient fulness and particularity in the first count of the indictment to constitute a good count in that particular?

"5. Is any overt act performed by any one of the alleged conspirators to effect the object of the conspiracy sufficiently stated in the first count of the indictment to constitute a good count in that particular?

"6. If there is any defect or imperfection in the first count of the indictment, is it in the matter of form only, not tending to the prejudice of the defendant, within the meaning of section 1025, Revised Statutes?

"7. Does the surveying contract set out in the first count of the indictment appear, upon all the allegations of the count, to be the individual private contract of W. H. Brown, or a contract made in his official character as surveyor-general, on behalf of and binding upon the United States?"

We are not able to discover in any one of these points that clear and distinct presentation of a question of law which we have so repeatedly held to be necessary to invoke the action of this court. Indeed, they are but a repetition in various forms of the question whether the indictment presents facts sufficient to constitute an offence under the statute against conspiracy. The indictment is so diffuse and obscure, presenting in no point a distinct issue of law on which the guilt of the defendants must rest, that it is impossible to decide any of the points without the most laborious wandering through the whole of the three counts of the indictment, and passing upon the whole question whether, under all the circumstances set out, the parties are liable to the indictment.

The authorities on that subject have been reviewed so often and we have so recently considered the question, that it is a waste of time to consider it further. It is sufficient to say that the system of criminal law of the United States does not contemplate a general right of appeal from the courts trying criminals to this court; it does not intend that in all cases before the trial is had the instructions of this court, concerning matters which may come in issue, shall be delivered as a guide to the court that is to try the cause. The purpose of

the provision is, that where a real question of a difficult point of law, clearly presenting itself and arising in the progress of the case, is such that the two judges sitting on the hearing differ in opinion in regard to that question, they are at liberty to certify it to this court for an answer. But it never was designed that, because a case is a troublesome one, or is a new one, and because the judges trying the case may not be perfectly satisfied as regards all the points raised in the course of the trial, the whole matter shall be referred to this court for its decision in advance of a regular trial, or that, in any event, the whole case shall be thus brought before this court.

Such a system converts the Supreme Court into a *nisi prius* trial court; whereas, even in cases which come here for review in the ordinary course of judicial proceeding, we are always and only an appellate court, except in the limited class of cases where the court has original jurisdiction. See *United States* v. *Briggs*, 5 How. 208; *United States* v. *Northway*, 120 U. S. 327; *Dublin Township* v. *Milford Institution*, 128 U. S. 510; and specially, *Jewell* v. *Knight*, 123 U. S. 426, 432, where all the cases are cited.

For these reasons

We cannot take jurisdiction of the present case, and it is ordered that it be remanded to the Circuit Court for such further proceedings as it may be advised to be proper.

UNITED STATES *v.* REILLY.

CERTIFICATE OF DIVISION IN OPINION FROM THE DISTRICT OF CALIFORNIA.

No. 1036. Submitted April 9, 1889. — Decided May 13, 1889.

No statute of the United States authorizes a commissioner of a Circuit Court to administer an oath to a deputy surveyor of the United States in regard to the manner in which he fulfilled a contract for surveying public land.

United States v. *Hall*, *ante*, 50, affirmed and applied to the certificate of division in opinion in this case.

Opinion of the Court.

THE case is stated in the opinion. This cause coming on to be heard next after *United States* v. *Hall*, *ante*, 50, and *United States* v. *Perrin*, *ante*, 55, the court declined to hear argument upon it.

Mr. Solicitor General for plaintiff in error.

Mr. Walter H. Smith, *Mr. Frank H. Hurd*, and *Mr. William M. Stewart* for defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

This case comes before us from the Circuit Court of the United States for the District of California, upon a certificate of division in opinion between the judges holding that court. It arises out of an indictment against the defendant, M. F. Reilly, in which he is charged with falsely certifying, as a commissioner of the Circuit Court of the United States for that circuit, to an oath or affidavit taken before him by one Charles Holcomb.

The indictment sets out that Holcomb, as a deputy United States surveyor, had a contract similar to that recited in the previous case of *United States* v. *Hall*, *ante*, 50, by which contract it was necessary that he should make affidavit that he had personally rendered the service required by it before he could obtain the certificate of the surveyor general, William H. Brown, or his successor in office, upon which he could draw compensation for that service. The indictment alleges that, instead of making such affidavit, he, or some one for him, procured the defendant, Reilly, who was a commissioner appointed by the Circuit Court of the United States under the act of Congress on that subject, to make out the form of an affidavit, and certify to it under his seal as such commissioner; when in fact no such oath was taken by Holcomb, nor any such affidavit made by him. For this offence Reilly is indicted.

A demurrer to this indictment was filed, alleging eight different objections to it, and on the argument of that demurrer the judges holding the Circuit Court certified to us

ten different questions on which they were divided in opinion on that hearing.

The remarks already made in the previous case, in regard to splitting up the case into numerous points in order to get this court to decide the whole matter in dispute in advance, apply with increased force to this case. Without further comment on this, it is sufficient to say that in the present case, as in that, one of the questions, relating to the power of the commissioner to administer the oath in this case, if he had attempted to do it, is we think pertinent and should be answered. That question, the fifth one of the series certified to us, is as follows: "Has a commissioner of the United States Circuit Court authority to administer oaths and make certificates for the purposes for which the certificate set out in the indictment is alleged to have been made and used?

Of course, if he had no authority to administer the oath, it was a wholly useless paper in which he made the certificate that the oath had been taken, and whether there is any law punishing him for that offence we are not informed, nor are we required by any of these certificates of division in opinion to inquire.

With regard to the question here asked us, it is sufficient to say that, as in regard to the power of notaries public to administer oaths, presented by the preceding case referred to, we have been unable to find any authority for a Circuit Court commissioner to take such affidavits or to administer such oaths.

The question is, therefore, answered in the negative.

PALMER *v.* ARTHUR.

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

No. 302. Submitted April 26, 1889. — Decided May 13, 1889.

It appearing that the alleged imperfections in the plaintiff's petition were either obviated by subsequent pleadings or cured by the verdict, and

that this writ of error was sued out for purposes of delay, the court affirms the judgment below with ten per cent damages, interest and costs.

The case is stated in the opinion.

Mr. Walter Evans for plaintiff in error.

Mr. William Lindsay for defendant in error.

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

This is an action at law to recover upon an alleged breach of contract to pay for certain staves made or procured to be made by defendant in error for plaintiff in error, to be culled, branded and received by the latter on the Cumberland River and its tributaries, in the counties of Knox and Bell, in the State of Kentucky.

The action was commenced in the Circuit Court of Whitley County, and removed into the Circuit Court of the United States for the District of Kentucky.

The petition of Arthur, the plaintiff below, (omitting the application for attachment,) was as follows:

"The plaintiff, E. F. Arthur, states that before the 30th of May, 1884, he had a contract with the defendant, L. M. Palmer, to make and have made for defendant an unlimited number of staves on the Cumberland River and its tributaries, in the counties of Knox and Bell, State of Kentucky, for which defendant was to pay plaintiff $14 for each 1000 that were 44 inches in length on the creeks and $15 per 1000 on the river, $9 per 1000 for 34-inch staves on the river and $8 per 1000 on the creeks; that on the 30th of May, 1884, plaintiff had made under the contract 800,000 staves, at which time defendant did not wish any more staves made, and plaintiff and defendant agreed that no more were to be made at the time, and defendant was to pay plaintiff for the staves made, and paid plaintiff at the time $4017.78 for 286,000 of the staves, and was to pay plaintiff for the remainder, 514,000 staves, on the 1st of November, 1884. Plaintiff states that of

514,000 staves not paid for and that had been made, 489,000 were 44-inch staves, for which defendant was to pay $14 per thousand, and 25,000 34-inch staves, for which defendant was to pay $8 per thousand; that there was due and owing the plaintiff by the defendant on the 1st of November, 1884:

For 489,000 at $14 per thousand . . . $6846,

For 25,000 at $8 per thousand 200,

making due and owing the plaintiff by the defendant for said staves $7046. Plaintiff states that Williamsburg, Ky., is the place where defendant carries on the business of manufacturing staves, etc., and where his authorized agents were located; that at the time the money was due on said staves he called on the agent at his place of doing business for the money, (the defendant being a non-resident of and absent from the State of Kentucky,) and he failed and refused to pay the same or any part thereof; same still due and owing the plaintiff by the defendant, with interest from the 1st of November, 1884. Plaintiff states that all of said staves have been culled and branded by the defendant except about 50,000, which it was the duty of the defendant to have culled and branded. Wherefore plaintiff asks judgment for said sum of seven thousand and forty-six dollars, his cost, interest, and all proper relief."

To this petition, Palmer, the defendant below, filed an answer, which conceded the existence of the contract, but averred that it was not fully nor accurately set forth by plaintiff, and stated various alleged differences as to the size and character of the staves, and the price to be paid therefor, asserting also that "all upon inspection were to come up to contract requirement," and that "the said contract related to and embraced only such staves as might be made by the plaintiff himself, or which might be made by others and paid for by plaintiff." It admitted that over 295,000 staves were received and paid for, but denied that defendant had agreed to pay for 514,000 other staves, or that he had culled or branded any other staves than those paid for May 30, 1884, since which date he had "not accepted nor has he had an opportunity to accept any more staves from the plaintiff, but he has also

accepted and received from persons making and owning the staves within the territory covered by the agreement with plaintiff about 13,000 staves, and has, with the plaintiff's consent, paid to the persons so making or owning such staves (and who were in nowise parties to the contract between plaintiff and defendant) the full price thereof," giving items aggregating $153.69.

To this answer plaintiff replied, averring, among other things, "that prior to the 30th of May, 1884, defendant's agents had inspected, culled and branded the 800,000 staves mentioned in the petition, except about 50,000."

The defendant rejoined to the reply, saying, that some time before May 30, 1884, he informed plaintiff "the contract with him would then be terminated, but that defendant would at once proceed to take up and inspect and pay for enough of the staves made to amount to the sum plaintiff then needed, viz., about $4000, and the remainder of the staves already made could be inspected, and, if up to contract, taken later. The defendant authorized such an arrangement, and it was agreed upon between and by the parties." But defendant further averred that plaintiff refused to permit the remaining staves to be inspected. Whereupon plaintiff surrejoined, denying that he refused to allow the staves to be inspected, and also that "there was to be any other or further inspection of the staves by defendant or his agents after they had been once culled and branded."

The cause having come on for trial and a jury having been empanelled to try the issue joined, the defendant, after the evidence was all in, amended his answer by averring that the staves in controversy were owned by parties other than plaintiff, which amended answer was "traversed of record by the plaintiff." The jury found for the plaintiff the sum of $6094 with interest from November 1st, 1884, and judgment was entered upon said verdict. No motion for a new trial or in arrest was made, nor was any bill of exceptions taken. From the judgment the pending writ of error was prosecuted to this court and errors assigned as follows: That the Circuit Court erred —

"1st. In rendering judgment for the plaintiff for any sum whatever.

"2d. In not rendering judgment on the trial for the said Lowell M. Palmer instead of for said E. F. Arthur.

"3d. In not adjudging that the plaintiff in error on the pleadings was entitled to a dismissal of the action and a judgment for his costs."

From the petition it appears that plaintiff sued upon a contract with defendant to make or cause to be made for him within Knox and Bell counties an unlimited number of staves of specified dimensions, to be paid for at stipulated prices; that on the 30th of May, 1884, plaintiff had made under the contract 800,000 staves, at which time the parties agreed the manufacture should cease, and defendant paid at once for 286,000 of the staves, and agreed to pay for the remainder, viz., 514,000, on the 1st day of the following November, but did not do so, and plaintiff claimed to recover as of November 1, 1884, $6846 for 489,000 staves at $14 per thousand, and $200 for 25,000 staves at $8 per thousand, and that of the 514,000 staves all had been culled and branded by defendant except 50,000. The defendant disputed the terms of the adjustment of May 30th and various other of the facts alleged by plaintiff, and insisted he was not bound to take any more staves than he had paid for without an inspection, which he had not been allowed to make. The verdict of the jury excluded the contract price of the 50,000 unbranded staves, and the price of the 13,000 staves, which defendant claimed to have paid others for, with the consent of plaintiff; disposed of the issue as to ownership; and necessarily determined the number of staves over and above what had been paid for May 30, 1884, and the number which had been culled and branded by the defendant, and that the agreement between the parties was such that the culling and branding amounted to an acceptance of the staves so culled and branded, the delivery and acceptance being complete without any further inspection. The objections to the petition amount simply to asserting that the ground of action was imperfectly and inaccurately stated; and whatever defects, imperfections or omissions there may have been, if not obviated

by the subsequent pleadings, were cured by the verdict, which must be assumed to have proceeded upon proof of facts which justified it; and, as it is apparent that the writ of error could only have been sued out for purposes of delay, the judgment is

Affirmed with ten per cent damages, interest and costs.

SPALDING *v.* MANASSE.
SAME *v.* SAME.
SAME *v.* VANACKER.
SAME *v.* SAME.
SAME *v.* YANADA.
SAME *v.* FARWELL.
SAME *v.* COHN.

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

Nos. 278, 279, 280, 281, 282, 284, 285. Argued April 25, 1889. — Decided May 13, 1889.

No error can be examined in the rulings of the court at the trial of a cause by the court without a jury by agreement of parties, if there is no allegation in the record that the stipulation was in writing, as required by the statute. *Bond* v. *Dustin*, 112 U. S. 604, and *Dundee Mortgage Co.* v. *Hughes*, 124 U. S. 157, followed.

THESE were suits against a collector of customs to recover back duties paid under protest. Judgment in each case for plaintiff, to which defendant sued out a writ of error. The case is stated in the opinion.

Mr. Assistant Attorney General Maury for plaintiff in error in each case.

Mr. Percy L. Shuman for defendants in error.

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

Counsel for Parties.

All of these cases were tried by the court without a jury, by agreement of the parties, as alleged in the record; but there is no allegation that the stipulation was in writing, as required by the statute; and, under the ruling in *Bond* v. *Dustin*, 112 U. S. 604, and *Dundee Mortgage Company* v. *Hughes*, 124 U. S. 157, no error can be examined in the rulings of the court at the trial. We can only inquire whether the declarations were respectively sufficient to sustain the judgments. As there appears to be no error in this regard, the judgments are severally

Affirmed.

ABENDROTH *v.* VAN DOLSEN.

ERROR TO THE CITY COURT OF NEW YORK.

No. 229. Argued April 12, 13, 1889. — Decided May 13, 1889.

The connection of the plaintiff in error with the partnership of Griffith & Wundram was not a matter in issue in the proceedings in bankruptcy against that firm.

An adjudication of the bankruptcy of a firm, and of the members in whose name the firm was doing business, in a bankrupt proceeding affecting them alone, to which a special partner was not a party, does not estop a copartnership creditor from setting up the liability of such special partner, imposed upon him by the statute, for non-compliance with its provisions.

A special partner in a partnership, who is not a party to proceedings in bankruptcy against the partnership and the general members of it, is not entitled to the stay of proceedings provided for in Rev. Stat. § 5118, until the question of the debtor's discharge shall have been determined.

A discharge of two general partners in bankruptcy cannot be set up in favor of a special partner in an action against the three as general partners on the ground that the special partner has made himself liable as a general partner.

THE case is stated in the opinion.

Mr. William H. Arnoux for plaintiff in error.

Mr. Carlisle Norwood, Jr., for defendants in error.

Opinion of the Court.

MR. JUSTICE LAMAR delivered the opinion of the court.

This writ of error brings before the court for review a judgment of the Court of Common Pleas for the city and county of New York, affirming, on appeal, a judgment of the City Court of New York. The former is, under the New York Code of Civil Procedure, the highest court of the State to which a decision of the latter court may, as a matter of right, be carried by appeal for reversal or affirmance. The Federal question involved relates to the construction of the Bankrupt Act of March 2, 1867.

On the 18th of June, 1877, the defendants in error filed in the Marine Court of the city of New York, now known as the City Court of New York, a complaint against William P. Abendroth, John Griffith and George W. Wundram, in which they alleged "that at the times hereinafter mentioned the defendants were copartners in business, carrying on such business in the city of New York under the firm name and style of Griffith & Wundram; that on or about the 7th day of August, 1872, at the city of New York, the said defendants, in and under their said firm name of Griffith & Wundram, made their certain promissory note in writing, bearing date on that day, whereby they promised, three months after the date thereof, to pay to the order of Van Dolsen & Arnott, these plaintiffs, the sum of nine hundred $\frac{32}{100}$ dollars, and thereupon delivered said note to these plaintiffs; that plaintiffs are the holders and owners of said note, and the said note is wholly unpaid; wherefore plaintiffs demand judgment against the defendants for the sum of nine hundred $\frac{32}{100}$ dollars, with interest from the 10th day of November, 1872, and for the costs of this action."

The defendant Abendroth alone appeared and filed his answer, which, after denying the partnership as alleged in the complaint, set up as a further defence that it was a limited partnership under the name of Griffith & Wundram, of which Griffith and Wundram were the general partners and he a special partner only, and as such special partner entitled, under the statutes of New York, to exemption from liability for engagements of the firm as a general partner.

For a third defence he pleaded, in bar and abatement, that, prior to the commencement of the suit, certain bankruptcy proceedings had been instituted in the District Court of the United States for the Southern District of New York, in bankruptcy, wherein an adjudication of bankruptcy of the said firm of Griffith & Wundram was duly rendered by said court, and wherein it was also declared and adjudged that said John Griffith and George W. Wundram, the bankrupts in said bankruptcy, were the general partners, and the defendant, Abendroth, was the special partner thereof.

The case was tried before a jury, which, under the direction of the court, found in favor of the plaintiffs for the amount claimed, with interest, and judgment was entered accordingly. Upon appeal the judgment was affirmed. To reverse that affirmance this writ of error was sued out.

From the evidence in this case it appears that, on the 23d of December, 1870, Abendroth, Griffith and Wundram formed a limited partnership under the statutes of New York, under the firm name of Griffith & Wundram, in which Griffith and Wundram were designated the general partners and Abendroth the special partner. All the requirements of the statute, as to the signing and publication of the articles, filing of the certificate and affidavit and publishing the same, were strictly complied with, except that the capital contributed by the special partner was not paid in cash, as stated in the affidavit, but by a post-dated check payable eight days after its execution, and cashed in ten days from its date, the day after the firm went into business. Such misstatement in the affidavit was held by the Court of Appeals of that State to render the special partner liable as a general partner for the engagements of the firm, under the following provision of the statute authorizing the formation of limited partnerships:

"And if any false statement be made in such certificate or affidavit all the persons interested in such partnership shall be liable for all the engagements thereof as general partners."

On the 30th of November, 1872, Wundram presented his petition in bankruptcy to the District Court of the United States for the Southern District of New York, setting forth

that he was a member of the copartnership consisting of himself and John Griffith, carrying on business under the firm name of Griffith & Wundram within that judicial district; that the members of said copartnership were, jointly and severally, unable to pay their debts; and with the other averments usual in such petitions. The usual schedules were annexed to the petition. No mention was made of Abendroth in the petition, but in the schedule he was stated to be one of the creditors of the firm, as were also the defendants in error here, Van Dolsen & Arnott. Upon this petition an order was issued requiring Griffith to show cause, etc. It contained no reference to Abendroth, and was not directed to him nor served upon him. After due proof of service on Griffith, the adjudication in bankruptcy was made in these words: "It is adjudged that John Griffith and George W. Wundram and the copartnership of Griffith & Wundram became bankrupt . . . before the filing of the petition, and they are therefore declared and adjudged bankrupts accordingly."

It is proper to note here that in this adjudication there is no reference to Abendroth as a partner, either general or special; and no designation of the firm as a limited partnership. The usual warrant of seizure of the estate of the bankrupt, the assignment of assets to the register in bankruptcy, the notice to creditors, and the first meeting of the creditors, all followed in the regular order of such proceedings. Abendroth was chosen by the creditors as assignee in bankruptcy, and accepted the office, with the approval of the judge. Upon the face of the return it appears that Van Dolsen and Arnott did not take any part in the selection of the assignee. At the second meeting of the creditors Joseph McDonald & Co., creditors of the bankrupts, presented a petition to the register in bankruptcy, setting forth that two days before the filing of the petition in bankruptcy certain of the creditors had agreed to sell their claims to Abendroth at twenty-five cents on the dollar, had afterwards proved their debts in bankruptcy, and had then assigned the same to Abendroth. They asked that Abendroth should not receive any dividend upon said assigned claims, and that the proof of them should be expunged, and the claims disallowed.

Opinion of the Court.

An order was made for a hearing on the petition before the register, five days' notice being first given to the creditors whose claims were thus opposed. Van Dolsen and Arnott were not among such creditors, and it is not contended that they received the notice above mentioned. The register having heard the case, made his report to the bankruptcy court, in which he presented the questions that came before him; among others, whether the debts assigned to Abendroth should be disallowed because he was a special partner in the bankruptcy firm, the petitioners relying upon a provision of the statutes of New York, in relation to limited partnerships, that no special partner, except in particular cases, therein specified, could be allowed to claim as creditor, in case of the bankruptcy of the partnership, until the claims of all the other creditors of the partnership should be satisfied. The register reported his opinion to be that, in respect to these assigned claims, Abendroth stood in the shoes of his assignors, and was a creditor as their representative, and in no other character. Upon this report of the register, the judge of the District Court adjudged that Abendroth was entitled to receive a dividend on the assigned claims, and that they ought not to be expunged or diminished. It appears that Abendroth and McDonald & Co. have both proved debts, but that Van Dolsen and Arnott were not among the creditors making such proofs.

The counsel for plaintiff in error does not contend that this court should disregard the construction which the courts of New York have given to the statutes of that State authorizing the formation of limited partnerships; nor does he deny that Abendroth incurred, at the formation of the partnership, a statutory liability for the debts of the firm, by the misstatement in the affidavit respecting the time and manner of putting in his capital as a special partner. But he contends that the plaintiffs are estopped from setting up this liability by the proceedings in bankruptcy, above recited, which he claims had the effect of an adjudication binding upon them that no such liability existed. This contention involves two propositions: first, that as Wundram's petition against Griffith alleged that the two, Griffith and Wundram, composed the firm, it clearly

meant that they were all of the copartners; and that accordingly the adjudication must be held to have been an adjudication of the fact that Abendroth was not a member of the firm.

We have seen that through the entire proceedings in bankruptcy, from the inception to the adjudication, inclusive, nothing appears affirmatively or negatively with regard to Abendroth's membership of the firm, no reference to him of any kind in the adjudication, and nothing in regard to him, except as a creditor in the schedule annexed to the petition. We concur in the opinion of the court below that the connection of Abendroth with the partnership was not a matter in issue, nor a point in controversy upon the determination of which the adjudication was rendered.

An adjudication in bankruptcy partakes in part of the nature of a judgment *in rem*, and in part of the nature of a judgment *in personam*. With regard to the estate of the bankrupt debtor, which has been by the court's warrant of seizure, or by the surrender of the debtor, brought within the possession and jurisdiction of the court, its orders, decrees, and judgments as to the right and title to the property, or as to the disposition of it among the parties interested, are binding upon all persons and in every court. As a determination of the legal status of the bankrupt, or of the relations of the creditors to both, its judgment is conclusive in all courts where it is pleaded. But as a determination of the legal status of a person not a bankrupt, and who was not a party to the proceeding, and whose status as a bankrupt has never been a question before the court, it unquestionably is not binding upon any person not a party to such proceeding. In the cases cited by the counsel for plaintiff in error, the adjudication either determined the legal status of the bankrupt debtor or related to the bankrupt estate brought within the jurisdiction of the court. In this case the petition neither asserted nor denied that Abendroth was a member of the bankrupt firm. No process was served upon him to show whether he was or was not such member; nor did he himself voluntarily appear and petition to be declared the one or the other.

In our opinion an adjudication of the bankruptcy of a firm,

and of the members in whose name the firm was doing business, in a bankrupt proceeding affecting them alone, to which a special partner was not a party, does not estop a copartnership creditor from setting up the liability of such special partner imposed upon him by the statute for non-compliance with its provisions.

The second ground involved in the contention of the plaintiff in error is, that there was, in the subsequent proceedings before the register, an express adjudication that Abendroth was a special partner and not a general partner; and that this adjudication was binding upon all the creditors, including the plaintiffs below in this action. We think this contention untenable. The question before the register in that proceeding was, whether the proof of the claims referred to should be expunged, and the dividends upon them disallowed to Abendroth. In his report to the court he expresses his opinion to be that neither the fact that Abendroth was the assignee in bankruptcy, nor the fact that he was a special partner in the firm, precluded him from drawing his share of dividends in the claims referred to. This was certainly not an adjudication by the court that he was a special partner. The district judge in the order made by him did not pass on any question discussed in the report of the register, except his conclusion that the claims assigned to Abendroth, as aforesaid, ought not to be expunged or diminished, and that he was entitled to the dividends on them; and he so ordered. The order, relating as it did exclusively to a question as to the distribution of the assets of the firm, contained no feature of an adjudication with respect to Abendroth's copartnership. Indeed, it is manifest from an examination of the register's report that he did not consider that the question as to whether Abendroth was or was not a special partner had any material bearing on the question as to how the money in the hands of the assignee should be distributed among the creditors. In either case he considered that the claim should not be expunged or diminished. But even if, for the sake of argument, we concede that this last order of the judge was in effect an adjudication that Abendroth was a special partner, there is nothing in the judg-

ment of the court below which denies its validity. The latter judgment also holds Abendroth to be a special partner, and as such liable, under the statute, in the same manner that he would be if he were a general partner. This is shown in the opinion of the court, which very properly holds that the statute, in fixing this liability on account of non-compliance with its provisions, does not change his special partnership into a general one, but simply makes him liable as a general partner to creditors. All his relations to his copartners, and their obligations growing out of their relation to him as a special partner, remain unimpaired. If before the firm became bankrupt he had been, under his statutory liability, forced to pay a bill or note, or other general debt of the firm, he would have been entitled to indemnity from his partners, and could have recovered back from them the amount, with legal interest thereon. The view presented by the Court of Appeals of New York upon this point, in the case of *Durant* v. *Abendroth*, 97 New York, 132, 144, is clear and satisfactory:

"Notwithstanding the erroneous statement in the affidavit as to the payment of the capital, the partnership was, in form, a limited partnership, and subject to all the rules applicable to such partnerships. If it had undertaken to make an assignment with preferences, such assignment could not have been sustained on the ground of the violation of the statute. That violation could be taken advantage of only by creditors, and its consequence simply was to give them recourse against the special partner personally, as if he had been a general partner."

Another ground relied on for reversal is, that the pendency of the proceedings in bankruptcy is a good plea in abatement of this action. Section 5106 of the Revised Statutes, cited in support of this proposition, formerly § 21 of the act of March 2, 1867, c. 176, 14 Stat. 526, provides that "no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the deter-

mination of the court in bankruptcy on the question of the discharge."

It is only necessary to say that Abendroth was in no sense the bankrupt in those proceedings, nor was he endeavoring to obtain his discharge as a bankrupt debtor in any proceedings in bankruptcy pending at the time this action was commenced. He is not entitled, therefore, to any stay of proceedings which the statute, by its own express terms, provides exclusively for the protection of the bankrupt.

The only remaining point relied on by plaintiff in error as a ground for reversal of the judgment below is, that the defendants were sued in the action as general partners, and the judgment in favor of the plaintiffs determined that they were general partners; and that the adjudication in bankruptcy of Griffith and Wundram was a judgment against the two partners, which is a bar to any action subsequently brought by the creditor against the two defendants as such general partners. Against this view there is, we think, an insuperable objection. By § 5118 of the Revised Statutes, formerly § 33 of the act of March 2, 1867, c. 176, 14 Stat. 533, the rule of the common law, as declared by this court in *Mason* v. *Eldred*, 6 Wall. 231, that a judgment against one upon a contract, merely joint, of several persons, bars an action against the others on the same contract, is rendered entirely inapplicable to adjudications in bankruptcy. That section provides: "No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise."

If the discharge of the two bankrupt partners, which is the final judgment in the proceedings, cannot estop the creditor from afterwards setting up the liability of the third partner for the joint debt, clearly the other and previous adjudication in the course of the proceedings cannot be held to have that effect. Though the action in the court below was brought against the three defendants, the jury was directed by the court to render its verdict against Abendroth alone, and the judgment was entered up against him alone, thus fully recognizing the

validity and force of the adjudication of bankruptcy of the other two partners. This form of action for enforcing the liability of a special partner, imposed by the statute of New York, has been decided by the New York Court of Appeals to be the proper one in the cases of *Durant* v. *Abendroth*, 97 N. Y. 132; *Sharp* v. *Hutchinson*, 100 N. Y. 533, and *Durant* v. *Abendroth*, 69 N. Y. 148. We think these decisions are correct.

The judgment of the court below is *Affirmed.*

Mr. Justice Blatchford took no part in the decision of this case.

DOUGLASS *v.* LEWIS.

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

No. 226. Argued April 3, 1889.—Decided May 13, 1889.

In construing a covenant in a deed, the words are to be taken most strongly against the party using them; but, in construing a covenant created by statute out of language of grant in a deed, and in derogation of the common law, the words should be construed strictly.

Covenants of seisin and for quiet enjoyment, created by statute from the use of certain words in a deed, are operative to their full extent only when the parties have failed to insert covenants in these respects in the deed, and may be controlled and limited in their operation by express covenants in that regard.

When a general covenant of warranty is inserted in a deed, a statutory covenant of seisin is not to be implied.

The case, as stated by the court in its opinion, was as follows:

Douglass brought his action in the District Court of the Second Judicial District of the Territory of New Mexico, September 11, 1883, for the breach of an alleged covenant of seisin in a deed made by Lewis and his wife to him, purporting to convey the title to one hundred and sixty acres of land.

Statement of the Case.

The petition averred that the defendants, by their deed of May 13, 1882, "did convey and warrant to the plaintiff, his heirs and assigns, in fee simple, certain real estate," describing it, and then continued, "and the defendants did by their said deed, for themselves, their heirs and personal representatives, covenant with the plaintiff, his heirs and assigns, amongst other things, that at the time of the making, ensealing and delivery of said deed, and 'at the time of the execution of said conveyance,' they, the said defendants, were lawfully seized of an indefeasible estate, and in possession of a title in fee simple in and to the said property, and then had good right and full power to convey the same. Nevertheless, plaintiff avers that the said tract of land in said deed described, and by said defendants bargained and sold to said plaintiff, was not the property of said defendants, and at the time of the making and delivery of said deed they, the said defendants, were not lawfully seized of an indefeasible estate in fee simple in and to said real estate, nor had they then good right and full power to convey the same, but, on the contrary thereof, the government of the United States had at the time of the making and delivery of said deed, and still has, lawful right and title to said real estate; and plaintiff avers that in consideration of the conveyance and sale of said lands in said deed described and set forth, he paid to said defendants the sum of five thousand three hundred and thirty-three dollars and thirty-three cents ($5333.33); that he, said plaintiff, has further expended and laid out large sums of money in building houses upon and improving said land, to wit, four thousand dollars ($4000); and so the plaintiff says that they, said defendants, have not kept the said covenants according to the true intent and meaning of said deed, and according to the statute in such case made and provided, but have broken the same, to the damage of plaintiff in the sum of ten thousand dollars ($10,000)."

Profert of the deed was made by the declaration, and defendants filed a demurrer, October 1, 1883, craving oyer of the condition of the said deed and covenant, which being read and heard, they insisted that the declaration and the matters

therein contained, etc., were insufficient in law. Pleas were also filed alleging that the deed was not defendants' deed; denying that the defendants covenanted with the plaintiff that they were lawfully seized; and averring that it was not true that they had not kept their covenants. Subsequently, and on the 19th day of October, an amended special demurrer to the declaration was filed, averring "that the said deed upon oyer contains no such covenant as the one alleged in the said declaration of the plaintiff — that is to say, that the said deed having some express covenants therein contained, and among which is not the covenant declared upon in the said plaintiff's declaration, to wit, no covenant of seisin, or 'that the said covenantors were at the time of making the said deed seized of an indefeasible title in fee simple' to the lands conveyed, and inasmuch as the parties have fully expressed their intention and agreements at the time of making the said deed by the express covenants therein contained, there can be none added by construction or otherwise; and, further, defendants say the said declaration alleges no eviction, and therefore he, the said plaintiff, ought not to have and maintain his said action," etc.

This, upon argument, was overruled November 3, 1883, the district judge filing his opinion thereon January 8, 1884, which thus concludes: "In the case at bar I am of opinion that the express covenant of warranty is independent of the covenant of seisin implied by the statute, and that an action may be maintained upon the latter, and can only be met by plea and proof of good title in the grantor at the time of the execution of the deed."

On the 16th of May, 1884, the defendants filed two pleas, alleging, in the first, that at the time of making the deed the grantors were seized and possessed of the said real estate, with full power and authority to convey according to the effect of the deed; and, in the second, that at the time of making the said deed the grantors "were lawfully seized of an indefeasible estate and in possession of a title in fee simple in and to the said real property, and then had good right and full power to convey the same" according to the form and effect of said

deed. The plaintiff demurred to the first of these pleas, the court sustained the demurrer, and the case went to trial on the issue made up on the second plea. Evidence was given on behalf of the plaintiff tending to show that the United States had assumed ownership and control over all the land in controversy and had disposed of a portion of the same, and that the defendants claimed that the land had been granted by Spain or Mexico to one Sandoval, who devised it to one of his relatives, from whom it had descended to the grantor of defendant Lewis, but that the claim of Sandoval had never been presented to any tribunal or officer of the United States for adjudication. All the documentary evidences of title offered on defendants' behalf, except the will of Sandoval and papers relating thereto, bore date in 1879 or subsequent thereto. The oral testimony tended to show that Sandoval and his descendants were in possession of the land for a number of years, probably from the date of the treaty of Guadalupe Hidalgo.

Plaintiff admitted that he was put into possession of the land and had never been disturbed in the possession, and, in effect, that he had never made demand for restoration of the consideration money or what might have been expended for improvements, nor had any demand been made on him to surrender the land prior to the commencement of the suit, nor had he offered to rescind or to restore the land. The court refused to admit the muniments of title relied on by the defendants, and charged the jury as follows: "There is no question of fact in this case for you to pass upon. There are only questions of law which it is the duty of the court to pass upon, and the entire responsibility of passing upon such questions is with the court. The court instructs the jury that it is their duty, under the law and the evidence in this case, to find a verdict for the plaintiff and assess his damages at the sum of $5333.33, being the amount of the money paid by him for the land in question." The jury returned a verdict accordingly, and motions for a new trial and in arrest of judgment were made by the defendants and severally overruled, and judgment rendered on the verdict. The case was carried by

appeal to the Supreme Court of the Territory, which court reversed the judgment of the District Court and dismissed the cause, from which judgment of the Supreme Court the pending writ of error was prosecuted. The Supreme Court of the Territory held that the effect of the introduction into the deed of an express covenant of warranty is to deny to the purchaser the benefit of the statutory covenant of seisin and said: "As there is no pretence in this case of an eviction or any claim whatever of a breach of the covenant of warranty, it follows that the action cannot be maintained, and that it was error in the court below to order a verdict for the plaintiff, and in overruling the motion in arrest of judgment."

Mr. J. H. McGowan (with whom was *Mr. C. W. Holcomb* on the brief) for plaintiff in error.

I. The covenant of warranty which is found written in the deed does not exclude the statutory covenants. These latter must be considered as express covenants, having the same effect as though written out in full in the instrument of conveyance. *Alexander* v. *Schreiber*, 10 Missouri, 460; *Browning* v. *Wright*, 10 Bos. & Pull. 13; *Howell* v. *Richards*, 11 East, 633; *Bender* v. *Fromberger*, 4 Dall. 436; *Funk* v. *Bechtoll's Executors*, 11 S. & R. 109; *Brown* v. *Tomlinson*, 2 Greene (Iowa), 525; *Hesse* v. *Stevenson*, 3 Bos. & Pull. 565; *Gainsford* v. *Griffith*, 1 Saunders, 51; *Smith* v. *Compton*, 3 B. & Ad. 189; *Roebuck* v. *Duprey*, 2 Alabama, 535; *Gates* v. *Caldwell*, 7 Mass. 68; *Carver* v. *Louthain*, 38 Indiana, 530; *Kent* v. *Cantral*, 44 Indiana, 452; *Bush* v. *Person*, 18 How. 82.

II. The statutory covenant of seisin is a general covenant, unlimited by any restrictive words found in the second statutory covenant. *Gratz* v. *Ewalt*, 2 Binney, 95; *Alexander* v. *Schreiber*, 10 Missouri, 460; *Browning* v. *Wright*, 2 Bos. & Pull. 13; *Gainsford* v. *Griffith*, 1 Saunders, 51; *Duvall* v. *Craig*, 2 Wheat. 45; *Peters* v. *Grubb*, 21 Penn. St. 455; *Rowe* v. *Heath*, 23 Texas, 614; *Sumner* v. *Williams*, 8 Mass. 162; *S. C.* 5 Am. Dec. 83.

III. The covenant of seisin is broken, if at all, as soon as it is made. Rawle on Covenants, § 205, and cases cited; *Lot* v.

Thomas, 1 Pennington (2 N. J. L.) 386; *King* v. *Gilson*, 32 Illinois, 348; *S. C.* 83 Am. Dec. 269; *Fitzhugh* v. *Croghan*, 2 J. J. Marsh. 429; *S. C.* 19 Am. Dec. 139; *Ross* v. *Turner*, 6 Arkansas, 132; *S. C.* 44 Am. Dec. 531; *Abbott* v. *Allen*, 14 Johns. 247; *Moore* v. *Merrill*, 17 N. H. 75; *S. C.* 43 Am. Dec. 593.

IV. The plaintiff is only required to declare its breach, and need aver neither eviction nor damages. *Pollard* v. *Dwight*, 4 Cranch, 421; *Mitchell* v. *Hazen*, 4 Connecticut, 495; *S. C.* 10 Am. Dec. 169; *Hamilton* v. *Wilson*, 4 Johns. 72; *S. C.* 4 Am. Dec. 253; *Lot* v. *Thomas*, *ubi supra*; *Pringle* v. *Witten's Executor*, 1 Bay, 256; *S. C.* 1 Am. Dec. 612; *Share* v. *Anderson*, 7 S. & R. 43; *S. C.* 10 Am. Dec. 421; *Fitzhugh* v. *Croghan*, 2 J. J. Marsh. 429; *Dickson* v. *Désiré's Administrator*, 23 Missouri, 151.

V. The burden of proof is on the defendant. *Swafford* v. *Whipple*, 3 Greene (Iowa), 261; *S. C.* 54 Am. Dec. 498; *Ayer* v. *Austin*, 6 Pick. 225; *Abbott* v. *Allen*, 14 Johns. 248; *Schofield* v. *Iowa Homestead Co.*, 32 Iowa, 317; *Jerald* v. *Elly*, 51 Iowa, 321; *Ingalls* v. *Eaton*, 25 Michigan, 32; *Marston* v. *Hobbs*, 2 Mass. 433; *S. C.* 3 Am. Dec. 61.

VI. The measure of damages is the purchase money and interest thereon. *Staats* v. *Ten Eyck*, 3 Caines, 111; *S. C.* 2 Am. Dec. 254; *Bender* v. *Fromberger*, 4 Dall. 436; *King* v. *Gilson*, 32 Illinois, 348; *Swafford* v. *Whipple*, *ubi supra*.

Mr. Samuel Shellabarger (with whom was *Mr. J. M. Wilson* on the brief) for defendants in error.

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

Assuming that defendants in error failed to sustain their plea that they "were lawfully seized of an indefeasible estate, and in possession of a title in fee simple in and to the said real property, and then had good right and full power to convey the same," counsel for plaintiff in error state their position "in the following propositions: 1. The covenant of warranty which is found written in the deed does not exclude the statutory covenants; these latter must be considered as express

covenants, having the same effect as though written out in full in the instrument of conveyance. 2. The statutory covenant of seisin is a general covenant, unlimited by any restrictive words found in the second statutory covenant. 3. The covenant of seisin is broken, if at all, as soon as it is made. 4. The plaintiff is only required to declare its breach, and need neither aver eviction or damages. 5. The burden of proof is on defendant. 6. The measure of damages is the purchase money and interest."

The defendants in error by their deed entered into a general covenant of warranty, but it is claimed that in virtue of the statute they are to be held in addition to a general covenant of seisin, a limited covenant as to incumbrances, and a general covenant of further assurance.

The statute relied on is as follows:

"The words 'bargained and sold,' or words to the same effect, in all conveyances of hereditary real estate, unless restricted in express terms on the part of the person conveying the same, himself and his heirs, to the person to whom the property is conveyed, his heirs and assignees, shall be limited to the following effect: *First.* That the grantor, at the time of the execution of said conveyance, is possessed of an irrevocable possession in fee simple to the property so conveyed. *Second.* That the said real estate, at the time of the execution of said conveyance, is free from all incumbrance made or suffered to be made by the grantor, or by any person claiming the same under him. *Third.* For the greater security of the person, his heirs and assignees, to whom said real estate is conveyed by the grantor and his heirs, suits may be instituted the same as if the conditions were stipulated in the said conveyance." Compiled Laws, New Mexico, 1884, § 2750, p. 1306.

The language used is somewhat ambiguous, arising, as the Supreme Court of the Territory informs us, from the section having been originally enacted in Spanish from English and then retranslated; but we are content with the view of that court that "hereditary real estate" means real estate of inheritance, and "possessed of an irrevocable possession in fee simple" means seized of an indefeasible estate in fee simple.

At common law, in the transfer of estates of freehold by deed, a warranty was implied from the word of feoffment, *dedi*, and from no other word, and from words of bargain and sale merely no covenant was implied in any case.

In 1707, the statute of 6 Anne, c. 35 was enacted, of which the 30th section is as follows:

"In all deeds of bargain and sale hereafter enrolled in pursuance of this act, whereby any estate of inheritance in fee simple is limited to the bargainee and his heirs, the words *grant*, *bargain and sell* shall amount to, and be construed and adjudged in all courts of judicature, to be express covenants to the bargainee and his heirs and assigns, from the bargainor for himself, his heirs, executors and administrators, that the bargainor, notwithstanding any act done by him, was at the time of the execution of such deed seized of the hereditaments and premises thereby granted, bargained and sold, of an indefeasible estate in fee simple, free from all incumbrances, (rents and services due to the lord of the fee only excepted,) and for quiet enjoyment thereof against the bargainor, his heirs and assigns, and all claiming under him, and also for further assurance thereof to be made by the bargainor, his heirs and assigns, and all claiming under him, unless the same shall be restrained and limited by express particular words contained in such deed; and that the bargainee, his heirs, executors, administrators and assigns, respectively, shall and may, in any action to be brought, assign a breach or breaches thereupon, as they might do in case such covenants were expressly inserted in such bargain and sale."

And in 1715, an act was passed by the colony of Pennsylvania, entitled "An act for acknowledging and recording of deeds," of which the 6th section declared that:

"All deeds to be recorded in pursuance of this act, whereby any estate of inheritance in fee simple shall hereafter be limited to the grantee and his heirs, the words *grant*, *bargain*, *sell*, shall be adjudged an express covenant to the grantee, his heirs and assigns, to wit, that the grantor was seized of an indefeasible estate in fee simple, freed from incumbrances done or suffered from the grantor (except the rents and services due

to the lord of the fee), as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed, and that the grantee, his heirs, executors, administrators and assigns, may in any action assign breaches as if such covenants were expressly inserted."

In *Gratz* v. *Ewalt*, 2 Binney, 95, 99, the construction of this statute was carefully considered, and Tilghman, C. J., in delivering the opinion, said: "The meaning is not clearly expressed; but I take it to be a covenant . . . that the estate was indefeasible as to any act of the grantor. For if it was intended that the covenant should be that the grantor was seized of an estate absolutely indefeasible, it was improper to add the subsequent words 'freed from incumbrance done or suffered by him.' . . . The words 'seized of an indefeasible estate in fee simple' are to be considered, therefore, not as standing alone, but in connection with the words next following, 'freed from incumbrances done or suffered from the grantor.' I am the more convinced that this was the intention of the legislature, by comparing the expressions in this act with the 30th section of the statute of 6 *Anne*, c. 35, which contains a provision on the same subject, and was evidently in the eye of the persons who framed our law. The *British* statute makes use of more words, and the intention is more clearly expressed. It declares that the words *grant, bargain and sell* shall amount to a covenant that the bargainor, *notwithstanding any act done by him*, was at the time of the execution of the deed seized of an indefeasible estate in fee simple, etc. Our law seems intended to express the substance of the *British* statute in fewer words, and has fallen into a degree of obscurity, which is often the consequence of attempting brevity. I can conceive no good reason why our legislature should have wished to carry this implied warranty farther than the *British* statute did; because it has bad effects to annex to words an arbitrary meaning far more extensive than their usual import, and which must be unknown to all but professional men. It might be very well to guard against secret acts of the grantor with which none but himself and those interested in keeping the secret could be acquainted. As for

any further warranty, if it was intended by the parties, it was best to leave them to the usual manner of expressing it in plain terms."

The statute of Anne, the Pennsylvania act, and the foregoing extract from the opinion of Chief Justice Tilghman, are given by Mr. Rawle in his admirable work on Covenants for Title, (5th ed. §§ 282, 283 *et seq.*,) and he states that "the construction thus given has never been departed from in Pennsylvania; and it is said by Chancellor Kent (4 Kent Com. 474) that 'by the decision in *Gratz* v. *Ewalt* the words of the statute are divested of all dangerous tendency, and that it will equally apply to the same statutory language in other States.'"

The provision upon this subject in the statutes of Alabama, Arkansas, Illinois and Mississippi, is substantially the same as in Pennsylvania, and the same construction has been put upon it by the courts. *Stewart* v. *Anderson*, 10 Alabama, 504; *Winston* v. *Vaughan*, 22 Arkansas, 72; *Finley* v. *Steele*, 23 Illinois, 56; *Weems* v. *McCaughan*, 7 Smedes & Marsh. 427. It is contended, however, that the statute of Missouri so differs from the statute of Anne and that of Pennsylvania as to require a different construction, which has been given it in *Alexander* v. *Schreiber*, 10 Missouri, 460, and that as the statute of New Mexico was taken from that of Missouri, the construction put upon the latter should be accepted as correct.

The language of the statute of Missouri (Gen. Stat. Missouri, 1865, p. 444, § 8) is as follows:

"The words 'grant,' 'bargain' and 'sell,' in all conveyances in which any estate of inheritance in fee simple is limited, shall, unless restrained by expressed terms contained in such conveyances, be construed to be the following express covenants on the part of the grantor, for himself and his heirs, to the grantee, his heirs and assigns: First, that the grantor was, at the time of the execution of such conveyance, seized of an indefeasible estate, in fee simple, in the real estate thereby granted; second, that such real estate was, at the time of the execution of such conveyance, free from incumbrances done or suffered by the grantor, or any person claiming under him; third, for further assurances of such real estate to be made by

the grantor and his heirs to the grantee and his heirs and assigns; and may be sued upon in the same manner as if such covenants were expressly inserted in the conveyance."

And the Supreme Court of Missouri, in *Alexander* v. *Schreiber*, *ubi supra*, after citing many cases holding that where a deed contains a limited covenant that the premises are free from incumbrances, and also a general covenant of warranty, the one does not limit the other, thus proceeds: "It is apparent from these cases, to which we have briefly referred, that whilst it is conceded that a special covenant will restrain a general one, where the two are absolutely irreconcilable, yet the courts have inclined very much to let both stand. A covenant is to be construed most strongly against the covenantor, and in giving effect to the intention of the parties to an instrument of conveyance, the courts have kept this principle in view. Where the particular covenants and the general covenants are entirely independent of each other and of a different character, they will all stand. The statute enumerates the three covenants which the words 'grant, bargain and sell' are declared to imply, as distinct and independent covenants. The second may be superfluous, but it does not therefore limit the first, which is independent of and inconsistent with it."

It appears to us, however, that where the question arises not upon the covenants in a deed, but upon the construction of a statute which turns certain words of grant into express covenants, the same rule of construction does not apply. In respect to deeds, the words are to be taken most strongly against the party using them, while in respect to statutes, if in derogation of the common law, as that under consideration is, they should be construed strictly. And, so construed, the statute of New Mexico seems clearly within the conclusion reached in *Gratz* v. *Ewalt*. The covenant that the grantor is "seized of an indefeasible estate in fee simple" is a covenant for a perfect title, and to couple with it a covenant that the land is free from incumbrances, "made or suffered to be made by the grantor, or by any person claiming the same under him," is incongruous and repugnant, unless the prior covenant is held to mean "notwithstanding any act done by the grantor."

But apart from this, as the statute invests the words "bargained and sold" with an effect they did not possess at common law, we think it was not intended that those words should so operate where the parties themselves have entered into covenants. In *Weems* v. *McCaughan*, 7 Smedes & Marsh. 422, 427, it is said: "The covenants raised by law from the use of particular words are only intended to be operative where the parties themselves have omitted to insert covenants. But where the party declares how far he will be bound to warrant, that is the extent of his covenant."

And the same result is reached and announced by the Supreme Court of Illinois in *Finley* v. *Steele*, 23 Illinois, 56, in which case Mr. Justice Walker, speaking for the court, says that "this statutory provision does not create this covenant against the intention of the parties;" that "the employment of any language from which it appears the parties intended that these words should not have such an effect," does away with the statutory covenant; that all statutes in derogation of the common law must be construed strictly; that if there is a doubt whether where there is a general covenant of warranty in the deed, such a case is embraced within the provisions of the statute, it should not be held as controlling the rights of the parties; that "there is scarcely a court before which this act has come for a construction, that has not characterized it as a provision of dangerous tendency, calculated to entrap the ignorant and unwary into liability which they never intended to incur;" that the rule is familiar that "the expression of one thing is the exclusion of another;" and "where the grantor inserts a covenant of general warranty, and omits all other covenants, that it must have been his intention to bind himself alone by the covenant he has inserted;" that under the statutory covenant "the breach occurs, if at all, upon the delivery of the deed, whilst under the covenant of general warranty a breach only takes place upon an eviction;" and that, "if the grantor were to write out this statutory covenant in a deed, and also insert a covenant of general warranty, it would present a very different question, as then it would by that act appear to be his inten-

tion that both covenants should be operative. In such a case the court would have to give effect to each, so far as it was not limited by the other."

These views strike us as sensible and just, and we concur with the Supreme Court of the Territory in its approval of them.

Chancellor Kent pointed out in his Commentaries the danger from importing into a deed, express covenants created by statute, "of imposition upon the ignorant and unwary, if any covenant be implied, that is not stipulated in clear and precise terms."

The covenant of warranty and that of seisin or of right to convey are not equivalent covenants. Defect of title will sustain an action upon the one, while disturbance of possession is requisite to recover upon the other. And we cannot hold that Lewis and wife, in covenanting for quiet enjoyment, intended to be bound by a covenant outside of their express agreement, which might impose a liability upon them the instant their deed was executed and delivered. Covenants of seisin and of good right to convey are broken, if at all, when the deed is delivered, and if the grantor is not well seized, or if he has not the power to convey, an action at once accrues.

But as Douglass was in possession when he commenced his action, it does not appear to be material to him whether he stands upon the covenant of general warranty in the deed or of seisin in the statute.

While the Supreme Court of Missouri has held that the covenant created by the statute may be imposed upon a grantor, notwithstanding he has warranted generally in the conveyance, yet the rule is there equally well settled, that the statutory covenant of seisin is merely a covenant for indemnity, and that nominal damages only are recoverable until the estate conveyed is defeated or real injury sustained. *Dickson* v. *Desiré's Admir.*, 23 Missouri, 151; *Collier* v. *Gamble*, 10 Missouri, 467.

In that view the grantee is protected by the general covenant of warranty substantially to the same extent as by the statutory covenant, and the conclusion is strengthened that where one is expressly inserted in the deed the other ought not to be implied.

Statement of the Case.

Lewis and wife had the right to contract that their grantee should not hold possession of the property and at the same time compel them to return the purchase money, and in either aspect there could be no substantial recovery here.

The judgment of the Supreme Court of the Territory is

Affirmed.

FOWLE *v.* PARK.

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

No. 263. Argued April 17, 1889. — Decided May 13, 1889.

A contract relating to a patent medicine which communicates its ingredients in confidence, and provides in substance that the parties shall enjoy a monopoly of the sale of it, each within a defined region in the United States, and that it shall not be sold below a certain rate or price, is not unreasonable or invalid as in restraint of trade.

On the facts stated in the opinion: *Held*, that the defendants sold the balsam within the prohibited territory, or to those by whom to their knowledge it was to be there sold, and that, as the record disclosed violations of the contracts in these respects, the cause should have gone to a master to state an account.

THE case was stated by the court as follows:

Seth A. Fowle and Horace S. Fowle, citizens of Massachusetts, filed their bill of complaint against John D. Park, Ambro R. Park and Godfrey F. Park, citizens of Ohio, in the Circuit Court of the United States for the Southern District of Ohio, on the 28th day of March, A.D. 1884, alleging that in 1844 one Lewis Williams, of Philadelphia, "prepared, invented and compounded a certain medicinal preparation of great and substantial value, for certain complaints and diseases, and assigned and adopted the name therefor of 'Wistar's Balsam of Wild Cherry,' he being then the sole proprietor and alone having knowledge of the nature and ingredients of said preparation;" that in May, 1844, Willams "sold, assigned and transferred for valuable consideration to him paid, to one Isaac Butts of the State of New York, said preparation and a

full and true copy of the receipt for preparing the same, under the name of 'Wistar's Balsam of Wild Cherry,' with the sole and exclusive right to manufacture and sell the said medicine under said name or otherwise, in certain enumerated States, counties, etc.;" that in March, 1845, said Isaac Butts, "for and in consideration of a large sum of money to him paid by Seth W. Fowle," sold, conveyed and transferred to Fowle, his heirs, assigns and personal representatives, "all his right, title and interest in and to said preparation or medicine, and said receipt with a true copy thereof, with the sole and exclusive right to manufacture, sell and cause to be sold the said medicine in the States, provinces and counties above named, as included in said transfer by Lewis Williams to the said Isaac Butts;" that at the time of said transfer, and as a condition thereof and part of the consideration therefor, Fowle agreed "that neither he nor his personal representatives or assigns would sell, cause to be sold, nor establish agencies for or be concerned in the sale of said balsam in any part of the United States, except those named in said transfer by Lewis Williams, and that neither he nor they would sell or cause to be sold said balsam anywhere for a less sum than seven dollars and $\frac{20}{100}$ of a dollar ($7.20) net for each and every dozen sold, or cause to be sold, except to agents for a whole State or Territory, in which case such agent should not sell below said rate;" that all the rights thus acquired by Fowle passed to the plaintiffs by purchase and inheritance; that Fowle and plaintiffs as successors "have continued to manufacture from said receipt and sell said balsam under said name from the year 1845 in large quantities up to the present time throughout said Territory and not elsewhere, except west of the ridge of the Rocky Mountains, as hereinafter stated," but have not sold below the stipulated price, and have expended great sums in establishing and increasing the business, and built up a large trade and good will in connection with the name "Wistar's Balsam of Wild Cherry," by which name their manufacture of said medicine has become largely known, they and the defendants herein being the only manufacturers thereof on the continent, and being the only parties except

Lucy A. S. Fowle, widow of said Seth W. Fowle, now having knowledge of the secret of its preparation; that about 1845 Williams disclosed the secret and mode of this preparation to Sanford and Park, and transferred to them a similar right to that given Butts to manufacture and sell said preparation "in certain parts of the then United States lying west of the territory included as aforesaid in said transfer to Seth W. Fowle," they agreeing not to sell on the territory of Butts, and the right so acquired by Sanford and Park subsequently passed to the defendant John D. Park, and the other defendants became interested therein through him; "that between the years 1849 and 1864, the portion of country between the Rocky Mountains and the Pacific having become largely a part of the United States, the said Seth W. Fowle and the said John D. Park both sold small quantities of said 'Wistar's Balsam of Wild Cherry' for some time in said territory in competition;" "that in 1864 said parties entered into a contract whereby it was agreed that the said Seth W. Fowle should have entire control of such sales in said territory west of the ridge of the Rocky Mountains free of all competition on the part of said John D. Park, the latter being paid a valuable consideration therefor by the said Fowle; that this arrangement continued until after the death of the said Fowle in A.D. 1867, and until on or about 1869, when the same terminated;" that in 1869 John D. Park entered into an agreement with Seth A. Fowle, one of the complainants, and Lucy A. S. Fowle, whereby, in consideration of $5000, he sold and transferred to them, their legal representatives and assigns, all interest in, or right to, the sale of said medicine west of the Rocky Mountains, and also all interest in or right to the good will of selling said balsam in said territory, and in the trade-mark on the labels, bottles, wrappers and packages containing said medicine, and in carrying on the business therein, said Park covenanting "for himself, his assigns and representatives, in said agreement, that the said Seth A. and Lucy A. S. Fowle and their assigns should have and enjoy the sole and exclusive right of selling said medicine within said limits," "free from any competition or interference by him or any one under him or by his author-

ity, permission, or aid, either directly or indirectly," etc.; that in 1872, complainants acquired all the rights of Lucy A. S. Fowle in said contract of 1869 with said John D. Park; that the copartners of said John D. Park, defendants herein, "derived all their interest in, and right to, the manufacture and sale of said balsam since the execution of said contract of 1869 from said John D. Park, and with full knowledge and subject thereto;" that the defendants and each of them have failed to comply with the contract between Williams and Sanford and Park in that they have for ten years last past sold and caused to be sold, and sold with knowledge or reason to know that the same was to be resold, said balsam in the territory comprised in the transfer to Butts, in large quantities in competition with complainants' trade, and have sold there and elsewhere at a less price than seven dollars per dozen, and have sold and caused to be sold said balsam in the territory described in the contract of 1869 with John D. Park, and at a lower price than seven dollars; and that complainants had gone to large expense on the faith of that contract and built up a large and valuable trade throughout the entire Pacific coast with which defendants are interfering and injuring and damaging complainants as well as interfering with their business east of the Allegheny Mountains. The bill, waiving an oath, prays for answers, an injunction, and an accounting.

The defendants admit in their answer the invention of the medicinal preparation and its name and the sale by Williams to Butts and by Butts to Seth A. Fowle, and the sale by Williams to Sanford and Park, which the defendants say was made the year before the sale to Fowle; and that John D. Park purchased the rights of Sanford and Park. They call for a production of the agreement in 1864 between Seth W. Fowle and John D. Park; they deny that they have sold any of the balsam in the territory transferred to Butts; they deny the sale of any balsam by them within the territory west of the Rocky Mountains named in the contract with John D. Park; and deny that they ever sold the balsam anywhere at less than seven dollars per dozen. They add to their answer averments, by way of cross-bill, in which they state

their exclusive right to manufacture and sell the balsam in those parts of the United States lying west of the territory included in the sale from Williams to Butts, as well as those States and counties named in the transfer of Williams to Sanford and Park, and assert that the Fowles, by putting up the medicine in packages containing less than eight liquid ounces, are selling the same for less than one-half of $7.20, and therefore the medicines of Fowle & Sons are sought for by dealers selling medicine in defendants' territory, who buy and resell the same to defendants' injury. They pray for answers, an oath not being waived, and that complainants may be enjoined from putting up for sale said medicine in packages of less size than those in use on the 1st day of March, 1845, the date of the contract between Butts and Fowle, and from selling packages of said medicine of whatever quantity at a less price than $7.20 per dozen, and for damages.

Complainants filed a replication to defendants' answer, and an answer under oath to their cross-bill, denying the assertion of the defendants that they had the exclusive right to manufacture and sell in all the territory of the United States lying west of that included in the sale and transfer from Williams to Butts, and averring that defendants had no right to manufacture or sell in any of the territory west of the ridge of the Rocky Mountains. They say that no size of package was stipulated for in the contract between Fowle and Butts, and that the object of the stipulation was, that the medicine should not be sold at a lower proportional rate than $7.20 for ten ounces, and that they had never sold at any less rate; that they have used a smaller size of bottle holding only four liquid ounces, but the lowest net price they ever charged for them has been at the rate of nine dollars per dozen bottles of ten ounces; and that no sales thereof have ever been made by them within the territory embraced in the contract between Williams and Sandford and Park, and such sales as have been made were made with full notice to defendants, with description and sample of bottle, and without objection, and they deny all injury to defendants. To this answer replication was duly filed.

Opinion of the Court.

The cause having been brought on for hearing, the agreement between Lewis Williams and Benjamin F. Sanford and John D. Park, dated May 1st, 1844; the agreement between Williams and Butts dated May 20, 1844; the agreement between Butts and Fowle, dated March 1st, 1845; the agreement between Fowle and Park, dated December 16, 1863; the agreement between John D. Park and Seth A. Fowle and Lucy Ann S. Fowle, dated November 17, 1869; the release of Lucy Ann S. Fowle to Seth A. Fowle, January 1st, 1873; as well as various letters of Fowle & Son in 1877 and 1878, to Park & Sons, and a letter from Park & Sons to Fowle & Son, in 1877; sundry invoices, bills, etc.; were put in evidence, together with the testimony of several witnesses bearing upon the question of sales by or with the knowledge of Park & Sons in the territory claimed by Fowle & Son.

The court found "that the complainants are not entitled to the relief prayed in their said bill of complaint," and thereupon dismissed complainants' bill at their costs and the cross-bill of respondents at their costs, from which decree complainants prosecuted this appeal.

Mr. Henry A. Morrill for appellants. *Mr. Alexander H. McGuffey* was with him on the brief.

No appearance for appellees.

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

No question arises in respect to the sale and transfer by Williams to Butts, and by Butts to Seth W. Fowle, and the acquisition by complainants of all the right, title and interest of the latter, nor as to the sale by Williams to Sanford and Park, and the passage of the title, interest, and rights of Sanford and Park to Park, and through him to his codefendants; and the agreement between Park and Fowle & Son, as to the territory west of the Rocky Mountains, is produced, and sustains the averments of the bill in that regard.

By the contract between Williams and Sanford and Park,

Williams, in consideration of the payment of $2500 by Sanford and Park, and the covenants entered into on their part, sold and transferred to Sanford and Park, a true copy of the recipe used in preparing said Balsam of Wild Cherry, together with the sole right to manufacture and sell said medicine in Ohio, Indiana, Illinois, Kentucky, Tennessee, Missouri, Michigan, Arkansas, Mississippi, Alabama, Louisiana, and all the territory lying west of those States, together with certain counties in the State of Virginia and certain counties in the State of Pennsylvania, and Sanford and Park covenanted and agreed to pay $2500 and $4764 for medicine consigned to them for sale, and also "that they will not sell or cause to be sold, or establish agencies for the sale of said balsam in any part of the United States except in the States and Territories herein granted to them, and also that they, the said Sanford and Park, will not sell, or cause any of said medicine to be sold, at less price than seven dollars for each and every dozen, except to such persons as shall become their agents for a whole State or Territory, and in all cases where such agencies are granted they also promise and agree to take from such agents an agreement, with a sufficient guaranty or penalty, that no sales of said medicine shall be made at a less price than that above named;" and Williams covenanted and agreed that he would not "manufacture, sell, or cause to be sold, any of said medicines within the territory herein granted to the said Sanford and Park, or any medicines under a different name, prepared from the same recipe used in preparing said balsam, or in any other form purporting to be an improvement on the said medicine," it being provided "that the said Sanford and Park shall not make known to any person the ingredients employed or manner of preparing said medicines." By a similar agreement Williams sold and transferred to Butts the recipe and the sole right to manufacture and sell said medicine in the six New England States; also in the States of New York, New Jersey, Delaware, Maryland, North and South Carolina, District of Columbia, and British America, and certain counties in the States of Pennsylvania and Virginia, for four thousand dollars, and eight thousand six hundred and sixty-one dollars

for medicine consigned to him, the parties covenanting as in the agreement with Sanford and Park.

The contract between Butts and Fowle was similar in terms, the money consideration being twenty-nine thousand five hundred dollars, and some accounts, a stock of drugs, and some apparatus and stereotype plates being included in the purchase.

By the agreement between John D. Park and Seth A. Fowle and Lucy Ann S. Fowle, Park, in consideration of $5000, sold, assigned, transferred and conveyed to said Seth A. and Lucy Ann S. Fowle all his "right, title, interest and claim in and to the property or proprietary right or franchise of the medicine or medicinal preparation called and known as 'Wistar's Balsam of Wild Cherry,' for and so far as regards all the territory or part of North America lying westerly of the ridge of the Rocky Mountains, embracing the whole of the following States and Territories of the United States, viz., the States of California, Oregon and Nevada, and the Territories of Washington, Idaho, Utah, Arizona and Alaska, and so much and such parts of the Territories of Montana, Wyoming, Colorado and New Mexico as are westerly of the ridge of said Rocky Mountains meaning and intending all territory lying westerly of said Rocky Mountains (including the westerly slope thereof) and between said mountains and the Pacific Ocean, and also all my right, claim and interest in and to the good will of the business of making, putting up and selling said Wistar's Balsam of Wild Cherry within said limits, and in and to the trade-marks, so far as used within said limits, on the labels, bottles, wrappers, or packages containing said medicine, or otherwise used in carrying on said business within the limits or territory aforesaid;" also in all of British Columbia and Mexico; "intending hereby to transfer and relinquish to said Fowles the whole market for the said medicine of all said territory westerly of the Rocky Mountains, and also, (so far as I have the power so to do,) of all said British Columbia and Mexico, so that they and their legal representatives and assigns may have and enjoy the sole and exclusive right of selling said medicines within said limits, so far as I can assure such right to them, and free from any competition

or interference by me or any one claiming under me or acting by or with my authority, permission, or aid, either directly or indirectly;" and he further covenanted that he "will not, and my heirs, executors, administrators, and assigns shall not, either within said territory westerly of the ridge of the Rocky Mountains, or within said British Columbia or Mexico, hereafter make, put up, sell, or offer or expose for sale, any of said Wistar's Balsam of Wild Cherry, or any other medicine whatever bearing the name of 'Wild Cherry,' in whole or in part, nor the said medicine under a different name prepared substantially from the same recipe or formula, or use the same, or trade-marks, or any of them, or be concerned, directly or indirectly, in the business of selling or in promoting the sale of said medicine within said limits in competition with said Fowles, their representatives and assigns, or in any way or by any means whatsoever do or knowingly aid or abet any other person to do anything to prejudice or interfere with the business of selling said medicine within the limits aforesaid solely by said Fowles, their representatives and assigns;" and then follows a covenant of further assurance.

If the defendants violated the provisions of these contracts by selling this article within the territory which it was covenanted complainants should occupy exclusively, or by selling to others for sale there, or by promoting such sales, we are aware of no reason for the refusal of relief unless it may be, as is contended, that the contracts were not enforceable on the ground of public policy.

We have not been favored with any opinion of the learned judge who decided the case in the Circuit Court, nor with any brief in appellees' behalf; and while we may naturally assume that the finding was based upon the supposed want of proof of violation of the contracts or their supposed invalidity, or both, we are left to conjecture as to the precise views which were entertained.

As we remarked in *Gibbs* v. *Consolidated Gas Company*, 130 U. S. 396, 409: "The decision in *Mitchel* v. *Reynolds*, 1 P. Wms. 181; *S. C.* Smith's Leading Cases, Vol. 1, Pt. II., 508, is the foundation of the rule in relation to the invalidity

of contracts in restraint of trade; but as it was made under a condition of things and a state of society different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other requires, the contract may be sustained. The question is whether, under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is, or is not, unreasonable. *Rousillon* v. *Rousillon*, 14 Ch. D. 351; *Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345; *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64, 68."

Relating as these contracts did to a compound involving a secret in its preparation; based as they were upon a valuable consideration, and limited as to the space within which, though unlimited as to the time for which, the restraint was to operate, we are unable to perceive how they could be regarded as so unreasonable as to justify the court in declining to enforce them.

The vendors were entitled to sell to the best advantage, and in so doing to exercise the right to preclude themselves from entering into competition with those who purchased, and to prevent competition between purchasers; and the purchasers were entitled to such protection as was reasonably necessary for their benefit. Williams had and transferred property in the secret process of manufacturing the article he had discovered, and he and his grantees could claim relief as against breaches of trust in respect to it. The policy of the law is to encourage useful discoveries by securing their fruits to those who make them. If the public found the balsam efficacious, they were interested in not being deprived of its use, but by whom it was sold was unimportant.

The decree below was probably not rendered, and cannot be sustained, upon the theory that these contracts were in themselves invalid.

It remains to be considered whether there is evidence tending to show that the defendants sold the balsam within the prohibited territory, or to those by whom to their knowledge it was to be there sold, or in any way promoted such sale.

We are of opinion that the record discloses violations of the contracts in these particulars, and that the cause should have gone to a master to state an account. One of the defendants was called by complainants as a witness, and though apparently an unwilling one, he admits four shipments of balsam to Atlanta, Ga., in 1879, 1880, 1883 and 1884; a shipment, in 1879, to New York; a shipment, in April, 1880, to Philadelphia; and identifies an entry on defendants' sales-book of a shipment to Coffin, Reddington & Co., San Francisco, Cal., in 1878, charged to Smith & Co., of Dayton, Ohio; although Georgia, New York, Philadelphia and California were all within complainants' territory. Evidence was also adduced of shipments by defendants to Henry, Curran & Co. at New York, in 1874, 1875 and 1876, not for sale in defendants' territory, but for the general purposes of the Eastern trade, and sold within the territory embraced in the original transfer to Butts, and of sales directly by Park & Sons to Crittenden and McKesson & Robbins, of New York, in 1878, 1880, 1881 and 1882. Coffin, of Coffin, Reddington & Co. of New York and San Francisco, testifies that for seven years he had purchased Park's Wistar's Balsam from S. N. Smith & Co., Dayton, Ohio, commencing in 1877, and the last purchase being in 1883, and that purchases were made under orders to ship direct to California, and that Smith & Co. furnished it for seven dollars a dozen, less freight. Smith testifies to the shipment of nine gross of this balsam to California, to the San Francisco branch of Coffin, Reddington & Co., during the years 1879 to 1883, inclusive, and one gross to John Helm & Co., of California; that he did not usually keep the article in stock, but ordered it from Park & Sons, and sometimes had the goods shipped directly by them; that while they rendered bills charging $84 and $87 per gross in some instances, or seven dollars or more per dozen, he, in fact, paid them only what he received, seven dollars per dozen less the freight, which, of course, indicates that defendants knew where the balsam was going, since they not only shipped some direct, but were paid by Smith on the basis of deducting freight equivalent to the charges to California, and, as well put by appellants' counsel, "if the sales

were to Smith & Co., in fact, then they were for much less than seven dollars a dozen, and in violation of contract." Smith also testifies to two instances — one in 1877 and one in 1878 — of the shipment of ten gross and five gross to Coffin, Reddington & Co., California, for so much less than seven dollars per dozen as the amount of the freight to California, which balsam Smith & Co. procured from the defendants, paying them the net sum received. The witness Park did not deny that balsam had been shipped directly to California, upon the order of Smith & Co.; he testified that they kept the balsam in stock at one time with Smith & Co., to be sold on their account; he would not say that the entries on the sales-books in the name of Smith & Co. necessarily showed to whom the article was shipped, and said that he did not know whether, when charged to Smith & Co., the article was shipped to them or to other parties; he identified the entry of one shipment to Coffin, Reddington & Co.; he knew the average amount of freight per gross on balsam shipped to California, which, deducted from $84, the contract sales price per gross, left substantially the amount in all cases received by Smith & Co. on the California shipments, and by them paid to Park & Sons; and he admitted several charges on Park & Sons' books against Smith & Co., for merchandise, corresponding in dates and amounts with shipments to California. The inference is a reasonable one, that the defendants knew that the balsam claimed to have been sold to Smith & Co., and which was shipped to California, was going there, and in addition they had been informed, in 1878, by the complainants, of the report that Wistar's Balsam of defendants' make had made its appearance in the San Francisco market, and complainants had subsequently objected to sales within their territory, to which defendants paid no attention. We do not think the latter are in any position to say that they did not know what was going on. Neither of them was called for the defence nor any testimony taken on their behalf. We are satisfied complainants sufficiently made out their case to justify according to them the relief prayed.

The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion.

UNITED STATES MUTUAL ACCIDENT ASSOCIATION *v.* BARRY.

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

No. 240. Argued April 9, 1889. — Decided May 13, 1889.

A certificate or policy issued by a Mutual Accident Association stated that it accepted B. as a member in division AA of the association; "the principal sum represented by the payment of two dollars by each member in division AA," not exceeding $5000, to be paid to the wife of B. in 60 days after proof of his death from sustaining "bodily injuries effected through external, violent and accidental means." B. and two other persons jumped from a platform four or five feet high, to the ground, they jumping safely and he jumping last. He soon appeared ill, and vomited, and could retain nothing on his stomach, and passed nothing but decomposed blood and mucus and died nine days afterwards. In a suit by the widow to recover the $5000, the complaint averred that the jar from the jump produced a stricture of the duodenum, from the effects of which death ensued. At the time of the death the association could have levied a two dollar assessment on 4803 members in division AA; *Held*,

(1) It was not error in the court to refuse to direct the jury to find a special verdict, as provided by the statute of the State;

(2) The issue raised by the complaint as to the particular cause of death was fairly presented to the jury.

(3) The jury were at liberty to find that the injury resulted from an accident;

(4) The policy did not contract to make an assessment, nor make the payment of any sum contingent on an assessment or on its collection; and the association took the risk of those who should not pay.

This was an action at law brought in the County Court of Milwaukee County, in the State of Wisconsin, by Theresa A. Barry, a citizen of Wisconsin, against the United States Mutual Accident Association, a New York corporation, to recover $5000, with interest thereon at seven per cent per annum, from July 15th, 1883, on a policy of insurance issued by the defendant on June 23d, 1882. The case, after answer, was removed by the defendant into the Circuit Court of the United

States for the Eastern District of Wisconsin. The material parts of the policy are set forth in the margin.[1]

The complaint, after setting forth the terms of the policy and averring that it was delivered by the defendant to John S. Barry, alleged, "that, on or about the 20th day of June, 1883, and while said policy was in full force and effect, at the town or village of Iron Mountain, in the State of Michigan, and while the said John S. Barry was attending to the duties of his profession, to wit, that of a physician, and wholly without his fault, it became necessary for him to step or jump from

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[1] No. 794. Division AA. $5000.

The United States Mutual Accident Association of the City of New York.

This certificate witnesseth, That The United States Mutual Accident Association, in consideration of the warranties and agreements made to them in the application for membership and of the sum of four dollars, do hereby accept John S. Barry, by occupation, profession, or employment a physician residing in Vulcan, State of Michigan, as a member in division AA of said association, subject to all the requirements and entitled to all the benefits thereof. The principal sum represented by the payment of two dollars by each member in division AA of the association, as provided in the by-laws (which sum, however is not to exceed five thousand dollars), to be paid to Theresa A. Barry (his wife), if surviving (in the event of the prior death of said beneficiaries, or any of them, said sum shall be paid as provided in the by-laws), within sixty days after sufficient proof that said member, at any time within the continuance of membership, shall have sustained bodily injuries effected through external, violent and accidental means, within the intent and meaning of the by-laws of said association and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof. . . . Provided always, That this certificate is issued and accepted subject to all the provisions, conditions, limitations, and exceptions herein contained or referred to. . . . Provided always, That benefits under this certificate shall not extend to hernia, nor to any bodily injury of which there shall be no external and visible sign, nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of the certificate, . . . nor to any case except where the injury is the proximate or sole cause of the disability or death. . . . And these benefits shall not be held to extend . . . to any case of death . . . unless the claimant under this certificate shall establish by direct and positive proof that the said death or personal injury was caused by external violence and accidental means, and was not the result of design either on the part of the member or of any other person.

a platform or walk to the ground beneath, about four feet downwards, and, in doing so, and in alighting upon said ground, he unexpectedly received an accidental jar and sudden wrenching of his body, caused by said jump or step downward and by coming in contact with the said ground beneath, as aforesaid, all of which was unexpected on his part and wholly without his fault or negligence; that the said jarring of his person and wrenching of his body, caused as aforesaid, was the immediate cause of, and directly produced, a stricture of the duodenum, from the effects of which the said John S. Barry continued to grow worse until, on the 29th day of June, 1883, he, on account of the same, died."

Issue was joined, and the case was tried by a jury, whose verdict was, that they found the issue in favor of the plaintiff, and assessed the damages to her at the sum of $5779.70; and a judgment was entered for her for that amount, and $189.35 costs, being a total of $5969.05. To review this judgment the defendant has brought a writ of error.

At the trial the plaintiff offered in evidence the policy or certificate, to which offer the defendant objected, for the reason that the complaint did not state facts sufficient to constitute a cause of action. The objection was overruled and the defendant excepted. The defendant objected also that the complaint alleged no assessment, and the court received the evidence subject to the objection. The plaintiff then proved, without objection, by the secretary of the defendant, that on the 23d of June, 1882, there were 804 members in division AA in the association, and on the same day in 1883, 4803 members, and on the same day in 1884, 5626 members; that, during June and July, 1883, the defendant, in case of a death in division AA, could have levied a two-dollar assessment on at least 4803 members, that number being then insured in that division; that the only members who were exempt from the two-dollar death assessment were those who became members subsequent to the death for which the assessment was made; that, if the defendant had desired to pay the loss occasioned by the death of Barry the amount to be paid would have been $5000; that the assessment levied next prior to June 29th,

Statement of the Case.

1883, was levied June 1st, 1883; that if, at the time a death was reported, and a claim was proved, there were sufficient funds to the credit of division AA, the loss was paid from those funds, without making a specific assessment; that, if there were not sufficient funds at that time, an assessment was made; and that, on June 29th, 1883, the defendant had on hand, belonging to class AA, $2060.15. The witness then produced the by-laws of the defendant for 1882–1883, the material parts of which are set forth in the margin.[1]

In the proofs of death furnished to the defendant was the following, in the evidence of the attending physician: "12th. What was the precise nature of the injury and its extent? Inflammation of the duodenum, from jarring (jump)."

The plaintiff's husband was a physician 30 years of age at the time of his death. He was, at the time of the injury, strong and robust, weighing from 160 to 175 pounds, about six feet high, and in good health. With two other physicians, Dr. Crowell and Dr. Hirschmann, he visited a patient, on June 20th, 1883, who lived in a house behind a drug store. On coming out of the house they were on a platform which was between four and five feet from the ground, and if they got off from the platform it was but a short distance to the back part of the drug store, where they desired to go. The other two

[1] Art. 1, sec. 3. The object of this association is to collect and accumulate a fund to be held and used for the mutual benefit and protection of its members, (or their beneficiaries,) who shall have sustained while members of the association bodily injuries, whether fatal or disabling, effected through external, violent and accidental means.

Art. 7, sec. 1. Upon sufficient proof that a member of one of the divisions of this association shall have sustained bodily injuries effected through external, violent and accidental means within the intent and meaning of these by-laws and the conditions named in the certificate of membership, and such injuries alone shall have occasioned death within ninety days from the happening thereof, the board of directors shall immediately order an assessment of two dollars upon each person who was a member of the division to which deceased belonged at the time of such death, and shall pay the amount so collected, according to the following schedule of classification . . . to the person or persons whose name shall, at the time of the death of such member, be found recorded as his last designated beneficiaries, if surviving. To members of division AA not exceeding $5000.

jumped from the platform first, and alighted all right. Dr. Hirschmann testifies: "Just after we had jumped Dr. Barry jumped, and he came down so heavy that it attracted our attention, and we both turned around, and we both remarked that it was a heavy jump, and I asked him, 'Doctor, are you hurt?' and he said, 'No; not much.' I have an indistinct recollection of his leaning against the platform when he jumped, but not sufficiently to state positively. If I were to jump I would jump and strike on my toes, and if I had any distance to jump would allow my knees to give. The way Dr. Barry came down it sounded to us as if he came down solid on his heels, so much so that we both turned around and remarked, 'Doctor, you came down heavily.' And I asked him, 'Are you hurt?' and he said, 'No; not much.' I heard the noise. It was a singular jump and sounded like an inert body. We then went with him to the drug store." Hirschmann drove home with him. He appeared ill on the way, and when he arrived home was distressed in his stomach, and vomited, and from that time on retained nothing on his stomach, and passed nothing but decomposed blood and mucus, and died nine days afterwards. There was much conflicting testimony as to the cause of death, and as to whether it resulted from duodenitis or a stricture of the duodenum, as alleged in the complaint, and from an injury caused by the jump. The issues presented to the jury sufficiently appear from the charge of the court.

At the close of the evidence on both sides, all of which is set forth in the bill of exceptions, the defendant moved the court to direct a verdict for it, on the ground that there was no evidence to sustain a cause of action. The motion was denied and the defendant excepted.

The plaintiff then, by leave of the court, amended her complaint by alleging that, at the time of Dr. Barry's death, and from that time, and for the balance of the year 1883, and including the time, as provided for in the policy, in which the said insurance was to be paid to the plaintiff herein, there were insured by it in class AA, the same class in which said Doctor Barry was at the time insured, 4803 members or per-

sons upon whom the defendant could have levied an assessment, under its by-laws and rules, of the two dollars per head, making an amount exceeding the plaintiff's claim of $5000. This amendment was objected to, but the defendant took no exception.

The defendant then demanded that the court submit a special verdict in the case, as provided by the rules of practice in the State of Wisconsin, and, as a question upon such special verdict, requested the court to submit the following question: "Whether the death of Dr. Barry was caused by duodenitis?" The demand was refused and the defendant excepted. The defendant then asked the court to submit, in connection with the general verdict, the special question as to whether the assured died of duodenitis. The request was refused and the defendant excepted.

The defendant then requested the court to charge the jury as follows: "It appears from the evidence in this case that by the policy in suit the defendant company accepted John S. Barry as a member of class AA, and in effect agreed to levy an assessment of two dollars upon each member of said class and to pay the same to the plaintiff if said John S. Barry should die of bodily injuries, effected through external, violent and accidental means, but in no event to pay more than $5000. Before the plaintiff can recover in this case she must show that the defendant, when it received the proof of death on or about July 15th, 1883, either had cash on hand belonging to class AA, or levied an assessment upon the members, and by that means the defendant received money which belonged to class AA. By the evidence in suit it appears that there were over 4000 members belonging to class AA during the months of June and July, 1883, who were subject to assessment of two dollars per man, and that, on June 1st, 1883, an assessment was made upon members belonging to class AA, and that on June 29th, 1883, the defendant had on hand $2060.15 belonging to class AA, and that an assessment was then pending and in process of collection. This evidence does not show any cash on hand belonging to class AA on July 15th or at any later date, nor is there any other evidence in the case

which would show that fact or that any assessment was levied. Therefore the plaintiff cannot recover in this action, and you are instructed to return a verdict for the defendant." The court refused to give this instruction and the defendant excepted.

The defendant then separately requested the court to charge the jury to find for the defendant because no accident within the true intent and meaning of the policy occurred to Dr. Barry; and that he did not die from duodenitis; and that they must find for the defendant if he, in jumping, alighted squarely on his feet, or if they found that the jump did not result in the obstruction or occlusion of the duodenum; and that there was no evidence of any wrenching, twisting, or straining of the body in the jumping; and that, considering the character of the injury alleged in the case and the difficulty attending its proper investigation, great weight should be given by the jury to the opinion of scientific witnesses accustomed to investigate the causes and effects of injury to the alimentary canal, and a distinction should be made in favor of the opinion of those accustomed to use the most perfect instruments and processes, and who are acquainted with the most recent discoveries in science and the most perfect methods of treatment and investigation.

The court refused to give these instructions severally, and the defendant excepted to each refusal.

The defendant also separately requested the court to charge the jury that their verdict must be for the defendant if they found that the alleged injury was not sustained by Dr. Barry, or that the injury was not effected through violent means, or through accidental means, or through external means, or that death occurred directly or indirectly in consequence of disease or bodily infirmity, or partly or wholly from disease, or not from duodenitis; and that they were not at liberty to speculate as to what occurred in the jump, but must be governed by the evidence of witnesses on the trial.

The court refused to give these instructions severally, except as contained in its general charge, and the defendant excepted to each refusal. This makes it necessary to set forth the parts of the charge to the jury which are involved in the several

requests. They are as follows, and the defendant excepted at the time separately to each part which is contained in brackets:

"By the terms of the certificate it was provided that, to entitle the beneficiary to the sum of five thousand dollars, the death should be occasioned by bodily injuries alone, effected through external, violent and accidental means; also, that the benefits of the insurance should not extend to any injury of which there was no external and visible sign, nor to any injury happening, directly or indirectly, in consequence of disease, nor to any death or disability caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of the certificate, nor to any case except where the injury was the proximate or sole cause of the disability or death.

"The issue between the parties may be briefly stated: It is claimed by the plaintiff that on the occasion mentioned by Dr. Hirschmann, when the deceased was at Iron Mountain, he sustained an injury by jumping from a platform to the ground; that this injury was effected by such means as are mentioned in the certificate; that the deceased, at the time of the alleged accident, was in sound physical condition and in robust health; and that the alleged injury was the proximate and sole cause of death.

"The defendant, on the other hand, denies that the deceased sustained any injury that was effected through accidental means, and also contends, that, if any injury was sustained, it was one of which there was no external or visible sign, within the meaning of the policy, and that the supposed injury was not the cause of the death of the deceased, but that he died from natural causes. The case, therefore, resolves itself into three points of inquiry:

"First. Did Dr. Barry sustain internal injury by his jump from the platform on the occasion testified to by Dr. Hirschmann?

"Second. If he did sustain injury as alleged, was it effected through external, violent and accidental means, within the sense and meaning of this certificate, and was it an injury of which there was an external and visible sign?

"Third. If he was injured as claimed, was that injury the proximate cause of his death?

"To entitle the plaintiff to a verdict, each and all of these questions must be answered by you in the affirmative, and if, under the testimony, either one of them must be negatively answered, then your verdict must be for the defendant.

["The first question (viz., Was the deceased, Dr. Barry, injured by jumping from the platform?) is so entirely a question of fact, to be determined upon the testimony, that the court must submit it without discussion to your determination. In passing upon the question, you will consider all the circumstances of the occurrence as laid before you in the testimony; the apparent previous physical condition of Dr. Barry; the subsequent occurrences and circumstances tending to show the change in his condition; the relation in time which the first developments of any trouble bore to the time when he jumped from the platform; the nature of his last sickness; and the symptoms disclosed in its progress and termination.]

"Further, you will inquire what evidence, if any, did the post-mortem examination and any and all subsequent examinations of the parts alleged to have been the seat of the supposed injury furnish of an actual physical injury; [what connection, if any, does there or does there not appear to be between the act of jumping from the platform and the subsequent events and circumstances which culminated in death, including the result, as you shall find it to be, of the post-mortem investigations. The question is before you in the light of all proven facts, for determination. The court cannot indicate any opinion upon it, without invading your exclusive province; and by your ascertainment of the fact the parties must be bound.]

["There is presented in the case a train of circumstances. Do they or not, so to speak, form a chain connecting the ultimate result with such a previous cause as is alleged? Was the act of jumping from the platform adequate or inadequate to produce an internal injury? Thus you may properly pursue the inquiry, guided by and keeping within the limits of the testimony.]

"If you find that injury was sustained, then the next question is, Was it effected through external, violent and accidental means? This is a pivotal point in the case, and therefore vitally important. The means must have been external, violent and accidental. Did an accident occur in the means through which the alleged bodily injury was effected?

["The jumping off the platform was the means by which the injury, if any was sustained, was caused.]

["Now, was there anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground?]

["The term 'accidental' is here used in its ordinary, popular sense, and in that sense it means 'happening by chance; unexpectedly taking place; not according to the usual course of things;' or not as expected.]

["In other words, if a result is such as follows from ordinary means voluntarily employed in a not unusual or unexpected way, then, I suppose, it cannot be called a result effected by accidental means.]

["But if in the act which precedes the injury something unforeseen, unexpected, unusual, occurs, which produces the injury, then the injury has resulted from the accident or through accidental means.]

["We understand, from the testimony, without question, that the deceased jumped from the platform with his eyes open, for his own convenience, in the free exercise of his choice, and not from any perilous necessity. He encountered no obstacle in jumping, and he alighted on the ground in an erect posture. So far we proceed without difficulty; but you must go further and inquire, and here is the precise point on which the question turns: Was there or not any unexpected or unforeseen or involuntary movement of the body, from the time Dr. Barry left the platform until he reached the ground, or in the act of alighting? Did he or not alight on the ground just as he intended to do? Did he accomplish just what he intended to, in the way he intended to? Did he or not unexpectedly lose or relax his self-control, in his downward movement? Did his feet strike the ground as he intended or

expected, or did they not? Did he or not miscalculate the distance, and was there or not any involuntary turning of the body, in the downward movement, or in the act of alighting on the ground? These are points directly pertinent to the question in hand.]

"And I instruct you that if Dr. Barry jumped from the platform and alighted on the ground in the way he intended to do, and nothing unforeseen, unexpected or involuntary occurred, changing or affecting the downward movement of his body as he expected or would naturally expect such a movement to be made, or causing him to strike the ground in any different way or position from that which he anticipated or would naturally anticipate, then any resulting injury was not effected through any accidental means. [But if, in jumping or alighting on the ground, there occurred, from any cause, any unforeseen or involuntary movement, turn, or strain of the body, which brought about the alleged injury, or if there occurred any unforeseen circumstance which interfered with or changed such a downward movement as he expected to make, or as it would be natural to expect under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or expected, and injury thereby resulted, then the injury would be attributable to accidental means.]

"Of course it is to be presumed that he expected to reach the ground safely and without injury. [Now, to simplify the question and apply to its consideration a common-sense rule, did anything, by chance or not as expected, happen, in the act of jumping or striking the ground, which caused an accident? This, I think, is the test by which you should be governed, in determining whether the alleged injury, if any was sustained, was or was not effected through accidental means.]

"You have the testimony in relation to the occurrence which it is claimed by the plaintiff produced in Dr. Barry a mortal injury. Taking it all into consideration and applying to the facts the instruction of the court, you will determine whether, if any injury was sustained, it was effected through external, violent, and accidental means. The defendant claims

that, if Dr. Barry did sustain injury, it was one of which there was no external and visible sign, within the meaning of the certificate of insurance, and therefore, that the plaintiff is not entitled to recover. [Counsel are understood to contend that no recovery could be had under a certificate of insurance in the form and terms of this one, if the injury was wholly internal. In that view the court cannot concur. It is true there must be an external and visible sign of the injury, but it does not necessarily follow from that that the injury must be external. That is not the meaning or construction of the certificate. Such an interpretation of the contract would, in the opinion of the court, sacrifice substance to shadow and convert the contract itself into a snare, an instrument for the destruction of valuable rights. Visible signs of injury, within the meaning of this certificate, are not to be confined to broken limbs or bruises on the surface of the body. There may be other external indications or evidence which are visible signs of internal injury. Complaint of pain is not a visible sign, because pain you cannot see. Complaint of internal soreness is not such a sign, for that you cannot see, but if the internal injury produces, for example, a pale and sickly look in the face, if it causes vomiting or retching, or bloody or unnatural discharges from the bowels, if, in short, it sends forth to the observation of the eye, in the struggle of nature, any signs of the injury, then those are external and visible signs, provided they are the direct results of the injury; and, with this understanding of the meaning of the certificate of insurance, and upon the evidence, you will say whether, if Dr. Barry was injured as claimed, there were or were not external and visible signs of the injury; and the determination of this point will involve the consideration of the question whether what are claimed here to have been external and visible signs were, in fact, produced by — were the result of — the injury, if any was sustained.]

"The next question is, if Dr. Barry was injured as claimed, was the injury the sole or proximate cause of his death? Interpreting and enforcing the certificate of insurance according to its letter and spirit, it must be held that, if any other cause

than the alleged injury produced death, there can be no recovery, so that, to entitle the plaintiff to recover, you must be satisfied that the alleged injury was the proximate cause of death. Whether a cause is proximate or remote does not depend alone upon the closeness in the order of time in which certain things occur. An efficient, adequate cause being found, it must be deemed the true cause, unless some other cause not incidental to it, but independent of it, is shown to have intervened between it and the result. If, for example, the deceased sustained injury to an internal organ, and that necessarily produced inflammation, and that produced a disordered condition of the injured part, whereby other organs of the body could not perform their natural and usual functions, and in consequence the injured person died, the death could be properly attributed to the original injury. In other words, if these results followed the injury as its necessary consequence, and would not have taken place had it not been for the injury, then I think the injury could be said to be the proximate or sole cause of death; but if an independent disease or disorder supervened upon the injury, if there was an injury — I mean a disease or derangement of the parts not necessarily produced by the injury — or if the alleged injury merely brought into activity a then existing, but dormant, disorder or disease, and the death of the deceased resulted wholly or in part from such disease, then it could not be said that the injury was the sole or proximate cause of death.

"It is claimed by the plaintiff that the supposed jar or shock said to have been produced by jumping from the platform caused some displacement in the duodenum; that it became occluded, to use the expression that has been used by witnesses; that there was constriction and occlusion of that intestine, which was accompanied with consequent inflammation — in short, that the deceased had duodenitis, as the direct result of the alleged original injury, and in consequence died. This contention is urged upon all the circumstances of the case, and upon the testimony offered by the plaintiff tending to show the symptoms which accompanied the last sickness, the diagnosis of the case made by attending physicians, and the

alleged developments of the autopsy. It is contended in behalf of the defendant, that there was no constriction, occlusion, or inflammation of the duodenum; that the deceased did not have duodenitis; and that no physical injury is shown to have resulted from jumping from the platform. This claim is based upon the contention that the various symptoms manifested in the last sickness of the deceased were consistent with natural causes, with some undiscovered organic trouble not occasioned by violence or sudden injury; that the conclusions of the physicians who made the post-mortem examination were erroneous; and that the microscopic examination of the parts in New York demonstrated such alleged error. Concerning the microscopic test made in New York by Dr. Carpenter, the plaintiff contends that it is not reliable and should not be accepted, for reasons urged in argument and which I need not repeat.

"Now, between these conflicting claims weighing and giving due consideration to all the testimony, you must judge. If the deceased died of some disease or disorder not necessarily resulting from the original injury, if there was an injury, then the defendant is not liable under this certificate of insurance; but if the deceased received an internal injury which in direct course produced duodenitis, and thereby caused his death, then the injury was the proximate cause of death.

"In considering this case you ought not to adopt theories without proof, nor to substitute bare possibility for positive evidence of facts testified to by credible witnesses. Mere possibilities, conjectures, or theories should not be allowed to take the place of evidence; where the weight of credible testimony proves the existence of a fact, it should be accepted as a fact in the case. Where, if at all, proof is wanting and the deficiency remains throughout the case, the allegation of fact should be deemed not established.

"There has been considerable testimony given by physicians, what we call expert testimony, and in the consideration of that testimony it is your province to determine which of these medical witnesses is right in his statement, opinion, or judgment. It is purely a question of fact for you, which of these

physicians was most competent to form a judgment as to the cause of Dr. Barry's death. Who has had the best opportunities for forming a judgment as to the cause of death?

"All this is to be taken into consideration by you in weighing and deliberating upon this evidence. . .

"I am asked to instruct you that, before the plaintiff can recover, she must show that when the defendant received the proofs of death, on or about July 15, 1883, it either had cash on hand belonging to class AA, or that it levied an assessment upon the members, and by that means received money which belonged to class AA. This construction of the certificate is upon the theory that, to entitle the plaintiff to recover, it is essential to show either that it had money on hand with which to meet this loss, or that it has made an assessment from which the loss can be paid.

"This instruction I must decline to give you, for the reason that it appears from the evidence that there were more than a sufficient number of members in class AA to pay the five thousand dollars on this certificate, if an assessment were to be made; and I regard it the duty of the association to make the assessment when the death loss is proved, and where the case is one upon which the association is liable to pay the loss.

"Now, to sum up the case, if you find from the evidence that the deceased, on the 20th day of June, 1883, sustained a bodily injury, and that such injury was effected through external, violent and accidental means, and was one of which there was an external and visible sign, and that the injury was the proximate or sole cause of death, then the plaintiff should have a verdict in her favor.

"If, on the contrary, you find either that the injury was not sustained, or that, if it was sustained, it was not effected through external, violent and accidental means, or was an injury of which there was no external and visible sign, or that it was not the proximate or sole cause of death, then your verdict should be for the defendant.

"If you find the plaintiff entitled to recover you will render a verdict in her favor for the sum of five thousand dollars, with interest at 7 per cent, computed from the 15th of Sep-

tember, 1883, to the present time, adding the interest to the principal, so that your verdict will show the gross sum."

After the charge had been given, a juryman inquired: "Is there any evidence showing that the association did make an assessment after receiving proof of Dr. Barry's death?" The court replied: ["There is some proof on that subject. You need not take that into consideration at all, for I have instructed you that if you should find the facts as I have stated them to you the plaintiff is entitled to recover. You need not take into consideration the matter of assessment."] The defendant excepted to the part in brackets.

Mr. B. K. Miller, Jr., for plaintiff in error.

I. The court erred in not directing a special verdict.

The Revised Statutes of Wisconsin, 1887, § 2858, provides: "The court in its discretion may, and when either party at or before the close of the testimony and before any argument to the jury is made or waived shall so request, the court shall direct the jury to find a special verdict. Such verdict shall be prepared by the court in the form of questions in writing, relating to only material issues of fact and admitting a direct answer, to which the jury shall make answer in writing. The court may also direct the jury, if they render a general verdict, to find in writing upon any particular question of fact, to be stated as aforesaid. In every action for the recovery of money only or specific real property, the jury may in their discretion when not otherwise directed by the court render a general or a special verdict."

If requested in proper time it is obligatory upon the judge to submit a special verdict; "the court *shall* direct the jury to find a special verdict." *Schatz* v. *Pfeil*, 56 Wisconsin, 429; *Fenelon* v. *Butts*, 53 Wisconsin, 344. This is the general rule in States where a similar rule is in force. This statute is binding on the Federal Courts. Rev. Stat. § 914; *Indianapolis, &c. Railroad* v. *Horst*, 93 U. S. 291, 301.

There are two forms of procedure in Wisconsin: one by an ordinary special verdict, in which the jury decides all the

facts, and upon which a judgment is rendered as in *Easton* v. *Hodges*, 106 U. S. 408; the second method is by submitting a general verdict and adding certain special questions.

In the case at bar a special verdict was demanded, and when that was refused a special finding was requested.

The error assigned refers only to the refusal of the court to submit a special verdict. The refusal to submit a special finding in addition to the general verdict was clearly not error in view of the decision in *Indianapolis Railroad Co. v. Horst*, 93 U. S. 299. It would seem, that a particular form of rendering a verdict was certainly a "form or mode of proceeding" within the true intent and meaning of the statute. *Chateaugay Ore & Iron Co., Petitioner*, 128 U. S. 544.

II. The trial court erred in not restricting the case to the issues made up by the pleadings.

The issue by the pleadings was "accidental death from duodenitis." The issue submitted by the court was accidental death from anything.

The complaint alleges that deceased jumped off a low platform and "unexpectedly received an accidental jar and sudden wrenching of his body caused by said jump." "That the said jarring of his person and wrenching of his body caused as aforesaid was the immediate cause of and directly produced a stricture of the duodenum from the effects of which . . . [he] died." The answer denies this. So the issue certainly was whether the insured died of duodenitis caused by an accident.

It is a general rule that the allegata and probata must agree. If a party plead with too great particularity he must make his proof accordingly.

The plaintiff alleged an accidental injury to duodenum. The defendant denied such an accident. The proof was directed almost entirely to this question. The court left it generally to the jury to say whether there was any accidental injury of any kind; thus submitting to the jury questions not raised by the pleadings or covered by the evidence.

III. There was no evidence to support the verdict because no accident was shown.

Argument for Plaintiff in Error.

The policy was to insure Dr. Barry against death by accident, provided he "shall have sustained bodily injuries effected through external, violent and accidental means . . . and such injuries alone shall have occasioned death." "Provided, always, that benefits under this certificate shall not extend to hernia nor to any bodily injury of which there shall be no visible sign nor to any bodily injury happening directly or indirectly in consequence of disease nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease . . . nor to any case except where the injury is the proximate or sole cause of the disability or death . . . nor to any case of death or personal injury unless the claimant, under this certificate, shall establish by direct and positive proof that the said death or personal injury was caused by external, violent and accidental means."

The court instructed the jury as follows: "Now, was there anything accidental, unforeseen, involuntary, unexpected in the act of jumping, from the time the deceased left the platform until he alighted on the ground?"

Again, "Was there or not any unexpected or unforeseen or involuntary movement of the body from the time Dr. Barry left the platform until he reached the ground or in the act of alighting? Did he or not alight on the ground just as he intended to? Did he accomplish just what he intended to, in the way he intended to? Did he or not unexpectedly lose or relax his self-control in his downward movement? Did his feet strike the ground as he intended or expected, or did they not? Did he not miscalculate the distance, and was there or not any involuntary turning of the body in the downward movement or in the act of alighting on the ground? These are points directly pertinent to the question in hand."

Again. "But if, in jumping or alighting on the ground, there occurred from any cause, any unforeseen or involuntary movement, turn or strain of the body which brought about the alleged injury, or if there occurred any unforeseen circumstances which interfered with or changed such a downward movement as he expcted to make or as it would be natural to expect under such circumstances, and as caused him to alight

on the ground in a different position or way from that which he intended or expected, and injury thereby resulted, then the injury would be attributable to accidental means."

There is no evidence that any one of these things happened. So far as the evidence goes, Dr. Barry voluntarily jumped off the platform, alighted squarely on his feet without falling, in fact did exactly what he intended to do and in the way intended.

An "accident" is defined to be "an event from an unknown cause," or "an unusual and unexpected event from a known cause." The death in this case was not caused by such an accident. *Southard* v. *Railway &c. Assurance Co.*, 34 Connecticut, 574; *McCarthy* v. *Travellers' Insurance Co.*, 8 Bissell, 362.

If there was an accident it does not follow from the evidence that he died therefrom.

After the jump they all went to a drug-store and met some gentlemen there. The deceased drove all the way home. He was ill that night and continued ill till the date of his death, and although he may have died of an obstruction of the bowels or even from duodenitis, there is absolutely no evidence that his death was caused by the jump. It is a clear case of *post hoc propter hoc.*

IV. No recovery at law was recoverable in this action, certainly not for more than nominal damages.

The policy of insurance provided that "the principal sum represented by the payment of $2 by each member in division AA . . . as provided in the by-laws," should be paid to Mrs. Barry.

The by-laws provide that "the board of directors shall . . . order an assessment of $2 upon each person . . . and pay the amount so collected." No evidence of an assessment was offered or given.

The contract between the parties is not that the defendant will absolutely pay $5000 or any other sum, but that it will levy an assessment and pay over the proceeds thereof. Plaintiff's remedy was clearly in equity for a specific performance and even if an action at law will lie it would be for breach of

covenant; the damages would be merely nominal. *Curtis* v. *Mutual Benefit Life Ins. Co.*, 48 Connecticut, 98; *Eggleston* v. *Centennial Mutual Life Association*, 18 Fed. Rep. 14; *Smith* v. *Covenant Benefit Association*, 24 Fed. Rep. 685; *Covenant Benefit Association* v. *Sears*, 114 Illinois, 108; *In re La Solidarité Mutual Benefit Association*, 68 California, 392; *Rainsbarger* v. *Union Mutual Aid Association*, 72 Iowa, 191; *Bailey* v. *Mutual Benefit Association*, 71 Iowa, 689; *Newman v. Covenant Mutual Benefit Association*, 72 Iowa, 242; *Tobin* v. *Western Mutual Aid Society*, 72 Iowa, 261.

Mr. William F. Vilas for defendant in error.

Mr. George Mc Whoeter and *Mr. C. B. Bice* filed a brief for defendant in error.

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

(1) When the trial took place, in December, 1885, the following provision of the state statute was in force in Wisconsin, (Rev. Stat. of Wisconsin, 1878, 760, § 2858, title 25, c. 128:) "The court, in its discretion, may, and when either party, at or before the close of the testimony and before any argument to the jury is made or waived, shall so request, the court shall direct the jury to find a special verdict. Such verdict shall be prepared by the court in the form of questions, in writing, relating only to material issues of fact and admitting a direct answer, to which the jury shall make answer in writing. The court may also direct the jury, if they render a general verdict, to find in writing upon any particular questions of fact to be stated as aforesaid. In every action for the recovery of money only, or specific real property, the jury may, in their discretion, when not otherwise directed by the court, render a general or a special verdict."

It is contended, for the defendant, that the court erred in refusing its demand to submit a special verdict in the case, as provided by the rules of practice in the State. It is, however,

conceded, in the brief of its counsel, that the refusal to submit a special question in connection with the general verdict, was not error, in view of the ruling of this court in *Indianapolis Railroad Co.* v. *Horst*, 93 U. S. 291, 299. In that case this court adhered to its views expressed in *Nudd* v. *Burrows*, 91 U. S. 426, 442, that the personal conduct and administration of the judge in the discharge of his separate functions was neither practice, pleading, nor a form or mode of proceeding, within the meaning of § 5 of the act of June 1, 1872, 17 Stat. 197, now § 914 of the Revised Statutes, and further said that the statute was not intended to fetter the judge in the personal discharge of his accustomed duties, or to trench upon the common law powers with which in that respect he is clothed. This principle has been uniformly applied since by this court; and we are of opinion that it covers the demand made in this case that the court should submit a special verdict, as provided by the rules of practice in the State of Wisconsin, and should submit the particular question mentioned in that connection.

(2) It is also urged as error that the court did not restrict the case to the issue made by the pleadings; that that issue was, that the assured died from "a stricture of the duodenum," produced by the accident; and that the issue submitted by the court was accidental death from anything. The court very properly refused to instruct the jury that the assured did not die from duodenitis; and its response to the request to instruct them that if they found he did not die from duodenitis, their verdict must be for the defendant, was, that it refused to give that instruction "except as contained in the general charge." It is contended, however, for the defendant, that, in the general charge, the jury were charged, in effect, that, if the assured sustained internal injury of any kind by his jump, and died therefrom, the plaintiff could recover. But we do not so understand the charge. In a part of it, before set forth, and not excepted to by the defendant, the court distinctly laid before the jury the issue as to the constriction or occlusion of the duodenum, and the contentions of the two parties in regard thereto, and told the jury that they must judge between those conflicting claims, weighing and giving due consideration to

all the testimony, and that if the deceased received an internal injury which in direct course produced duodenitis, and thereby caused his death, then the injury was the proximate cause of death.

(3) It is further urged that there was no evidence to support the verdict because no accident was shown. We do not concur in this view. The two companions of the deceased jumped from the same platform, at the same time and place, and alighted safely. It must be presumed not only that the deceased intended to alight safely, but thought that he would. The jury were, on all the evidence, at liberty to say that it was an accident that he did not. The court properly instructed them that the jumping off the platform was the means by which the injury, if any was sustained, was caused; that the question was, whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground; that the term "accidental" was used in the policy in its ordinary, popular sense, as meaning "happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected;" that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means. The jury were further told, no exception being taken, that, in considering the case, they ought not to adopt theories without proof, or substitute bare possibility for positive evidence of facts testified to by credible witnesses; that where the weight of credible testimony proved the existence of a fact, it should be accepted as a fact in the case; but that where, if at all, proof was wanting, and the deficiency remained throughout the case, the allegation of fact should not be deemed established.

In *Martin* v. *Travellers' Ins. Co.*, 1 Foster & Fin. 505, the policy was against any bodily injury resulting from any accident or violence, "provided that the injury should be occa-

sioned by any external or material cause operating on the person of the insured." In the course of his business he lifted a heavy burden and injured his spine. It was objected that he did not sustain bodily injury by reason of an accident. The plaintiff recovered.

In *North American Ins. Co.* v. *Burroughs*, 69 Penn. St. 43, the policy was against death "in consequence of accident," and was to be operative only in case the death was caused solely by an "accidental injury." It was held that an accidental strain, resulting in death, was an accidental injury within the meaning of the policy, and that it included death from any unexpected event happening by chance, and not occurring according to the usual course of things.

The case of *Southard* v. *Railway Passengers' Assurance Co.*, 34 Connecticut, 574, is relied on by the defendant. That case, though pending in a state court in Connecticut, was decided by an arbitrator, who was then the learned district judge of the United States for the District of Connecticut. But if there is anything in that decision inconsistent with the present one, we must dissent from its views.

(4) It is contended that no recovery at law could be had on this policy, or, at most, only one for nominal damages, on the ground that the contract of the defendant was not to pay any sum absolutely, but only to levy an assessment and pay over the proceeds; and that the remedy of the plaintiff was solely in equity, for a specific performance of the contract.

The policy says: "The principal sum represented by the payment of two dollars by each member in division AA of the association as provided in the by-laws," not to exceed $5000, "to be paid" to the wife. Although the by-laws state that the object of the association "is to collect and accumulate a fund" for the purpose named, and that, on the requisite proof of bodily injury to, and the death of, a member of a division, the board of directors shall immediately order an assessment of two dollars upon each person who was a member of the division to which the deceased belonged at the time of his death, and pay the amount so collected, according to the prescribed schedule of classification, to the proper beneficiary, the policy

does not contract to make an assessment, nor does it make the payment of any sum contingent on an assessment, or on the collection of an assessment. It agrees to pay a principal sum represented by the payment of two dollars for each member in division AA, within sixty days after proof of death. The association always knows the number of members which is to be multiplied by two. It has sixty days in which to make the assessment and collect what it can, before making any payment, but it takes the risk as to those who do not pay in time or at all. The liability to assessment is all that concerns the beneficiary, not the making or collection of an assessment; and the liability to assessment only measures the amount to be paid under the policy.

In view of the amendment made to the complaint at the trial which was not excepted to, and of the testimony of the secretary of the defendant, the charge of the court on the subject of an assessment was proper, and so was the verdict.

In the cases cited by the defendant either the policy was different from the present one, in providing only for levying an assessment and paying the amount collected, or there was no proof of the assessable number of members.

We see no error in anything excepted to by the defendant, and the judgment is

Affirmed.

THOMPSON v. HUBBARD.

HUBBARD v. THOMPSON.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Nos. 265, 271. Submitted April 17, 1889. — Decided May 13, 1889.

In this case, it was held, on the facts, that the title to a copyright in a book had passed from the person who secured it to another person, as the result of a completed transaction between them, independently of all agreements in regard to other matters, the consideration for the sale having been paid, and the contract having never been rescinded.

The grantee, having sued the grantor for infringing the copyright, it ap-

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peared that although the copyright had been properly secured by the grantor, the grantee, in publishing editions of the book, had, in some of the copies, not printed, in the notice of copyright, either the year or the name, and in others, had omitted the name; *Held*, that he had forfeited the right to sue the grantor for infringement.

The requirement of the statute in regard to printing the prescribed notice of copyright in the book, is one of the conditions precedent to the perfection of the copyright, the other two being the deposit, before publication, of the printed copy of the title, and the depositing in the public office, within the prescribed time after publication, of copies of the book.

Such requirement in regard to printing the notice extends to editions published by the grantee of a copyright, during his ownership thereof.

The failure of the grantee to print the notice prevents his right of action, even as against his grantor, who originally secured the copyright, from coming into existence.

These were cross-appeals from a decree of the Circuit Court of the United States for the Eastern District of Missouri. On the 28th of November, 1882, Alfred H. Hubbard, a citizen of Pennsylvania, carrying on business at Philadelphia under the name of Hubbard Bros., filed his bill of complaint in that court against Nathan D. Thompson, a citizen of Missouri, carrying on business at St. Louis under the name of N. D. Thompson & Co. This bill alleged that in 1880 Thompson was the proprietor of a certain book entitled "Illustrated Stock Doctor and Live Stock Encyclopedia, including Horses, Cattle, Swine and Poultry, with all the facts concerning the various breeds and their characteristics, Breaking, Training, Sheltering, Buying, Selling, profitable use and general care; embracing all the diseases to which they are subject — the causes, how to know and what to do; given in plain, simple language, free from technicalities, but scientifically correct, and with directions that are easily understood, easily applied, and remedies that are within the reach of the people; giving the most recent, approved and humane methods for the preservation and care of stock, the prevention of disease and restoration of health. Designed for the farmer and stock-owner, by J. Russell Manning, M. D., V. S., with 400 illustrations. Saint Louis, Mo., N. D. Thompson & Co., Publishers, 520, 522, and 524 Pine Street, 1880;" that the book was a

compilation, the manuscript of which was owned by Thompson; that Thompson entered it for copyright, in accordance with the provisions of the statute; that he deposited a title-page of it in the office of the librarian of Congress, on the 27th of March, 1880, and before its publication; that thereafter, having published the book, he, on the 7th of June, 1880, deposited two copies of it in the office of the librarian of Congress, and printed in every copy of it, on the page next after the title-page, a notice of copyright, as prescribed by statute, and thereby became the owner of the copyright; that, on the 30th of March, 1880, Thompson entered into an agreement in writing with Hubbard Bros., a firm composed of Hubbard and one Ayer, carrying on business in Philadelphia, a copy of which instrument, marked Exhibit A, was annexed to the bill and is set forth in the margin,[1] and which

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[1] Memorandum of Agreement.

N. D. Thompson agrees to sell, and does hereby sell, to H. Bros. the entire plates (not less than one thousand pages) of a new book entitled Manning's Illustrated Stock Doctor and Live Stock Encyclopedia, for the sum of $4000, including copyright, the originals of the illustrations, all the stamps for binding the book, and circular plates, and deliver same as soon as first edition now printing is off press, shipping same to Philadelphia, and delivering same well boxed to the depot in St. Louis, free of charge for boxing or drayage. He agrees further to pay for all books manufactured from said plates, upon his order, with his exclusive imprint and copyright, cash within sixty days, and to order not less than five hundred at a time, and to order in time to admit of their being bound after receipt by Hubbard Bros. of the order.

He agrees to pay for all books he orders made from said plates, a net price which shall be ten per cent in advance of cost to H. Bros., of their manufacture, and also the further cost of boxing and drayage.

He further agrees to confine his sales to the following territory: the States of Mo., Ark., Indian Territory, La., Texas, Miss., So. Ill., Kentucky and Tenn., west of Tenn. River.

He further agrees, for the period of two years, to publish no books except those he now has in course of publication, viz.: Texas History, Almanac and the Tice Almanac, and to devote his energies largely for the above period to the vigorous prosecution of the sale of the publications (Books and Bibles) of Hubbard Bros., and theirs exclusively, including bibles, aside from his own as named, paying for the same within sixty days of date of bills at the rate of 65 per cent off from retail prices, and for all cirs. pros. books, posters, &c., at cost.

was duly recorded in the office of the librarian of Congress; that thereafter, and on May 28, 1880, Thompson rendered to Hubbard Bros. a further instrument in writing, in the form of a bill of sale for the book, a copy of which was annexed to the bill and marked B, and was duly recorded in the office of the librarian of Congress, and was as follows:

"St. Louis, *May 3d*, 1880.

"Messrs. Hubbard Bros., Philadelphia, Pa., bought of N. D. Thompson & Co.

"To complete set electrot. plates, stock book, copyright, originals of illustrations, and stamps for binding same.	$4000 00
"Credit by amount deducted from bills in April.	500 00
	"$3500 00;"

In consideration of the fulfilment [of the] foregoing covenants and agreements, Hubbard Bros. agree to purchase and do hereby purchase the plates of Manning's Stock Doctor, &c., as before described, paying for same $500 offset present ac.; $1000 by note at 8 mos.; $1000 note at 12 mos.; $1000 by note at 18 mos.; $500 by note at 24 mos. Notes bearing interest at 6 per cent per annum. They further agree to supply N. D. Thompson all he may order of books from said plates in 500 lots, with his exclusive imprint and copyright mark, at ten per cent advance on actual cost of manufacture, also cost of boxing and drayage, on 60 days by N. D. Thompson.

They further agree to supply N. D. Thompson their other books and bibles made for sale through and supplied to their branches, at a discount of 65 per cent from the retail prices of the same, granting him the exclusive right of sale of close books in Mo., (excepting six counties adjacent to Kansas City,) Ark., Texas, La., that part of Ky. and Tenn. lying west of the Tennessee River and So. Ill.

It is mutually agreed that each party to this contract shall be responsible to the other in the amt. of $1.00 per copy for each copy of exclusive or close books sold in the other's territory by the general agents or canvassing agents of the opposite party, and further, that all applications for agency of close or exclusive books outside the field of either shall be referred to the party having exclusive right of sale, and a charge of 50c. made for each application so referred. It is further agreed that, should N. D. Thompson go out of business, or for any reason cease to prosecute the sale of Manning's Stock Doctor, &c., then the right of sale in his exclusive field shall revert to Hubbard Bros. unless his successor shall prosecute the sale in like

that Hubbard Bros. paid Thompson in full for said book, plates, copyright, illustrations, and stamps, the consideration mentioned in said bill of sale, and thereby became the sole owners of said book and of the copyright therein, and thereupon employed many persons in the United States and Canada to sell the book by subscription, giving to them the exclusive right to sell the book within the geographical limits assigned to them respectively, and employed Thompson, among others, as one of their agents to sell the book in a large and valuable territory, within which he had the exclusive privilege of selling the book by subscription, and for that purpose of employing others to assist him; that Hubbard Bros. added to the book, and enlarged and improved it, and caused to be printed and bound a large number of copies, each copy having printed therein a notice of copyright, and expended large sums of money in doing so and in advertising the book in newspapers and by means of circulars and prospectuses; that, in June, 1881, Hubbard became, by purchase from Ayer, the sole proprietor of the book and the copyright of it; that Thompson in 1881 and 1882, with full knowledge of the premises, compiled, printed, published and sold, and was continuing to sell and offer for sale, a book entitled "The American Farmers' Pictorial Cyclopedia of Live Stock, embracing Horses, Cattle, Swine, Sheep and Poultry, including departments on Dogs and Bees; being also a complete Stock Doctor; combining the effective method of object-teaching with written instruction. Giving all the facts concerning the various breeds; characteristics and excellences of each; best methods of breeding, training, sheltering, stable management and general care; with specific directions how to buy and how to sell, including careful and illustrated analysis of the points of domestic animals,

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manner as he would have done; the field on stock book to be the same as on H. Bros.' books, except the six counties in Missouri adjacent to Kansas City.

HUBBARD BROS.
N. D. THOMPSON.

Plates to be made collateral security for payment of notes.

H. BROS.

with all the diseases to which they are subject, how to know them, the causes, prevention, and cure, given in plain, simple language, free from technicalities, but scientifically correct, and prescribing remedies readily obtained and easily applied. Designed for the successful and profitable use of the American Farmer and Stock Owner. By Hon. Jonathan Periam, editor 'American Encyclopedia of Agriculture;' editor 'Prairie Farmer;' former editor 'Western Rural;' Member Illinois Department of Agriculture; first Superintendent of Agricultural Illinois Industrial University; Life Member American Pomological Society; author 'History Farmers' Movement;' 'Lessons for Life,' etc. etc.; and A. H. Baker, V. S. Veterinary Editor 'American Field;' Veterinary Surgeon Illinois Humane Society; Medalist of the Montreal Veterinary College; Member of the Montreal Veterinary Medical Association, etc. etc. With over 700 appropriate engravings. Saint Louis, Mo.: N. D. Thompson & Co. Publishers, 520, 522, and 524 Pine Street. 1882;" and that such book was an infringement on the Manning book, its materials being copied in great part therefrom, the combination and arrangement of them in the two books being similar in all material respects.

The bill prayed for an injunction, both preliminary and perpetual, to restrain Thompson from printing, publishing and selling, or offering for sale, any copies of the Periam and Baker book, and for an account of those published and sold, and for the payment of the damages suffered by Hubbard, and for general relief.

An application for a preliminary injunction was denied by the court, but it required Thompson to give a bond in $5000, to answer any damages that might be adjudged against him, and to keep an account of the books in question which he had sold or should sell.

On the 5th of February, 1883, Thompson filed an answer to the bill, in which he admitted that he was the owner of the manuscript of the Manning book, and obtained the copyright therefor. It alleged that said Exhibit A was not recorded in the office of the librarian of Congress until August 23, 1882; that, before March 30, 1880, Hubbard Bros., composed of

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Hubbard and Ayer, entered into negotiations with Thompson to purchase from him the Manning book, including the copyright thereof, which was thereafter to be obtained, the originals of cuts, stamps for binding and plates for circulars; that, on the 30th of March, 1880, Thompson met Hubbard at the Union Depot in St. Louis, and there, and on the railroad train while passing, on that day, from St. Louis to East St. Louis, Thompson verbally agreed with Hubbard, for Hubbard Bros., on the basis for the future sale of said book, copyright, originals of cuts, plates and stamps; that such agreement for the sale, thereafter to be made, was on the terms that Thompson would sell to Hubbard Bros. the plates necessary for printing the books, including the copyright, originals of cuts, and stamps for binding, Thompson to have the right first to publish an edition of 2000 copies of the book, and then to deliver the plates, cuts and stamps, properly packed for shipping, at the Union Depot in St. Louis, and, in consideration thereof, Hubbard Bros. were to pay to Thompson $4000, and also to manufacture said book for him and deliver the same to him in St. Louis, at a less cost than that for which he was then manufacturing the book, agreeing to manufacture and deliver it to him in St. Louis for a less price than $1.10 per copy, and that the book so to be manufactured for and delivered to Thompson should in each copy contain the name of "N. D. Thompson & Co., publishers, St. Louis, Missouri," exclusive of the name of any other publisher, and should contain, on the proper page, the exclusive copyright notice of N. D. Thompson & Co., in accordance with the act of Congress; that Thompson would order delivery of the books in lots of 500 copies, Hubbard Bros. to have a reasonable time after the receipt of the order in which to have the books bound; that the books should be furnished to Thompson at a net price of 10 per cent in advance of the actual cost of manufacture, including boxing and drayage, and that Thompson should have the exclusive right to sell the book within the bounds of the following territory, namely, the States of Missouri, Arkansas, Indian Territory, Louisiana, Texas, Mississippi, and that portion of Iowa bounded on the north by the third tier of counties from the

Missouri line, and that part of Illinois, not including, but south of Rock Island and Will counties, constituting about three fourths of the State of Illinois, and also in that portion of Kentucky and Tennessee bounded on the east by the Louisville and Nashville and the Nashville and Chattanooga railroads, and also a portion of the State of Indiana; that Thompson, having agents and canvassers engaged in selling the book on subscription for future delivery, in Iowa, Wisconsin, Michigan, Illinois and Ohio, at places and covering territory not included in that before mentioned, should continue to sell the book by such agents and canvassers then in his employ, in such territory then occupied by them; that Hubbard Bros. also agreed with Thompson that they would sell and furnish to him all other books and publications manufactured or issued for sale by them, through their house or branch offices, at a discount of 65 per cent off from the retail price of the same, and that he should have the exclusive right to sell said books and publications of Hubbard Bros. in Missouri, (excepting the six counties adjacent to Kansas City,) and also in Arkansas, Texas, Louisiana, that part of Kentucky and Tennessee lying west of the Tennessee River, and the southern half of Illinois; that Hubbard Bros. would supply to him all circulars, prospectus books, and posters necessary and usual in prosecuting the sale of said books, at the cost price thereof, payment to be made for the same, and for said publications of Hubbard Bros., by Thompson, within sixty days from the date of sale; that a contract and agreement should be written in proper form, and executed by Thompson and Hubbard Bros., in accordance with and on the considerations aforesaid, and that in such contract Thompson would agree, for two years from its execution, to publish no books other than such as he then had in course of publication, and devote his attention largely to the sale of such publications of Hubbard Bros., to be so purchased from them, and to push the sale thereof exclusively, except as to publications of Thompson; that each party to the contract so to be entered into would pay to the other $1 per copy for each copy of the Manning book sold by either in any of the territory to be so reserved and exclusively set apart for the other;

that all applications for agencies for the sale of any of the said books, coming to one of the parties from territory reserved exclusively for the other, should be by such party referred to the other; that the party to whom such application should be referred would pay to the other 50 cents for every such application; that, if Thompson should go out of business or cease to prosecute the sale of the Manning book, then, unless the successor of Thompson would continue the same, Hubbard Bros. should have the exclusive right to sell said book; and that, on the execution of such contract, Thompson would assign the copyright to Hubbard Bros., and they would execute a mortgage to him on such plates, cuts and stamps, to secure to him the performance of the contract.

The answer further alleged that the $4000 so to be paid by Hubbard constituted only a small portion of the consideration of the contract to be made; that the plates, cuts and stamps were of greater value than $10,000; that Hubbard, falsely pretending to have made a memorandum in writing, with pencil, on paper, containing an outline of the terms and considerations of the contract thereafter to be entered into, a copy of which memorandum written by Hubbard is Exhibit A to the bill, represented to Thompson that such memorandum was incomplete, but contained the outlines of the contract thereafter to be made in accordance with such full understanding of the parties, and promised that he would prepare a contract in proper form, in writing, and elaborate the same in accordance with such considerations, and that Hubbard Bros. would execute it; that thus, by fraud and deceit, Hubbard persuaded Thompson to sign, with a pencil, such memorandum, Thompson at the time believing and relying on such false promises and representations of Hubbard; and that such memorandum was not agreed upon as, or understood or intended to be, the contract to be entered into by Thompson and Hubbard Bros., nor was it understood as, or intended to be, an assignment of the copyright of the book.

The answer further averred that Thompson, believing that Hubbard Bros. would in good faith execute the contract as agreed to be made and carry out the same in accordance with

the terms so agreed upon, shipped and delivered to Hubbard Bros. the plates, cuts and stamps necessary for the manufacture of the book, and, at the request of Hubbard or of Hubbard Bros., forwarded to them the paper marked Exhibit B to the bill, which was intended to be only a statement of the account of a part of the consideration to be rendered by Hubbard Bros., namely, $4000 which was to be paid in money; that Hubbard Bros. thereafter refused to carry out any part of the contract as agreed upon, and had refused to furnish Thompson with copies of the Manning book at the price agreed upon, or at any price less than the usual and regular wholesale price thereof, and had refused to manufacture for, or deliver to, Thompson any copy of said book, containing the copyright notice of him or of N. D. Thompson & Co., in accordance with the statute, and, having published editions of the book, had sold it in the territory exclusively to be reserved and set apart to Thompson; that Hubbard thereupon declared that there was no agreement or contract in existence between Hubbard Bros. and Thompson, and Thompson assented thereto; that thereby said agreement for said contract, and the terms of said contract, were by mutual consent rescinded; and that Hubbard Bros. did not, in each or any copy of the book, have printed any legal notice of copyright. The answer denied that the defendant, by publishing and selling the Periam and Baker book, has infringed any copyright belonging to Hubbard in the Manning book.

A replication was filed to this answer, on the 23d of February, 1883.

On the 10th of May, 1883, Thompson filed in the same court his cross-bill against Hubbard, setting forth that, having procured to be compiled the Manning book, and being its owner, he, on the 27th of March, 1880, before the manuscript of it was completed, and before the book was published, deposited in the mail, addressed to the librarian of Congress, at Washington, a printed copy of the title of the book, which was received by such librarian; and that, having thereafter published the book, he did, within ten days from its publication, deposit in the mail, addressed to such librarian, at Washington,

two complete printed copies thereof, of the best edition issued, and did print in each copy of said book published by him, on the page next after the title-page, a notice of copyright, in accordance with the statute, and so became the owner of the copyright of the book, and received from said librarian a certificate of the copyright thereof.

The cross-bill contained in substance the same allegations as are found in Thompson's answer to the original bill, in regard to the negotiations between the parties and the terms of the verbal agreement alleged by Thompson to have been made between them. It alleged that during the conversation at St. Louis, and while crossing to East St. Louis, each of the parties had in his hands a written paper, both of which were produced by Hubbard at the time; that, during the consideration of such writings, Hubbard made or pretended to make some alterations in the one held by him, which instrument and alterations Thompson did not at the time examine or read; that neither of the writings was at the time altered to correspond with the verbal agreement, and the two writings were not at the time compared, and the alterations so made in the one held by Hubbard were not made in the one held by Thompson; that afterwards Hubbard proposed to insert, and did insert, in said writings the clause, "Plates to be made collateral security for payment of notes;" that that clause was not in accordance with the agreement then and there made, it having been agreed that the plates should be collateral security for the performance of the verbal agreement; that afterwards, and when the train was about to leave East St. Louis, where Thompson was to leave it and return to St. Louis, Hubbard, representing to Thompson that the writings were incomplete, but that they contained the outlines of the contract thereafter to be made, and promising that he would prepare in proper form, in writing, a contract, and elaborate it in accordance with the verbal agreement and the considerations before set forth, and that Hubbard Bros. would execute it, and representing and promising that the said writings would be used only as a guide and outline, from which the real agreement would be drawn and framed in accordance with the full

understanding of the parties as so set forth, persuaded Thompson to sign, with a pencil, the writing attached to the original bill as Exhibit A; that, immediately on the return of Hubbard to Philadelphia, Hubbard Bros. caused their agents to be instructed to observe the boundary lines of the territory reserved to Thompson in said verbal agreement, as territory which had been reserved exclusively to Thompson thereby; that Thompson did not at the time see or know that the following clause in the writings was contained therein, namely, "The field on stock book to be the same as on H. Bros.' books except the six Co.'s, in Mo. adjacent to Kansas City," and did not discover the same until a day or two after he had signed the memorandum; that that clause was inserted by Hubbard without the knowledge and consent of Thompson, and Thompson never agreed or intended to agree to the same; that immediately after he discovered that clause in the writing retained by him, a copy of which writing is contained in the margin,[1]

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[1] Memorandum of Agreement.

N. D. T. agrees to sell H. Bros. the plates (1000 p.) of Manning's Stock Dr., etc., including copyright, the originals of cuts, stamps for binding and circular plates, for $4000, and deliver same soon as first edition now printing is off press, well boxed, at depot in St. Louis, free of charge for boxing and drayage.

He agrees further to pay for all books manufactured from said plates upon his order (with his exclusive imprint and copyright mark); to order not less than 500 at a time, and sixty days, and in time to admit of their being bound, after receipt by Hubbard Bros. of his order. He agrees to pay for all books he orders made from said plates, a net price of ten per cent in advance of cost of manufacture, including boxing and drayage.

He further agrees to confine his sales to the following territory, viz: the States of Missouri, Arkansas, Indian Territory, Louisiana, Texas, Mississippi, Southern Illinois, one third of each Indiana, Kentucky, Tennessee.

He further agrees, for the period of two years, to publish no books, except those he now has in course of publication, viz.: Texas History, Almanac, and the Tice Almanac, and to devote his energies largely for the above period to the vigorous prosecution of the sale of the publications (books and bibles) of Hubbard Bros., and to theirs exclusively (including bibles), (aside from his own, as named), paying for the same within sixty days of date of bills, at the rate of sixty-five per cent off from the retail prices, and for all circulars, prospectus books, posters, etc., at cost.

In consideration of the fulfilment of the foregoing covenants and agree-

he and Hubbard Bros. had a correspondence in relation to the territory to be reserved to him, in which he insisted upon the territory described in such verbal agreement, as that agreed upon between Hubbard Bros. and himself to be reserved to him, except as afterwards mentioned in the cross-bill; that, on the 13th of April, 1880, he proposed, by way of concession to Hubbard Bros., that instead of the territory agreed to be reserved by the verbal agreement, the territory to be reserved by the contract to be made should be as follows: The two southern tiers of counties in Iowa, instead of three, as in said verbal agreement provided as aforesaid; Illinois, south of and including the counties of Henry, Bureau, LaSalle, Grundy and Kankakee; none in Indiana, instead of a third of it; the boundary line in Kentucky to be the Louisville and Nashville

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ments, H. Bros. agree to purchase and do hereby purchase the plates of Mf'g. Stock Dr., etc., as before described, paying for the same as follows, viz.: $500 in present stock accounts unsettled, and $500 24 months; $1000 by note at 8 months; $1000 by note at 12 months; $1000 by note at 18 months, notes bearing interest at 6 per cent per annum.

They further agree to supply N. D. T. all he may order of books from said plates in 500 lots, with his exclusive imprint and copyright mark, at 10 per cent advance on actual cost of manufacture, (said cost to include boxing and drayage,) and for cash on receipt of goods by N. D. T.

They further agree to supply N. D. T. such of their other publications, (books and bibles, as are issued for sale through their home and branch offices,) at a discount of 65 per cent off the retail price of the same, granting him the exclusive right of sale of close books in Mo., (excepting six counties adjacent to Kansas City,) Ark., Texas, La., that part of Ky. and Tenn. lying west of the Tenn. River, and So. Ill.

It is mutually agreed, that each party to this contract shall be responsible to the other in the amount of $1 per copy for any close or exclusive books sold upon the territory of the other, and that all applications for agency coming from without the field of either shall be referred to the party having right of sale, and a charge of 50 cents made for each application so referred.

It is further agreed, that should N. D. T. go out of business, or for any reason cease to prosecute the sale of Manning's Stock Dr., then the right of sale in his exclusive field shall belong to H. Bros., unless his successor shall prosecute the sale in like manner.

The field on Stock Book to be same as on H. Bros.' book, except as to six Co.'s adjacent to Kansas City. Plates to be made collateral security for payment of notes.

HUBBARD BROS.

Railroad, and, in Tennessee, the Nashville and Montgomery Railroad; none of Alabama, instead of half of it, as in said verbal agreement provided; and the whole of Missouri, Arkansas, Texas, Louisiana, and Mississippi, and of the Indian Territory; and that Thompson should have the right to work out agencies made outside the field thus reserved prior to the acceptance by Hubbard Bros. of the proposal last aforesaid; that Hubbard Bros. on the 16th of April, 1880, declined such proposition, and made a counter proposition to Thompson which he, on the 20th of April, 1880, declined to accept; that Thompson then proposed that if the Iowa and Illinois territory, which he reserved in such proposition, should be conceded to him, he would agree to the proposition of Hubbard Bros. to make the territory to be reserved to him in Kentucky and Tennessee all that lying west of the Tennessee River, the other territory to be the same as in his said proposition; that Hubbard Bros. on the 20th of April, 1880, proposed to accept the proposition last aforesaid of Thompson if Thompson would relinquish the outside agencies, meaning those agencies not within the territory reserved and to be reserved to Thompson under his two propositions last aforesaid; that Thompson refused to relinquish said outside agencies at once, but, on the 20th of April, 1880, proposed so to do by the 15th of July following, provided Hubbard Bros. would accept his proposition of the 13th of April, 1880, as modified by his subsequent propositions aforesaid; that afterwards, and on the 20th of April, 1880, and on the 24th of April, 1880, Hubbard Bros. accepted the last aforesaid proposition of Thompson, and any agreement then existing between Hubbard Bros. and Thompson, if not originally such as Thompson had averred, was modified in accordance with said propositions and the acceptance thereof; that, between the 4th and 28th of May, 1880, Thompson shipped and caused to be delivered to Hubbard Bros. the plates, cuts, and stamps, necessary for the manufacture of the Manning book; that on the 26th of May, 1880, Hubbard Bros. requested Thompson to send them a bill specifying the electrotype plates, copyright, original wood engraving, electrotypes of illustrations, and stamps for binding; that,

on the 28th of May, 1880, he forwarded to them the written paper marked Exhibit B to the original bill; that, on June 1, 1880, Hubbard Bros. sent to him notes for the $3500 of the money part of the consideration, having theretofore allowed him $500 on current account; that, on the 22d of July, 1880, Hubbard Bros. sent to him a draft in writing of a contract prepared in more regular form, a copy of which was annexed to the cross-bill, and which, it is alleged, was materially different from either of the said purported memoranda of agreement, and from the said verbal agreement; that Thompson did not execute that draft; that, on the 2d of August, 1880, he prepared a draft of a contract, the provisions of which were substantially the same as those of the verbal agreement as so modified, except that he made in it certain alterations, by way of concessions in favor of Hubbard Bros.; that he sent it to Hubbard Bros., but they refused to execute it; and that afterwards there was further dispute over the territory to be reserved, and on other points.

The cross-bill further alleged the bringing and pendency of the original bill, and stated its contents and the proceedings which had taken place in the court in the original suit, and alleged that Thompson was still the owner of the Manning book and the copyright thereof; and that Hubbard, ever since he obtained possession of said property, had been and then was publishing and selling the book without any legal copyright notice therein, in the field which was to have been reserved exclusively to Thompson, and thus had been and was then infringing the copyright of Thompson in the Manning book, and threatened to continue to do so.

The cross-bill tendered to Hubbard the sum of $4000 so paid by Hubbard Bros. to Thompson, with interest at the rate of 6 per cent per annum from the time it was paid, upon the condition that Hubbard Bros. should surrender to Thompson the plates, cuts and stamps for the Manning book, and such other and further or different conditions as the court might order, and prayed for a perpetual injunction to restrain Hubbard from publishing, selling, or offering for sale, any copies of the Manning book, and for an account of all copies of it

published or sold, or to be published or sold by Hubbard, and for the payment to Thompson by Hubbard of all damage for an unlawful publication by Hubbard of the Manning book, and for a decree that Hubbard deliver back the plates, cuts and stamps, on such conditions as the court might order.

On the 19th of October, 1883, Hubbard filed an answer to the cross-bill, reaffirming the matter set forth in his original bill, and averring that all communications in reference to the delivery of things purchased and payment therefor, between Thompson and Hubbard, were in writing; that the efforts made between the parties to agree upon a more perfect draft of the agreement of March 30, 1880, failed, and therefore both parties to it fell back upon its provisions; that the covenants of that agreement, in reference to the sale of the Manning book and its purchase by Hubbard, were fully complied with, and the terms and conditions of the sale were never called in question or made matter of dispute, until after Thompson had completed and published his infringing book; that the covenants in that agreement with reference to the mode of doing business between Hubbard and Thompson were subsequently modified by correspondence, so that Thompson was enabled to order books in less quantities than 500 copies at a time, and on shorter notice than had been provided in the agreement of March 30, 1880; that, in consideration of such variance, Thompson agreed that the books furnished to him in smaller quantities and on shorter notice should be charged at the rate of 65 per cent off the retail price; that there was some correspondence on the question of territory, and also in reference to the covenants in the agreement of March 30, 1880, by which Thompson agreed, for the period of two years from that date, to publish no other book or books than those mentioned in the agreement, and to devote his energies largely, for the period of two years, to the vigorous prosecution of the sale of Hubbard Bros.' publications, and to them exclusively; that it was agreed by both parties, in that correspondence, that the adjustment of such matters in dispute should be made the subject of a personal conference between the parties, at the time of a proposed visit of Thompson to Philadelphia, and it was also

agreed that at such conference the matter of the price at which Hubbard would agree to furnish the Manning books to Thompson in smaller quantities and at shorter notice than was provided in the agreement, should be settled finally; that it was agreed between Thompson and Hubbard that the contract between them was that the price to be paid by Hubbard for "complete electrotype plates, Stock Book, copyright, originals of illustrations, and stamps for binding" was $4000; that the considerations for the covenant on the part of Thompson, that he would for two years publish no books except "Texas History, Almanac, and the Tice Almanac," and would devote his energies largely for two years to the vigorous prosecution of the sale of Hubbard's books exclusively, paying for the same within sixty days from date, all bills at the rate of 65 per cent off from retail prices, and for all circulars, prospectuses, posters, etc., at cost, were the granting of the exclusive right of sale of Hubbard's "close" books within the territory mentioned, and the agreement to furnish the Manning books in lots of 500 at an advance of 10 per cent on actual cost of manufacture, upon the further terms and conditions contained in the agreement of March 30, 1880; that, after Thompson had completed the delivery of the electrotype plates, illustrations, stamps, etc., and Hubbard had given to Thompson his promissory notes, the sale of the Manning book to Hubbard was complete, and the agreement providing for the sale and mode of payment was of no further legal effect than as an instrument in writing conveying the copyright, and the covenants providing for the regulation of the business of the publication and sale of books between the parties, which were executory and were to continue for the period of two years, remained in force, subject to modifications from time to time made and agreed to by the parties; that, notwithstanding the failure of Thompson to order books in accordance with the terms of the contract, Hubbard filled all orders for books made on him by Thompson, imposing the condition, nevertheless, that, until Thompson would bring himself under the terms of the contract of March 30, 1880, Hubbard would charge the Manning books to Thompson at 65 per cent off

from the retail price, upon condition, however, that if Thompson would subsequently, upon his promised visit to Philadelphia, put himself upon the covenants of said contract, and show a willingness to perform them, Hubbard would abate the price at which the books were charged; that Thompson assented to such a course of dealing; that it was not true that the correspondence between the parties had reference to the contract of sale of the Manning books, plates, cuts, stamps, and copyright; that such contract of sale was not at any time spoken of as annulled, withdrawn, or rescinded, and no words were used in reference thereto which could be considered by Thompson to be a rescission, or an implied rescission, or an intended rescission of the contract; that Thompson and Hubbard at all times considered the sale of the Manning book, including plates, cuts, copyright, etc., and the payment therefor, as complete, when the promissory notes were forwarded to Thompson by Hubbard; and that such sale was treated as conclusive, complete, and absolute, by Thompson and Hubbard, until after Thompson had published the Periam and Baker book, and it was only then that Thompson began to dispute the title of Hubbard in the Manning book and the copyright thereof.

A replication was filed to the answer to the cross-bill, proofs were taken on both sides, and it was stipulated between the parties that all proof taken in either suit might be used in both.

The case was brought to a hearing before Judge Treat, the district judge, and on the 8th of July, 1885, he made a decision, holding, that if the copyright of the Manning book had been transferred to Hubbard, the Periam and Baker book was an infringement of it, but ordering a re-argument before the circuit judge (Judge Brewer) and himself, on three questions: (1) Whether Thompson assigned the copyright of the Manning book to Hubbard, so that Hubbard could pursue him for an infringement; (2) whether, if such assignment was made, it was rescinded; (3) whether, inasmuch as the imprint of Hubbard's publication did not conform to the terms of the statute, he could maintain an action against Thompson for an infringe-

ment, although Thompson knew that the copyright had been granted.

The case was heard before the two judges, and was decided in an opinion given by Judge Brewer, and reported in 25 Fed. Rep. 188. The view of the court was, that the testimony left the matter much in doubt, whether the paper signed on March 30, 1880, was understood by the parties to be a definite and closed contract, "or a mere preliminary statement — a memorandum of matters upon which they had agreed, and which, with all unsettled details, were thereafter to be put into the form of a complete contract in writing and then signed and executed." The conclusion of both judges was stated to be, that there was not in the testimony that which enabled the court to say that the parties, in respect to all the items of the proposed agreement between them, ever came to a definite understanding; that there were still some matters unsettled and undetermined, so that a contract, as it was a single contract and understood to be a single contract, could not be said to have been finally and definitely consummated; that the cross-bill ought to be sustained so far as concerned the tender — that is, the plates ought to be returned to Thompson upon the payment by him to Hubbard of the $4000 and interest, but that, so far as any claim by Thompson for an accounting and damages was concerned, the course of dealing between the parties had been such that equitably Thompson was not entitled to any such accounting.

On the 27th of October, 1885, a decree was made, entitled in both suits, adjudging that no assignment or sale of the copyright of the Manning book, or of the electrotype plates, originals of illustrations, and stamps for binding, was ever made by Thompson to Hubbard, by virtue of the instruments of writing and acts mentioned and described in the original bill, and that Hubbard neither acquired nor had any title to or ownership in the copyright of said book under said instruments and acts, or any of them, and dismissing the original bill; and it was decreed under the cross-bill, that Thompson was and always had been the owner of the copyright, electrotype plates, originals of illustrations, and stamps for binding,

of the Manning book, and that Hubbard, on the tender to him of $4000 with interest from May 15, 1880, to the date of the tender, should, on demand, surrender and deliver back to Thompson the electrotype plates, originals of illustrations, and stamps for binding, pertaining to said book and received by him from Thompson; that, if such tender should not be accepted, then said sum and interest should be paid into the registry of the court, to abide its further order; that Thompson was not equitably entitled to an accounting and damages; and that each party should pay his own costs. From this decree each party appealed to this court.

Mr. J. B. Henderson, for Thompson, cited: (1) As to the character and rescission of the contract: *Bruce* v. *Pearson*, 3 Johns. 534; *Innis* v. *Roane*, 4 Call, (Va.) 379; *Hazard* v. *New England Ins. Co.*, 1 Sumner, 218; *Dodge* v. *Hopkins*, 14 Wisconsin, 630; *Green* v. *Wells*, 2 California, 584; *Babcock* v. *Huntington*, 9 Alabama, 869; *Jennings* v. *Gage*, 13 Illinois, 610; *S. C.* 56 Am. Dec. 476; *Tisdale* v. *Buckmore*, 33 Maine, 461; *Cocke* v. *Rucks*, 34 Mississippi, 105; *Evans* v. *Gale*, 17 N. H. 573; *S. C.* 43 Am. Dec. 614; *Harris* v. *Bradley*, 9 Indiana, 166; *Smethurst* v. *Woolston*, 5 W. & S. 106; *Lucy* v. *Bundy*, 9 N. H. 298; *Allen* v. *Webb*, 24 N. H. 278; *Preble* v. *Bottom*, 27 Vermont, 249; *Wright* v. *Haskell*, 45 Maine, 489; *Young* v. *Wakefield*, 121 Mass. 91; *Steam Packet Co.* v. *Sickles*, 10 How. 419; *Bank of Columbia* v. *Hagner*, 1 Pet. 455. (2) As to the notice of the copyright by Thompson: *Burrow-Giles Lithographic Company.* v. *Sarony*, 111 U. S. 53; *Jollie* v. *Jaques*, 1 Blatchford, 618; *Baker* v. *Taylor*, 2 Blatchford, 82; *Parkinson* v. *Laselle*, 3 Sawyer, 330; *Boucicault* v. *Hart*, 13 Blatchford, 47; *Ewer* v. *Coxe*, 4 Wash. C. C. 487; *Rubber Company* v. *Goodyear*, 9 Wall. 788; *Wheaton* v. *Peters*, 8 Pet. 59; *Callaghan* v. *Myers*, 128 U. S. 617, 652; *Merrell* v. *Tice*, 104 U. S. 557; *Struve* v. *Schwedler*, 4 Blatchford, 23; *Banks* v. *Manchester*, 128 U. S. 244.

Mr. J. R. Sypher, *Mr. S. M. Breckinridge* and *Mr. John G. Johnson*, for Hubbard, cited. (1) As to the contract: *Laver*

v. *Dennett*, 109 U. S. 90; *Hartshorn* v. *Day*, 19 How. 211; *Nash* v. *Towne*, 5 Wall. 689; *Slater* v. *Emerson*, 19 How. 224; *Brawley* v. *United States*, 96 U. S. 168; *Chicago* v. *Sheldon*, 9 Wall. 50; *Farmers' Bank* v. *Groves*, 12 How. 5; *Warren* v. *Leland*, 2 Barb. 613; *Mallory* v. *Mackaye*, 12 Fed. Rep. 328; *Pulte* v. *Derby*, 5 McLean, 328; *Smoot's Case*, 15 Wall. 36; *Preston* v. *Luck*, 27 Ch. D. 497; *Kennedy* v. *Lee*, 3 Meriv. 440; *Darlington Iron Co.* v. *Foote*, 16 Fed. Rep. 646; *Bean* v. *Clark*, 30 Fed. Rep. 225; *Wheeler* v. *New Brunswick Railroad Co.*, 115 U. S. 29. (2) As to the copyright: *Wheaton* v. *Peters*, 8 Pet. 591; *Parkinson* v. *Laselle*, 3 Sawyer, 330; *Baker* v. *Taylor*, 2 Blatchford, 82; *Myers* v. *Callaghan*, 5 Fed. Rep. 726; *Story's Executors* v. *Holcombe*, 4 McLean, 306; *Chappelle* v. *Davidson*, 2 Kay & Johns. 123; *Bogue* v. *Houlston*, 5 DeG. &. S. 267; *Alexander* v. *McKenzie*, 9 Scotch Sess. Cas. 2d Series, 758; *Emerson* v. *Davies*, 3 Story, 768.

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

We are unable to concur in the conclusion of the Circuit Court on the question of the sale by Thompson to Hubbard of the copyright of the Manning book.

The price of the book and its copyright, including originals of cuts, circulars, plates and book stamps, having been fixed by agreement at $4000, the disputed point in the negotiations of March 30, 1880, was as to the extent of territory to be allowed to Thompson for the sale of the Manning book, he insisting upon being allowed more territory than was specified in the draft agreements produced by Hubbard. The two drafts, one of which was retained by each party, differ practically only as to the amount of territory in which Thompson was to be allowed to sell the Manning book. The two instruments agree as to the territory in which Thompson was to have an exclusive right to sell the other publications of Hubbard.

The two parties differ in their testimony as to what was

agreed upon in regard to the clause which is substantially the same in both of the instruments, namely: "The field on stock book to be the same as on H. Bros.' books except the six counties in Missouri adjacent to Kansas City," Hubbard testifying that his copy represented exactly what had been settled upon, and that the concluding paragraph was added to make everything certain, while Thompson testifies that he supposed the concluding sentence was added to express the understanding about the plates being collateral security for the notes which were to be given, although the special provision about the collateral security was inserted in the paper retained by him, as well as in that which he signed.

The two papers agree in providing for the sale to Hubbard of the plates of the Manning book, including copyright, the originals of cuts, the stamps for binding, and the plates for circulars, for $4000, the same to be delivered, well boxed, at the depot in St. Louis, free of charge for boxing or drayage, as soon as the first edition, then printing, should be off the press. They also agree in stating that Thompson should pay for all books which should be manufactured from the plates upon his order, with his exclusive imprint and copyright mark, if ordered in lots of not less than 500 at a time, payable in cash in 60 days, the price to be 10 per cent in advance of the cost to Hubbard Bros. of their manufacture, and also the further cost of boxing and drayage.

The two papers also agree in providing that, for the period of two years, Thompson would publish no books except those he then had in course of publication, namely, Texas History, Almanac and the Tice Almanac, and would devote his energies largely for that period to the vigorous prosecution of the sale of the publications (books and bibles) of Hubbard Bros., and theirs exclusively, (including bibles,) aside from his own, as named, paying for the same within sixty days of date of bills, at the rate of 65 per cent off from the retail prices, and for all circulars, prospectus books, posters, etc., at cost.

The two papers also agree in the time and manner of payment, in cash and in notes, for the plates and copyright.

The two papers also agree in providing that Hubbard Bros.

should supply Thompson with all books he might order from such plates in 500 lots, with his exclusive imprint and copyright mark, at 10 per cent advance on the actual cost of manufacture, also the cost of boxing and drayage, to be paid in cash on the receipt of the goods by Thompson; and in the statement that Hubbard Bros. would supply Thompson with their other books and bibles at a discount of 65 per cent from the retail prices of the same, and that they granted him the exclusive right of the sale of their "close" books in certain specified territory; and in stating that each party should be responsible to the other in the amount of $1 per copy for any "close" or exclusive books sold in the territory of the other, and that all applications for agency coming from without the field of either should be referred to the party having the exclusive right of sale, and a charge of 50 cents be made for each application so referred, and that, if Thompson should go out of business, or for any reason cease to prosecute the sale of the Manning book, the right of sale in his exclusive field should revert to Hubbard Bros., unless his successor should prosecute the sale in like manner as he would have done.

Afterwards, in correspondence with Hubbard, Thompson insisted upon being allowed a larger territory for the sale of the Manning book than that specified in the paper he had signed. Hubbard insisted that the provision which appears in both of the papers, "The field on stock book to be the same as on H. Bros.' books except the six counties in Missouri adjacent to Kansas City," specified the territory which had been settled upon. Thompson also, in a letter to Hubbard, desired a date to be fixed for the notes and for the commencement of the two years of his exclusive right in the Hubbard books. As to those matters, Hubbard replied that the date of the notes and the commencement of the two years would properly be fixed as of the date of the delivery of the plates. The dispute about the territory to be allowed to Thompson in respect to the Manning book continued, but was finally settled in a correspondence which occurred in April, 1880, and such settlement resulted in the shipment of the plates by Thompson to Hubbard, and in the payment of the consideration therefor,

by $500 of cash and $3500 in notes, the longest of which ran for two years from the 15th of May, 1880, and all of which were duly paid.

Thompson testifies that he shipped the plates because he and Hubbard had come to an agreement as to territory; and he also sent to Hubbard the bill of sale before set forth as a part of the original bill.

In enclosing to Thompson, on the 1st of June, 1880, the notes amounting to $3500, Hubbard wrote to him as follows: "We enclose herewith notes to the amount of $3500, which, with $500 allowed you on book account, is in full settlement of your bill of May 3d for plates, copyright, original cuts and stamps for binding, of Manning's Illustrated Stock Doctor and Live Stock Encyclopedia. The first lot of plates did not reach us till about the 12th, second lot about the 18th, and third lot is not in yet, so we date notes the 15th, which is sooner than is really due you. Please acknowledge receipt in full and oblige." The notes were all of them dated May 15, 1880, and each of them bore interest at 6 per cent per annum, the three $1000 notes being payable respectively at 8, 12 and 18 months after date, and the $500 note at two years after date. Thompson, in a letter to Hubbard Bros., dated June 4, 1880, acknowledged the receipt of the four notes, and said: "With $500 previously allowed, they are payment in full of plates, engravings, copyright and all the material that enter into the manufacture of the Stock Book. The reservation being that we control certain field, and are to get books at a certain rate above actual cost of manufacture."

The draft of an agreement which Hubbard sent to Thompson in July, 1880, related only to future deliveries of the Manning book, to the territory in which it was to be sold by Thompson, and to the exclusive agency by Thompson for the publications of Hubbard. It did not mention the sale of the plates or the copyright, or the consideration therefor, because that had been settled by the bill of sale and the delivery of the notes; and it fixed the territory in which the Manning book was to be sold by Thompson, according to the limits which had been settled upon by the compromise of April,

1880. Up to July, 1880, after the compromise of April, 1880, no controversy had arisen in regard to any copies of the Manning book ordered by Thompson, because he had ordered none, having on hand the edition which he had printed before he delivered the plates to Hubbard. The draft agreement prepared by Thompson and sent by him to Hubbard in August, 1880, differed in matters which Hubbard considered material, from the draft agreement sent by Hubbard to Thompson in July, 1880.

We are of opinion that the transaction between the parties in regard to the sale of the copyright of the Manning book and the plates therefor, was a completed transaction, independently of all contracts or agreements in regard to other matters, that the consideration therefor was paid, and that that contract was never rescinded.

The remark made by Hubbard, in his letter to Thompson of August 12, 1880, "I am quite agreeable to your view that there is virtually no agreement between us," had reference to matters other than the sale of the copyright and the plates, which had passed to Hubbard, and which he had in his possession, and for which he had paid partly in cash and partly in the negotiable promissory notes of Hubbard Bros. There was no idea on the part of either party that the copyright and the plates were to be reconveyed to Thompson, or that he was to repay the consideration to Hubbard. Neither party suggested anything of the kind. Hubbard was publishing the book and pushing its sale, and Thompson, in and after the fall of 1880, was buying from Hubbard and paying for such copies of the Manning book as he desired to sell. The real dispute between the parties was as to the extent to which Thompson should be bound to exert himself in selling Hubbard's other publications, and should be restricted in selling any other publications than the three specified in the paper of March 30, 1880, and the point which concerned the matter of the sale of Hubbard's publications for two years had become unimportant when the original bill was filed, because that time had then expired.

The preparing and publishing by Thompson of the Periam and Baker book was entirely inconsistent with the idea that

he still owned the copyright of the Manning book. At the time the original bill was filed, Hubbard had fully performed his agreement to furnish the Manning book to Thompson as Thompson ordered it, had respected the territory allotted to Thompson, and had shipped his other publications to Thompson as demanded. On these facts, there could be no revesting in Thompson of the title to the copyright and the plates, and all that he could ever have a right to, growing out of the failure by Hubbard to perform any agreements which he had entered into, was a remedy by damages in an action at common law, or a remedy by a bill in equity for specific performance, on the basis of the existence of the actual agreement made.

The remaining question is as to whether Hubbard, as the owner of the copyright of the Manning book, can maintain his suit against Thompson for its infringement.

The following statement is made in the brief by Hubbard: "It is conceded that plaintiff's book was duly entered for copyright; that before publication a printed copy of the title of the book was delivered at the office of the librarian of Congress at Washington; that, within ten days after publication, two complete copies of the best edition of the book were delivered at the office of the librarian of Congress at Washington; and that on the page next after the title-page there was printed, in every copy of the first edition of the book, notice of copyright in the following words, viz.: 'Entered according to act of Congress, in the year 1880, by N. D. Thompson & Co., in the office of the Librarian of Congress, at Washington.' It is also conceded that, after Mr. Thompson had delivered the electrotype plates of the book to Hubbard Brothers, they changed the form of the copyright notice so as to read as follows, viz.: 'Entered according to Act of Congress,' in which form the notice was printed in the copies of several editions, and that afterward plaintiff again changed the notice of copyright so as to read as follows: 'Copyright, 1880,' in which last mentioned form the notice was printed in the copies of several editions."

One of the forms used by Hubbard did not state either the year in which the copyright was entered, or by whom it was

entered; while the other form mentioned the year but not the name.

Section 4962 of the Revised Statutes provides as follows: "No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title-page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words: 'Entered according to act of Congress, in the year ——, by A. B., in the office of the Librarian of Congress at Washington.'"

Section 1 of the act of June 18, 1874, c. 301, 18 Stat. 78, which act took effect on and after August 1, 1874, provides as follows: "That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title-page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof or of the substance on which the same shall be mounted, the following words, viz.: 'Entered according to act of Congress, in the year ———, by A. B., in the office of the Librarian of Congress, at Washington;' or, at his option the word 'Copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out; thus — 'Copyright, 18—, by A. B.'" The 4th section of the same act repealed all laws and parts of laws inconsistent with the provisions contained in the first three sections of the act.

It is very clear that Hubbard, as the proprietor of the copyright, was bound to give the statutory notice in the several copies of every edition published by him, and that

he did not do so. The plain declaration of the statute is, that no person shall maintain an action for the infringement of *his* copyright, unless he shall give notice thereof by inserting the prescribed words in the several copies of every edition published. That means, every edition which he, as controlling the publication, publishes. His failure to give such notice debars him from maintaining an action for the infringement of *his* copyright. The word "action" means an action either at law or in equity.

Section 3 of the act of May 31, 1790, c. 15, 1 Stat. 125, declared that no person should be entitled to the benefit of that act, unless he should first deposit a printed copy of the title of a book in the prescribed office; and further provided that the author or proprietor should, within a prescribed time, cause a copy of the record of the title to be published in one or more newspapers, as prescribed.

Section 1 of the act of April 29, 1802, c. 36, 2 Stat. 171, provided that every person who should seek to obtain a copyright of a book should, in addition to the requisites enjoined in the act of 1790, give information, by causing the copy of the record to be inserted at full length in the title-page, or in the page immediately following the title of the book.

Section 5 of the act of February 3, 1831, c. 16, 4 Stat. 437, declared that no person should be entitled to the benefit of that act, unless he should insert the prescribed words in the published copies of the book. In section 97 of the act of July 8, 1870, c. 230, 16 Stat. 214, now section 4962 of the Revised Statutes, the language of section 5 of the act of 1831 was changed so as to declare that no person should maintain an action for the infringement of his copyright, unless he should insert in the several published copies the notice prescribed. This requirement of giving the prescribed notice has always been held, under all of the statutes, to be one of the conditions precedent to the perfection of the copyright, the other two being the deposit, before publication, of the printed copy of the title, and the depositing in the public office, within the prescribed time after publication, of a copy or copies of the book. *Wheaton* v. *Peters*, 8 Pet. 591; *Merrell* v. *Tice*, 104 U. S. 557; *Callaghan* v. *Myers*, 128 U. S. 617, 652.

Syllabus.

It is not enough that Thompson, while he owned the copyright, gave the required notice in the copies of every edition he published, while it was *his* copyright. The inhibition of the statute extended to and operated upon Hubbard while he owned the copyright, in respect to the copies of every edition which he published, and for his failure he is debarred from maintaining his action.

The view is urged, that the only object of the notice required by the statute is to give notice of the copyright to the public; and that, as Thompson himself took the copyright, and had vested the title to it in Hubbard, he has no right to infringe the copyright, although it may be invalid as to the rest of the world. But we are of opinion that the failure of Hubbard to comply with the statute operated to prevent his right of action against Thompson from coming into existence. This right of action, as well as the copyright itself, is wholly statutory, and the means of securing any right of action in Hubbard are only those prescribed by Congress. *Wheaton* v. *Peters*, 8 Pet. 591, 662, 663; *Banks* v. *Manchester*, 128 U. S. 244, 252.

The decree of the Circuit Court is reversed, and the case is remanded to that court with directions to dismiss the original bill and the cross-bill, with costs in the Circuit Court to neither party. Each party is to pay one half of all the costs in this court.

STEWART v. MASTERSON.

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

No. 287. Argued April 25, 1889. — Decided May 13, 1889.

A demurrer to a bill in equity cannot introduce as its support new facts which do not appear on the face of the bill, and which must be set up by plea or answer.

Where there is matter in the bill which is properly pleaded, and is properly

ground for equitable relief, and requires an answer or a plea, a demurrer to the whole bill will be overruled.

Where a bill is taken as confessed by one of two defendants before a decree is made dismissing the bill, on demurrer, as to the other defendant, the latter can appeal from the decree, although it does not dispose of the case as to his codefendant.

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

Mr. Charles C. Lancaster for appellant.

Mr. S. S. Henkle 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 Western District of Texas by James Reid Stewart. The original bill was filed against James L. Tait and his wife, and Branch T. Masterson. Tait and wife demurred to the bill, among other things, for multifariousness, as did also Masterson. On a hearing, the demurrers were sustained, with leave to amend the bill. The plaintiff then filed an amended bill against Masterson and Tait. It was taken as confessed as to Tait, and an order made that the cause be proceeded in *ex parte* as to him. Masterson demurred to the amended bill, and the demurrer was sustained and the bill as against him was dismissed. The plaintiff has appealed to this court.

The allegations of the amended bill are substantially as follows: On the 10th of May, 1878, at Glasgow, Scotland, Stewart and Tait entered into a written agreement. By that agreement, Stewart's son and Tait were to proceed together to Texas, and Tait was to purchase 2560 acres of land, in such place as might seem to him most advantageous, at a price not to exceed 12 shillings per acre, title deeds to be made out and recorded in the name of Stewart, and he to authorize payment of the purchase money on delivery of the title deeds to the order of such party as might be named therein, money for improvements to be furnished by Stewart as required by Tait,

he to give receipts as acting for Stewart, and the farm to be worked on equal shares, and profits to be equally divided between Stewart's son and Tait, the agreement to remain in force for five years from the date of purchase of the land; a further tract of 2560 acres to be purchased in the names of Tait and Stewart's son, on a credit of four years, payment to be made out of realized profits; and until such additional land should be paid for, but not exceeding five years, Stewart should not require the repayment of moneys advanced; interest to be paid for such moneys at the rate of 6 per cent per annum; Tait to do his best as to supervision and guidance of Stewart's son, and to have the management and be responsible to Stewart; the amount to be advanced by Stewart not to exceed in all £3250 sterling.

The amended bill then makes the following allegations: In pursuance of such agreement, Tait, in June, 1878, purchased for Stewart and in his name, and went into the occupancy of, and held for him as his agent, for five years, 4605 acres of land in Bexar County, Texas, known as the Gasper Flores survey No. 13, and situated within the territory of the McMullen grant, thereinafter described and bounded as set forth; Stewart paid for the land $9000, and expended in improvements, as owner, $6147.51, and thereby increased the value of the land at least $3 per acre, making the whole value of the improvements, as made by him, $19,962.51. He paid about $1000 taxes on the land. The title was from the government of Spain, which conveyed in fee to the Indians of San José Mission, land known as the McMullen grant, in the counties of Medina and Bexar. It was conveyed by the Indians to one Garza, and by him and the Indians to one John McMullen, in fee. While McMullen owned and occupied it, and in February, 1840, one Maverick, being the owner of Texas land certificate No. 276, as the assignee of Gasper Flores, the grantee of the State of Texas, located such certificate on a portion of the land within the McMullen grant, known as the Gasper Flores survey No. 13, being the identical land owned by Stewart and thereinbefore described, and afterwards procured a patent for the land and became vested with all the title of the

Republic or State of Texas thereto, and claimed survey No. 13, adversely to the title and possession of McMullen. Afterwards, McMullen conveyed the McMullen grant to one Howard, and he, in February, 1851, commenced a suit in equity, styled chancery suit No. 10, in the Circuit Court of the United States for the Western District of Texas, to remove the cloud upon his title. Maverick was made a party to that suit and appeared, and on the final hearing it was decreed that the heirs of Howard, (he having died and they having been substituted as plaintiffs,) should recover the McMullen grant from Maverick and the other defendants, and that the title of said heirs was free from all clouds, and that all patents, locations, and surveys, owned by the defendants in the suit, were void, and they were ordered to cancel the same, and the title of said heirs to the McMullen grant was adjudged to be a good title. On a reference made by said decree, a master reported that Maverick appeared to have claimed to be the owner of the Gasper Flores survey No. 13, being the land of Stewart, and that the same was situated within the limits of the McMullen grant. The master made a deed in triplicate, conveying all the interest of the heirs of McMullen to the McMullen grant, and the heirs of Howard acquired legal title to and possession of that grant, and one Castro purchased from the heirs of Howard and became the owner of said survey No. 13, and went into possession thereof, and afterwards sold the same in fee to Stewart, for $9000, and delivered possession thereof to him, in June, 1878, the deed expressing the consideration of $10,500, and being duly recorded in Bexar County, as was also the said deed to Castro. Thus, Stewart's land became and was land titled from the State, evidence of the appropriation of which was on the county records of the county of Bexar, and in the general land office of the State, according to the provisions of section 2 of article 14 of the constitution of the State. The heirs of Howard were, by virtue of said decree, put in possession of all the land in the McMullen grant claimed by the defendants in suit No. 10, and the State of Texas acquiesced in the decree, and caused the McMullen grant to be marked on the maps of the general land office

by its boundaries within the counties of Bexar and Medina, and the grant was marked on the county maps of each of those counties, by authority of the State, and the heirs of Howard and those holding under them have been required to pay state and county taxes on the land, and the State and the county of Bexar have levied taxes on Stewart's land and collected the same from him as owner thereof, ever since he purchased it, and he has ever since been in the actual possession and occupancy of the same and the improvements thereon, and thus his appropriation of the land was evidenced by the occupation of the owner or some person holding for him, under the provisions of section 2 of article 14 of the state constitution. Masterson became and was a party defendant to said suit No. 10, before the final determination of the same, as the assignee in bankruptcy of one Herndon, a defendant therein, (who had located a certificate on and taken out a patent to lands within the McMullen grant, and whose claim was a cloud on the McMullen title,) and had full knowledge of the decree and of the proceedings in suit No. 10, before and after the decree, and knowledge of the possession and title of the heirs of Howard and of Castro, and of Stewart's title, possession, and improvements, and that Tait was, during five years from June 22, 1878, holding Stewart's land and the improvements thereon as the agent of Stewart. The foregoing decree and conveyances vested in Stewart the absolute property in said 4605 acres of land, but Masterson and Tait fraudulently colluded with each other that Tait should abandon Stewart's land and all the improvements thereon and deliver the same over to Masterson for the consideration of $750, to be paid by him to Tait, with intent to cheat Stewart out of the value of said improvements and deprive him of his title to the land. Masterson, with such intent, and in contempt of said decree, and in violation of said provision of the constitution of Texas, fraudulently located and caused to be surveyed the whole of Stewart's land, as vacant and unappropriated domain of the State of Texas, by virtue of several land certificates issued by the State and owned by Masterson, and caused the surveys thereof and the field-notes of the surveys to be recorded in the

office of the county surveyor of Bexar County, with particulars set forth in the amended bill, and procured patents to issue to himself thereon to the lands described in such surveys and field-notes, covering Stewart's said land. In August, 1882, Masterson commenced an action of ejectment or trespass to try title, in the District Court of Bexar County, against Tait, to acquire possession of Stewart's said land. The suit was brought for the purpose, among other things, of furnishing a pretext for Tait to abandon Stewart's property, and, having served its purpose, it was dismissed by Masterson, who paid all the costs thereof; and Tait, in pursuance of such collusive agreement and the payment to him of $750 by Masterson, surrendered, and Masterson received occupancy of, 1280 acres of the land and a dwelling-house and improvements thereon, and pretends to hold the same as owner, and also to claim title and the right of possession to the remainder of Stewart's land, unoccupied by him, under and by virtue of Masterson's said locations and patents thereon. The amended bill tenders to Masterson the amount of the actual expenses incurred by him in paying for the certificates, surveys and patents. Tait is insolvent, and if, upon a final hearing, the title of Masterson should be decreed to be paramount to that of Stewart, the value of Stewart's improvements on the land, namely, $19,962.51, would be lost to him, unless adjudged to him against Masterson by a decree, and made a lien upon the land.

The amended bill waives an answer on oath as to all matters except those specified in six interrogatories, as to which an answer on oath is required. It prays for an accounting by Masterson as to the cost incurred by him in the purchase of his certificates, the location and running of the surveys, and the procurement of patents on the 4605 acres of land; that the title acquired by him, if any, be by a decree vested in Stewart on the payment of the amounts so expended by Masterson; that the cloud upon Stewart's title be removed, and Masterson forever barred of all interest in the land; and that Stewart be quieted in his title and possession, and be decreed to be the owner. There is an alternative prayer that, in case

the title to the 4605 acres be found to be in Masterson, then the amount of the value of the improvements made on the land be adjudged to Stewart against Masterson, and made a lien on the land; that the land be sold to satisfy the lien; and that Masterson be foreclosed and barred of all interest in the land, except the equity of redemption before sale by the payment of the amount of the lien; and for general relief.

The demurrer of Masterson purports to be a demurrer to the amended bill, and to the original bill as amended by the amended bill. It demurs thereto and to the jurisdiction of the court sitting in equity, and assigns several grounds of demurrer: (1) That the amended bill sets up substantially matters against which the court sustained the demurrer to the original bill, in that it appeared by the original bill, and cause No. 10 in equity therein referred to and stated as a part of Stewart's title and the exhibits, order and decree in cause No. 10, that Stewart's pretended title to the lands sued for is based on the so-called McMullen grant which the Supreme Court of Texas, in the case of *McMullen* v. *Hodge*, 5 Texas, and in *Howard* v. *McKenzie*, 54 Texas, declared to be vacant public domain; and the decision in *McMullen* v. *Hodge* was rendered long before Stewart purchased, and McMullen, against whom it was rendered, is a remote vendor of Stewart, and Stewart's claim is under him; and Stewart has not, by the amended bill, set up any other claim than the void one defectively set up in the original bill; and the amended bill does not contain proper allegations to entitle him to assert a claim for the value of improvements; (2) that there is a want of equity in the bills; (3) that Tait has no interest in the matters concerning which the decree is sought against Masterson, and no relief is asked against Tait, and no facts are alleged which would entitle Stewart to maintain this suit against Masterson and Tait, and there is a misjoinder of parties defendant; (4) that Stewart has a full, complete and adequate remedy at law.

We think the demurrer to the amended bill ought to have been overruled, and Masterson put to his answer thereto. It appears by the opinion of the court below, filed in deciding on the demurrer to the original bill, that the case made by

that bill against Masterson and Tait was substantially the same as the case made against them by the amended bill, and that the demurrer to the original bill was sustained on the ground of multifariousness, because, in addition, it sought an account from Tait personally, as agent or trustee of Stewart, in respect to funds entrusted by Stewart to Tait, and also prayed to have established a lien in respect thereto, in favor of Stewart, upon a homestead which it was alleged Tait had purchased for himself and his wife with such funds. The court was of opinion that Tait was a proper party to the bill with Masterson, in respect to the matters other than the accounting by Tait and that Stewart might reform his original bill and so frame it as to embrace solely the matters against Masterson and Tait relating to Stewart's title to the land in question, and the alternative claim to a right to be paid for the value of permanent improvements made upon the land, as against Masterson.

It is assigned as error by Stewart that nowhere in the original bill or in the amended bill is it admitted that the McMullen title, which Stewart is litigating in this case, is the identical McMullen title which has been at various times litigated in the courts of Texas; that the court below had no authority to take judicial notice of the identity of the grant in litigation with another grant referred to in the state reports, when this identity was not admitted in the bill demurred to; and that that court could derive knowledge of such identity only from evidence properly offered and admitted, after due allegations in a plea or answer.

It is very clear that the present demurrer introduces as its support new facts which do not appear on the face of the bill, and which must be set up by plea or answer. Story Eq. Pl. 9th ed. §§ 447, 448, 503, 647.

In addition to this, as there is matter properly pleaded in the amended bill, and properly ground for equitable relief, which requires an answer or a plea, and as the demurrer is to the whole bill, it ought to have been overruled. The case, as stated, shows there is no plain, adequate, and complete remedy at law.

Statement of the Case.

As the order taking the bill as confessed by Tait, and directing that the cause be proceeded in thenceforth *ex parte* as to him, was entered before the decree was made sustaining the demurrer of Masterson and dismissing the bill as against him, that decree is final as to him, and one from which he could appeal. There was no decree from which Tait could appeal, and when the case returns to the Circuit Court a final disposition of it can be made as against Tait. He was properly made a defendant with Masterson, although no relief was prayed against him in respect of the matters in which he is alleged to have been concerned with Masterson.

The decree of the Circuit Court is reversed, and the case is remanded to that court, with a direction to overrule the second demurrer of Masterson, and to take such further proceedings as shall not be inconsistent with this opinion.

CORNELY *v.* MARCKWALD.

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

No. 293. Argued April 26, 1889.—Decided May 13, 1889.

The decision in *Rude* v. *Westcott*, 130 U. S. 152, affirmed that the payment of a sum in settlement of a claim for an alleged infringement of a patent cannot be taken as a standard to measure the value of the improvements patented, in determining the damages sustained by the owner of the patent in other cases of infringement.

Where a plaintiff seeks to recover damages because he has been compelled to lower his prices to compete with an infringing defendant, he must show that his reduction in prices was due solely to the acts of the defendant, or to what extent it was due to such acts.

Where he seeks to recover damages for the loss of the sale of infringing machines which the defendant has sold, he must show what profit he made on his own machines.

IN EQUITY. The case is stated in the opinion.

Mr. Benjamin F. Lee, for appellant.

Mr. William A. Coursen for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity brought by Emile Cornely against Freeman D. Marckwald, for the alleged infringement of letters patent No. 83,910, granted to Cornely, as assignee of Antoine Bonnaz, the inventor, for an "improvement in sewing-machine for embroidering." There was an interlocutory decree for the plaintiff, establishing the validity of the patent and its infringement, and ordering a reference to a master to take an account of profits and damages.

The master reported that the defendant had made a profit of $142.92, by the sale of 26 infringing machines; and that he was not a wilful and deliberate infringer. As to damages, he reported that the plaintiff had instituted ten suits against other infringers on the patent, all of which, with one exception, were settled on the basis of $50 for each infringing machine; that the plaintiff claimed that that afforded a proper measure of damages, on the basis of an established license fee; that there was a deviation in one instance because, as was stated by a witness, the case presented "circumstances of exceptional hardship," but what the circumstances were did not appear; that it did not appear that licenses were issued to any one other than in the settlement of a suit, or that the plaintiff had adopted the sum of $50 as a sum on the payment of which he was prepared to grant a license to any and all who wished to use the invention; and that the facts did not warrant the measurement of the damages by a fixed and established license fee.

The master also reported that the plaintiff claimed that he had been forced to lower his prices to compete with the defendant; that the evidence did not show that any reduction in prices by the plaintiff was solely due to the acts of the defendant, or to what extent it was due to such acts; that as to damage to the plaintiff from the loss of the sale of machines which the defendant had sold, it did not appear what profits the plaintiff made on his machines, or what it cost to make

them; and that, therefore, such damage could not be computed and could not be reported as exceeding the nominal sum of six cents.

The plaintiff excepted to the report, and, on a hearing, the court made a decree, (23 Blatchford, 163,) overruling the exceptions, and confirming the report, and awarding to the plaintiff the $142.92, with interest and costs, except the costs on the accounting subsequent to the master's draft report and the costs on the exceptions, which two items of costs it awarded to the defendant. The plaintiff has appealed from so much of the decree as awards to him no damages beyond the six cents.

The Circuit Court, in its opinion, held, that evidence of payments made for infringements was incompetent to establish a price as for a fixed royalty; that, as to loss by the plaintiff from the diversion of sales, he had failed to give any evidence showing the cost of his machines, or what his profits would have been; that, as there was no basis for a computation of the loss of profits, the determination of the master was correct; and that his conclusion was proper as to the alleged loss of the plaintiff by reason of the enforced reduction of his prices.

We concur in these views. As to the question of an established license fee, the case is governed by the recent decision of this court in *Rude* v. *Westcott*, 130 U. S. 152, where it was held that the payment of a sum in settlement of a claim for an alleged infringement of a patent "cannot be taken as a standard to measure the value of the improvements patented, in determining the damages sustained by the owner of the patent in other cases of infringement."

Decree affirmed.

COLER *v.* CLEBURNE.

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

No. 728. Submitted January 3, 1889. — Decided May 13, 1889.

Where a case is tried by a Circuit Court, on the written waiver of a jury, and there is a bill of exceptions which sets forth the facts which were proved, that is a sufficient special finding of facts to authorize this Court, under § 700 of the Revised Statutes, to determine whether the facts found are sufficient to support the judgment.

A statute of Texas provided that bonds to be issued by a city, for erecting water works, should be signed by the mayor, and forwarded by him to the state comptroller for registration. Bonds issued for that purpose were dated January 1, 1884, but not signed till July 3, 1884, and then were not signed by the mayor, but, under a resolution of the city council, were signed by a private citizen, who had been mayor on January 1, 1884, but had gone out of office in April, 1884, and been succeeded by a new mayor, and who appended the word "mayor" to his signature. The bonds stated on their face that they were authorized by a statute of Texas, and an ordinance of the city, specifying both. In a suit against the city, to recover on coupons cut from the bonds, brought by a *bona fide* holder of them; *Held*,

(1) No one could lawfully sign the bonds but the person who was mayor of the city when they were signed;

(2) The city council had no authority to provide for their signature by any other person;

(3) The city was not estopped as against the plaintiff, from showing the facts as to the signature of the bonds;

(4) The bonds were invalid.

The case distinguished from *Weyauwega* v. *Ayling*, 99 U. S. 112, and controlled by *Anthony* v. *County of Jasper*, 101 U. S. 693.

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

This is an action at law brought in the Circuit Court of the United States for the Northern District of Texas, by W. N. Coler, Junior, against the city of Cleburne, a municipal corporation of Texas, to recover on 234 coupons, of $35 each, amounting to $8190, cut from a series of 51 bonds, of $1000 each, purporting to have been executed and issued by that corporation. The case was tried by the court, on the written

waiver of a jury, and, having heard the evidence, it adjudged that the plaintiff take nothing by his suit, and that the defendant go without day and recover its costs. The plaintiff has brought a writ of error.

There is no special finding of facts, but there is a bill of exceptions, which, after setting forth what was proved, states, that the court, on the pleadings and proof, found the law for the defendant, and rendered final judgment for it and against the plaintiff, for costs of suit. This is a sufficient special finding of facts to authorize us, under § 700 of the Revised Statutes, to determine whether the facts found are sufficient to support the judgment.

The plaintiff, in his petition and four supplemental petitions, alleged that he was the *bona fide* owner, holder and bearer, before maturity, of the coupons, for a valuable consideration paid; that the bonds were issued by the city for the purpose of erecting a system of water works; and that the bonds and coupons were made and issued in pursuance of article 420 of the Revised Statutes of the State of Texas, and of an ordinance adopted by the city council of the defendant, September 13, 1883.

The defendant, with other pleas, interposed one, called in the record a plea of *non est factum*, which says, that the bonds and coupons in question are not the obligations of the defendant, and were never executed and delivered by it, because they never had any existence prior to July 3, 1884; that they were never signed by J. M. Odell, (who had, on the first Tuesday in April, 1884, been duly elected to the office of mayor of said city for a term of two years, and was on the 3d of July, 1884, the legally qualified and acting mayor of the city,) or by his authority, or by any person authorized by law to act as mayor of the city; that said mayor at all times refused to sign the same; that, although said bonds and coupons purport, on their face, to have been executed on January 1, 1884, and to be signed by the mayor of the city, they were in fact made on the 3d of July, 1884, and antedated, and signed by one W. N. Hodge, a private citizen, but formerly mayor of the city, whose term of office had expired in April, 1884; that

any registration of the bonds in the office of the comptroller of public accounts of the State of Texas was illegal and without authority, because they were never forwarded to the comptroller by the mayor, Odell, or by any person authorized by him to do so, and he never forwarded to the comptroller his certificate showing the values of taxable property, real and personal, in said city for the year 1884, and never authorized any person so to do; and that said bonds and coupons were never delivered by said mayor, or by his authority, or by any person authorized to act as mayor of the city, to the Texas Water and Gas Company, or to any other person or persons.

The plaintiff filed a demurrer to the above plea, as insufficient in law. The bill of exceptions states that this demurrer was considered by the court in its general finding.

The bonds and coupons, which were put in evidence, were in the following form:

"1000. UNITED STATES OF AMERICA. 1000.

"No. 51. $1000.

"The city of Cleburne, in Johnson County, State of Texas, hereby acknowledges that, for value received, it is indebted and bound and hereby promises to pay, unto the Texas Water and Gas Company, or bearer, at the ———, in the city of New York, at the expiration of twenty years from the date hereof, the sum of one thousand dollars in lawful money of the United States of America, and also that it is bound and will pay interest on said sum of one thousand dollars, at the rate of seven per centum per annum, on the first days of January and July of each year thereafter, to and including the first day of January, A.D. 1904, to the bearer, according to the respective coupons therefor hereto attached, for thirty-five dollars each, signed by the mayor of the city of Cleburne and attested by the secretary of the city of Cleburne, upon presentation at the fiscal agency in New York. This bond is authorized by article 420 of the Revised Statutes of the State of Texas and by an ordinance adopted by the board of aldermen of the city of Cleburne, on the 13th day of Sept., 1883, in conformity to said article 420.

Statement of the Case.

"This bond is one of a series of fifty-one of like tenor and effect, issued for the erection of a complete system of water works, and is secured by an ordinance of the city of Cleburne under the general laws of the State, and setting apart all the net revenues of said water works to pay the interest and sinking fund upon the same, and requiring the council to annually levy and collect a tax of thirty-five cents on the one hundred dollars' worth of property, if so much shall be required, to pay the interest and two per cent sinking fund.

"It is understood that the city of Cleburne shall have the right to call in any or all the bonds of this series, numbered from one to fifty-one, respectively, at any time after ten years from the date of said bonds, upon first giving public notice thereof in the city organ of the city of Cleburne, for three months before the first days of January or July in any year, and interest shall cease from the time they are so called in, respectively.

"In witness whereof the mayor of the city of Cleburne hereto signs his name, and the city secretary of the [L. S.] city of Cleburne attests with the seal of the said city of Cleburne, hereto affixed, this the first day of January, A.D. 1884.

"W. N. HODGE, *Mayor.*

"Attest: W. H. GRAVES, *Secretary.*

"1000."

The bond is indorsed as follows: "51. $1000 city of Cleburne water-works bond; interest seven per cent, payable July 1st and January 1st of each year. Twenty-years bond. Registered July 12th, 1884. Wm. J. Swain, comptroller."

"$35.00. $35.00.

"On the first day of July, 1886, the city of Cleburne, State of Texas, will pay to bearer, in the city of New York, thirty-five dollars, being six months' interest on water-works bond No. 51.

"W. N. HODGE, *Mayor.*

"W. H. GRAVES, *Secretary.*"

Statement of the Case.

The plaintiff proved that the Texas Water and Gas Company, a corporation, through its proper officers, made a written contract with the city, through its proper officers, on September 13, 1883, to erect for it a complete system of water works, the material used and the manner of building being fully shown in specifications and plans, on or before June 1st, 1884, in consideration for which the city agreed to pay the builder $51,000, in bonds of $1000 each, payable to bearer 20 years after January 1, 1884, bearing interest at seven per cent, represented by semi-annual coupons for $35 each attached thereto, the same to be engraved, signed by its mayor and secretary, and delivered to the Texas Water and Gas Company upon the completion of said system of water works according to plans and specifications, and the acceptance thereof by the city after the same had been duly tested. It was further proved, that said contract provided that, upon the works having been tested and the same reported and received by the city, the builder should be discharged from all further obligations on account of the works. It was further proved, that the system of water works was built within the time agreed upon, and accepted by the city; and that, on the 13th of September, 1883, the city council adopted an ordinance fully authorizing the contract above mentioned, a copy of which ordinance is given in the margin.[1]

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[1] An ordinance to provide for the construction of water works in the city of Cleburne, to provide for issuing bonds, and to levy a tax to pay interest and create a sinking fund.

Whereas the city council of the city of Cleburne deem it absolutely necessary that some steps should be taken by the city of Cleburne to protect the property of the city and citizens against fire; and whereas it is further manifest that the establishment of an efficient system of water works is the most economical protection against fires; and whereas the Texas Water and Gas Company, a corporation having its chief domicil in the city of Tyler, Smith County, Texas, has made a proposition, with plans and specifications, to construct a complete system of water works in the city of Cleburne, and for the city of Cleburne, (as per plans and specifications now on file in the office of the city secretary,) for fifty-one bonds of the city of Cleburne for one thousand dollars each, with interest at seven per cent per annum, with coupons attached for interest, payable semi-annually; and whereas the city

Statement of the Case.

It was also proved, that, after the defendant accepted the water works, and on July 3, 1884, the 51 bonds for $51,000 were delivered to the Texas Water and Gas Company, and

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council of the city of Cleburne has accepted said proposition of the said Texas Water and Gas Company; now, therefore —

Be it ordained by the city council of the city of Cleburne, That the mayor and city secretary are hereby authorized and fully empowered to execute, sign and deliver for and in behalf of the city of Cleburne a contract with the Texas Water and Gas Company, a corporation under the laws of Texas, for the construction of a complete system of water works within the corporate limits of the city of Cleburne, according to the plans and specifications submitted by the Texas Water and Gas Company, through M. T. Brown, vice-president and general manager of said corporation; and it is further ordained, that the mayor is forthwith required to have lithographed fifty-one bonds for one thousand dollars each, due twenty years after date, and redeemable at the option of the city at any time after ten years, with forty coupons attached to each, for thirty-five dollars each, payable in the city of New York or in the city of Austin, Texas, the said coupons to fall due the first day of July, 1884, and the first day of January, 1885, and on each subsequent first day of July and first day of January for each and every year up to and including the first day of July, 1905, and, after said bonds are lithographed, the same to be executed, signed and delivered to the said Texas Water and Gas Company, upon the said company's complying with their contract, as therein provided.

And it is further ordained by the city council aforesaid, that all the revenues realized from operation of water works aforesaid, over and above the expenditures in operating the same be, and the same is hereby, appropriated and constitute a fund to pay the interest and create a sinking fund for the final redemption of said bonds as afore provided.

And it is further ordained by the city council aforesaid, that the following tax shall be annually levied and collected, and the same is hereby appropriated, to pay the interest on water-works bonds hereinbefore authorized to be issued, one fourth of one per cent on each one hundred dollars' worth of property, and that this provision shall remain and be in force until the said water-works bonds are fully paid and satisfied, provided nothing herein shall prevent the city from remitting the tax or any part thereof herein provided for, in the event the net revenue shall realize a fund sufficient to pay interest and create ten per cent sinking fund on said water-works bonds.

And it is further ordained that this ordinance takes effect from and after its passage.

And it is further ordained by the city council aforesaid, that to the above there shall be levied and collected one tenth of one per cent, under and by virtue of the power of the city to levy and collect an annual tax to defray the current expenses of its local government, and the same is hereby set

registered by the comptroller of the State; that the defendant, before the delivery of said bonds, cut off and cancelled the first coupon thereon, maturing July 1, 1884; that it took charge of the works and contracted a sale of them to another corporation, which corporation operated them for a time; that afterwards the defendant resumed the control of them and still has possession of them, and uses them for fire protection and other uses; that the Texas Water and Gas Company sold all of the bonds and coupons and delivered them to third parties soon after they were received; that the defendant, by its city council, on July 3, 1884, adopted a resolution authorizing and requesting ex-Mayor W. N. Hodge, whose name had been engraved on the coupons attached to the 51 bonds, to sign the bonds as and upon the date January 1, 1884, when he was actually the mayor of the city, and that said bonds be signed by W. H. Graves, who was the secretary of the defendant on January 1, 1884, as well as on July 3, 1884. The defendant proved that W. N. Hodge, who signed the bonds, ceased to be mayor in April, 1884; that Odell became then the mayor; that the bonds were signed July 3, 1884; and that the city council authorized Hodge, who was then a private citizen, to sign the bonds on that day.

It was also proved that Mayor Odell did not furnish a statement of the valuation of property to the comptroller, nor forward to him the 51 bonds for registration, and refused to sign more than 40 of said bonds; and that the defendant was using and operating the water works, and had been for over 20 months.

Articles 420 to 424, of the Revised Statutes of Texas, in

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apart and appropriated to the payment of the interest and the sinking fund of the bonds herein provided for.

Provided, that this section of this ordinance shall be inoperative for such year or years as it may be found that the tax and revenue heretofore provided for and set apart shall be sufficient to pay the interest and sinking fund as provided.

Passed September 13th, 1883.

Approved September 13, 1883.

(Signed) W. N. HODGE, *Mayor.*

Attest: W. H. GRAVES, *Secretary.*

force at the time of the issue of these bonds, (Rev. Stat. of 1879, title 17, c. 4, p. 72,) were as follows:

"Art. 420." The city council shall have power "to appropriate so much of the revenues of the city, emanating from whatever source, for the purpose of retiring and discharging the accrued indebtedness of the city, and for the purpose of improving the public markets and streets erecting and conducting city hospitals, city hall, water works, and so forth, as they may from time to time deem expedient; and in furtherance of these objects they shall have power to borrow money upon the credit of the city, and issue coupon bonds of the city therefor, in such sum or sums as they may deem expedient, to bear interest not exceeding ten per cent per annum, payable semi-annually at such place as may be fixed by city ordinance: *Provided*, That the aggregate amount of bonds issued by the city council shall, at no time, exceed six per cent of the value of the property within said city, subject to *ad valorem* tax.

"Art. 421. All bonds shall specify for what purpose they were issued, and shall not be invalid if sold for less than their par value; and when any bonds are issued by the city a fund shall be provided to pay the interest and create a sinking fund to redeem the bonds, which fund shall not be diverted nor drawn upon for any other purpose, and the city treasurer shall honor no drafts on said fund except to pay interest upon, or redeem the bonds for which it was provided.

"Art. 422. Said bonds shall be signed by the mayor and countersigned by the secretary, and payable at such places and at such times as may be fixed by ordinance of the city council, not less than ten nor more than fifty years.

"Art. 423. It shall be the duty of the mayor, whenever any bond or bonds are issued, to forward the same to the comptroller of public accounts of the State, whose duty it shall be to register said bond or bonds in a book kept for that purpose, and to indorse on each bond so registered his certificate of registration, and to give, at the request of the mayor, his certificate certifying to the amount of bonds so registered in his office up to date.

Argument for Plaintiff in Error.

"Art. 424. That it shall be the duty of the mayor, at the time of forwarding any of said bonds for registration, to furnish the comptroller with a statement of the value of all taxable property, real and personal, in the city; also, with a statement of the amount of tax levied for the payment of interest and to create a sinking fund. It is hereby made the duty of the comptroller to see that a tax is levied and collected by the city sufficient to pay the interest semi-annually on all bonds issued, and to create a sinking fund sufficient to pay the said bonds at maturity, and that said sinking fund is invested in good interest-bearing securities."

It is assigned for error, that the Circuit Court erred in overruling the plaintiff's demurrer to the plea of *non est factum*, because that plea failed to exclude the idea that the defendant, or the law, had authorized the person who actually signed the bonds and coupons to do so.

Mr. W. S. Herndon for plaintiff in error.

Plaintiff being a *bona fide* holder was not required to look beyond the recitals in the bond and the legislative enactments giving power to issue them.

If at the date of the bond it was authorized by law and if it appears to have been properly issued in accordance with the enabling acts, he must recover, though there may have been irregularity and even fraud or misconduct on the part of the agents who acted for the city in uttering them. The bonds bear date January 1, 1884. At that time W. N. Hodge was the mayor of this city, and his signature appears upon the bonds and on the coupons. This is the only ground of irregularity and is the basis of plea of *non est factum*. *Weyauwega* v. *Ayling*, 99 U. S. 112; *Walnut* v. *Wade*, 103 U. S. 683; *East Lincoln* v. *Davenport*, 94 U. S. 801; *Clay County* v. *Society for Savings*, 104 U. S. 579; *County of Moultrie* v. *Savings Bank*, 92 U. S. 631; *Nauvoo* v. *Ritter*, 97 U. S. 389.

The ordinance adopted by defendant city, September 13, 1883, became a part of the contract and was the authority to the then mayor, W. N. Hodge, and the secretary, to draft and

sign the bonds, ready for delivery, before January 1, 1884. The bonds and coupons having been signed in accordance with said ordinance, the innocent purchaser was not required to look beyond this, and the defendant city having uttered the bond thus required is estopped from denying its regularity and validity. The registration of the bonds by the comptroller was a judicial act, based upon a determination of the value of the taxable property, and the status of the bonded debt. The indorsement of this registration binds the municipality as against an innocent purchaser.

Such power having been exercised and the bond registered, the innocent purchaser may rely upon such judicial decision in favor of the regularity and validity of the bond. Arts. 323 and 424, Revised Statutes of Texas; *Sherman County* v. *Simons*, 109 U. S. 735; *Anderson County* v. *Beall*, 113 U. S. 227; *Town of Coloma* v. *Eaves*, 92 U. S. 484; *Commissioners* v. *Bolles*, 94 U. S. 104; *Commissioners* v. *Clark*, 94 U. S. 278.

Mr. James W. Brown for defendant in error.

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

Article 422 of the statute provides that the bonds shall be signed by the mayor. This clearly means that they shall be signed by the person who is mayor of the city when they are signed, and not by any other person. The legislature having declared who shall sign them, it was not open to the city council to provide that they should be signed by some other person. Article 423 of the statute provides that it shall be the duty of the mayor, whenever any bonds are issued, to forward them to the comptroller of public accounts of the State, for registry. They could not be issued until they were properly signed by a person who was the mayor at the time they were signed, and the comptroller could receive them lawfully for registry only from such mayor. So, also, by article 424, it is made the duty of the same mayor, and not that of

any other person, at the time of forwarding the bonds to the comptroller for registration, to furnish him with the statement specified in that article. No other person than such mayor could furnish the comptroller with such statement.

The complete answer to the suggestion that the plea does not negative the idea that the bonds may have been signed by a person authorized by the defendant to sign them, is that, in view of the statute, the defendant had no power to authorize any other person to sign them than the person who was mayor at the time they were signed. The answer to the suggestion that the plea does not negative the idea that they may have been signed by a person authorized by law to sign them, is, that, in view of the provisions of the statutes of Texas referred to, and of the allegations of the plea, it was for the plaintiff to aver or show, in reply to the plea, that the person who signed them, or some other person than the person who was mayor at the time they were signed, was authorized by law to sign them.

It is contended for the plaintiff, that as Hodge, who signed the bonds as mayor, was the mayor on January 1, 1884, the date of the bonds, and the plaintiff was an innocent purchaser of them for value, he was not bound to look beyond the bonds themselves, and the enabling acts authorizing their issue, and that, if there was lawful authority to issue them and the city appeared to have acted upon that authority, he was not obliged to inquire further, no matter what irregularity characterized the acts of the officers who issued them on behalf of the city; that the face of the bonds referred him to article 420 of the statutes, and to the ordinance of September 13, 1883; that an examination of the statute and the ordinance would show authority to issue the bonds; that the records of the city would show that the persons who signed the bonds were the mayor and the secretary of the city on the 1st of January, 1884, the date of the bonds; that the indorsement on each bond would show that it had been registered by the comptroller; and that he had a right to presume that the bonds had been forwarded to the comptroller by the mayor, as provided by the statute, or otherwise the comptroller would not have registered them.

But we have always held that even *bona fide* purchasers of municipal bonds must take the risk of the official character of those who execute them. An examination of the records of the city in regard to the issuing of the bonds would have disclosed the fact that the bonds had not been signed and issued under the ordinance of September 13, 1883, until July 3, 1884, that W. N. Hodge was not mayor on that day; and that the person who then signed the bonds as mayor was a private citizen.

In *Anthony* v. *County of Jasper*, 101 U. S. 693, municipal bonds were signed and issued in October, 1872, on a subscription made in March, 1872, to the stock of a railroad company, and bore date the day of the subscription. The presiding justice who signed the bonds did not become such until October, 1872. Thus the person who was in office when the bonds were actually signed, signed them, but they were antedated to a day when he was not in office. In the present case, the bonds were not signed by an officer who was in office when they were signed, but by a person who was in office on the antedated day on which they bore date. In the Jasper County case there was a false date inserted in the bonds in order to avoid the effect of a registration act which took effect between the antedated date and the actual date of signing. In the present case, there was a false signature. But the principle declared in the Jasper County case is equally applicable to the present case. It was there said by Chief Justice Waite, delivering the judgment of the court, (p. 698:) "The public can act only through its authorized agents, and it is not bound until all who are to participate in what is to be done have performed their respective duties. The authority of a public agent depends on the law as it is when he acts. He has only such powers as are specifically granted; and he cannot bind his principal under powers that have been taken away, by simply antedating his contracts. Under such circumstances, a false date is equivalent to a false signature; and the public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other. After the power of an agent of a private person has been

revoked, he cannot bind his principal by simply dating back what he does. A retiring partner, after due notice of dissolution, cannot charge his firm for the payment of a negotiable promissory note, even in the hands of an innocent holder, by giving it a date within the period of the existence of the partnership. Antedating, under such circumstances, partakes of the character of a forgery, and is always open to inquiry, no matter who relies on it. The question is one of the authority of him who attempts to bind another. Every person who deals with or through an agent assumes all the risks of a lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other. In *Bayley* v. *Taber*, 5 Mass. 286, it was held that when a statute provided that promissory notes of a certain kind, made or issued after a certain day, should be utterly void, evidence was admissible on behalf of the makers to prove that the notes were issued after that day, although they bore a previous date. . . . Purchasers of municipal securities must always take the risk of the genuineness of the official signatures of those who execute the paper they buy. This includes, not only the genuineness of the signature itself but the official character of him who makes it."

This ruling has been since followed. In *Bissell* v. *Spring Valley Township*, 110 U. S. 162, where bonds were issued by a township in payment of a subscription to railway stock, under a statute which made the signature of a particular officer essential, it was held, that without the signature of that officer they were not the bonds of the township, and that the municipality was not estopped from disputing their validity by reason of recitals in the bond, setting forth the provisions of the statute, and a compliance with them. The same principle is recognized in *Northern Bank* v. *Porter Township*, 110 U. S. 608, 618, 619, and *Merchants' Bank* v. *Bergen County*, 115 U. S. 384, 390.

The case of *Weyauwega* v. *Ayling*, 99 U. S. 112, is cited for the plaintiff. In that case the bonds of a town bore date June 1, and were signed by A as chairman of the board of supervisors, and by B as town clerk, and were delivered by

Opinion of the Court.

A to a railroad company. When sued on the coupons by a *bona fide* purchaser of the bonds for value before maturity, the town pleaded that the bonds were not in fact signed by B until July 13, at which date he had ceased to be town clerk, and his successor was in office. It was held, Chief Justice Waite delivering the opinion of the court, that the town was estopped from denying the date of the bonds, because, in the absence of evidence to the contrary, it must be assumed that the bonds were delivered to the company by A with the assent of the then town clerk.

In *Anthony* v. *County of Jasper* the court distinguished that case from *Weyauwega* v. *Ayling*, and said that in the latter case it held that "the town was estopped from proving that the bonds were actually signed by a former clerk after he went out of office, because the clerk in office adopted the signature as his own when he united with the chairman in delivering the bonds to the railroad company," while in the former case the bonds were not complete in form when they were issued, and it was only by a false date that they were apparently so. In the present case, it appears affirmatively by the bill of exceptions that the person who was mayor of the city at the time the bonds were signed took no part in signing, delivering or issuing them; that they were not complete in form when they were issued, because they were not signed by the then mayor; and that it was only by a false date that they were then apparently complete in form. Hence, the present case is not like *Weyauwega* v. *Ayling*, but is like *Anthony* v. *County of Jasper*.

This case is analogous to that of *Amy* v. *City of Watertown*, No. 1, 130 U. S. 301, where the statute required process to be served on the city by serving it on the mayor, and it was not so served, and it was held that there could be no substituted service, and no legal service without service on the mayor.

Regarding these views as decisive of this case we forbear discussing other questions on which it is maintained that the ruling of the Circuit Court was correct.

Judgment affirmed.

Statement of the Case.

HANS NIELSEN, Petitioner.

APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT OF THE TERRITORY OF UTAH.

No. 1527. Argued April 18, 22, 1889. — Decided May 13, 1889.

Where a court is without authority to pass a particular sentence, such sentence is void, and the defendant imprisoned under it may be discharged on *habeas corpus*.

A judgment in a criminal case denying to the prisoner a constitutional right, or inflicting an unconstitutional penalty, is void, and he may be discharged on *habeas corpus*.

THIS was an appeal from a final order of the District Court for the First Judicial District of the Territory of Utah, refusing to issue a *habeas corpus* applied for by the petitioner, who prayed to be discharged from custody and imprisonment on a judgment rendered by said court on the 12th of March, 1889. The judgment was that the petitioner, Hans Nielsen, having been convicted of the crime of adultery, be imprisoned in the penitentiary of the territory for the term of 125 days. The appeal to this court is given by § 1909 of the Revised Statutes.

The case arose upon the statutes enacted by Congress for the suppression of polygamy in Utah. The 3d section of the act, approved March 22, 1882, entitled "An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes," reads as follows:

"SEC. 3. That if any male person, in a territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court." 22 Stat. 31, c. 47, § 3.

The 3d section of the act of March 3, 1887, entitled "An act to amend an act entitled an act to amend section fifty-

three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy and for other purposes," reads as follows:

"SEC. 3. That whoever commits adultery shall be punished by imprisonment in the penitentiary not exceeding three years; and when the act is committed between a married woman and a man who is unmarried, both parties to such act shall be deemed guilty of adultery; and when such act is committed between a married man and a woman who is unmarried, the man shall be deemed guilty of adultery." 24 Stat. 635, c. 397, § 3.

On the 27th of September, 1888, two indictments were found against the petitioner, Nielsen, in the District Court, one under each of these statutes. The first charged that on the 15th of October, 1885, and continuously from that time till the 13th of May, 1888, in the district aforesaid, he, the said Nielsen, did unlawfully claim, live and cohabit with more than one woman as his wives, to wit, with Anna Lavinia Nielsen and Caroline Nielsen. To this indictment, on being arraigned, Nielsen on the 29th of September, 1888, pleaded guilty; and on the 19th of November following he was sentenced to be imprisoned in the penitentiary for the term of three months and to pay a fine of $100 and the costs.

The second indictment charged that said Nielsen, on the 14th of May, 1888, in the same district, did unlawfully and feloniously commit adultery with one Caroline Nielsen, he being a married man and having a lawful wife, and not being married to said Caroline. Being arraigned on this indictment on the 29th of September, 1888, after having pleaded guilty to the other, Nielsen pleaded not guilty, and that he had already been convicted of the offence charged in this indictment by his plea of guilty to the other.

After he had suffered the penalty imposed by the sentence for unlawful cohabitation, the indictment for adultery came on for trial, and the petitioner, by leave of the court, entered orally a more formal plea of former conviction, in which he set up the said indictment for unlawful cohabitation, his plea of guilty thereto, and his sentence upon said plea, and claimed

that the charge of unlawful cohabitation, though formally made only for the period from 15th October, 1885, to 13th May, 1888, yet, in law, covered the entire period from October, 1885, to the time of finding the indictment, September 27th, 1888, and thus embraced the time within which the crime of adultery was charged to have been committed; and he averred that the Caroline Nielsen with whom he was charged to have unlawfully cohabited as a wife, was the same person with whom he was now charged to have committed adultery; that the unlawful cohabitation charged in the first indictment continued without intermission to the date of finding that indictment; and that the offence charged in both indictments was one and the same offence and not divisible, and that he had suffered the full penalty prescribed therefor.

To this plea the district attorney demurred, the court sustained the demurrer, and the petitioner, being convicted on the plea of not guilty, was sentenced to be imprisoned in the penitentiary for the term of 125 days. The sentence was as follows, to wit:

"The defendant, with his counsel, came into court. Defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none; and no sufficient cause being shown or appearing to the court, thereupon the court rendered its judgment:

"That whereas said defendant, Hans Nielsen, having been duly convicted in this court of the crime of adultery, it is therefore ordered, adjudged and decreed that the said Hans Nielsen be imprisoned in the penitentiary of the Territory of Utah, at the county of Salt Lake, for the term of one hundred and twenty-five days.

"You, said defendant, Hans Nielsen, are rendered into the custody of the United States marshal for the Territory of Utah, to be by him delivered into the custody of the warden or other proper officer of said penitentiary.

"You, said warden or other proper officer of said penitentiary, are hereby commanded to receive of and from said

United States marshal him, the said Hans Nielsen, convicted and sentenced as aforesaid, and him, the said Hans Nielsen, to safely keep and imprison in said penitentiary for the term as in this judgment ordered and specified."

Thereupon being delivered into the custody of the marshal, the defendant below, on the next day, or day following, during the same term of the court, presented to the court his petition for a *habeas corpus*, setting forth the indictments, proceedings and judgments in both cases, and his suffering of the sentence on the first indictment, and claiming that the court had no jurisdiction to pass judgment against him upon more than one of the indictments, and that he was being punished twice for one and the same offence. As before stated, the court being of opinion that if the writ were granted he could not be discharged from custody, refused his application. That order was appealed from.

Mr. Jeremiah M. Wilson and *Mr. Franklin S. Richards* for the petitioner, appellant.

Mr. Solicitor General, on behalf of the United States, opposing.

I. The record in this case does not show want of jurisdiction in the court below, but only alleged errors of the court in the exercise of its jurisdiction. If the judgment of the court in sustaining the demurrer was wrong, it was an error, but the error was one of judgment. The judgment might be voidable for error, but was not void for want of power, and, until reversed, was conclusive. *Ex parte Watkins*, 3 Pet. 191, 202. The writ of *habeas corpus* should not be converted into a mere writ of error. *Ex parte Parks*, 93 U. S. 18; *Ex parte Carll*, 106 U. S. 521; *Ex parte Bigelow*, 113 U. S. 328; *Pitner* v. *The State*, 44 Texas, 578.

II. The defendant was not placed twice in jeopardy for the same offence.

(1) The offences charged in the first and second indictments are not the same. The first indictment charges unlawful co-

habitation under the third section of the act of the 22d of March, 1882, 22 Stat. 31. Its descriptive language is, "hereafter cohabits with more than one woman." The second charges adultery under the third section of the act of the 19th of February, 1887, 24 Stat. 635. Its descriptive language is, "whoever commits adultery." The definition of adultery is: The voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. 1 Bouvier's Law Dictionary, 126. The essential elements of this crime are that the offender shall be married; that he or she shall have sexual intercourse with a person other than his or her husband or wife; that his or her husband or wife shall be living at the time of the act. No one of these elements is essential to the offence of "unlawful cohabitation." The word "cohabit" in the statute means "to be together as husband and wife." The offence is to live with more than one woman, holding out to the world by word or deed that such women are the wives of the offender. Neither actual marriage nor sexual intercourse are essential elements of this offence. These propositions are all sustained by the opinion of this court in the case of *Cannon* v. *United States*, 116 U. S. 55.

(2) The first indictment is for a continuous offence. The time laid in it is: "On the 15th day of October, 1885, . . . and on divers days thereafter, and continuously between the day last aforesaid and the 13th day of May, 1888." Under this indictment no evidence could have been received of any act done on the 14th day of May, 1888, nor on any other day later than the 13th. *Commonwealth* v. *Robinson*, 126 Mass. 259. The time laid in the second indictment is, "On the 14th day of May, 1888." There is no period of time that is common in the two indictments. No evidence could have been given on the first indictment for any offence committed as charged in the second. The records therefore relied on by the petitioner do not show that he was placed twice in jeopardy, but show on the contrary, *prima facie*, that he was not. The burden of proving the identity of the offences is on the defendant. Wharton's Crim. Pl. and Pr. § 483.

(3) But even if the offence of "unlawful cohabitation" included one element of the crime of adultery, and both had been laid within the same time, it is not conceded that the petitioner was thereby placed twice in jeopardy. *Moore* v. *People of the State of Illinois*, 14 How. 20.

In the case of *Morey* v. *Commonwealth*, 108 Mass. 433, the defendant had been indicted at September Term, 1867, for lewd and lascivious association and cohabitation with Bridget Kennedy. The offence was laid from October 1, 1866, continuously to August 1, 1867. He was convicted. At the same term he was convicted for adultery with Bridget Kennedy, in which the dates were laid January 1, June 1 and August 1, 1867. The court ruled that he had not been twice convicted of the same offence. The conclusion is thus stated by Gray, J., delivering the opinion: "The indictment for adultery alleged and required proof that the plaintiff in error was married to another woman, and would be satisfied by proof of that fact and of a single act of unlawful intercourse. Proof of unlawful intercourse was indeed necessary to support such indictment. But the plaintiff in error could not have been convicted upon the first indictment by proof of such intercourse, and of his marriage, without proof of continuous unlawful cohabitation; nor upon the second indictment by proof of such cohabitation, without proof of his marriage. Full proof of the offence charged in either indictment would not, therefore, of itself, have warranted any conviction upon the other. The necessary consequence is, that assuming that proof of the same act or acts of unlawful intercourse was introduced on the trial of both indictments, the conviction upon the first indictment was no bar to a conviction and sentence upon the second."

The authorities bearing upon the question are fully cited, compared and discussed in the above case; among others the case of *Commonwealth* v. *Roby*, 12 Pick. 496, in which it was ruled a conviction for assault with intent to murder did not bar a conviction for murder committed by the same act.

In the case of *State* v. *Elder*, 65 Indiana, 282, it is ruled: "But when the same facts constitute two or more offences,

wherein the lesser offence is not necessarily involved in the greater, and when the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, then the first prosecution will not be a bar to the second, although the offences were both committed at the same time and by the same act." See also *Commonwealth* v. *McShane*, 110 Mass. 502, and authorities there cited; and *Shannon* v. *Commonwealth*, 14 Penn. St. 226. Where the evidence to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea is generally good, but not otherwise. 1 Wharton's Crim. Law, Pr., Pl. and Ev. §§ 565 and 565*a*.

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

The first question to be considered, is, whether, if the petitioner's position was true, that he had been convicted twice for the same offence, and that the court erred in its decision, he could have relief by *habeas corpus?*

The objection to the remedy of *habeas corpus*, of course, would be, that there was in force a regular judgment of conviction, which could not be questioned collaterally, as it would have to be on *habeas corpus*. But there are exceptions to this rule which have more than once been acted upon by this court. It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on *habeas corpus*. This was so decided in the cases of *Ex parte Lange*, 18 Wall. 163, and *Ex parte Siebold*, 100 U. S. 371, and in several other cases referred to therein. In the case of *In re Snow*, 120 U. S. 274, we held that only one indictment and conviction of the crime of unlawful cohabitation, under the act of 1882, could be had for the time preceding the finding of the indictment, because the crime was a continuous one, and was

but a single crime until prosecuted; that a second conviction and punishment of the same crime, for any part of said period, was an excess of authority on the part of the District Court of Utah; and that a *habeas corpus* would lie for the discharge of the defendant imprisoned on such conviction. In that case, the *habeas corpus* was applied for at a term subsequent to that at which the judgment was rendered; but we did not regard this circumstance as sufficient to prevent the prisoner from having his remedy by that writ.

It is true that, in the case of Snow, we laid emphasis on the fact that the double conviction for the same offence appeared on the *face* of the judgment; but if it appears in the indictment, or anywhere else in the record, (of which the judgment is only a part,) it is sufficient. In the present case it appeared on the record in the plea of *autre fois convict*, which was admitted to be true by the demurrer of the government. We think that this was sufficient. It was laid down by this court in *In re Coy*, 127 U. S. 731, 758, that the power of Congress to pass a statute under which a prisoner is held in custody may be inquired into under a writ of *habeas corpus* as affecting the jurisdiction of the court which ordered his imprisonment; and the court, speaking by Mr. Justice Miller, adds: "And if their want of power appears on the face of the record of his condemnation, whether in the indictment or elsewhere, the court which has authority to issue the writ is bound to release him:" referring to *Ex parte Siebold*, 100 U. S. 371.

In the present case, it is true, the ground for the *habeas corpus* was, not the invalidity of an act of Congress under which the defendant was indicted, but a second prosecution and trial for the same offence, contrary to an express provision of the Constitution. In other words, a constitutional immunity of the defendant was violated by the second trial and judgment. It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment

against the defendant. This was the case in *Ex parte Lange*, where the court had authority to hear and determine the case, but we held that it had no authority to give the judgment it did. It was the same in the case of Snow: the court had authority over the case, but we held that it had no authority to give judgment against the prisoner. He was protected by a constitutional provision, securing to him a fundamental right. It was not a case of mere error in law, but a case of denying to a person a constitutional right. And where such a case appears on the record, the party is entitled to be discharged from imprisonment. The distinction between the case of a mere error in law, and of one in which the judgment is void, is pointed out in *Ex parte Siebold*, 100 U. S. 371, 375, and is illustrated by the case of *Ex parte Parks*, as compared with the cases of Lange and Snow. In the case of Parks there was an alleged misconstruction of a statute. We held that to be a mere error in law, the court having jurisdiction of the case. In the cases of Lange and Snow, there was a denial or invasion of a constitutional right. A party is entitled to a *habeas corpus*, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner. As said by Chief Baron Gilbert, in a passage quoted in *Ex parte Parks*, 93 U. S. 18, 22, "If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge." This was said in reference to cases which had gone to conviction and sentence. Lord Hale laid down the same doctrine in almost the same words. 2 Hale's Pleas of the Crown, 144. And why should not such a rule prevail *in favorem libertatis?* If we have seemed to hold the contrary in any case, it has been from inadvertence. The law could hardly be stated with more categorical accuracy than it is in the opening sentence of *Ex parte Wilson*, 114 U. S. 417, 420, where Mr. Justice Gray, speaking for the court, said: "It is well settled by a series of decisions that this court, having no jurisdiction of criminal cases by writ of error or appeal, cannot discharge on *habeas corpus* a person imprisoned under

the sentence of a Circuit or District Court in a criminal case unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence." This proposition, it is true, relates to the power of this court to discharge on *habeas corpus* persons sentenced by the Circuit and District Courts; but, with regard to the power of discharging on *habeas corpus*, it is generally true that, after conviction and sentence, the writ only lies when the sentence exceeds the jurisdiction of the court, or there is no authority to hold the defendant under it. In the present case, the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the Constitution, which bounds and limits all jurisdiction.

Being of opinion, therefore, that *habeas corpus* was a proper remedy for the petitioner, if the crime of adultery with which he was charged was included in the crime of unlawful cohabitation for which he was convicted and punished, that question is now to be considered.

We will revert for a moment to the case of *In re Snow*. Three crimes of unlawful cohabitation were charged against Snow, in three indictments, the crimes being laid continuous with each other, one during the year 1883, one during 1884, and one during 1885. We held that they constituted but a single crime. In the present case there were two indictments; one for unlawful cohabitation with two women down to May 13th, 1888, and the other for adultery with one of the women the following day, May 14th, 1888. If the unlawful cohabitation continued after the 13th of May, and if the adultery was only a part of, and incident to it, then an indictment for the adultery was no more admissible, after conviction of the unlawful cohabitation, than a second indictment for unlawful cohabitation would have been; and for the very good reason, that the first indictment covered all continuous unlawful cohabitation down to the time it was found. The case would then be exactly the same as that of *In re Snow*. By way of illustrating the argument we quote from the opinion in that case. Mr. Justice Blatchford delivering the opinion of the court, said: "The offence of cohabitation, in the sense of this

statute, is committed if there is a living or dwelling together as husband and wife. It is inherently a continuous offence, having duration; and not an offence consisting of an isolated act. That it was intended in that sense in these indictments is shown by the fact that in each the charge laid is that the defendant did on the day named and 'thereafter and continuously,' for the time specified, 'live and cohabit with more than one woman, to wit, with' the seven women named, and, 'during all the period aforesaid' 'did unlawfully claim, live and cohabit with all of said women as his wives.' Thus, in each indictment, the offence is laid as a continuing one, and a single one, for all the time covered by the indictment; and, taking the three indictments together, there is charged a continuing offence for the entire time covered by all three of the indictments. There was but a single offence committed prior to the time the indictments were found. . . . On the same principle there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen years and a half, and fines amounting to $10,500, or even an indictment covering every week. . . . It is to prevent such an application of penal laws, that the rule has obtained that a continuing offence of the character of the one in this case can be committed but once, for the purposes of indictment or prosecution, prior to the time the prosecution is instituted." These views were established by an examination of many authorities.

Now, the petitioner, in his plea, averred in terms that the unlawful cohabitation, with which he was charged in the first indictment, continued without intermission up to the time of finding that indictment, covering the time within which the adultery was laid in the second indictment. He also averred that the two indictments were found against him upon the testimony of the same witnesses, on one oath and one examination as to the alleged offence, covering the entire time specified in both indictments. This plea was demurred to by the prosecution, and the demurrer was sustained. The averments of the plea, therefore, must be taken as true. And, assuming them to be true, can it be doubted that the adultery charged

in the second indictment was an incident and part of the unlawful cohabitation? We have no doubt of it. True, in the case of Snow, we held that it was not necessary to prove sexual intercourse in order to make out a case of unlawful cohabitation; that living together as man and wife was sufficient; but this was only because proof of sexual intercourse would have been merely cumulative evidence of the fact. Living together as man and wife is what we decided was meant by unlawful cohabitation under the statute. Of course, that includes sexual intercourse. And this was the integral part of the adultery charged in the second indictment; and was covered by and included in the first indictment and conviction. The case was the same as if the first indictment had in terms laid the unlawful cohabitation for the whole period preceding the finding of the indictment. The conviction on that indictment was in law a conviction of a crime which was continuous, extending over the whole period, including the time when the adultery was alleged to have been committed. The petitioner's sentence, and the punishment he underwent on the first indictment, was for that entire, continuous crime. It included the adultery charged. To convict and punish him for that also was a second conviction and punishment for the same offence. Whether an acquittal would have had the same effect to bar the second indictment is a different question, on which we express no opinion. We are satisfied that a conviction was a good bar, and that the court was wrong in overruling it. We think so because the material part of the adultery charged was comprised within the unlawful cohabitation of which the petitioner was already convicted and for which he had suffered punishment.

The conclusion we have reached is in accord with a proposition laid down by the Supreme Judicial Court of Massachusetts in the case of *Morey* v. *Commonwealth*, 108 Mass. 433, 435. The court there says, by Mr. Justice Gray: "A conviction of being a common seller of intoxicating liquors has been held to bar a prosecution for a single sale of such liquors within the same time, upon the ground that the lesser offence, which is fully proved by evidence of the mere fact of unlawfully mak-

ing a sale, is merged in the greater offence; but an acquittal of the offence of being a common seller does not have the like effect. *Commonwealth* v. *Jenks*, 1 Gray, 490, 492; *Commonwealth* v. *Hudson*, 14 Gray, 11; *Commonwealth* v. *Mead*, 10 Allen, 396." Whilst this proposition accords so nearly with our own views, it is but fair to say that the decision in *Morey* v. *Commonwealth* is the principal one relied on by the government to sustain the action of the District Court of Utah in this case. Morey was charged under a statute in one indictment with lewdly and lasciviously associating and cohabiting with a certain female to whom he was not married; and in another indictment he was charged with committing adultery with the same person on certain days within the period of the alleged cohabitation. The court held that a conviction on the first indictment was no bar to the second, although proof of the same acts of unlawful intercourse was introduced on both trials. The ground of the decision was, that the evidence required to support the two indictments was not the same. The court said: "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not, whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offence. A single act may be an offence against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." p. 434. We think, however, that that case is distinguishable from the present. The crime of loose and lascivious association and cohabitation did not necessarily imply sexual intercourse, like that of living together as man and wife, though strongly presumptive of it. But be that as it may, it seems to us very clear that where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence.

It may be contended that adultery is not an incident of unlawful cohabitation, because marriage of one of the parties must be strictly proved. To this it may be answered, that whilst this is true, the other ingredient (which is an incident of unlawful cohabitation) is an essential and principal ingredient of adultery; and, though marriage need not be strictly proved on a charge of unlawful cohabitation, yet it is well known that the statute of 1882 was aimed against polygamy, or the having of two or more wives; and it is construed by this court as requiring, in order to obtain a conviction under it, that the parties should live together as husband and wives.

It is familiar learning that there are many cases in which a conviction or an acquittal of a greater crime is a bar to a subsequent prosecution for a lesser one. In Mr. Wharton's Treatise on Criminal Law, vol. 1, § 560, the rule is stated as follows, to wit: "An acquittal or conviction for a greater offence is a bar to a subsequent indictment for a minor offence included in the former, wherever, under the indictment for the greater offence, the defendant could have been convicted of the less;" and he instances several cases in which the rule applies; for example, "An acquittal on an indictment for robbery, burglary, and larceny, may be pleaded to an indictment for larceny of the same goods, because upon the former indictment the defendant might have been convicted of larceny." "If one be indicted for murder, and acquitted, he cannot be again indicted for manslaughter." "If a party charged with the crime of murder, committed in the perpetration of a burglary, be generally acquitted on that indictment, he cannot afterwards be convicted of a burglary with violence, under 7 Wm. IV and 1 Vic. c. 86, 2, as the general acquittal on the charge of murder would be an answer to that part of the indictment containing the allegation of violence." "An acquittal for seduction is a bar to an indictment for fornication with the same prosecutrix." "On the same principle, in those States where, on an indictment for adultery, there could be a conviction for fornication, an acquittal of adultery is a bar to a prosecution for fornication." It will be observed that all these instances are supposed cases of acquittal; and in order that an acquittal may be a bar

to a subsequent indictment for the lesser crime, it would seem to be essential that a conviction of such crime might have been had under the indictment for the greater. If a conviction might have been had, and was not, there was an implied acquittal. But where a conviction for a less crime cannot be had under an indictment for a greater which includes it, there it is plain that while an acquittal would not or might not be a bar, a conviction of the greater crime would involve the lesser also, and would be a bar; and then the proposition first above quoted from the opinion in *Morey* v. *Commonwealth* would apply. Thus, in the case of *The State* v. *Cooper*, 1 Green, N. J. Law, 361, where the defendant was first indicted and convicted of arson, and was afterwards indicted for the murder of a man burnt and killed in the fire produced by the arson, the Supreme Court of New Jersey held that the conviction of the arson was a bar to the indictment for murder, which was the result of the arson. So, in *State* v. *Nutt*, 28 Vermont, 598, where a person was convicted of being a common seller of liquor, it was held that he could not afterwards be prosecuted for a single act of selling within the same period. "If," said the court, "the government see fit to go for the offence of being a 'common seller,' and the respondent is adjudged guilty, it must, in a certain sense, be considered as a *merger* of all the distinct acts of sale up to the filing of the complaint, and the respondent cannot be punished but for one offence." Whereas, in *Commonwealth* v. *Hudson*, 14 Gray, 11, after an acquittal as a common seller, it was held that the defendant might be indicted for a single act of selling during the same period. See 1 Bishop's Crim. Law, 5th ed. § 1054, etc.

The books are full of cases that bear more or less upon the subject we are discussing. As our object is simply to decide the case before us, and not to write a general treatise, we content ourselves, in addition to what has already been said, with simply announcing our conclusion, which is, that the conviction of the petitioner of the crime of unlawful cohabitation was a bar to his subsequent prosecution for the crime of adultery; that the court was without authority to give judgment and sentence in the latter case, and should have vacated

and set aside the same when the petitioner applied for a *habeas corpus;* and that the writ should have been granted and the petitioner discharged.

The judgment of the District Court is reversed, and the cause remanded, with directions to issue a habeas corpus *as prayed for by the petitioner, and proceed thereon according to law.*

NEW ORLEANS *v.* GAINES'S ADMINISTRATOR.

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

No. 4. Argued October 13, 14, 1887. — Decided May 13, 1889.

By the French jurisprudence prevailing in Louisiana, a creditor may exercise the rights of action of his debtor, a right analogous to the garnishee or trustee process in some States.

This right cannot be enforced in the Federal courts by an action at law, but by a suit in equity, on the principle of subrogation.

The true owner of lands in Louisiana, having recovered the lands, and obtained judgment for the fruits and revenues against the possessor, may file a bill in equity against the possessor's grantor, who guaranteed the title, to recover the amount thus recovered — the warrantor of title in Louisiana being liable to the grantee for the fruits and revenues, for which the latter has to account to the true owner.

There are degrees of bad faith in the case of unlawful possessors. A merely technical possessor in bad faith, who supposed his title was a good one, and resisted the claims of the true owner in moral good faith, will not be compelled to answer for fruits and revenues which he has not received.

A fictitious charge against such a possessor (by way of fruits and revenues) of a certain per cent per annum on an inflated valuation of the property, exhibited in sales at auction in a time of wild speculation, will be set aside as speculative and unjust.

This was a bill filed by Myra Clark Gaines against the city of New Orleans to recover the amount, with interest, of the fruits, revenues and value for use, of certain lands in the city of New Orleans, containing about 135 arpents, which the complainant had recovered from various persons claiming title

under the city. The charge was, that the city was liable as grantor of the land, as well as guarantor of the title, and ought to respond for all the rents and revenues of the property actually received by itself or its grantees, or which might have been received by a judicious and provident use of the property.

The bill was filed August 7, 1879, and on the 5th of May, 1883, a decree was rendered in favor of the complainant for the sum of $1,925,667.83, with interest on $950,110 from January 10th, 1881. From that decree the present appeal was taken.

A brief outline of the history of this litigation will conduce to a better understanding of the case. Daniel Clark, a prominent citizen of New Orleans, of large wealth and possessions, died there on the 16th of August, 1813, without leaving any known heirs-at-law nearer than his mother, who was residing at Germantown, near Philadelphia. A will was found amongst his papers, sealed up in a package bearing the following inscription in his own hand: "This is my olographic will. New Orleans, 20th May, 1811." (Signed) "Daniel Clark." The will was short, containing only the following words, to wit: "In the name of God, I, Daniel Clark, of New Orleans, do make this my last will and testament: *Imprimis.* I order that all my just debts be paid. Second. I leave and bequeath unto my mother, Mary Clark, now of Germantown, in the State of Pennsylvania, all the estate, whether real or personal, which I may die possessed of. Third. I hereby nominate my friends, Richard Relf and Beverly Chew, my executors, with power to settle everything relating to my estate." (Signed) "Daniel Clark." This will was duly admitted to probate, and letters testamentary were granted to the executors named therein.

The executors proceeded to take possession of the estate, and disposed of a large part of it. There were some outlying lands, in the suburbs of the city, bordering on St. John's Bayou, that were not disposed of until 1821, amongst others the lands now in controversy. Relf and Chew, besides being executors of Clark's will, held a power of attorney from Mary Clark, his mother, dated October 1, 1813, by which, styling

herself to be heir, devisee and legatee of Daniel Clark, she appointed them, (Relf and Chew,) naming them as merchants of New Orleans and executors of the will of Daniel Clark, jointly and severally, as her lawful attorneys, for her and in her behalf, to take possession of the real and personal estate of Clark; to manage, sell, let, occupy and sue for the same, or any part thereof; to collect moneys, debts and effects belonging to her as sole legatee, devisee, or heir-at-law of said Clark; to make all necessary and proper acts and deeds for conveying any of the property, and generally to do everything that she could do in the premises. This power was deposited of record with John Lynd, a notary public of New Orleans, on the 22d of April, 1817. By an act of sale, dated 30th of October, 1821, Relf and Chew, in the name of Mary Clark, and by virtue of said power of attorney, after having put up the property at auction, sold and conveyed to one Evariste Blanc, the highest bidder, for the sum of $4760, a piece of land described as situated on the Bayou St. John, containing about 135 superficial arpents, [equal to 114 acres,] adjoining the road of the Navigation, or Carondelet, Canal, the lands of E. Cauchoit, the Broad Street and Bellechasse Street, etc., in conformity with a plan drawn by Joseph Pilié, city surveyor, on the 20th of August, 1821; and they subrogated the purchaser to all the rights of property that Mary Clark had in the land, with right of seizing the same.

On the 26th day of September, 1834, Evariste Blanc sold and conveyed the same and other adjoining lands, amounting in all to 240 arpents, [equal to nearly 203 acres,] to the city of New Orleans for the sum of $45,000, making the cost of the property in question about $25,000. This purchase was made by the city for the purpose of controlling the laying out of the streets and other public improvements, in that district, in conformity with the general plan of the city, and more for the public advantage. No one at that time had any serious question about the validity of the title. Mrs. Gaines, then Mrs. Whitney, it is true, had, with her husband, in June preceding filed a petition in the Probate Court in a pending proceeding on the part of a creditor of Daniel Clark, claiming to be his

daughter and heir, and Relf had been cited to answer it; but it was regarded as a visionary claim, and made no public impression.

The city reserved four or five blocks of this purchase for public purposes, (the erection of drainage works, etc.,) and in March, 1837, sold off most of the balance in building lots. This happened at a time when real estate in New Orleans had suddenly risen to the most inflated and fictitious prices. The real estate craze, indeed, had infected large portions of the country. These sales were afterwards mostly anulled for defects of title, or never carried out, and it would probably have been impossible for the purchasers to have responded for the extravagant prices agreed to be paid. In some cases they were six or seven times the normal value of the property. According to the *procès-verbal* of the auctioneers, the adjudications amounted to the enormous sum of over $600,000, and the sales of the lots and squares involved in the present case amounted to $553,460; but, as before remarked, the whole transaction, except with regard to a few parcels, fell through, and the property came back into the city's hands. Yet the amount of these sales forms the basis of the exceedingly large decree in this case. The same property, afterwards, about 1848, was again put up at auction, and the property now in question brought only about $100,000 including some of the original sales not annulled; — being less than one fifth of the nominal amounts bid at the first sale. This property, afterwards, by a long process of litigation, was recovered by Mrs. Gaines as the heir and devisee of Daniel Clark under a late discovered will, and the tenants were ousted, and this suit was brought, as before stated, to recover from the city the entire rents and revenues of the property from the time of its purchase from Evariste Blanc. The decree in the case, where there was no proof of actual rents and revenues received by the city or its grantees, (as was the case wherever, and as long as, the particular property was unimproved,) charges the city five per cent per annum on the amount of the sales of 1837, from that time to the date of the decree (46 years), and interest on that yearly five per cent from the time it accrued,

making the amount of revenues, in many cases, more than 400 per cent of the said sales. In this way the amount of rents and revenues on unimproved property, with the interest thereon to the 10th of January, 1881, is figured up at $1,348,959.91; in addition to which the decree awards the complainant the sum of $576,707.92 for the revenues of the improved property whilst in the hands of grantees of the city; making a total decree of $1,925,667.83, with interest to accrue from January 10, 1881, on the sum of $950,110 (the assumed principal) until paid. The master had allowed but 70 per cent of the amount of the sales of 1837 as the basis of calculation, but the court in its final decree deemed it proper to add on the other 30 per cent.

The connection of Mrs. Gaines with this property arose as follows: In the early part of the present century one Samuel B. Davis, generally known as Colonel Davis, resided in New Orleans, and in 1812 removed to Philadelphia, and afterwards to Wilmington, in the State of Delaware. In the war of 1812 he had some command in the defence of the Delaware coast. One of the members of his family was a young girl, named Myra, who passed as his daughter; but some of Daniel Clark's intimate friends, including Colonel Davis, were aware that the girl was acknowledged by Clark to be his daughter, — natural daughter, as generally supposed. She had been born in New Orleans in 1805 or 1806, and placed in Davis's family, who was an intimate friend of Clark. Her mother was née Zulime Carrière, but at the time of the child's birth was called Madame Des Grange, having been married to a man of that name. In 1802 she had had a previous child by Clark, named Caroline, who was born in Philadelphia, and educated there and in Trenton, at Clark's expense, his partner and agent in Philadelphia, Mr. Daniel W. Coxe, having charge of her. This daughter afterwards married a man by the name of Barnes. After the birth of her first daughter, Zulime or Madame Des Grange returned to New Orleans, and Myra was born there. This child was taken into the family of Colonel Davis, as before stated, and passed as his daughter. On the 13th of September, 1832, she was married to Mr. William

Wallace Whitney at Delamore Place, State of Delaware (Colonel Davis's residence), as the daughter of Colonel Davis.[1] Mr. Whitney having died in 1837, she afterwards, in 1839, married General Edmund P. Gaines. She always asserted that, up to the time of her marriage to Whitney, she was wholly ignorant of her true paternity.

Her claim to be entitled to the property of Daniel Clark rests on two grounds: first, that she was his legitimate daughter; second, that he made a will shortly before his death in 1813 (which, however, was lost or destroyed), in which he declared her to be his legitimate daughter, and bequeathed to her all his estate subject to the payment of certain legacies.

The first claim, that she was the legitimate daughter of Daniel Clark, was based on the allegation that he was married to her mother, Zulime Carrière, or Madame Des Grange, at Philadelphia in 1802 or 1803. This supposed marriage is testified to by Zulime's sister, Madame Despau, who says that Mr. Clark desired it to be kept secret, because Zulime's husband, Des Grange, was still living. This was true; but against that it is alleged that he (Des Grange) had another wife living when he married Zulime, so that his marriage with her was void. Proceedings were undertaken in the ecclesiastical court, at New Orleans, in September, 1802, to convict Des Grange of bigamy, but they failed, and he was discharged. The validity of Zulime's marriage to Clark, therefore, in the last of 1802, or beginning of 1803, (if they were married,) depended on the fact of Des Grange being a married man when he married Zulime, which was in 1794. On this point considerable evidence of a conflicting character was taken.

Meantime Daniel Clark, in 1806 or 1807, paid his addresses to a Miss Caton, of Baltimore, and in August, 1808, Zulime married a Dr. Gardette, of Philadelphia — proceedings, both, which seemed to many persons inconsistent with the marriage of Clark and Zulime in 1803. Her sister's explanation, how-

[1] *Marriage notice in the Philadelphia Gazette of September* 17, 1832: "Married.— On Thursday evening, the 13th inst., at Delamore Place, Del., by the Rev. Mr. Pardee, William Wallace Whitney, Esq., of New York, to Miss Myra E., daughter of Colonel Samuel B. Davis."

ever, was that Zulime was indignant that Clark delayed to acknowledge her and that he paid his addresses to another lady.

This is the general result of the allegation of Zulime's marriage with Daniel Clark. It is clear from the evidence of some of his confidential business friends that they gave it no credence. But a majority of this court, in *Gaines* v. *Hennen*, 24 How., and *Gaines* v. *New Orleans*, 6 Wall., were satisfied from the evidence that they were married in 1802 or 1803, and that Zulime was free to marry at the time. Of course we are bound by that decision in this case, as the city of New Orleans was a party or privy in those cases.

The other ground on which Mrs. Gaines's claim rests, is the supposed will which Daniel Clark made shortly before his death, in 1813. No copy of such will was ever found; but the testimony of certain persons intimate with Clark was adduced, to the effect that they saw such a will in his hands, and knew it to be in his handwriting, and either read it or heard him state the contents of it; and heard him declare that he intended it to be his last will; and from this testimony the will on which the whole claim of Mrs. Gaines really turns was reduced to writing and admitted to probate in the state courts of Louisiana, and the courts of the United States considered themselves bound by that decision. It is true that the Louisiana courts have since decided against the will, and revoked the probate; but their decision has been set aside by this court because Mrs. Gaines had applied to have the cause removed to the United States Circuit Court, and the court of the State had refused to allow such removal. The case was afterwards tried by the Circuit Court of the United States, and that court made a decree confirming the probate of the will. This decree was made on the 30th of April, 1877, at the same time with decrees in two other cases against various possessors of the property in question, which will be noted hereafter.

All this was the outcome of a long series of litigation on the subject of Mrs. Gaines's claim. Her first appearance in the courts, and the first notice that any one had of her claim, was her filing a petition with her husband, W. W. Whitney, as

before stated, on the 18th of June, 1834, (21 years after Clark's death,) in the Probate Court of New Orleans, in a certain proceeding instituted by one Shaumburg, a creditor of Clark, against his executors for not executing the will and settling up the estate. In this petition she claimed to be the child and only heir of Daniel Clark, and prayed that the will of 1811 might be annulled and set aside, and that she might be declared the heir of Clark, and that the executors of the will of 1811 might be decreed to deliver up to her the possession of all the property belonging to the estate. She alleged that Clark had made another will making her his sole heir; but made no application concerning it. After some litigation the plaintiff, Shaumburg, was non-suited in June, 1836, and that proceeding was ended.

In July of the same year (1836) Myra and her husband, Whitney, filed a bill in the Circuit Court of the United States for Louisiana against Relf and Chew, the executors of the will of 1811, and against the heirs of Mary Clark (Daniel's mother — who had died in 1823) and against the occupants of the various tracts of land of which Clark died seized, amongst others, against the city of New Orleans as occupant of the Blanc tract of 135 arpents; and praying for the establishment of the will of 1813, which she alleged had been made and left by Mr. Clark and had been destroyed; and that it might be decreed that the will of 1811 was revoked by the will of 1813 and was void; and that it might be further decreed that she, Myra, was the legitimate child of said Clark, and that he, Clark, was the lawful husband of her mother, Zulime Carrière; and that all the sales of real and personal property and slaves of said Clark made by Relf and Chew were null and void; and that the occupants and possessors of the real estate and slaves should deliver up the same to the complainant with all the rents, profits and issues thereof, and for an accounting, etc. This suit was pending in the Circuit Court and in this court until 1852. Different phases of it will be found reported in 13 Pet. 404; 15 Pet. 9; 2 How. 619; 6 How. 550.

The Circuit Court in the case of *Gaines* v. *Chew*, 2 How. 619, was divided in opinion on three points: (1) whether the

bill was multifarious or not; (2) whether the court had jurisdiction of the case without probate of the will of 1813; (3) whether the case was one of equity or law. This court held, (1) that the bill was not multifarious, being against the executors Relf and Chew, and those who claimed under them; (2) that no claim could be based on the will of 1813 until it was admitted to probate, and the probate of the first will was revoked, and that the Circuit Court had no jurisdiction for this purpose; (3) that the discovery sought by the bill was sufficient to give the court of chancery jurisdiction. This decision was rendered in 1844. Meantime Mr. Whitney had died in 1837, and Myra was married to General Edmund P. Gaines in 1839, who died in June, 1849; the suit being revived as occasion required.

Proceedings were carried on separately against one of the defendants, named Patterson, in the Circuit Court, and a decree was obtained there in 1840 in favor of the complainants, requiring Patterson to surrender the property claimed by him. On appeal to this court the decree was reversed, and a decree was made establishing, as against Patterson, the validity of Clark's marriage with Zulime Carrière, the legitimacy and heirship of Myra, and her title as forced heir to four fifths of the property held by Patterson, notwithstanding the will of 1811. The other defendants have always insisted that this case was a collusive one. The decree of this court was rendered early in 1852, and the case is reported as *Patterson* v. *Gaines*, 6 How. 550.

Thus far, 39 years after Clark's death, only one piece of property had been recovered; but declarations of the majority of this court were made that gave the complainants great encouragement to continue the litigation.

As none of the parties, except Patterson, were bound by the decision against him on the legitimacy question, and as it was a question attended with some difficulties, it was deemed important by Mrs. Gaines, and her counsel, if possible, to have the will of 1813 established by probate proceedings in Louisiana. The next move was in that direction. In January, 1855, a petition for that purpose was filed by her in the

proper Probate Court in New Orleans. In March following judgment was rendered against the will, and denying probate. But in December, 1855, a decision was rendered by the Supreme Court of Louisiana, on appeal, establishing the will in the form contended for by Mrs. Gaines, and a decree was entered to that effect on the 25th of February, 1856. This was more than 42 years after the death of Mr. Clark.

The decree of probate thus obtained was of limited effect. It bound none but those who were parties to the proceeding. The city of New Orleans and Relf, surviving executor of the will of 1811, applied for leave to intervene in the case; but leave was refused. An attorney was appointed to represent the absent relatives. But the probate of the will enabled Mrs. Gaines to take her stand upon it in the courts of the United States, and to avail herself, until it was successfully assailed, of the status which it gave her, by express declaration, as the legitimate child and sole heir and legatee of Daniel Clark.

Immediately after probate of the will was thus obtained, new litigation was started against the parties in possession of the property of Daniel Clark, all the suits being bills in equity. First, a bill was filed by Mrs. Gaines against François Dusnan de la Croix to recover the slaves left by Clark, which were purchased by de la Croix from the executors. Next, a bill was filed December 22, 1856, by Mrs. Gaines against the city of New Orleans and four other persons, charging the city as possessed of the whole 240 arpents before mentioned, being the entire tract sold to the city by Evariste Blanc, including the 135 arpents now in question. Lastly, a bill was filed March 27th, 1857, against Lizardi, Egaña, Slidell, Hennen and 14 others, as possessors respectively of the several lots contained in a square between Poydras and Perdido streets in New Orleans, but not embracing any of the Blanc tract.

The bills in these three cases were dismissed by the Circuit Court by simultaneous decrees rendered by Judge McCaleb, on the 17th of April, 1858. These decrees were appealed to this court, and were severally reversed, and the claim of Mrs. Gaines was sustained by a majority of the court.

In the last case, that of *Gaines* v. *Lizardi and others*, de-

cided in January, 1861, and reported in 24 How. 553, under the name of *Gaines* v. *Hennen*, Chief Justice Taney and Justices Catron and Grier dissented. In the other two cases, *Gaines* v. *New Orleans* and *Gaines* v. *De la Croix*, decided in January, 1868, and reported in 6 Wall. 642, 719, Justices Grier, Swayne and Miller dissented. In consequence of the absence of a justice of the Supreme Court at the Circuit Court holden at New Orleans, and the district judge being interested, the judgments were not entered there on the mandates until May, 1871.

The lands recovered were generally surrendered, and where no settlements were made references were ordered to ascertain and take account of the rents and revenues — but only five squares of the Blanc tract were recovered, being all that remained in the possession of the city. The Circuit Court, following the declarations of the Supreme Court, held that the defendants were possessors in bad faith — that is, that they were chargeable with notice of Relf and Chew's want of authority to sell the lands in question, and that this deprived them, under the law of Louisiana, of the benefit of prescription, and made them accountable for all the rents and revenues from the time their respective possessions commenced. This operated as a great hardship; for, although technically possessors in bad faith, the defendants really and in truth supposed their titles to be valid. The Circuit Court also decided, in the case against the city, that the latter was not responsible for rents and revenues except whilst in actual possession of the property; and as the city had sold off the greatest portion of the Blanc tract, and had only retained possession of the square on which the drainage machine was located and four other vacant squares, a reference was ordered to ascertain the amount of rents and revenues derived from those portions and from the residue of the whole tract whilst it remained in the city's hands. The master estimated the rents and revenues derived from the drainage machine in several different ways, resulting in different amounts, the lowest being $2400 a year for the preceding 35 years, which, with interest and after deducting expense of repairs, amounted to $125,266.79. He

further reported that no rents or revenues were derived from the four vacant squares or from the residue of the property whilst in the city's possession. A decree was rendered for the amount reported, and was afterwards affirmed by this court in the case of *New Orleans* v. *Gaines*, 15 Wall. 624. The principle established in that case, that the city was not responsible for rents and revenues except during the time of its actual possession, will have a bearing on one of the branches of the present case hereafter considered.

After the settlement of Mrs. Gaines's general claim in her favor in the cases of *Gaines* v. *Hennen*, *Gaines* v. *New Orleans*, and *Gaines* v. *De la Croix*, she commenced other suits against the actual possessors of the property of Daniel Clark. On the 22d of November, 1865, she filed a bill against P. H. Monsseaux and over 190 other persons alleged to be in possession of various lots that belonged to said Clark, including portions of the Blanc tract sold to the city as aforesaid. On the 12th of February, 1870, she filed another bill against P. F. Agnelly and over 300 other persons alleged to be in possession of other lots belonging to said Clark, including other portions of the Blanc tract. On the 30th of April, 1877, decrees were entered in these suits in accordance with the previous decisions, and references were made to a master to ascertain the amount of rents and revenues due from the various parties. In the former case rents and revenues were reported to be due from 103 different parties occupying lots on the Daniel Clark portion of the Blanc tract, amounting in the aggregate to $471,836.54; in the latter case rents and revenues were reported due from 38 different parties occupying lots on said tract, amounting in the aggregate to $45,212.80. The total of both was $517,049.34. These sums included interest to the time of the accounting in each case, at different dates in the years 1877, 1878 and 1879. The property was generally improved property, and the parties were charged for the time they occupied it the full amount of rents and revenues received or that might have been received. These amounts with interest, continued to January 10, 1881, were included, without alteration, in the decree in the present case. They were regarded as in the nature of *res judicata*.

Argument for Appellant.

There was another suit determined by the Circuit Court at the same time with those just referred to. This was the case of Joseph Fuentes and 74 other persons, including the *City of New Orleans* v. *Mrs. Gaines*, instituted May 27, 1869, in the Probate Court of New Orleans, to revoke the will of 1813, and to recall the probate thereof. Mrs. Gaines applied to remove the case to the Circuit Court of the United States, but the state court, as before stated, refused to relinquish jurisdiction, and on the 4th of December, 1871, rendered a decree revoking the probate of that will. This decree was affirmed in February, 1873, in a very elaborate opinion by the Supreme Court of Louisiana; but the decree of that court was reversed by this court in March, 1876, on the ground that the case should have been removed. *Gaines* v. *Fuentes*, 92 U. S. 10. The Circuit Court afterwards, on the 30th of April, 1877, rendered a decree to the effect that the will was duly probated by the Louisiana court, in 1855, and upon sufficient legal and truthful testimony.

Finally, the present suit was commenced by a bill filed August 7th, 1879, as before stated, for the purpose of compelling the city of New Orleans to respond for all the rents, fruits, revenues and profits of the whole 135 arpents of Clark's land purchased of Evariste Blanc in 1834, from the time of such purchase until the time of bringing the suit, except those which had been accounted for in the suit of *Gaines* v. *City of New Orleans*, before referred to.

Mr. Henry C. Miller and *Mr. J. R. Beckwith* for appellant.

I. There is no equity jurisdiction to compel a unilateral account when there are no offsets or items to be charged, discharged or surcharged, nor to compute damages for alleged torts. *Hipp* v. *Babin*, 19 How. 271; *Root* v. *Railway Co.*, 105 U. S. 189; *Ellis* v. *Davis*, 109 U. S. 485; *Gaines* v. *Miller*, 111 U. S. 395; *Van Weel* v. *Wooston*, 115 U. S. 228; *Buzard* v. *Houston*, 119 U. S. 347; *Parkersburg* v. *Brown*, 106 U. S. 487; *Ambler* v. *Choteau*, 107 U. S. 586; *Litchfield* v. *Ballou*, 114 U. S. 190. In such case the defendant has a con-

stitutional right to a trial by jury. *Insurance Co.* v. *Bailey*, 13 Wall. 616; *Grand Chute* v. *Winegar*, 15 Wall. 355; *Lewis* v. *Cocks*, 23 Wall. 466; *Killian* v. *Ebbinghaus*, 110 U. S. 568; *New York Guarantee Co.* v. *Memphis Water Co.*, 107 U. S. 205; *Francis* v. *Flinn*, 118 U. S. 385; *United States* v. *Wilson*, 118 U. S. 86; *Fussell* v. *Gregg*, 113 U. S. 550.

II. Equity will not deal with an account simply because it is complicated; to sustain a bill for an account there must be mutual demands: not a single matter involved, but a series of transactions on the one side, and payments on the other. *Porter* v. *Spencer*, 2 Johns. Ch. 179; *Badger* v. *McNamara*, 123 Mass. 117; *Walker* v. *Brooks*, 125 Mass. 241; *Ball* v. *Carew*, 13 Pick. 28; *Dinwiddie* v. *Bailey*, 6 Ves. 136; *Bailey* v. *Taylor*, 1 Russ. & Myln. 73; *Ambrose* v. *Dunmow*, 9 Beavan, 508; *Padwick* v. *Stanley*, 9 Hare, 627; *Hemings* v. *Pugh*, 4 Giff. 456. A bill will not lie for a mere money demand, which can be perfectly well ascertained at law. *Holmes* v. *Eastern Counties Railway*, 3 Kay & Johns. 675; *Darthez* v. *Clemens*, 6 Beavan, 165; *O'Mahony* v. *Dickson*, 2 Sch. & Lef. 400. Complication of accounts, where the receipts or items are all on one side, if ever sufficient ground for intervention of equity, must show a very strong case of entanglement. *Foley* v. *Hill*, 1 Phillips Ch. 399.

III. Where there is an effort to give equity jurisdiction by a general charge that accounts were intricate, and cannot be taken without the aid of equity, the bill must disclose circumstances and facts showing the intricacy of the account, or the bill will be dismissed. *Bowles* v. *Orr*, 1 Younge & Coll. 464; *Paduick* v. *Hurst*, 418 Beavan, 575; *Norris* v. *Day*, 4 Younge & Coll. Ex. Eq. 475; *Jones* v. *Manud*, 3 Younge & Coll. Ex. Eq. 347; *Phillips* v. *Phillips*, 9 Hare, 471; *Glenie* v. *Imri*, 3 Younge & Coll. Ex. Eq. 432; *Fluker* v. *Taylor*, 3 Drewry, 183; *Ranger* v. *Great Western Railway Co.*, 5 H. L. Cas. 72.

IV. A bill in equity cannot be maintained for discovery if it cannot be maintained for relief, unless the bill shows the discovery to be in aid of a suit at law or the defence of a suit at law, actually pending or about to be brought and the action

or defence not frivolous. *Brown* v. *Swan*, 10 Pet. 497; (in this case the doctrine is elaborately considered;) *Mitchell* v. *Green*, 10 Met. 101; *Pool* v. *Lloyd*, 5 Met. 525; *Ahrend* v. *Odiorne*, 118 Mass. 261; *Walker* v. *Brooks*, 125 Mass. 241; *Haskins* v. *Burr*, 106 Mass. 48; *Dun* v. *Coates*, 1 Atk. 287; *Anon.* 2 Ves. Sen. 451; *Gelston* v. *Hoyt*, 1 Johns. Ch. 547, 548. It is doubtful if a bill of discovery can be maintained since parties can be examined as witnesses. *Heath* v. *Erie Railway Co.*, 9 Blatchford, 316.

V. A bill against a corporation as sole defendant, or a bill that waives answer under oath, is not a bill for discovery. *Huntington* v. *Saunders*, 120 U. S. 78; *United States* v. *Wagner*, L. R. 2 Ch. 582; *Republic of Liberia* v. *Roye*, 1 App. Cas. 139; *Republic of Costa Rica* v. *Erlinger*, L. R. 19 Ex. 33; *Republic of Peru* v. *Wegelns*, L. R. 20 Eq. 140.

VI. *Res Judicata* bears upon parties and all those in privity, and is not only conclusive as to all matters that have been drawn into the controversy between them in a former judicial controversy, but also conclusive as to all matters that might have been litigated in the prior litigation. *Packet Co.* v. *Sickles*, 6 Wall. 592; *Hopkins* v. *Lee*, 6 Wheat. 109; *United States Bank* v. *Beverly*, 1 How. 134; *Chapman* v. *Smith*, 16 How. 114; *Thompson* v. *Roberts*, 24 How. 233; *Campbell* v. *Rankin*, 99 U. S. 261; *Baird* v. *United States*, 96 U. S. 430; *Aurora* v. *West*, 7 Wall. 82; *The Appollon*, 9 Wheat. 362; *Durant* v. *Essex Co.*, 7 Wall. 107; *Nashville &c. Railway* v. *United States*, 113 U. S. 261; *Hebburn* v. *Dunlop*, 1 Wheat. 179; *Ballance* v. *Forsyth*, 24 How. 183; *Beloit* v. *Morgan*, 7 Wall. 619; *Gould* v. *Evansville &c. Railroad Co.*, 91 U. S. 526; *Whiteside* v. *Haselton*, 110 U. S. 296; *Corcoran* v. *Ches. & Ohio Canal Co.*, 94 U. S. 741; *Bryan* v. *Kennett*, 113 U. S. 179; *United States* v. *Parker*, 120 U. S. 89; *Coffey* v. *United States*, 116 U. S. 436. This is also the established jurisprudence in all of the States.

VII. Under the statute law of Louisiana, a plaintiff cannot split up a cause of action and sue in detail or detachments. Articles 91 and 156 of the Louisiana Code of Practice have been in continuous force since 1825, long before Mrs. Gaines

commenced any litigation as heir of Clark. Article 91 relates to the jurisdiction of the court as to amount, and ends in its last paragraph: "But if one in order to give jurisdiction to a judge, demand a sum below that which is really due him, he shall be presumed to have remitted the overplus, and after having obtained judgment for the sum he had claimed, he shall lose all right of action for that overplus." It may be claimed that this article is special and applies only to cases where the plaintiff has abated his demand in order to give jurisdiction to a particular court. If this is true, still Article 156 is conclusive. That article is as follows: "If one demand less than is due him, and do not amend his petition in order to augment his demand, he shall lose the overplus." Both of these articles have received judicial construction by the Supreme Court of the State. *McCaleb* v. *Estate of Fluker*, 14 La. Ann. 316; *Brandagee* v. *Chamberlain*, 2 Rob. La. 207; *Vascocu's Widow* v. *Pavie*, 14 La. 135. It will not be disputed that this is a firmly established part of the law of remedy in Louisiana, and has been in full force and operation since 1825.

The rule as stated in Article 156 is exactly the rule that has always prevailed both in equity and common law courts. *Rockwell* v. *Langley*, 19 Penn. St. 502; *Smith* v. *Weeks*, 26 Barb. 463; *Fulton* v. *Matthews*, 15 Johns. 432; *S. C.* 8 Am. Dec. 261; *Weckersham* v. *Whedon*, 33 Missouri, 561; *Stein* v. *Steamboat*, 17 Ohio St. 471; *S. C.* 93 Am. Dec. 631; *Barksdale* v. *Greene*, 29 Georgia, 418; *Rogers* v. *Higgins*, 57 Illinois, 244.

VIII. "The sale of a thing belonging to another person is null. It may give rise to an action for damages in case of eviction when the buyer knew not that the thing belonged to another person." This rule, as construed in Louisiana, refuses damages in case of eviction where the buyer knew the thing did not belong to the vendor: *Jeannin* v. *Milluadon*, 5 Rob. La. 76; *Hall* v. *Nevill*, 3 La. Ann. 326; *Scott* v. *Featherston*, 5 La. Ann. 306; *Nash* v. *Johnston*, 9 Rob. La. 8.

IX. Daniel Clark's will of 1811, after its probate, was a muniment of title warranting possession by the occupants of the Blanc tract until it was set aside by the probate of the

alleged will of 1813. *Davis* v. *Gaines*, 104 U. S. 386; *Allen* v. *Dundas*, 3 T. R. 125; *Rex* v. *Vincent*, 1 Strange, 481; *Woolley* v. *Clark*, 5 B. & Ald. 744; *Packman's Case*, 6 Rep. 19; *Simene* v. *Simene*, 1 Lev. 3d. ed. 90; *Thomson* v. *Harding*, 2 El. & Bl. 630; *Parker* v. *Kett*, 1 Ld. Raym. 658; *Waters* v. *Stickney*, 12 Allen, 1; *S. C.* 90 Am. Dec. 122; *Kittridge* v. *Folsom*, 8 N. H. 98; *Stone* v. *Peasley's Estate*, 28 Vermont, 716; *Steele* v. *Renn*, 50 Texas, 467.

X. A warrantor, who is not in possession, in the event of recovery on the covenant of warranty, only owes interest from judicial demand if the amount is liquidated, or from judgment if the amount is unliquidated. *Melançon's Heirs* v. *Robichaud's Heirs*, 19 La. 357; *Daquin* v. *Coiron*, 3 La. 387; *Connolly* v. *Bertrand*, 12 La. 313; *Herman* v. *Sprigg*, 3 Martin (N. S.) 190.

XI. The warrantee has no right of action against the warrantor until the warrantee is actually out of possession. The return of a writ of possession to which the warrantor is not a party is not adequate proof of actual eviction in a suit on the covenant of warranty. *Hale* v. *New Orleans*, 13 La. Ann. 499; *Melançon's Heirs* v. *Duhamel*, 7 La. 286; *Fletcher's Heirs* v. *Carélier*, 10 La. 120; *Laborde* v. *New Orleans*, 13 La. Ann. 326.

XII. The owner of realty, after eviction of adverse holder, has no action against the vendor of the evicted for rents and profits. *Gillaspie* v. *Citizen's Bank*, 35 La. Ann. 779.

Mr. John A. Campbell, *Mr. Thomas J. Semmes* and *Mr. Alfred Goldthwaite* for appellees.

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

The complainant's claim in this suit is that the city of New Orleans, as unlawful possessor and vendor of the property, is primarily responsible in the same manner and to the same extent as it would have been if it had never sold any part of it, but had remained in possession of the whole from the time of

its purchase to the present time. The argument is, that the city, as vendor, put its grantees into possession, and thus enabled them to keep the complainant out of possession, and is, therefore, responsible as principal, and not merely as surety or guarantor of its grantees; — although the latter position is also assumed. Its liability as principal is asserted as a fundamental proposition on which the case may be safely rested.

Another principle invoked and applied is, that, inasmuch as the city of New Orleans claimed the property under the sale of Relf and Chew, although claiming it through the medium of Evariste Blanc, it was a possessor in bad faith, and, as such, accountable, not only for the rents and revenues actually received, but for all that might have been received by the most provident management of the property.

The manner in which these assumed principles of law have been applied by the court below in the disposition of the case will be considered hereafter.

As already stated, the amount of the decree pronounced against the city was $1,925,667.83, of which $1,348,959.91 were for rents and revenues of unimproved property. The remainder, $576,707.92, was for rents and revenues of improved and unimproved property found due from the defendants in the suits of *Gaines* v. *Monsseaux et al.* and *Gaines* v. *Agnelly et al.*, before referred to; the amount being somewhat increased by additional interest. The parties in those cases relied on the city to protect them, and appear to have let things take pretty much their own course.

As the complainant was allowed, in her first suit against the city of New Orleans, before referred to, to recover all rents and revenues received by the city from each portion of the Blanc tract, derived from Clark's estate whilst it was in possession thereof, the complainant, in her claim before the master in the present case, waived all rents and revenues arising from the tract prior to March 10, 1837, the time when the auction sale was made as before mentioned; but claimed that there had been no adjudication or recovery against the city for any such rents and revenues after that date, except for the five squares referred to in that former suit; and hence she

claimed an account for all rents and revenues accruing after the 10th of March, 1837, except with regard to the said five squares, and some few other lots specially designated, which do not require attention here.

The master, therefore, in taking his account, assumed that no account of rents and revenues had ever been rendered by the city after the said 10th day of March, 1837, except as aforesaid, and proceeded to charge it with the entire rents and revenues of all the land in the whole tract, (except as aforesaid,) from the said date to the time of making the report, without regard to the question whether the city or its grantees were in actual possession or not. The rents and revenues thus charged against the city for unimproved land were not rents and revenues actually received, but fictitious rents and revenues, assessed at the rate of five per cent per annum on 70 per cent of the amount of the inflated sales of 1837, with interest thereon to the time of making the report, that being what the master deemed a fair equivalent of what the property ought to have produced. We shall see hereafter that the court added to this estimate interest on the other 30 per cent of the amount of said sales.

From the reports of the master we are led to understand that the amounts found due from the defendants in the other suits, aggregating, with interest, $576,707.92, as above stated, were estimated and made up on the same principles which were followed with regard to the unimproved property; not by taking merely the actual rents and revenues received, but adding thereto fictitious amounts which it was supposed might have been received by provident management, and by interest on hypothetical values in the absence of other evidence of income.

Now, in relation to the principles before referred to, on which the complainant contends that her case may be rested, and which the court seems to have adopted, we have the following observations to make. The first proposition is that the city of New Orleans is primarily liable for all the rents and revenues of the entire tract derived from the Clark estate and purchased from Evariste Blanc, for the entire period since

1837, down to the time of the decree. Leaving out of view, for the present, the secondary liability to which the city may be equitably bound to respond on its warranty of title to its grantees, is it true, in point of law, that the city is primarily liable in the manner above stated, with regard both to the time when it had possession itself, and also to the time when its grantees had the possession? The contrary of this proposition was distinctly decided by the Circuit Court in the case of *Gaines* v. *New Orleans*, and its decision was affirmed by this court in *New Orleans* v. *Gaines*, 15 Wall. 624. It is true that the complainant acquiesced in the decision of the Circuit Court in that case, and did not appeal; but that only left the decision standing as a precedent against her, all the more effective for such acquiescence.

The common law, certainly, does not recognize any such rule as that contended for. The person who receives the rents and profits is the only person who is to respond for them. It was even made a question in *Doe* v. *Harlow*, 12 Ad. & El. 40, and in *Doe* v. *Challis*, 17 Q. B. 166, whether the landlord of a tenant in possession was liable for mesne profits. After argument it was decided that he was. But the reason of this is obvious: the tenant's possession is the possession of his landlord. It is true that, by the ancient law, where there was an entire disseisin, the estate was deemed out of the disseisee for the time being, and no intrusion upon the land was a trespass against him; and, therefore, a grantee of the disseisor, or a second disseisor, was not responsible to the true owner at all, who had to look to his immediate disseisor for damages in an assize. Hobart, 98. But the modern action for mesne profits only lies against the tenant in possession who is cast in an action of ejectment; and where no ejectment has been brought, the actual trespasser on the land is the person amenable to an action of trespass *quare clausum fregit*, or assumpsit for use and occupation, where the trespass is waived.

The present case, however, is not to be decided by the rules of the common law. The counsel for the complainant relies on the French or civil law to sustain his position. But no case is cited to show that the rule contended for has ever been

adopted in Louisiana. On the contrary, there is a very recent case which decides the contrary. We refer to *Gillaspie* v. *Citizen's Bank*, 35 La. Ann. 779. In that case the bank had foreclosed a mortgage and bought in the property, and after three or four years' possession sold it to a third person. More than a year after this sale, a suit was brought by a guardian of minor children interested in the land, for a nullity of the sale on foreclosure, and judgment of nullity was rendered and the sale was set aside, on the ground that in the executory process of the bank two of the joint owners of the property had not been made parties. A suit was then brought against the bank to recover the minors' share of the fruits and rents from the time of the sale under the foreclosure, including the time that the grantee, or vendee, of the bank had possession, as well as that in which the bank itself had possession. The Supreme Court of Louisiana held that this could not be done; that it was a familiar rule of their jurisprudence, that "the possessor alone can be held liable to account for rents and revenues"; and, therefore, that the right of the plaintiff to demand rents and revenues against the bank must be restricted to the time it was in possession. This case is conclusive against the complainants' contention as to the primary liability of the city, except for the actual time when the city was in possession.

The only plausible ground on which the city can be made responsible for rents and revenues received by its grantees is that of subrogation, by which the real owner whose title has been judicially established, after pursuing the grantee in possession, and reducing his or her demand against such possessor into judgment, may take the place of such grantee and possessor in suing the grantor, who is under obligation to protect and indemnify such grantee. Can this be done in the present case? The grantees have been sued; judgment has been obtained against them; the city was sufficiently notified of the prosecution to be bound by the result as guarantor; indeed, the city practically conducted the defences. The complainant in her bill alleges, and it is proved, that the defendants in those suits have demanded of the city that it pay or settle the said

judgments and protect them therefrom. The complainant also alleges in her bill that the said defendants are unable to pay the said judgments, except through the aid of the city.

Under these circumstances, the grantees who have lost their property, and who have thus been made liable in judgments for the rents and revenues, might themselves, before satisfying such judgments, have maintained a suit in equity against their guarantor, the city of New Orleans, to protect them from the adjudged liability to pay. An action at law would not lie until actual payment; but equity would regard it the duty of the guarantor to protect the grantee from the extreme hardship of having to pay that which the guarantor himself ought to pay, it being the law of Louisiana that a person evicted from property conveyed to him with warranty may recover from his warrantor not only the price, but the amount of rents and revenues, which he is bound to respond for to the true owner.

As between the city and its grantee, the former, by reason of its guaranty of title, is really the principal debtor, and bound to protect the grantee as a principal is bound to protect his surety. Therefore the grantee is entitled to such remedies as a surety hath; and when fixed by judgment, if not before, may file a bill against his guarantor to protect him. Lord Redesdale says: "A court of equity will also prevent injury in some cases by interposing before any actual injury has been suffered, by a bill which has been sometimes called a bill *quia timet*, in analogy to proceedings at the common law, where in some cases a writ may be maintained before any molestation, distress, or impleading. Thus a surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt when due, whether the surety has been actually sued for it or not; and upon a covenant to save harmless, a bill may be filed to relieve the covenantee under similar circumstances." Redesdale's Treatise, 148, 4th ed.; and see *Ranelaugh* v. *Hayes*, 1 Vernon, 189, 190; *Lee* v. *Rook*, Mosely, 318; *Wooldridge* v. *Norris*, L. R. 6 Eq. 410; *Marsh* v. *Pike*, 10 Paige, 595, 597; *Taylor* v. *Heriot*, 4 Desaussure, 227; Fell on Guaranties, 247; De Colyar on Guaranties, 308, c. 5, Amer. ed. In *Lee* v. *Rook*, the Master of the Rolls said: "If I borrow money on a

mortgage of my estate for another, I may come into equity (as every surety may against his principal) to have my estate disencumbered by him."

Then, if the grantees, who have been ousted, and who are condemned in judgment to pay to Mrs. Gaines the rents and revenues due to her, might have maintained a suit in equity against the city to compel it to indemnify them, why may not Mrs. Gaines be subrogated to the grantees' right and equally maintain a suit against the city? The claim is an equitable one. It is in proof that all the acts of sale of the city contained express agreements of guaranty, with right of subrogation; and an act of sale in Louisiana imports a guaranty whether it is expressed or not.

But if the suit could not be maintained on purely equitable grounds alone, there is a principle of the civil law obtaining in Louisiana, by the aid of which there can be no doubt of its being maintainable. The Code Napoléon had an article (Art. 1166) expressly declaring that creditors may exercise all the rights and actions of their debtor, with the exception of those that are exclusively attached to the person. It is true that the Louisiana Code has no such article; but it is laid down by writers of authority that this principle prevails in French jurisprudence without the aid of any positive law. 43 Dalloz, 239, etc., title *Vente*, Arts. 932–935. The decisions to the contrary seem to be greatly outweighed by other decisions and by sound doctrine. The right thus claimed for the creditor (the word creditor being used in its large sense, as in the civil law) may very properly be pursued in a suit in equity, since it could not be pursued in an action at law in the courts of the United States; and all existing rights in any State of the Union ought to be suable in some form in those courts.

We think, therefore, that this part of the decree, amounting to the sum of $576,707.92, with accruing interest, being for the amount of the judgments obtained in the other suits, ought to be allowed, unless subject to reduction for the cause hereafter referred to.

As to the remainder of the decree, amounting to $1,348,959.91, being for rents and revenues and "value for use,"

as the master calls it, of the unimproved land, we cannot concur in the decision of the Circuit Court. We think that that sum is made up and arrived at by a method entirely too unsafe and unreliable. It being conceded that the city or its grantees actually derived no rents or revenues at all from the property, the former is charged, instead, with interest, in many cases, for more than forty years, on a false and inflated valuation, based on the sales of 1837 which were never carried out, and never could be, and, in addition, with interest upon that interest. It seems to us an enormous charge. It cannot be reasonable or sound. The land was a waste, a wilderness, and much of it a swamp. It probably never would have had any material value but for the draining operations instituted and carried on by the city on a portion of it. The sales in 1837 were made at a time of public frenzy. One of the witnesses, who had been a deputy sheriff, being asked if he knew at what price real estate sold in 1837, said: "I was at the time in a notary's office with my uncle; and I remember it was a kind of frenzy. You could hardly buy a lot without being offered triple the price for it. Lawyers made fortunes by it, like Mr. Pepin. Property behind the paper mill was sold, and when people went there to look at [it] there was three or four feet of water, and they paid a big price for it." Dr. Labatut being asked in reference to the Blanc tract, testified as follows: "I know that Mr. Blanc bought it. I don't know when it was." Being asked if he could give a description of what condition that property was in in 1837, he said: "It was simply a forest, had trees on it, and it was not cultivated." The master in his report gives the following abstract, from his point of view, of this class of testimony. He says: "The evidence on behalf of defendant has been chiefly directed to the establishing of the alleged facts — that the soil so left vacant and unimproved was not fit for use; that it would have been money thrown away, a waste of energy and substance, even to have endeavored to do anything with it; that for years, the end of which has not come, it had been and was destined to remain barren and untouched by the hands of man; and that, therefore, complainant could take nothing on

account of her dispossession, even though it had lasted for a period of some forty-five years. To substantiate this view of the case, sixteen witnesses were examined before the master, several of whom being amongst the oldest citizens in this city. Few of those oldest witnesses have any distinct remembrance or knowledge of the exact locality in contest, the 'Blanc tract,' but all remember the city when it was nothing but a marsh, first, from Rampart back to Claiborne Street, a distance of six squares back from the old square or body of the city (carrê de la ville), and then from Claiborne back to Broad Street, ten squares from Claiborne, Dorgenois Street, one square from Broad towards Claiborne, being the limit of said tract on the river side. And a few also remember that in 1837 all of this 'Blanc tract' was swampy, frequently a hunting-ground for three of them, often inundated in heavy rains, and two of them say the land was partly high and partly low. But they all say the city has progressed since then; it is solidly built all along the front of the tract from Rampart to Broad, and that part of the city is well settled. Some of the witnesses had been and are yet the owners of large tracts or parcels of land in and around the city, and had not been able to make anything out of them. Some had tried and had failed to obtain revenues from a few of their squares; others had not tried at all, deeming it beforehand a hopeless task. One of the oldest had purchased a piece of vacant land many years ago, and did not keep it long vacant, over five or six months and built on it as soon as he could, so as to derive revenue from it. Witness did not think it produced a revenue whilst vacant, not well remembering, but inferring this from the fact of his building, for, says he, when vacant property produces a revenue you don't build on it to make it produce a revenue. Another witness says that in the aggregate property has produced no revenue whatever since 1868, taking as data for his opinion the decreased assessed value of property. Another witness testified that in his opinion 2½ per cent or 3 per cent is all that improved real estate could produce here; that this was also the opinion he had heard expressed years ago by agents of extensive land property; that so it was in

his case when abroad some thirty-five years ago, his property being attended to by an agent, but that when he returned home and managed for himself he did a little better. Another witness was agent for several years of a large estate, and is so yet, there being in that estate a piece of ground on the outskirts of the city covering over five hundred acres, with good outbuildings and dwelling-house, which did not bring over $600 per year, though it brought at one time, after the war, $2400 per annum; but when asked if it had ever been used or attempted to be used as city property, answers in the negative. His principal had owned a piece of land in this 'Blanc tract,' but had never attempted to make it produce a revenue on account of the pending suit in eviction, and he adds that even without the suit in eviction nothing could have been made out of it, because vacant property is not wanted by anybody. Another says that the squares of this tract, from Broad along Canal Carondelet are worth nothing at all; but that all of this land, even along the Canal Carondelet, was salable from 1860 to 1870, provided there was nothing of Gaines's claim on them; and that, for seven or eight years, no vacant ground, high or low, can, in witness' opinion, be rented in this city. Another says there was no diligence by which the owner of vacant property in the Gaines claim could have made it produce a revenue without improving it. Two of the witnesses state that this property, as all low lands in this city, needed ditching as well as artificial drainage in order that it might be built upon; and one of them, that this tract began to be drained artificially by machinery about the time of its purchase by the city. And the preceding witness, who states that the vacant property in the Gaines claim could not yield a revenue without improvements — would be too expensive, and that he would not make them on any one square for its ownership. The great inflation of the price of real estate in this city in 1837 was also testified to by several of the witnesses, together with the disastrous effect of the panic of that year in depreciating the value of property."

Notwithstanding this evidence, and a great deal more to the same purport, the master reasoned that, because some

people improved their land and obtained good revenues from it, the city, or its grantees, might have done the same; and that a possessor in bad faith is chargeable with all that can be made out of the property. We think that there are two errors in this reasoning. First, it does not follow that because small parcels of land in the suburbs of the city may be made profitable by cultivation and improvement, therefore the whole suburbs can be turned to account in the same way. There are hundreds of acres in the vicinity of Washington, for example, lying open and in common. A German gardener may purchase a small lot, and by his industry make it produce a large revenue; and another might erect a saloon and get a reasonable custom. But it would be impossible to convert the entire suburbs, consisting, perhaps, of more than a thousand acres, into market gardens and beer saloons, or to build cottages or rows of houses on them to any advantage. The small examples are exceptions. Large outlying tracts have to abide the natural growth and spread of the city. They may lie unproductive in the hands of the most provident men for years.

Another error made by the master, and by the court, is, as to the extent to which the rule is to be carried, that a possessor in bad faith is bound to respond for all that the property possessed can be made to produce. We do not understand that this rule requires a possessor to change the state of the property. Suppose, for example, a large tract of land is wild, mostly forest, and might be made to produce immense yields of grain and produce if it were cleared of timber and broken up and cultivated. Is the possessor in bad faith — only technically such perhaps — bound to respond to the true owner, on recovery, for the thousands of bushels of wheat and corn and other produce that might have been raised on the land? Is it the duty of a possessor, even a possessor in bad faith, to change the state of the land from wild land to cultivated, farming land, for example, or to open and work mines of iron or copper or gold, so as to make as much out of the land as can be made out of it, and hand it over to the true owner? Does any such principle as this prevail in the law? We think not. The estimation of such undeveloped revenues is alto-

gether too speculative a matter. It is true, the master does not enter into an account of what might have been, but, under the idea that a great deal might have been made out of the land, assumes the arbitrary basis of the crazy prices of 1837, and charges the city with the interest on them, and interest on that interest; and no wonder that the decree is swelled up to nearly two millions of dollars.

The truth is, that there are degrees of bad faith. There are some possessors who, without any title at all, pertinaciously keep the true and known owner out of possession. They may be properly called knavish possessors. There are others who take a conveyance and go into possession in entire ignorance of any defect in their title, though they are technically possessors in bad faith, because by proper inquiry they might have discovered the defect. Such possessors, certainly, cannot be placed on the same level with the knavish and fraudulent possessors of whom we have just spoken. In the case of *Donaldson et al.* v. *Hull*, 7 Martin (N. S.) 112, 113, Judge Martin, delivering the opinion of the court in a case of mere technical possession in bad faith, said: "The case appears peculiarly a hard one, as the defendant bought in *moral* good faith, with the knowledge of the only one of the plaintiffs who was of age, and from the aunts of all of them, who had been selected by their mother to protect their interests after her death, and as the plaintiff who was of age received from him her part of the price. It is to be lamented that the law imposes on courts of justice the obligation of decreeing the restoration of the value of the services of slaves against a possessor who has fairly paid a full price for them, while it authorizes them to do no more in the case of a dishonest holder, who has taken them in possession without paying anything for them. But on assessing the value of the services which a defendant is to be decreed to restore, we think the same rule ought not to prevail. In assessing damages for their detention, the good faith or dishonest conduct of a defendant should influence us; and if justice demands vindictive damages in the latter case, it prescribes a just moderation in the former. The plaintiff must not receive more than he would if he had been in possession."

Opinion of the Court.

In the present case, notwithstanding the strong language which has been applied to the city of New Orleans in resisting so perseveringly the claims of Mr. Gaines, we cannot but express our conviction that those claims have been opposed in entire good faith. When the city purchased the land, no one dreamed of any defect in the title. Only one will was known, and by that will Mary Clark, the mother of the testator, was made universal heir and legatee. She had accepted the heirship; her giving a power of attorney to sell the lands of the estate indicated that; and her subsequent conduct all went to the same point. Mrs. Gaines, in her first bill, alleged that Mary Clark had accepted the inheritance and taken possession. Why should any one have doubted of the title? Nevertheless, a majority of this court has held that the vice in the title ought to have been known to the purchaser. We abide by that decision, but we cannot shut our eyes to the fact that it was not a moral but a mere technical failure of duty on the part of the purchaser not to have discovered a defect in the title.

Then the evidence to sustain the claims of Mrs. Gaines was so full of obscurities and improbabilities that a possessor of land purchased from the representatives of Daniel Clark could not be blamed for not giving it credence, and for resisting her suits to the utmost. We have given an outline of the history of her litigation for the purpose of showing how great reason the parties attacked in their possessions had to defend themselves with vigor. A full report of the evidence would have shown it still more strongly. We cannot blame them for making resistance. Although bound by the decisions that have been made by this court in the matter, we cannot say, and no one can say, that there was not much evidence of a very strong character in favor of a contrary conclusion.

In our judgment, there was no sufficient evidence that any rents or revenues were derived from the unimproved lands, either by the city of New Orleans, or by its grantees; and that part of the decree which is based on such supposed rents and revenues, amounting to $1,348,959.91, must be disallowed, and the bill must be dismissed with regard thereto.

As to the residue of the decree, amounting to $576,707.92, founded on the judgments recovered against persons in possession of various portions of the property, claiming under sales made by the city of New Orleans, whilst those persons would have been proper parties to the suit, in order that it might appear that the sums recovered against them had not been released or compromised for less amounts than the face of the judgments, and that they might be bound by the decree, still, as the objection of want of parties was not specifically made, and as it would be a great hardship on all the parties concerned to have to begin this litigation over again, we do not think that the bill should be dismissed on that ground, but that the said sum of $576,707.92 should be allowed to the complainant, with interest thereon, as provided in the decree of the Circuit Court, subject, however, to the qualification that if the defendant can show that any of the said judgments have been compromised and settled for any less sums than the face thereof, with interest, the defendant should be entitled to the benefit of a corresponding reduction in the decree; and a reasonable time should be allowed for the purpose of showing such compromises if any have been made.

The result is that the decree of the Circuit Court must be

Reversed and the cause remanded, with instructions to enter a decree in conformity with this opinion.

The Chief Justice and Mr. Justice Lamar were not members of the court when this case was argued, and took no part in its decision.

New Orleans v. *United States ex rel.: Gaines's Administrators; New Orleans* v. *United States ex rel.: Gaines's Administrators.* Appeals from and in error to the Circuit Court of the United States for the Eastern District of Louisiana. Nos. 2, 3. Argued October 13, 14, 1887. Decided May 13, 1889. Mr. Justice Bradley delivered the opinion of the court. The decision just made in the case of *The City of New Orleans* v. *Myra Clark Gaines* renders it necessary that the judgment or decree in this case should be reversed, and

Counsel for Parties.

it is reversed accordingly, and the cause remanded with instructions to dismiss the petition.

Reversed.

Mr. Henry C. Miller and *Mr. J. R. Beckwith* for appellant. *Mr. John A. Campbell, Mr. Thomas J. Semmes* and *Mr. Alfred Goldthwaite* for appellees.

HOLLON PARKER, Petitioner.

ORIGINAL.

No. 5. Original. Submitted April 26, 1889. — Decided May 13, 1889.

An appeal taken from the judgment of a District Court in Washington Territory to the Supreme Court, under the territorial act of November 23, 1883, in relation to the removal of causes to the Supreme Court, is a matter of right, if taken within the prescribed time, and no notice of intention to take it need be given.

Rights, under our system of law and procedure, do not rest in the discretionary authority of any officer, judicial or otherwise.

The chambers of a district judge of Washington Territory, who is also a judge of the Supreme Court of the Territory, may be held whilst he is in attendance upon the Supreme Court at the place where such court is sitting, although it be without the territorial limits of his district, and at such chambers he may receive notice of an appeal from a judgment rendered by him within his district.

Mandamus lies where an inferior court refuses to take jurisdiction, when by law it ought to do so, or when, having obtained jurisdiction, it refuses to proceed in its exercise. *Ex parte Brown*, 116 U. S. 401, distinguished.

A writ of mandamus to correct a mistake of an inferior court as to its jurisdiction may issue to the court and to its judges, although the court is composed of different members from those by whom the error complained of was commiited.

Petition for a writ of mandamus. The case is stated in the opinion.

Mr. John H. Mitchell for the petitioner.

Mr. W. W. Upton, Mr. C. B. Upton, Mr. John B. Allen, Mr. B. L. Sharpstein and *Mr. J. L. Sharpstein* opposing.

Opinion of the Court.

Mr. Justice Field delivered the opinion of the court.

This is an application for a writ of mandamus to the Supreme Court of Washington Territory to reinstate an appeal to that court from a judgment of the District Court of the First Judicial District of the Territory, dismissed for alleged irregularity in taking it. The case is before us on a return of the Supreme Court to our rule. The material facts upon which the application is made, condensed from the statement contained in the record and briefs of counsel, are as follows:

In May, 1884, the petitioner, Hollon Parker, commenced an action in the District Court of the First Judicial District of Washington Territory against George Dacres, to recover possession of certain real property situated in the county of Walla Walla, in the Territory, and demanding also in his complaint $22,500 as the value of the rents and profits of the property whilst unlawfully detained from him. The defendant appeared and answered the complaint, denying generally its allegations, and setting up that he had purchased the premises at a judicial sale had on a judgment rendered in an action between other parties in that court, and had made permanent improvements thereon to the value of $6000. The plaintiff replied to the answer, denying its allegations. On the trial which followed, the defendant, under the instructions of the court, obtained a verdict of the jury, upon which judgment was entered in his favor on the 14th of February, 1885. Soon afterwards, and during the same month, an appeal from the judgment was taken by the plaintiff to the Supreme Court of the Territory, which, on the 14th of July following was dismissed, because no assignment of errors had been filed with the clerk of the District Court and served on the adverse party or his attorney, within twenty days after entry of notice of appeal in the journal of the District Court, as required by its rules.

By the law of the Territory a party against whom a judgment is rendered is allowed six months to appeal from it. In this case the time to appeal extended to August 14, 1885. Accordingly, on the 27th of July, 1885, the plaintiff gave another

notice of appeal, by writ of error, to the Supreme Court of the Territory, from the judgment, at the chambers of the judge of the District Court, and requested that the notice be entered upon the journal of the court, and it was thereupon ordered that the notice of appeal be thus entered, and that the appeal be allowed. This proceeding was had at the chambers of the district judge whilst he was at Olympia, attending the Supreme Court of the Territory, he being one of its members. Olympia is without the territorial limits of the district of which he was judge.

The important sections of the act of the Territory of November 23, 1883, under which the appeal was taken, are as follows:

"An act in relation to the removal of causes to the Supreme Court.

"Sec. 1. *Be it enacted by the Legislative Assembly of Washington Territory*, That any person desiring to remove a cause from any District Court of Washington Territory may do so, either in person or by his attorney of record, and in the following manner: Such person or attorney may give notice in open court, or at chambers, that he appeals such cause to the Supreme Court of the Territory; such notice shall, by order of the court, or judge having jurisdiction of the cause, be entered in the journal of such court, and no other service or notice shall be required; and thereupon the clerk of such court shall make and certify a full and complete transcript of said cause, including the journal entries thereunto appertaining, and cause such transcript to be filed with the clerk of the Supreme Court within the time allowed by law; and thereupon the Supreme Court shall have complete and perfect jurisdiction of such cause.

"Sec. 2. That the Supreme Court shall hear and determine all causes removed thereto, in the manner hereinbefore provided, upon the merits thereof, disregarding all technicalities."

"Sec. 5. The notice of appeal hereinbefore provided for may be given at any time within six months after the rendi-

tion of the judgment, order, or decision intended to be removed to the Supreme Court.

"Sec. 6. All acts and parts of acts, so far as they conflict herewith, are hereby repealed.

"Approved November 23, 1883."

Subsequently the defendant moved to dismiss this second appeal, and at the January Term of the Supreme Court of 1887, it was dismissed, on the ground that the notice of appeal not being given in open court, and being in its nature an application for an order allowing the appeal, was entertained by the judge without the preliminary notice to the adverse party prescribed by § 2140 of the code. 3 Washington Ter. 12. That section, so far as it relates to this matter, is as follows:

"Sec. 2140. When a party to an action has appeared in the same he shall be entitled to at least three days' notice of any trial, hearing, motion, or application to be had or made therein, before any judge at chambers; which motion shall be in writing, setting forth the nature of the motion or application and the grounds thereof, and specifying the time and place where the same will be made, and which may be served on the adverse party or his attorney."

It would appear, from the statements of counsel, that on the argument of the motion to dismiss the appeal it was also contended that the district judge of the First Judicial District had no jurisdiction to hear the application for an appeal at chambers without the territorial limits of his district; and that position is also taken here.

We are of opinion that neither the objection that no notice of application for the appeal was given, nor that the judge, in acting without the territorial limits of his district, was without jurisdiction in the matter, is tenable.

1. The act of the Territory of November 23, 1883, in providing for a new mode, different from what previously existed, by which cases can be removed from the District Court to the Supreme Court of the Territory, declares that notice of appeal may be given in open court or at chambers; that such notice shall, by order of the court or judge having jurisdiction, be

entered on the journal of the court; and that no other service or notice shall be required. This language is inconsistent with any requirement that notice to the opposite party shall be given that the party desirous of appealing intends to give notice of an appeal. The nature of the proceeding is such that no notice of it is required before application is made to the judge. When an appeal is taken notice of the fact is usually given to the opposite party, or a citation is served on him. The act of the Territory, however, renders the entry upon the journal sufficient notice to all parties. Section 2140 of the code can have no proper application to orders which are granted of course, as being matters of right, but only to those matters which may be contested and refused. An appeal from a District Court to the Supreme Court of the Territory within the six months allowed by law was not a matter which could be refused at the discretion of the district judge or court. Rights under our system of law and procedure do not rest in the discretionary authority of any officer, judicial or otherwise. There was, therefore, no occasion to give notice of the intention of the party to take the proceeding.

The second objection is equally untenable. When the law allowed the proceeding to be taken at the chambers of the judge of the court, it meant at the chambers where he can conveniently attend to business relating to cases in his district, not that they must necessarily be within the territorial limits of his district. As one of the judges of the Territory, it is a part of his duty to sit in the Supreme Court. He is one of its members, and his chambers, whilst the Supreme Court is in session, and he is in attendance upon it, may be at the place where that court is sitting. Otherwise, the right of appeal within the six months allowed by law would be abridged for the period for which notice is to be given.

It is also objected that mandamus is not the proper remedy for the petitioner, under the decision in *Ex parte Brown*, 116 U. S. 401. There the Supreme Court of the Territory entertained jurisdiction of the cause which was brought before it by appeal, but dismissed it for want of due prosecution; that is to say, because errors had not been assigned in accordance

with rules of practice applicable to the form of the action; and we held that the judgment could only be reviewed here on writ of error or appeal, as the case might be. In the case before us, the Supreme Court of the Territory dismissed the appeal because not properly taken; that is, because the cause had not been brought before it from the lower court. The distinction in the two cases is obvious: in the one, the court below had taken jurisdiction and acted; but in the present case it refused to take jurisdiction. The right of mandamus lies, as held in *Ex parte Parker*, 120 U. S. 737, where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise. It does not lie to correct alleged errors in the exercise of its judicial discretion. *Ex parte Morgan*, 114 U. S. 174; *Chateaugay Ore and Iron Co., Petitioner*, 128 U. S. 544, 557.

It is also objected that when the order dismissing the appeal was made the Supreme Court of the Territory consisted of other judges than its present members. The then Chief Justice has died and a new Chief Justice occupies his place. The only Associate Justice then in office who now remains on the bench, Mr. Justice Langford, took no part in the decision. The question, therefore, is raised whether under such circumstances the mandamus can issue to the court, constituted as it now is, to reinstate a case dismissed by their predecessors. We do not think the objection is tenable. The mandamus is to correct a mistake as to its jurisdiction, committed by the court, and although it is the custom in such cases to direct the writ not merely to the court but to its judges by name, yet including their names within the writ, except in special cases where disobedience may be apprehended, is at the present day little more than a mere matter of form. Disobedience to the writ would be as unusual on the part of the court to which it is directed as would be a refusal to carry into effect the reversal of its judgment in an ordinary action. The object of the writ in the present case is to require the court to proceed in a matter properly cognizable by it, but upon which, from a mistaken view of the law as to its jurisdiction, it has refused

to act. *Thompson* v. *United States*, 103 U. S. 480, 483; *People* v. *Collins*, 19 Wend. 56; *State* v. *Warner*, 55 Wisconsin, 571.

It follows that the writ of mandamus must issue as prayed, directing the Supreme Court of the Territory to reinstate the appeal taken to it in the case mentioned, and to proceed to the hearing thereof in the usual course of its business.

STICKNEY *v.* STICKNEY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 243. Argued April 9, 10, 1889.—Decided May 13, 1889.

In a suit in equity in the Supreme Court of the District of Columbia it is competent, under the acts of Congress, for a married woman, who is a party thereto, to disclose, as a witness, directions given by her to her husband respecting the investment of her separate property, though she could not be compelled to make such disclosure against her wishes. Rev. Stat. Dist. Col. §§ 876, 877.

There is no higher presumption that a married woman in the District of Columbia intends, by placing her separate money in the hands of her husband, thereby to make a gift of it to him, than there is that a third person has such intent when he in like manner deposits money with him. 16 Stat. 45, c. 23.

In the District of Columbia, whenever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of it to him.

THE court, in its opinion, stated the case as follows:

This suit was brought by the complainant below, appellee here, Jeannie K. Stickney, widow of William Stickney, who died in October, 1881, against certain of his heirs, to establish her claim as creditor for the sum of about seventy-nine thousand dollars against the estate, real and personal, held in the name of her husband at the time of his death, and to obtain a decree that said estate be applied to its payment, except so far as may be necessary to discharge his just debts. Her conten-

tion is, that all that estate was acquired by her husband with her moneys received by her as legatee under the will of her deceased father, Amos Kendall, and which were delivered to him to invest for her benefit and in her name, but which without her knowledge, and contrary to her directions, he used and invested in his own name.

Complainant intermarried with William Stickney in January, 1852, and continued his wife until his death in October, 1881. They resided in the District of Columbia, and their married life was one of mutual confidence and affection, nothing ever occurring to mar its happiness. From his marriage to 1857 he was, the greater part of the time, a clerk in the government service. In that year he became secretary of Mr. Kendall, and continued so until the latter's death in November, 1869, receiving a monthly salary of $100, or, as supposed by one of his brothers, a yearly salary of $1500, himself and wife living with and receiving their board from Mr. Kendall. Whilst secretary of Mr. Kendall he received no salary from any other source. He had, however, accumulated a small amount of property, chiefly in lands, but it appears to have been acquired from moneys or proceeds of property given to his wife by her father, or from moneys furnished by him. It is not, however, important for the disposition of the present case to determine whether he had, previous to the death of Mr. Kendall, property in his own right, and if so, the extent of it. The question is, did he receive moneys of his wife to invest for her benefit, which he used and invested in his own name, and, if so, whether the estate which he left standing in his name can be subjected to the payment of the amount thus received.

Mr. Kendall left at his death an estate worth nearly half a million of dollars. By his will he made his four daughters residuary legatees, and provided that payment of any debts which might be due to him from any of them should not be required in money, but should be adjusted in the distribution to them of certain specified bonds. He appointed as executors Mr. Stickney and Mr. Robert C. Fox, his sons-in-law. His will was admitted to probate, and letters testamentary were issued to them. The distributive share which came to Mrs.

Stickney from her father's estate amounted to nearly eighty thousand dollars in money or its equivalent. Mr. and Mrs. Stickney had one son and to him Mrs. Stickney desired in 1879 to make a Christmas present of $1000. At her request Mr. Stickney sent her the money for that purpose. It appears also that Mrs. Stickney received from him at different times checks amounting to $600. No other sum except these is shown to have been paid by him to her of the means she received from her father. The whole went into his hands under directions, and with the understanding, as she asserts, that it was to be invested by him for her benefit and in her name. When she wanted the $1000 mentioned, she wrote to him the following letter: —

"*December* 23, 1879.

"Dear Will: I wish 'Will' to have $1000 of the Chicago payment for his Christmas gift. Please bring check for the amount, and the balance invest in my name, as I have asked you to do with all other moneys accruing from my inheritance.

"Jeannie."

The evidence that Mrs. Stickney expected that her husband would invest her money for her benefit in her name, and that he understood that to make such investment was his duty, consists not merely in her declarations, but in the statements of Stickney himself, made at different times to parties with whom he was dealing. The instances of this kind are numerous, and in their combined force, considered with the presumption attendant on the receipt of money where there is no relation of debtor and creditor between the parties, that the receiver is to hold it subject to the other's order or to invest it for his use, remove all reasonable doubt on the subject. How far the presumptions thus raised are to be deemed rebutted by the fact that there is no proof of any express promise on Stickney's part to comply with her request, and by her failure to call for any account from him or statement as to the investments made, will be hereafter considered. It would seem that the confidence in her husband prevented any suspicion that

her wishes as to the investment of her moneys had not been respected.

The illness of which Mr. Stickney died created no apprehension until within a few hours before his death. He then handed to his wife the keys to his box in the Safe Deposit Company, with instructions to retain them and examine his papers. Upon their examination after his funeral, none were found showing any property in her name; all the property which he held stood in his own name. He died intestate, leaving as his sole heirs and next of kin three brothers and four children of a deceased brother, two of whom were minors. She was appointed administratrix of his estate. The three brothers, upon being acquainted with the situation of affairs, and the fact that the moneys received by her from her father had been used and invested by the deceased in his own name, immediately relinquished to her all their claims to his estate, by a conveyance reciting that he had left in his individual name real and personal property acquired from the proceeds of her sole and separate estate, and formally recognizing her beneficial interest therein. By this conveyance Mrs. Stickney became the owner in her own right of three fourths of her husband's estate absolutely, with a right of dower in the remaining fourth of the real estate, and her distributive share in the personalty. She thereupon, to avoid any litigation over the property with the relatives of her husband, offered to recognize the claims of the infant children of the deceased brother, and to make reasonable compensation to the adult children, provided they would execute a release to her of their claims. The adults declined to execute such a release upon those terms, and the infants were incompetent to do so. Mrs. Stickney accordingly filed the present bill against the four children to determine the controversy, and the justice of her claim to be paid out of the estate of her husband as its creditor, the amount received by him from her separate property, after deducting the $1600 mentioned, which she had received from him.

The adult children answered the bill denying the equities claimed, and pleading the statute of limitations against their

assertion. The minor children, by their guardians *ad litem*, also answered the bill, claiming such interest in the premises as they might be entitled to, and submitting themselves to the protection of the court.

In October, 1882, on motion of the complainant and with the consent of the solicitors of the adult defendants and of the guardians *ad litem* of the infant defendants, the case was referred to the auditor of the court to ascertain and report, upon the evidence to be produced before him, among other things, whether the complainant was a creditor of, or entitled to repayment out of, the estate of her deceased husband, and if so, to what amount, liberty being given to state any special circumstances.

Much testimony was taken by the auditor, and the books of account of the executors of the estate of Amos Kendall and also of William Stickney were produced before him. He reported that the proceeds of the estate of Amos Kendall which came into the hands of his executors were from time to time divided among the legatees, and upon the receipts of the complainant to the executors her share was delivered to her husband, who used and invested the same in his own name without the knowledge of the complainant and in contravention of her express directions; that the books of William Stickney, deceased, showed in most instances the specific use made by him of the moneys which were the share of the complainant, derived from her father's estate; that the complainant never assented to or acquiesced in the use or investment of the property by her husband in his own name; that she intended to retain the apparent as well as the real ownership, the nominal as well as the equitable right; and that he considered himself as her trustee and proclaimed himself as such. The auditor, in applying the act of Congress passed on the 10th of April, 1869, commonly known as the Married Woman's Act, to the facts of the case, held that Mr. Stickney received the moneys as her agent and trustee, and was liable to account to her as such, and that no appropriation or investment by him without authority from her relieved him from such accountability. He reported also that the amount which Mr. Stickney

had received of the moneys belonging to her from her father's estate was $79,971.13, from which he deducted the $1600 mentioned, and found a balance due to her of $78,371.13.

To the plea of the statute of limitations, which was urged by the defendants in bar of the complainant's claim, the auditor replied that there were several answers: first, the complainant's disability by reason of her coverture; second, the character of the indebtedness, which had its origin in a relation of trust; and, third, that not until the death of her husband did she discover that her property was not invested or held in her own name. He, therefore, reported that the complainant was a creditor, and entitled to repayment, out of the estate of her deceased husband, of the amount found to be due to her for moneys received by him which came to her from the estate of her father.

Exceptions were taken to this report, which were heard at a special term of the court, and overruled, and a decree was entered thereon for the complainant, that William Stickney, her husband, was justly indebted to her at the time of his death in the sum of $78,371.13; that no portion of it had been paid or satisfied; that, as administratrix of the personal estate of her deceased husband, she was entitled, in the regular course of her administration, to devote to the reduction of the said indebtedness, as against the defendants, and each of them, the undistributed balance of the personal estate in her hands, ascertained by the report of the auditor to be $32,202.08; that she be permitted to withdraw from the register of the court $2650.26, previously paid into it by her, after deducting the clerk's fees; and that the real estate of the said William Stickney at the time of his death, or so much thereof as might be necessary, be sold for the payment of the commutation of her dower therein, and the balance of said indebtedness. On appeal to the court in general term this decree was affirmed. To review that decree the case is brought by appeal here.

Mr. S. S. Henkle for appellants.

I. Mrs. Stickney's testimony concerning her conversations with her husband is incompetent. Such conversations are ex-

cluded on the ground of public policy, 1 Greenl. Ev. 254, 334, 343; and that disability is not removed by §§ 876 and 877 of the Revised Statutes of the District of Columbia. *Holtzman* v. *Wagner*, 5 Mackey, 15; *Lucas* v. *Brooks*, 18 Wall. 436, 452.

In *Jacobs* v. *Hesler*, 113 Mass. 157, a wife testified before the auditor that she gave money of her separate estate to her husband, to invest for her in United States bonds, which he promised to do, but did not do, but used the money in his business. The auditor reported the facts as above, if her testimony as to conversations between her husband and herself was competent; if not, then he found the fact to be that she placed the money in her husband's hands without any agreement, and that he used it in his business. The Supreme Court of Massachusetts held the conversations incompetent. Mr. Justice Gray said: "It must be deemed incompetent evidence as a conversation between husband and wife."

II. The essential facts established by the evidence do not make Mrs. Stickney a creditor of her husband's estate.

At common law all the personal property and money of the wife which was reduced to possession by the husband became absolutely his. *Tower* v. *Hagner*, 3 Whart. 48; *Kesner* v. *Trigg*, 98 U. S. 50. In equity, however, the wife might have a *separate estate* which was not subject to the control of the husband and of which she had the absolute *jus disponendi* as if she were *feme sole*. *Caton* v. *Rideout*, 1 McN. and G. 599. This *separate estate* was usually settled upon trustees for her use, but might be vested in herself without the intervention of trustees. *Hardy* v. *Van Harlingen*, 7 Ohio St. 208; *Jones* v. *Clifton*, 101 U. S. 225. As to the control and disposal of the income of her *separate estate* she was as independent of the control of her husband as though she were *feme sole*. *Muller* v. *Bayley*, 21 Gratt. 521; *Hardy et al.* v. *Van Harlingen*, *ubi supra*. She might loan the income of her *separate* estate to her husband and take his note or bond for it, or she might give it to him. She might be a creditor of her husband, as to this, and enforce the obligation.

The Married Woman's Act of the District of Columbia is contained in §§ 727 to 730 inclusive, Rev. Stat. Dist. Col.

By this act the wife becomes the absolute owner of all her property, real and personal by operation of law, and her separate estate is no longer confined to the estate which was settled to her use by deed or devise, and she now has the *jus disponendi* of the principal as well as the income. She may deal as to her separate property with all the world, including her husband, she may loan it, or give to her husband or anybody else without limit or restraint. So far the construction of these modern enabling acts is uniform.

As to what acts or facts will be construed into a gift or loan from the wife to the husband, there is some diversity in the decisions of the courts in the different States where these acts have been adopted. The only cases cited by the auditor to sustain his conclusion that the use by the husband of his wife's money by her consent, without more, made him her trustee for the money, and made him or his estate liable to her as a debtor, are *Johnston* v. *Johnston*, 31 Penn. St. 450; *Gochenauer's Estate*, 23 Penn. St. 460; *Grabill* v. *Moyer*, 45 Penn. St. 530.

It will not be controverted but that the weight of authority in Pennsylvania sustains the auditor; but there are even there cases which do not. See *Nagle* v. *Ingersoll*, 7 Penn. St. 204.

This Pennsylvania doctrine is opposed to the line of decisions in Maryland, from which the District of Columbia derives its jurisprudence. *Grover & Baker Sewing Machine Co.* v. *Radcliff*, 63 Maryland, 496; *Farmers' and Merchants' Bank* v. *Jenkins*, 65 Maryland, 245.

In *Jenkins* v. *Middleton*, 68 Maryland, 540, decided in 1888, the Court of Appeals said: "It is settled upon the soundest reasons, that if a man uses the money of his wife with her acquiescence, she does not acquire a claim against him or his estate, unless at the time of the receiving or using of the money he made her an express promise to repay it." "It is useless to agitate the question because it is the settled law of the court. Not to speak of former decisions, it has recently been declared in *Grover & Baker Sewing Machine Co.* v. *Radcliff*, 63 Maryland, 496; *Farmers' and Mechanics' Bank* v. *Jenkins*, 65 Maryland, 245. It is vain to argue that Mid-

dleton loaned the money to himself and his partner jointly. *He could not become a sole debtor or a joint debtor to his wife without an express promise.*"

This doctrine prevails in the other States and in England. *Monroe* v. *May*, 9 Kansas, 466; *Logan* v. *Hill*, 19 Iowa, 491; *Jacobs* v. *Hesler*, 113 Mass. 157; *Caton* v. *Rideout*, 1 McN. & G. 597; *Muller* v. *Bayley*, 21 Grattan, 529; *Hardy* v. *Van Harlingen*, 7 Ohio St. 209.

The circumstances of this case show that Mr. Stickney used the money of his wife as *husband*, and not as *trustee*. Consequently he, in his lifetime, was not responsible to her for it, nor is his estate since his decease.

III. Since the enabling statutes, the wife is *sui juris* as to her separate property, and may sue in her own name any one who interferes with it, even her husband. She may loan her separate money to her husband and enforce payment as against a stranger. *Emerson* v. *Clayton*, 32 Illinois, 493; *Monroe* v. *May*, *ubi supra*; *Drury* v. *Briscoe*, 42 Maryland, 151.

IV. The disability of a married woman being removed, the statute of limitations so far as her separate property is concerned, applies to her as well as to any other person. *Castner* v. *Walrod*, 83 Illinois, 171; *Wilson* v. *Wilson*, 36 California, 450; *S. C.* 95 Am. Dec. 194.

Mr. John Selden for appellee.

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

The exceptions to the auditor's report, calling for consideration, are founded upon two grounds: one, the supposed incompetency of the complainant to testify as to directions given to her husband to invest moneys of her separate estate for her benefit and in her name; and the other, the supposed conclusiveness of the presumption that moneys belonging to the separate estate of the wife, when she allows her husband to use them, become gifts to him.

The general rule of the common law is, that neither husband nor wife is admissible as a witness for or against each other in any case, civil or criminal. This exclusion, as Greenleaf says, is founded partly upon the identity of their legal rights and interests, and partly on principles of public policy, that the confidence existing between them shall be sacredly protected and cherished to the utmost extent, as being essential to the happiness of social life. But this doctrine has been modified in several States, in many particulars, by direct legislation upon the subject, such as that neither husband nor wife shall be compellable to disclose any communication made to him or her during the marriage, as in New York. A voluntary statement is receivable under such a statute. *Southwick* v. *Southwick*, 2 Sweeny (N. Y.) 234. In some States the statutes include only private conversations in the privilege, but not such as take place in the presence of others. *Fay* v. *Guynon*, 131 Mass. 31. The Revised Statutes of the United States relating to the District of Columbia, on the subject of witnesses, provide as follows:

"Sec. 876. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action or other proceeding in any court of justice in the District, or before any person having by law or by consent of parties, authority to hear, receive and examine evidence within the District, the parties thereto, and the persons in whose behalf any such action or proceeding may be brought or defended, and all persons interested in the same, shall, except as provided in the following section, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of any of the parties to the action or other proceeding.

"Sec. 877. Nothing in the preceding section shall render any person who is charged with an offence in any criminal proceeding competent or compellable to give evidence for or against himself; Or render any person compellable to answer any question tending to criminate himself; Or render a husband competent or compellable to give evidence for or against his wife, or a wife competent or compellable to give evidence

for or against her husband, in any criminal proceeding or in any proceeding instituted in consequence of adultery; Nor shall a husband be compellable to disclose any communication made to him by his wife during the marriage, nor shall a wife be compellable to disclose any communication made to her by her husband during the marriage."

These provisions dispose of the objection of counsel. Mrs. Stickney was at liberty, though not compellable, to state the directions given by her to her husband respecting the investment of her money. And without this qualification of the rule of the common law we are inclined to think that the changed law respecting her separate property, created by the Married Woman's Act of April 10, 1869, c. 23, 16 Stat. 45, would require for its successful enforcement some modification of the common law rule as to a husband or wife being a witness where a controversy arises between them relating to the disposition of her separate personal property. That property no longer, as at common law, vests in her husband by the marriage. That act provides as follows:

"SEC. 1. That, in the District of Columbia, the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were *feme sole*, and shall not be subject to the disposal of her husband, nor be liable for his debts; but such married woman may convey, devise and bequeath the same, or any interest therein, in the same manner and with like effect as if she were unmarried.

"SEC. 2. That any married woman may contract, and sue and be sued, in her own name, in all matters having relation to her sole and separate property in the same manner as if she were unmarried; but neither her husband nor his property shall be bound by any such contract nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were sole."

So far as her separate property is concerned, a married woman thus becomes as absolute owner as though she were

unmarried, and it would seem should also have the same protection, through her own evidence, as a *feme sole*. We do not think, therefore, that the exception of the defendants is well taken. With the testimony of Mrs. Stickney, corroborated as it is in many particulars by statements of others and by the books of her husband and those of the executors of the estate of Amos Kendall, there can be no serious contention as to the correctness of the conclusions reached by the auditor as to matters of fact involved, upon the evidence presented to him.

This view of the admissibility of Mrs. Stickney's testimony disposes also of the supposed presumption, arising from her allowing her husband to use the moneys of her separate estate, that she intended them as a gift to him. Any presumption of that kind, if it would otherwise arise in the case, was entirely rebutted by her repeated and express directions to invest the moneys for her benefit in her own name. But we are of opinion that, in the absence of her testimony, there would be no presumption, since the passage of the Married Woman's Act, that she intended to give to her husband the moneys she placed in his hands, any more than a gift would be inferred from a third person who in like manner deposited money with him. If there be no proof of indebtedness to the party receiving the moneys, the presumption would naturally be that they were placed with him to be held subject to the order of the other party, or to be invested for the latter's benefit. We think that whenever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of it to him. In *Grabill* v. *Moyer*, 45 Penn. St. 530, 533, the Supreme Court of Pennsylvania, in speaking of the effect of an act of that State, passed on the 11th of April, 1848, containing provisions similar to the Married Woman's Act of the District of Columbia, said: "When the act of assembly declares, as it does, that all property, real, personal and mixed, which shall accrue to any married woman during coverture, by will, descent, deed of conveyance, or

otherwise, shall be owned, used, and enjoyed by such married woman, as her own separate property; when the leading purpose of the act is to protect the wife's estate by excluding the husband, it is impossible for us to declare that the mere possession of it by the husband is proof that the title has passed from the wife to him. After it has been shown, as it was in this case, that the property accrued to the wife by descent from her father's and brother's estates, the presumption necessarily is that it continued hers. In such a case it lies upon one who asserts it to be the property of the husband to prove a transmission of the title, either by gift or contract for value, for the law does not transmit it without the act of the parties. If mere possession were sufficient evidence of a gift, the act of 1848 would be useless to the wife. Nothing is more easy than for the husband to obtain possession, even against the consent of the wife. And where he obtains it with her consent, it can be at most but slight evidence of a gift."

The case of *Bergey's Appeal*, 60 Penn. St. 408, cited by the auditor in his report, is in point here. Bergey received money belonging to his wife, being her patrimonial portion, in her presence, and both united in a receipt for it. Not a word was spoken by the wife when her husband took up the money to count it, and put it in his pocket; nor was a word ever heard afterwards to the effect that the wife had made a gift of it. The husband appropriated it to the purchase of a farm, and the Supreme Court of the State held that no inference could arise of a gift from the transaction as detailed, observing that "she was not bound to attempt a rescue of it from him, or proclaim that it was not a gift. She might rest on the idea that his receipt, in her presence, was with the intent to take care of it for her. In *Johnston* v. *Johnston's Administrator*, 31 Penn. St. 450, this court said, in a case of the nature of this, 'as the law made it (the money) hers, it presumes it to have been received for her by her husband.' That case contrasts the presumptions arising from the receipt of money by husbands, prior and subsequent to the act of 11th of April, 1848. In the first period, the presumption is that he has received it under and by virtue of his marital

power as his own; in the second, the presumption is the opposite, that he received it for his wife, the act of assembly having declared it hers, and for her 'sole and separate use.'" And again: "If it was not a gift, the husband was a trustee for his wife, and whether he kept the money in his pocket or put it into real estate which he had purchased, honesty required that he should account to her for it. He could be compelled to do so in equity."

There are decisions of courts of some of the other States, holding that a presumption arises of a gift from the wife to the husband of moneys placed by her in his hands, unless an express promise is made by him at the time that he will account to her for them or invest them for her benefit. But the decisions we have cited are more in accordance, we think, with the spirit and purpose of the Married Woman's Act, and only by conformity with them can it be fully carried out. Here there are no creditors alleging that they gave credit to the deceased upon his supposed ownership of the property standing in his name, or any other circumstance calling for any qualification of the widow's right to claim an application of that property to the payment of the moneys by which it was acquired, received from her to be invested for her benefit, and in her name.

Decree affirmed.

CREHORE *v.* OHIO AND MISSISSIPPI RAILWAY COMPANY.

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

No. 272. Decided May 13, 1889.

A fatal defect in the allegation of diverse citizenship in a petition for the removal of a cause from a state court for that reason, cannot be corrected in the Circuit Court of the United States.

THIS was a case commenced in a state court and removed thence on the ground of diverse citizenship of the parties.

Argument for the Motion.

The case was reached on the calendar on the 24th April, 1889. After argument was commenced, the court, for reasons which are stated in the opinion below, did not desire to hear further argument and ordered it remanded to the Circuit Court, with directions to remand it to the state court. In the interim between the close of hearing arguments on the 26th April, and the close of the term on the 13th May, a petition on behalf of the defendant in error was filed praying that the mandate might be modified by omitting the direction to remand the cause to the state court, in order that the defect might be corrected in the Circuit Court.

Mr. Lawrence Maxwell, Jr., for the motion.

I concede that the judgment should be reversed. But the further question is whether, if this court were simply to reverse the judgment and remand the case to the Circuit Court, it would be competent for the defendant to take steps there, or in the state court, to correct and amend its former defective proceedings for removal, so as to make the record conform to the fact, and to secure the removal of which it was really entitled. I submit that the answer to this question is clear upon principle, and furthermore that the question is determined in our favor by repeated decisions of this court. *Parker* v. *Overman*, 18 How. 137; *Grace* v. *American Central Ins. Co.*, 109 U. S. 278; *Thayer* v. *Life Association*, 112 U. S. 717.

In view of these decisions, the statement attributed to Mr. Justice Miller, in the report of *Cameron* v. *Hodges*, 127 U. S. 322, that no precedent was known which would authorize an amendment to be made in the Circuit Court, by which grounds of jurisdiction might be made to appear, which were not presented to the state court on the motion for removal, would seem to be inadvertent. The point really decided in *Cameron* v. *Hodges* is however not open to dispute, for it is clear that the record in the Circuit Court cannot be cured, as was there attempted, by affidavits filed in this court.

It is not just that the defendant should lose the benefit of a jurisdiction to which it was entitled under the law, because

of the mere inadvertent omission of its counsel, to which attention was never directed, and which was overlooked, not only by all of the parties and counsel, but by the court itself, and discovered by no one until long after the cause had come into this court.

In *Stevens* v. *Nichols*, 130 U. S. 230, there was no application in this court to have the cause remanded for further proceedings in the Circuit Court, nor any showing that the citizenship of the parties was in fact such at the commencement of the action, as to have warranted the removal. The point now raised in this case was therefore not presented or passed upon, and the circumstance that the judgment of reversal directed that the case should be remanded to the state court, cannot be regarded as an adjudication of the point presented now, much less as an overruling of the long line of decisions in this court, to which I have called attention.

Mr. John Mason Brown opposing.

Mr. Justice Harlan delivered the opinion of the court.

This action was brought by the plaintiff in error, who was the plaintiff below, in the Louisville (Kentucky) Law and Equity Court, against the Ohio and Mississippi Railway Company, to recover damages for personal injuries alleged to have been sustained by him, while a passenger upon the road of that company, by reason of the wilful neglect of those by whom it was operated. The company, on the 24th of November, 1884, filed its petition, accompanied by bond in proper form, for the removal of the case, upon the ground of the diverse citizenship of the parties, into the Circuit Court of the United States for the District of Kentucky. Thereupon an order was made by the state court that it would proceed no further. The case was docketed and tried in the Circuit Court of the United States, and resulted in a verdict for the defendant, followed by a judgment dismissing the plaintiff's petition. From that judgment the plaintiff prosecuted a writ of error.

At the argument in this court at the present term, attention

was called to the fact that the record did not sufficiently show the citizenship of the parties at the commencement of the action, as well as at the time of the application for removal. *Stevens* v. *Nichols*, 130 U. S. 230. Upon this ground an order was entered reversing the judgment of the Circuit Court, and remanding the cause, with directions that it be sent back to the state court. The case is again before us upon a motion in behalf of the railway company, that the judgment of reversal be so framed as to omit therefrom an absolute direction to the Circuit Court to remand the cause to the state court, to the end that the defendant may take steps for the correction and amendment of the petition for removal, and of the record and proceedings in that behalf.

It is conceded that the record does not show affirmatively the citizenship of the parties at the commencement of the action in the state court, and that the judgment, for that reason, must be reversed.

Upon the filing by either party, or by any one or more of the plaintiffs or defendants, "*entitled* to remove any suit," mentioned in the first or second sections of the act of March 3, 1875, 18 Stat. 470, of the petition and bond required by its third section, "it shall *then* be the duty of the state court to accept said petition and bond, and proceed no further in such suit." The effect of filing the required petition and bond in a removable case is, as said in *Railroad Co.* v. *Mississippi*, 102 U. S. 135, 141, that the state court is thereafter "without jurisdiction" to proceed further in the suit; or in *Railroad Co.* v. *Koontz*, 104 U. S. 5, 14, its rightful jurisdiction comes to "an end;" or, in *Steamship Co.* v. *Tugman*, 106 U. S. 118, 122, "upon the filing, therefore, of the petition and the bond — the suit being removable under the statute — the jurisdiction of the state court absolutely ceased, and that of the Circuit Court of the United States immediately attached." It has, also, been repeatedly held, particularly in *Stone* v. *South Carolina*, 117 U. S. 430, 432, following substantially *Railroad Co.* v. *Koontz*, that, "a state court is not bound to surrender its jurisdiction of the suit on a petition for removal until a case has been made which on its face shows that the petitioner has

a right to the transfer;" and that, "the mere filing of a petition for the removal of a suit, which is not removable, does not work a transfer. To accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record, and the necessary security having been given, the power of the state court in the case ends, and that of the Circuit Court begins." These decisions were in line with *Insurance Co.* v. *Pechner*, 95 U. S. 183, 185, arising under the judiciary act of 1789, in which it was held that a "petition for removal when filed becomes a part of the record in the cause;" that the party seeking the removal should state "facts which, taken in connection with such as already appear, entitle him to transfer;" and that, "if he fails in this, he has not, in law, shown to the court that it cannot 'proceed further with the cause.'"

It thus appears that a case is not, in law, removed from the state court, upon the ground that it involves a controversy between citizens of different States, unless, at the time the application for removal is made, the record, upon its face, shows it to be one that is removable. We say, upon its face, because "the state court is only at liberty to inquire whether, on the face of the record, a case has been made which requires it to proceed no further;" and "all issues of fact made upon the petition for removal must be tried in the Circuit Court." *Stone* v. *South Carolina*, 117 U. S. 430, 432; *Carson* v. *Hyatt*, 118 U. S. 279, 287. If the case be not removed, the jurisdiction of the state court remains unaffected, and, under the act of Congress, the jurisdiction of the Federal court could not attach until it becomes the duty of the state court to proceed no further. No such duty arises unless a case is made by the record that entitles the party to a removal.

All this is made entirely clear by the express requirement of the act of 1875, that the Circuit Court shall remand "to the court from which it was removed" any cause brought from that court, whenever it appears that it is not one of which the Federal court can properly take cognizance. *Cameron* v. *Hodges*, 127 U. S. 322, 326. If a suit entered upon the docket of a

Circuit Court as removed upon the ground of the diverse citizenship of the parties, was never, in law, removed from the state court, no amendment of the record made in the former could affect the jurisdiction of the latter or put the case rightfully on the docket of the Circuit Court as of the date when it was there docketed; for the only mode provided in the act of Congress by which the jurisdiction of the state court of a controversy between citizens of different States can be divested is by presenting a petition and bond in *that* court showing, in connection with the record, a case that is removable. The present motion, in effect, is that such amendment of the record may be made in the Circuit Court, as will show that this case *might* have been removed from the state court, not that, in law, it has ever been so removed.

This question was before us at the present term in *Stevens* v. *Nichols*, above cited, which was brought in a state court, and tried in a Circuit Court of the United States as one involving a controversy between citizens of different States, and, therefore, removable from the state court. But as the record did not show that it was a removable case, the judgment was reversed, with directions to send the case back to the state court. It is proper to say that the question was there fully considered, although it was not deemed necessary to state the reasons for the conclusion then reached. The present motion, bringing that question distinctly before us, seemed to require that the reasons for our conclusion be stated with fulness, especially because inadvertent language in some previous cases is interpreted as announcing different views from those now expressed.

The motion to modify the order of reversal heretofore made is denied.

MORGAN *v.* STRUTHERS.

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

No. 234. Argued March 29, 1889. — Decided May 13, 1889.

A contract between A, a subscriber to the stock of a proposed incorporated company, and B, another subscriber to the same, made without the knowledge of the remaining subscribers, by which A agrees to purchase the stock of B at the price paid for it, if at a specified time B elects to sell it, is not contrary to public policy, and can be enforced against A if made fairly and honestly, and if untainted with actual fraud.

This was an action of assumpsit, brought in the court below by J. Pierpont Morgan, a citizen of the State of New York, against Thomas Struthers and one Thomas S. Blair, citizens of Pennsylvania, to recover the sum of $26,282.19, with interest, on a certain contract in writing, more particularly described hereafter. The defendant Blair not having been served with process the case proceeded against Struthers alone.

The material facts in the case were substantially as follows: In the year 1873, Thomas Struthers, Thomas S. Blair and Morrison Foster were the owners of certain patents for the manufacture of iron and steel, and also of certain real estate and works erected thereon, to be used for such manufacture, situate in Pittsburgh, Pennsylvania. They then procured an incorporation under the laws of the State of New York, in the name of the "Blair Iron and Steel Company," with a capital of $2,500,000, divided into 25,000 shares of $100 each, the stock being paid up in full by a transfer to the company of the patents and the works at Pittsburgh. The entire amount of the capital stock was issued to the incorporators on or about April 12, 1873. With a view of raising a working capital, Blair, Struthers and Foster had issued the following prospectus:

"New York, *January* 20, 1873.

"The capital stock of the Blair Iron and Steel Company is 25,000 shares, of $100 each, $2,500,000. This capital has been

paid up by the transfer of the patents for the Blair process and the works at Glenwood, Twenty-third Ward of Pittsburgh, Pa., to the company, (the deed for the Glenwood property to be made as soon as an empowering act can be obtained from the Pennsylvania legislature, which we have bound ourselves to procure,) and the whole stock of said company issued to us in payment therefor. We have agreed to place in the hands of General A. S. Diven, as trustee, 9000 shares of this stock, to be used as working capital for the company, subject to the order of the board of trustees of said company, except $50,000 of the proceeds thereof first to be paid to us by said trustee. The trustees of the company have, with our consent, ordered a sale of 6000 of said shares, for the purpose of raising a present working capital, and paying said $50,000, the minimum price to be $50 per share; and said trustee, with the approbation of the board of trustees, now offers said 6000 shares at said minimum price of $50 per share, to be paid for as follows, viz.: one third part thereof as soon as the whole 6000 shares shall be subscribed for, and the remainder in such instalments as the board of trustees may call for the same for the purposes of the business, the certificates to be delivered when the whole shall be paid. "Thomas S. Blair.

"T. Struthers.

"Morrison Foster.

"By his attorney T. Struthers."

"We, the undersigned, hereby subscribe to the number of shares of the above six thousand shares set opposite to our names, respectively, to be paid for according to the terms above set forth; but this subscription not to be binding until the whole six thousand shares shall have been reliably subscribed."

A number of persons subscribed to this paper without any other condition, but Morgan, the plaintiff, demanded and obtained from the promoters of the enterprise a further stipulation or agreement, the existence of which was not made known to others who signed the original paper, some before and some after Morgan, and which additional stipulation was as follows:

Statement of the Case.

"Whereas J. Pierpont Morgan has purchased four hundred shares of the stock of the Blair Iron and Steel Company, at the price of fifty dollars per share, and sold by A. S. Diven, trustee of said company: Now we, the undersigned, in consideration of one dollar to us in hand paid, the receipt whereof is hereby acknowledged, do hereby agree that if, at the end of one year from this date, said J. Pierpont Morgan shall desire to sell the said shares at the price paid for the same by him, we will purchase the same at that price, and pay to him the amount paid by him on the same, with interest at the rate of seven per cent per annum.

"Thos. S. Blair.
"T. Struthers.

"New York, April 4, 1873."

At the end of the year the agreement of purchase was renewed for another year, and at the expiration of that year it was again renewed, the following agreement being entered into:—

"New York, *March* 22, 1875.

"In consideration of the waiver by J. Pierpont Morgan of the right of election to sell to us the four hundred shares of stock in the Blair Iron and Steel Company, (subscribed and paid for by him,) as he was entitled to do by agreement with us in 1873, renewed and extended, by agreement of 1874, to April 4, 1875, we do hereby agree that his right to do so shall be extended for another year, viz., to April 4, 1876. If he shall at that time elect to sell to us the four hundred shares so subscribed and held by him, we will receive and pay for the same the amount paid by him therefor, with interest at the rate of seven per cent per year from the date of the payment by him of the respective instalments thereon; and, as collateral security for the performance by us of this our agreement, we have placed in the hands of Joseph W. Drexel, Esq., four hundred shares of the stock of the said Blair Iron and Steel Company, to be held by him in trust for that purpose.

"T. Struthers.
"T. S. Blair."

Argument for Defendant in Error.

On the 20th of March, 1876, Morgan notified Blair and Struthers that he desired to avail himself of the terms of the agreement entered into between them, and on the 4th of April of that year tendered them the stock referred to in the agreement.

The defendants having failed and refused to comply with the terms of the contract of repurchase, Morgan, on the 1st of March, 1882, brought this action, averring in his declaration the foregoing facts. The defendant in his answer admitted the making of the contract declared upon, and all the facts alleged by the plaintiff in support of his claim; but set up, by way of defence, two propositions, either of which he claimed was sufficient to defeat the plaintiff's case, viz.: —

First. The contract sued on was invalid, and against public policy, because made secretly with one of a number of persons who had subscribed together, upon the same express terms and conditions, for stock in a manufacturing corporation, whereby the plaintiff had sought to procure to himself an advantage withheld from the other subscribers; and

Second. The defendant is not precluded from setting up the invalidity of such contract because he was a party to it.

The case was tried by a jury, which, under instructions from the court, found in favor of the defendant; and judgment was rendered accordingly. To reverse that judgment this writ of error is prosecuted.

Mr. John Dalzell for plaintiff in error.

Mr. George Shiras, Jr., (with whom were *Mr. R. Brown* and *Mr. W. M. Lindsey* on the brief,) for defendant in error.

I. The contract sued on was invalid, because made secretly with one of a number of persons who had subscribed together, upon the same express terms and conditions, for stock in a manufacturing corporation, and whereby the plaintiff had sought to secure to himself an advantage withheld from the other subscribers. *Jackman* v. *Mitchell*, 13 Ves. 581; *Ex parte Sadler and Jackson*, 15 Ves. 52; *Leicester* v. *Rose*, 4 East, 372; *Coleman* v. *Waller*, 3 Younge & Jer. 212; *White*

Mountain Railroad Co. v. *Eastman*, 34 N. H. 124; *Miller* v. *Hanover Junction Railroad*, 87 Penn. St. 95; *Robinson* v. *Pittsburgh & Connellsville Railroad*, 32 Penn. St. 334; *S. C.* 72 Am. Dec. 792; *Melvin* v. *Lamar Iron Co.*, 80 Illinois, 446; *Blodgett* v. *Morrill*, 20 Vermont, 509; *Connecticut River Railroad* v. *Bailey*, 24 Vermont, 465; *S. C.* 58 Am. Dec. 181; *Hodge* v. *Twitchell*, 33 Minnesota, 389; *Sternburg* v. *Bowman*, 103 Mass. 325; *Fay* v. *Fay*, 121 Mass. 561; *Lee* v. *Sellers*, 812 Penn. St. 473; *Getty* v. *Devlin*, 54 N. Y. 403; *S. C.* 70 N. Y. 504. *Meyer* v. *Blair*, 109 N. Y. 600, cited and relied on by plaintiff in error, is not binding upon this court.

II. The defendant was not precluded from setting up the invalidity of the contract because he was a party to it.

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

Several exceptions were taken during the progress of the trial, to the rulings of the court in excluding evidence offered by the plaintiff, to its refusal to give instructions requested by the plaintiff, and to its general charge to the jury, which are embodied in twelve assignments of error. It is not necessary to discuss them seriatim, as the main contention relates to the correctness of the instructions given by the Circuit Court to the jury. In order to determine the principle on which the instructions rest, it will be useful to ascertain the points incidentally connected with the case about which there is no dispute.

First. It is conceded, and the court so charged the jury, correctly, as we think, that the contract made by Morgan with Struthers touching the repurchase of the stock, standing by itself, was a perfectly fair and honest one, in which there was no vice inherent that would relieve the person making it from its obligation. If, therefore, its validity or binding force is impaired, it must be because of its extrinsic effect by reason of the relations of the parties to the other stockholders in the corporation.

It is also conceded that, as to these stockholders, no actual

fraud or deceit was practised in the making of the contract sued upon. This is virtually the ground upon which the court refused to admit evidence offered by the plaintiff for the avowed purpose of showing the good faith of the transaction as to the other subscribers. It said:

"It is not necessary for the defendants, to sustain their defence, to show actual fraud. If the tendency of such things is to operate as a fraud upon others, that is the basis of the rule."

It is also a fact, undenied and undeniable, that the plaintiff strictly complied with all the terms and stipulations expressed in the prospectus, and in the contract of subscription, by paying into the treasury of the corporation the entire amount of his subscription.

It should also be considered as conceded — for there is nothing in the pleadings, nor in the evidence, nor in any of the rulings of the court, nor in the argument of counsel, to the contrary — that he did not enter into any secret agreement with the corporation or any other person that he should not be required to pay the amount he had subscribed. And, finally, the court more than once gives strong intimation that there is no reason in equity, justice, or fair dealing, why the defendant should not be made to comply with his obligation.

On the other hand, it is conceded that the contract sued on was a collateral, optional contract, made at the time of plaintiff's subscription, which constituted the inducement to it, and was not made known to all the other subscribers to stock.

The only question, then, presented for our consideration is, whether the collateral contract, perfectly fair and honest in itself, and untainted with any actual fraud upon any person, entered into by a subscriber of stock with other subscribers, to the effect that they will purchase the same, and pay to him the amount paid by him, if at a time specified he chooses to sell the same, is contrary to public policy, and cannot be enforced against the party to it. Upon this question the view of the court below is stated very explicitly. It says:

"If others of the subscribers to the stock were not informed of the fact that plaintiff had obtained said agreement as a con-

dition or part of his agreement to subscribe for the said stock, and that the existence of such accompanying agreement was not made known to others of said common subscribers, this said agreement was in the eye of the law a fraud upon the other subscribers who did not receive and were not informed of the existence of such agreement, and was contrary to the policy of the law, and the plaintiff cannot recover."

Again, in his general charge he repeats: "Whatever may be our own views as to the honesty of such an attempt to defeat the enforcement of an honest contract, that is a consideration which you or I have nothing to do with. If you find that the beneficial arrangement set up and sought to be enforced in this suit was not made known to all the subscribers to that stock, and they were not afforded an opportunity to avail themselves of like security, that arrangement was void, and cannot be enforced."

We cannot concur in this conclusion. We are not prepared to affirm that there is a public policy which operates such a restraint upon the transfer of stock in a corporation as to render the contract in question, conceded to be valid and fair in itself, fraudulent as to the co-subscribers with the plaintiff for the 6000 shares sold by the company and to render it invalid against the party to it, who, it is admitted, has no equity or justice in his favor.

Nor do we assent to the proposition upon which this conclusion rests. That proposition is, that when a man purchases or subscribes to shares of stock in an incorporated joint stock company, there is upon him, in addition to the express terms of the subscription contract, an implied obligation, incident to the common enterprise, which restrains him from making any engagement with other individuals to secure his own stock against risk, unless the other subscribers are informed of it and put upon an equal footing as to such security.

One essential feature of an incorporated joint stock company is the right of each stockholder, without restraint, to sell or transfer his shares at pleasure. Thompson, Liability of Stockholders, § 210, and cases there cited. So well established is this right that a by-law of a bank putting restrictions upon

the transferability of stock in the hands of its members has been held void as being in restraint of trade. *Moore* v. *Bank of Commerce*, 52 Missouri, 377. Even where the charter gives the corporation the power to regulate transfer of stocks, it has been held that this power does not include the authority to restrain transfers. *Choteau Spring Co.* v. *Harris*, 20 Missouri, 382, citing 10 Mass. 476, and numerous other authorities.

Counsel for defendant urges that notwithstanding this right to make an absolute sale of his stock belongs to each subscriber, the policy of the law forbids one of them, whose act of subscription may be held out as an inducement for others to subscribe, from making a contract of future sale with a view to secure his investment; and renders such a contract void, because many co-stockholders "may have been chiefly induced to subscribe by a knowledge that so prominent and successful an operator was willing to risk his money in such an adventure; and who, had they been told that he had exacted a private security or guaranty which availed to give him the benefit of both the experiment in business and of getting back his money with interest, if it did not succeed, would assuredly either have refused to subscribe or have demanded a similar guaranty. Moreover, they had a right to suppose that the new firm was to have the countenance of Mr. Morgan and probably his assistance in the future." This is a palpable misconception of the nature of the transaction. There was nothing in the prospectus, or in the subscription contract, or in the nature of the enterprise, to justify such a presumption or expectation on the part of the other stock subscribers. It is just in this respect, especially, that an incorporated joint stock company differs from an ordinary co-partnership. In the latter, the individual members of the firm are presumed to, and in general actually do, contribute to the common enterprise, not only their several shares of partnership capital, but also their individual experience, skill or credit, no member having the right to sell out his interest or to retire from the firm without the consent of the co-partners; and if he does either, the act amounts to a dissolution of the partnership. Parsons on Partnership, § 171. The very reverse, as we have

said, is the case of a joint stock corporation, in which each stockholder, whether by purchase or original subscription, has the right, unless restrained by the charter or articles of association, to sell and transfer his shares, and, by transferring them, introduce others in their stead.

It also urged that "the other subscribers had a right to presume that Mr. Morgan went into the common enterprise upon the same terms with themselves." This proposition is true so far as those terms are prescribed in the charter, the prospectus, and the contract of subscription; but it is also true that each of those stockholders had the equal right to sell, or agree to sell, that stock whenever and to whomsoever he chose, such stock being personal property, and subject to any disposal he might choose to make of it; and that this right belonged none the less to Morgan, on account of his prominence and known skill as an operator, than it did to any other member of the corporation.

We have read with care all the authorities cited by counsel for defendant in error to support the claim that the contract in question is, in the eye of the law, fraudulent and void. Those which relate to contracts connected with subscriptions of stock are simply illustrative, in different forms, of a doctrine settled in a great number and variety of decisions, that a corporation has no legal capacity to release an original subscriber to its capital stock from payment of it, in whole or in any part; and that any arrangement with him by which the company, its creditors, or stockholders, shall lose any part of that subscription, is *ultra vires* and a fraud upon creditors and the co-subscribers. *Burke* v. *Smith*, 16 Wall. 390, 395; *Bedford Railroad Co.* v. *Bowser*, 48 Penn. St. 29; Green's Brice's Ultra Vires. This doctrine rests upon the principle that the stock subscribed, both paid and unpaid, is the capital of the company, and its means of carrying out the object for which it was chartered and organized. All these cases fall within this principle. In each of them the agreement declared void, had it been carried out, would have diminished the common fund, which is a trust fund for the benefit of the general creditors of the corporation, the stockholders, and all others having an

interest therein, and would have been violative of the terms upon which the subscriptions had been expressly made, and under which the trust originated. The corporation would have been damaged in its capital by the loss of the subscriptions, and the co-subscribers would have been damaged by the lessening of their common trust fund. As we have seen, no feature of damage to the corporation, actual fraud, or violation of contract, exists in this case. The contract sued on, if specifically carried out, would have simply resulted in what all agree lay within the power of each subscriber at the time of making his subscription — a transfer of his stock and the introduction of other stockholders in his stead.

Counsel for defendant has cited cases of composition between an insolvent debtor and his creditors, where one creditor has secured, by a secret arrangement, either with the insolvent or some other person, terms more favorable to himself than the composition agreement provided for all of the other creditors joining therein. In the English cases the doctrine is carried to the fullest extent, that such secret arrangements are utterly void, even as against the party with whom the arrangement was made. The American decisions, whilst perhaps not going to the extent of the English decisions, clearly assert the illegality of such arrangement. 1 Story Eq. Jur. §§ 378, 379; *White* v. *Kuntz*, 107 N. Y. 518. But we think that the analogy between the cases of composition agreements and those of stock subscriptions is remote, and that the decisions as to the former are not applicable to this case.

The relations of composition creditors, either to the insolvent's estate or to each other, are widely different from those which stock subscribers bear to the corporation and their co-subscribers. Upon the failure or insolvency of a debtor, his creditors stand together in a common relation of claims, proportionate to their amount and grade, upon an interest in his (the insolvent's) estate. "The purport," says Mr. Justice Story, "of a composition or trust deed, in cases of insolvency, usually is, that the property of the debtor shall be assigned to trustees, and shall be collected and distributed by them among the creditors, according to the order and

terms prescribed in the deed itself. And, in consideration of the assignment, the creditors, who become parties, generally agree to release all their debts beyond what the funds will satisfy." 1 Story Eq. Jur. § 378. It is clear that any secret bargain by which one of these creditors obtains more than the composition deed gives, and more than he agrees under it to take, violates the equality which is the basis of the deed of settlement, and operates a gross fraud upon the creditors — a fraud which the law, in its policy of precaution rather than by mere remedial justice, suppresses by depriving the parties of the fruit of their clandestine arrangements.

It is not necessary to restate the widely different basis of the relation of stock subscribers to a joint stock corporation and to each other, where each subscriber acts for himself, in the act of subscription, with the unrestricted right, in the exercise of vigilance and foresight, to make any arrangement for the security of his shares, provided he does not lessen the amount of his subscription, which constitutes part of the trust fund in which all the subscribers have an equal interest.

We think this case perfectly clear on principle. We cite, however, as persuasive authority in support of our conclusion, the decision in *Meyer* v. *Blair*, 109 N. Y. 600, 607, in which a contract identical in every material particular with the one we are considering, made between Blair and Struthers and Meyer, a subscriber to the 6000 shares of stock, was considered by the Court of Appeals of the State of New York, and held valid and binding upon the parties to it. In that case the court says:

"The present case is not, we think, within the principle of the stock-subscription cases, or the cases of composition, to which reference has been made. The main object of the company in offering the stock for sale was to secure 'working capital,' as is shown by the prospectus. This object was known to the subscribers. If the subscription of the plaintiff was a pretence merely, or if the subscription had been accompanied by a secret agreement between the plaintiff and the company that he should be relieved from the subscription, or by which the terms of the purchase were materially changed to the disadvantage

of the company, and for the advantage of the plaintiff, there might be ground for applying the rule declared in the subscription cases, and declaring the transaction to be a fraud on the other subscribers. . . . But there was no agreement between the company and the plaintiff, secret or otherwise, direct or indirect, except the agreement contained on the face of his subscription. The plaintiff, by his subscription, became bound to the company to take the shares subscribed for, and this agreement has never been discharged, or in any way impaired. The plaintiff remained bound by his subscription, notwithstanding the agreement with the defendants, as fully and completely as though the agreement with the defendants had never been made. Nothing has occurred to change, qualify or limit his obligation to the company. The company sold the shares to secure 'working capital.' . . . The defendants were interested in setting the company afoot. They were the principal holders of its stock. . . . They sought out the plaintiff. On his declining at first to subscribe to the stock of the company, they offered him the inducement that they would take the stock off his hands within a year, at cost price, if he desired it. It appears that the same inducement was offered to other subscribers, but not to all. We think there was nothing illegal in the arrangement."

The conclusions to which we have come on the questions discussed dispense with any consideration of the other point presented by the plaintiff in error, viz.: that the defendant should be estopped from setting up the invalidity of the contract sued on because he is a party to it. For, as we have found the contract valid and legal, the question of estoppel does not arise.

For the foregoing reasons,

The judgment of the court below is reversed and the cause remanded, with instructions to grant a new trial and to take such further proceedings as shall be consistent with this opinion.

BACON *v.* NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

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

No. 173. Argued and submitted January 23, 1889. — Decided May 13, 1889.

If a mortgage of real estate in Michigan containing a power of sale is duly recorded, as provided by law, it is not necessary that the bond secured by it and that an agreement referred to in it and adopted and made a part of it should also be recorded, in order that a foreclosure may be had by advertisement and sale in the manner provided by the statutes of the State.

Where a mortgage debt is payable in instalments, a provision in the mortgage that if at the expiration of the time limited for the payment of all there shall remain due on the mortgage a sum not greater than a sum named, which is less than the amount of the whole mortgage debt, the mortgagor may have the privilege of paying the amount due by giving his note therefor secured by mortgage on other real estate, does not suspend the power of foreclosure and sale for non-payment of instalments as they become due.

This court concurs with the Supreme Court of the State of Michigan in holding that the misspelling of the name of the mortgagee in an advertisement for the foreclosure of the mortgage by public sale under a power of sale in the mortgage in the manner required by the statutes of the State, and other errors in that advertisement which worked no prejudice to the mortgagor — as a reference in the advertisement to the record pointed out to all persons interested the means of obtaining true information and of correcting all mistakes — were not defects sufficient to defeat a title acquired at that sale.

EJECTMENT. Plea, the general issue. Judgment for the plaintiff. Defendant sued out this writ of error. The case is stated in the opinion.

Mr. Edward Bacon, for plaintiffs in error, submitted on his brief.

Mr. John E. More for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

Opinion of the Court.

This is a suit in ejectment, brought in the court below by the defendant in error, a Wisconsin corporation authorized by the laws of that State to purchase and hold real estate, against the plaintiffs in error, citizens of Michigan, to recover possession of certain real estate in the city of Niles, in the last named State, together with damages for its retention.

The defendants pleaded the general issue. The case was tried by the court without the intervention of the jury, which, by the written request of counsel for defendants, made a special finding of facts in accordance with §§ 649, 700, of the Revised Statutes of the United States, and, upon such findings, rendered judgment in favor of the plaintiff. This writ of error is brought to review that judgment.

The findings of the court are substantially as follows. At the commencement of this suit, the premises in controversy were valued at from $12,000 to $25,000, and were in the possession of the defendants, Lydia A. Bacon claiming title in fee-simple, and the other defendants claiming under her as tenants or otherwise. Solyman Waterman is the common source of title to both the plaintiff and the defendant, Lydia A. Bacon. On the 8th of May, 1849, Waterman, then owning the fee to this property and the right of possession, gave a purchase-money mortgage to one Anna H. Dickson, to secure the payment of $1400, payable in five equal annual instalments on the 29th of November, with interest quarterly, each year. He failed to make the payments specified, the mortgage was foreclosed, and, upon such foreclosure, the premises were bid off by the mortgagee for $684.80. The time for redemption having expired without any one redeeming, the sheriff of the county made and executed a deed to her for the property, which was duly recorded, and she entered into actual possession thereof as such purchaser, claiming title April 1, 1855. Anna H. Dickson afterwards conveyed the premises to one Crofoot, and he, on the 20th of September, 1867, conveyed them to Edgar Reading, who entered and continued in the actual possession thereof until 1876.

On the 19th of June, 1874, Reading executed a mortgage of this property to the plaintiff to secure the payment of

$, which was afterwards duly foreclosed for failure to comply with its terms, and the property was bid in by the plaintiff. The sale was duly confirmed and the master made and executed a deed therefor to the plaintiff on the 28th of October, 1879.

There is no controversy concerning the proceedings in equity to foreclose the Reading mortgage, nor as to the sale and conveyance of the property under the decree in that case. The contention relates to the prior foreclosure under the Waterman mortgage.

Waterman's mortgage to Anna H. Dickson, the foreclosure proceedings as to which are claimed by defendants to have been illegal and invalid, contained the usual power of sale upon default of any part of the sum thereby secured to be paid; and, at the time of the foreclosure thereof, there was due and unpaid thereon $664.50, and no proceeding at law had been commenced to recover any part of the debt.

The statutes of Michigan provide that "every mortgage of real estate containing therein a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement in the cases and in the manner hereinafter specified." It then specifies, among other things, that the mortgage must have been recorded, and that a notice that the same will be foreclosed by a sale of the mortgaged premises shall be given by publishing it for twelve successive weeks, at least once in each week, in a newspaper printed in the county where the premises are situated, which notice shall specify: (1) The names of the mortgagor and mortgagee; (2) the date of the mortgage and when recorded; (3) the amount claimed to be due thereon at the date of the notice; and (4) a description of the mortgaged premises. 2 Compiled Laws of 1871, §§ 6912, 6913, 6914 and 6915.

December 18, 1852, Anna H. Dickson caused notice that the mortgage from Solyman Waterman to her would be foreclosed, by a sale of the mortgaged premises, describing them, to be published in the *Niles Republican*, a newspaper published in the county where the premises are situated. The day of sale fixed in the notice was March 15, 1853. That notice, as printed,

is dated "Dec. 28, 1852," ten days subsequent to the date of the first publication thereof. It describes the mortgage as having been given "by Solyman Waterman to Anna H. Dixon, both of the village of Niles, in the State of Michigan," and "dated the eighth day of May, 1848," whereas the real date of the mortgage is 1849 and the real name of the mortgagee is "Dickson." Again, as then published, the notice is signed "Anna H. Dixon, mortgagee." With such mistakes, it was published once in each week for three successive weeks; then "Dixon" was changed to "Dickson" where the name is appended to it. With no other change it was published the fourth, fifth and sixth weeks. The seventh publication was made January 29, 1853, when the name appended to it read "Dickens." It was then published weekly till February 12, 1853, on which day's publication the final letter "e" in the word "mortgagee," appended to the signature, disappeared. No other changes occurred. It was then published, for and including the remainder of the period of twelve successive weeks, once in each week in said newspaper.

The notice stated correctly the day when, and the book in which, the mortgage was recorded, and also the sum due thereon. The sale took place at the time specified in the notice. The mortgage had been duly recorded prior to the commencement of the foreclosure proceedings; but neither an agreement referred to in the body of the mortgage as having been made between the parties thereto on the 29th of November, 1848, adopted and made a part of it, nor the bond mentioned therein had been recorded. There is a stipulation in the mortgage giving the mortgagor a right to pay any sum not exceeding $1000 of the $1400 thereby secured, at any time before the last instalment should become due, by a bond and mortgage well securing such sum on other real estate in the village of Niles.

August 25, 1868, Waterman commenced an ejectment suit in the Circuit Court of Berrien County, Michigan, against Reading to recover possession of the premises, to which suit Reading appeared and pleaded the general issue. That suit was once tried in 1880, resulting in a judgment in favor of

Waterman, but on error the Supreme Court of the State reversed that judgment, and remanded the cause for a new trial (46 Michigan, 107); and the same was pending and undetermined in the Circuit Court of Berrien County at the time this suit was commenced. On the 16th of October, 1880, Waterman, for the consideration of $300, conveyed to the defendant, Lydia A. Bacon, all his right and title to the premises in dispute. Under that deed she claims title herein.

The assignments of error may all be reduced to one proposition, viz.: The findings of the court upon the facts in the case do not support the judgment.

To support the judgment it is only necessary that the findings should show possession by the defendants, and title and right of possession in the plaintiff. There is no question but that they show that the defendants were in possession of the premises at the time the suit was commenced. There is no privity between the parties to the suit, and the only question for consideration, therefore, relates to the title the plaintiff has to the property. It is insisted by the plaintiffs in error that that title is invalid, because the foreclosure proceedings in the matter of the Waterman mortgage were not in accordance with law, and were fatally defective in at least three particulars, viz.:

(1) The mortgage was not "duly recorded" so as to warrant a foreclosure by advertisement under the power of sale, for the reason that the agreement of November 29, 1848, which is referred to and in all its terms and conditions adopted and made part of the mortgage, was not recorded.

(2) The power of sale contained in the mortgage was not operative between December 1, 1852, and April 1, 1853.

(3) The notice under which the sale was made was irregular, defective and illegal.

The first of these propositions cannot be sustained. The registry statutes of Michigan provide that "every conveyance of real estate within this State hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate or any portion

thereof, whose conveyance shall be first duly recorded." Howell's Stat. Mich. § 5683. Sections 5674 to 5677, inclusive, prescribe the manner in which such recording should be done.

The object of recording the mortgage is to give notice to third persons. The rule is well-nigh universal in the United States that, as between the parties thereto, the mortgage is just as effectual for all purposes without recording as it is with it. Jones on Mortgages, § 467. That is the rule in Michigan. *Sloan* v. *Holcomb*, 29 Michigan, 153.

The condition in the mortgage which, it is claimed, prevented the power of sale from being operative at the time the sale was made, when read in connection with the rest of the instrument, means simply this: That if, at the expiration of the time limited for the payment of the five instalments and the interest thereon, the mortgagee had not foreclosed for the accrued instalments, and there should still remain due on the mortgage a sum not greater than $1000, the mortgagor might have the privilege of paying the amount due by giving his note therefor, secured by mortgage on other real estate in the city of Niles. That privilege, however, did not prevent the instalments from falling due at the times stipulated, nor prevent a sale of the property, under the other terms of the mortgage, to satisfy them when they fell due. True, the mortgagor might have stopped the sale by insisting on the terms of the stipulation in the mortgage and complying with the obligations resting on him. It was his privilege to have done so. But that privilege could have been waived, and the rights held under that stipulation lost by failure to assert them.

Even granting that the mortgagor had the right of insisting on the terms of the stipulation at any time before the date fixed for the fifth instalment to become due, notwithstanding the sale before that time, it is not apparent how any one but the purchaser at the sale could be heard to complain, since no one else could be injured. For, under those circumstances, the sale which purported to be absolute, with only the right to redeem within the statutory period attaching thereto, would have a still further condition limiting it, viz.: Be subject to annulment and rescission at any time before the expiration of

the period mentioned in the stipulation. But the proposition which we have assumed does not arise here, for the mortgagor in this case did nothing. He neither paid nor offered to pay the instalments as they came due, in cash, nor did he pay or offer to pay them by giving his note secured by mortgage on other real estate in the city of Niles, at any time before the sale of the property, or at any time thereafter. But, on the contrary, he stood by and allowed the property to be sold, saw the sheriff's deed executed for it, and never attempted to redeem. Afterwards, the purchaser at the sale, who, it happens, was the original mortgagee, took possession of it. It is not until 13 years after that event, when the property has increased in value many fold by improvements thereon and the natural rise in the value of real estate attendant upon the growth of the city, that he seeks to regain possession of the property by bringing a suit in ejectment.

It would be going too far to hold that, after all these laches, he or his assigns can defeat the title acquired at the mortgage sale and transmitted to the plaintiff, by setting up any supposed irregularity in the foreclosure proceedings. The time to have asserted any rights that he possessed under and by virtue of the stipulation incorporated in the mortgage was limited by the terms of that instrument. And, by failing to assert them within that time, allowing the sale to go on, and that time to elapse, he and his assigns should be estopped from setting up any claim to the property in question.

With reference to the third reason assigned for the illegality of the foreclosure proceedings, we do not think much need be said. The Supreme Court of Michigan in *Reading* v. *Waterman*, 46 Michigan, 107, in passing upon this identical question held, that, so far as the notice of sale and the sale itself was concerned, there were no defects sufficient to defeat the title acquired at that sale. As the question involved the legality of proceedings provided for by the statutes of the State, and is thus a question of the construction of a state statute by the highest court of the State, or, more properly, perhaps, a rule of property in that State, we would follow the ruling of the Michigan Supreme Court upon it even though we might have

some doubts upon it as an original proposition. *Sumner* v. *Hicks*, 2 Black, 532; *South Ottawa* v. *Perkins*, 94 U. S. 260; *Brine* v. *Insurance Co.*, 96 U. S. 627; *Connecticut Insurance Co.* v. *Cushman*, 108 U. S. 51; *Equator Co.* v. *Hall*, 106 U. S. 86. But in our opinion that question was properly decided by that court.

Say the court in its opinion in the case referred to:

"The error in the indorsement cures itself by reference to the deed itself, from which the time of redemption could be determined at once. *Johnstone* v. *Scott*, 11 Michigan, 232. Such a mistake was there held unimportant. The blunders which appear to have got into the notice of sale indicate very careless printing, and the changes in the different issues are not easily explained; but how far they can be allowed to defeat the sale depends on the effect they were likely to have on persons interested. Authorities are cited and arguments made on this matter which relate to proceedings which are had of a hostile character and *ex parte*, where it is commonly held that such action, contrary to the usual course of law and against persons who have not the common-law benefit of self-protection, should be held invalid unless conforming strictly to statutory authority. We held in *Lee* v. *Clary*, 38 Michigan, 223, that statutory foreclosures did not come in all respects within the same mischief. The statutes regulating them are made to enlarge, and not to cut down, the rights of mortgagors. Before such statutes were passed, sales made under a power of sale contained in the mortgage were governed by the same rules applicable to the sales under any other power, and courts, in the absence of statutes, have never applied to such powers any such technical rules as would impair the security of purchasers. The power is part of the contract, and should be construed on principles applicable to contracts and not as a hostile process.

"The statutes were intended to prevent surprise or unfairness, and they should be enforced in everything substantial. Courts cannot disregard any of their positive provisions. But, on the other hand, those provisions cannot be enlarged or unreasonably construed, so as to render mortgage sales unsafe,

or to make bidding hazardous. The law was designed to encourage and not to destroy recourse to these simple and cheap remedies; and while no substantial right should be disregarded, substantial regularity is all that should be held imperative.

"The only things absolutely required in the notice of sale are the names of the parties original or by assignment, the date of the mortgage, and of its record, the amount claimed to be due, and a description *substantially* agreeing with that in the mortgage. In the present case the body of the notice contained the name of the mortgagor, but the mortgagee was named therein 'Dixon,' and not 'Dickson.' These names, however, are the same in sound and legally identical unless shown to refer to two different persons. Here the name of Mrs. Dixon was referred to as mortgagee, and the mortgage itself removed any such possibility of error. The name signed to the notice was shifted by some accident to the types, but as the notice showed the foreclosure was on behalf of the original mortgagee, no harm could come from such a manifest slip, which could mislead no one. The notice was first published December 18th, but was dated December 28th. This was also of no account, as the error was palpable. The day of sale was properly given and the publication full. The notice gave the date of the mortgage once correctly and once incorrectly. The date and place of record and the volume and page were also given accurately. It was manifest on the face of the notice that one of these dates was wrong, and the means of correction were given by the record. It is indeed suggested that the date given correctly as 1849 refers to the bond, and not to the mortgage, which is mentioned as of 1848, the days of the month corresponding. This does not strike us forcibly, for it would not be likely that a mortgage given one year would refer to a bond not made until a year after. It is not to be supposed that purchasers under foreclosure sales look at the dates of instruments without consulting the records to ascertain the state of the title. The information given by this notice directed every one immediately to the record, and that necessarily explained the true date of the two dates set

out in the notice itself. We cannot imagine that any one could be deceived by the imperfection."

The reasoning of the Michigan Supreme Court, in our opinion, is sound, and its conclusion correct.

There are no other features of the case that call for extended discussion or even special mention.

Upon the whole case, we think the judgment of the court below was correct, and it is, accordingly, *Affirmed.*

SAVIN, Petitioner.

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

No. 1553. Argued April 25, 1889.— Decided May 13, 1889.

The courts of the United States have power to punish, by fine or imprisonment, at their discretion, misbehavior in their presence, or misbehavior so near thereto as to obstruct the administration of justice, although the offence is also punishable by indictment under Rev. Stat. § 5399.

Attempting to deter a witness, in attendance upon a court of the United States in obedience to a subpœna, and while he is near the court room, in the jury-room temporarily used as witness-room, from testifying for the party in whose behalf he was summoned, and offering him, when in the hallway of the court, money not to testify against the defendant, is misbehavior in the presence of the court.

Within the meaning of § 725, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court.

Although the word "summary," as used in the first section of the act of March 3, 1831, (4 Stat. 487, c. 99,) was omitted from the present revision of the statutes, the courts of the United States have the power to punish by fine or imprisonment, at their discretion, contempts of their authority, in the cases defined in § 725.

In proceeding against a party for contempt, the court is not bound to require service of interrogatories upon the appellant to afford him an opportunity to purge himself of contempt in answering, but may, in its discretion, adopt such mode of determining the question as it deems proper, having due regard to the essential rules that prevail in the trial of matters of contempt.

Statement of the Case.

THE case, as stated by the court in its opinion, was as follows:

The appellant, claiming to be illegally imprisoned under color of the authority of the United States, presented to the Circuit Court of the United States for the Southern District of California his petition for a writ of *habeas corpus*. The prayer for the writ was denied, and the petition was dismissed. This appeal brings up the judgment of the court for review.

It appears that on the 27th day of February, 1889, the District Attorney stated to the District Court of the United States for the Southern District of California that he had been informed that one of the witnesses for the government in the case of *The United States* v. *Hippolyte Goujon*, then pending in that court, had been corruptly approached, and an effort made to intimidate him from testifying. The witness alleged to have been thus approached was on the same day examined under oath in open court, in the presence of the respondent, who was in the custody of the marshal. The evidence was taken down by a stenographer, designated by the court and acting under oath. As the result of that examination an order was made that the appellant be cited to show cause before the District Court, at a specified hour, on the next day, why he should not be adjudged guilty of contempt. On the succeeding day, the citation having been duly served, the matter came on for hearing, the respondent being present in court, and represented by counsel. He demanded of the prosecution "service of interrogatories." The demand was denied by the court, and to that ruling he excepted. Witnesses having been examined on behalf of the government, and the respondent having testified in his own behalf, (but to what effect does not appear from the record,) and the matter having been submitted, the District Court, upon the testimony taken down by the stenographer, entered the following order and judgment:

"Whereas, during the progress of the trial of the action of *The United States of America* v. *H. Goujon*, in this court, on the 27th day of February, 1889, one Bartolo Flores, a witness on the part of the government duly subpœnaed and in attend-

ance upon the court, testified, in substance, that while in said attendance, on said 27th of February, one Alejandro Savin, on two several occasions, once in the jury-room of said court, temporarily used for witnesses, and within a few feet of the court-room, and once in the hallway of said court building, immediately adjoining said court-room, did approach said witness, and in said jury-room did improperly endeavor to deter the said witness from testifying in behalf of the government in said cause, and in the said hallway he offered the said witness money not to testify against the defendant in said action of *The United States* v. *Goujon;* and whereas, upon such testimony of said Flores, this court then and there made an order directing the said Savin to show cause before this court, at 9.30 o'clock A.M., on the 28th day of February, 1889, at the court-room thereof, why he should not be adjudged guilty of a contempt of this court; and whereas, on said 28th day of February, the said Savin appeared with counsel in response to said order; whereupon the said matter was heard in open court, and witnesses for and against him were sworn, and their testimony given, and the same having been duly considered by the court, the court now finds the facts to be: That during the progress of the trial of the action of *The United States of America* v. *H. Goujon*, in this court, on the 27th day of February, 1889, one Bartolo Flores, a witness on behalf of the government, duly subpœnaed and in attendance upon the court, while in such attendance, on the said 27th day of February, was on two several occasions, once in the jury-room of said court, which was temporarily used for a witness-room, and which is located within less than seven feet of the court-room, and once in the hallway of said court building, immediately adjoining the court-room, was approached by the respondent, Alejandro Savin, and said Savin did then and there, in said jury-room, unlawfully attempt and endeavor to deter said witness, Flores, from testifying for the government in the aforesaid action, and in said hallway the said Savin did at the time stated unlawfully offer the said witness, Flores, money not to testify against the defendant therein, the aforesaid Goujon; from which facts it is considered and adjudged by the court

that the said respondent, Alejandro Savin, did thereby commit a contempt of this court, for which contempt it is by the court now ordered and adjudged that the said Alejandro Savin be imprisoned in the county jail of Los Angeles County, California, for the period of one year.

"The marshal will execute this judgment forthwith.

"February 28, 1889. "Ross, *District Judge.*"

Pursuant to that order, and in conformity with a warrant, reciting that he had been convicted of a contempt of the court, the respondent was committed to jail. In his petition he claimed that the District Court had no jurisdiction or legal authority to try and sentence him in the manner and form above stated, for these reasons: 1. The matters set out in the judgment do not constitute a contempt of court provided for by § 725 of the Revised Statutes of the United States. 2. The proceedings were insufficient to give the court jurisdiction to render judgment. 3. The judgment is not based or founded upon any proceedings in due course of law, and is, therefore, void.

Mr. J. A. Anderson for appellant.

I. The District Court had no jurisdiction to summarily punish appellant for the matters and things set out in its judgment ordering his imprisonment.

The only jurisdiction that District and Circuit Courts of the United States have to punish for contempt is derived from the act of March 2, 1831, 4 Stat. 487, c. 99, now §§ 725, 5399, of the Revised Statutes. The language of that statute is imperative. "The power of the several courts of the United States to issue attachment and inflict summary punishment for contempt of court shall not be construed to extend to any cases except," etc.

The act then proceeds to state the *cases* of contempt that could be punished summarily, and then in the second section points out the cases that should be punished by indictment.

The obvious intent of this imperative limitation was to pre-

vent the United States courts from following the example of the English courts in summarily punishing persons for contempt, in a vast variety of cases, which they held to be constructive contempts.

Congress obviously thought that all that was necessary for the prompt vindication of the dignity and authority of the court was to empower the court to punish summarily: (1) Misbehavior, causing a disturbance of which the judge holding the court was conscious and could perceive through his senses, in the immediate presence of the court, or so near thereto as to prevent the court from duly proceeding in the administration of justice; (2) misbehavior of its officers in their official duties; (3) disobedience to its orders, judgments, or processes.

Congress also obviously thought that all other cases which the English courts had been in the habit of summarily punishing as contempts might safely be relegated to the usual mode of punishing crimes.

Now, as the first section of the act deprived the court of the power to summarily punish a number of graver offences in the nature of contempts, and that had theretofore been summarily punished as contempts, it became necessary to make them punishable by indictment, and hence the necessity for the second section of the act.

The second section therefore provides that persons shall be punished by indictment who shall corruptly interfere with any juror, witness, or officer in any court of the United States, in the discharge of his duty, or who shall corruptly or by threats or force obstruct or impede or endeavor to obstruct or impede the due course of justice therein — that is, such acts, even though they did not occur in the presence of the court, and though the court was not conscious of them at the time they occurred. See *Ex parte Robinson*, 19 Wall. 505, 511; *Harwell* v. *State*, 10 Lea, 547.

II. The proceedings upon which the judgment of contempt was based were not in due course of law, and were not of a character upon which a valid judgment could be based, because: (1) No written specifications of the facts constituting the contempt were furnished Savin, (but when demanded

were denied,) so as to give him the opportunity of purging himself of the contempt; (2) the judgment of the court is based upon the testimony of witnesses, whereas the only valid judgment the court could render in a case of criminal constructive contempt is one based upon the answer of the defendant — either dismissing the proceeding or punishing the defendant, according as his answer either denied or confessed the alleged contempt; (3) even if it were lawful to have a trial and take testimony in this class of cases, yet it could only have been done upon an issue formed upon a specific charge in writing and an answer denying it; whereas in this case the proceedings were purely oral.

Even if the court had jurisdiction to summarily punish for the matters set out in the judgment, yet the judgment is void on account of the departure by the court from the mode of procedure in criminal contempt cases, established by the common law courts from time immemorial: a mode always followed in England and in this country, except when a different mode is prescribed by statute.

This mode was to reduce the charge to writing of some kind, (an affidavit, order to show cause, interrogatories, etc.,) specifically designating and setting out the facts constituting the alleged contempt. Then to serve a copy on the defendant and give him the opportunity of answering the charge, and then if he fully and explicitly denied the charge under oath, to dismiss the proceedings and not permit the answer to be contradicted by the testimony of others.

In this case no writing specifically setting out the facts constituting the alleged contempt was ever served upon the defendant. When he called for interrogatories they were denied him. The whole proceeding was oral, and the judgment was based on the testimony of witnesses contradicting the testimony of defendant denying the charge.

In considering the nature of proceedings leading to a judgment of contempt, the cases should be divided into two classes: (1) Those cases in which the facts necessary to base the conviction on are known to the judge or judges by their senses of seeing, hearing, etc.; (2) those cases in which the

facts necessary to base the conviction on must be brought to the knowledge of the court by the testimony of witnesses.

In the class of direct cases, from necessity and the very nature of things, the judge acts instantly on his own observation and knowledge and adjudges the party guilty of contempt, and the only writing, paper or record entry consists of the judgment and warrant of committal. In this class of cases this entire departure from the fundamental law of the land in relation to criminal proceedings is based alone on necessity, and should be carried not a step further than is necessary.

In the class of constructive cases, as a basis of the proceedings there must be some affidavit, record, interrogatories or some writing stating and specifying the facts constituting the alleged contempt on which to base the order of arrest or attachment and to which the defendant may demur, plead or answer, and when he has answered, purging himself of contempt, no evidence contradicting it can be heard. *In re Terry*, 128 U. S. 289; *Ex parte Wright*, 65 Indiana, 504, 509.

The proceeding for constructive contempt should be commenced either by a rule to show cause or by an attachment. *Whittem* v. *State*, 36 Ins. 196; and *Ex parte Wright*, *ubi sup.* The defendant should be allowed to answer under oath, and after he has fully and explicitly denied the facts constituting the charge specifically made against him he should be discharged and no evidence be allowed to contradict him. *Burk* v. *State*, 27 Indiana, 430; *In the matter of John Pitman*, 1 Curtis, 186; *In re May*, 2 Flippin, 562; *Ex parte Kilgore*, 3 Texas App. 247; *Ex parte Field*, 1 California, 187; *Ex parte Rowe*, 7 Cal. 181; *Ex parte Langdon*, 25 Vt. 678, 682; *S. C.* 60 Am. Dec. 296.

Mr. Solicitor General and *Mr. George J. Denis*, United States attorney for the Southern District of California, opposing.

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

The power of the courts of the United States to punish contempts of their authority is not merely incidental to their general power to exercise judicial functions, but, as was said in *Ex parte Terry*, 128 U. S. 289, 304, where this subject was considered, is expressly recognized and the cases in which it may be exercised are defined, by acts of Congress. The judiciary act of September 24, 1789, c. 20, § 17, invests them with "power to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." 1 Stat. 83. By an act of Congress of March 2, 1831, c. 99, 4 Stat. 487, "declaratory of the law concerning contempts of court," it was enacted:

"That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness or any other person or persons, to any lawful writ, process, order, rule, decree or command of the said courts.

"Sec. 2. That if any person or persons shall corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavor to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence."

Section 725 of the Revised Statutes, title "The Judiciary," is in these words: "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of

their authority: *Provided*, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

The second section of the act of 1831 is in part reproduced in § 5399 of the Revised Statutes, title "Crimes." That section is as follows: "Every person who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness, or officer in any court of the United States, in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three months, or both."

It is contended that the substance of the charge against the appellant is, that he endeavored, by forbidden means, to influence or "impede" a witness in the District Court from testifying in a cause pending therein, and to obstruct or impede the due administration of justice, which offence is embraced by § 5399, and, it is argued, is punishable only by indictment. Undoubtedly, the offence charged is embraced by that section, and is punishable by indictment. But the statute does not make that mode exclusive, if the offence be committed under such circumstances as to bring it within the power of the court under § 725; when, for instance, the offender is guilty of misbehavior in its presence, or misbehavior so near thereto as to obstruct the administration of justice. The act of 1789 did not define what were contempts of the authority of the courts of the United States, in any cause or hearing before them, nor did it prescribe any special procedure for determining a matter of contempt. Under that statute the question whether particular acts constituted a contempt, as well as the mode of proceeding against the offender, was left

to be determined according to such established rules and principles of the common law as were applicable to our situation. The act of 1831, however, materially modified that of 1789, in that it restricted the power of the courts to inflict summary punishments for contempt to certain specified cases, among which was misbehavior in the presence of the court, or misbehavior so near thereto as to obstruct the administration of justice. *Ex parte Robinson*, 19 Wall. 505, 511. And although the word "summary" was, for some reason, not repeated in the present revision, which invests the courts of the United States with power "to punish by fine or imprisonment, at the discretion of the court, contempts of their authority" in certain cases defined in § 725, we do not doubt that the power to proceed summarily, for contempt, in those cases, remains, as under the act of 1831, with those courts. It was, in effect, so adjudged in *Ex parte Terry*, above cited.

The question then arises, whether the facts recited in the final order in the District Court as constituting the contempt — which facts must be taken in this collateral proceeding to be true — make a case of misbehavior in the presence of that court, or misbehavior so near thereto as to obstruct the administration of justice therein. There may be misbehavior in the presence of a court amounting to contempt, that would not, ordinarily, be said to obstruct the administration of justice. So there may be misbehavior, not in the immediate presence of the court, but outside of and in the vicinity of the building in which the court is held, which, on account of its disorderly character, would actually interrupt the court, being in session, in the conduct of its business, and consequently obstruct the administration of justice.

Flores, we have seen, was in attendance upon the court in obedience to a subpœna commanding him to appear as a witness in behalf of one of the parties to a case then being tried. While he was so in attendance, and when in the jury-room, temporarily used as a witness-room, the appellant endeavored to deter him from testifying in favor of the government in whose behalf he had been summoned; and, on the same occasion, and while the witness was in the hallway of the court

room, the appellant offered him money not to testify against Goujon, the defendant in that case. Was not this such misbehavior upon the part of the appellant as made him liable, under § 725, to fine or imprisonment, at the discretion of the court? This question cannot reasonably receive any other than an affirmative answer. The jury-room and hallway, where the misbehavior occurred, were parts of the place in which the court was required by law to hold its sessions. It was held in *Heard* v. *Pierce*, 8 Cush. 338, 341, that "the grand jury, like the petit jury, is an appendage of the court, acting under the authority of the court, and the witnesses summoned before them are amenable to the court, precisely as the witnesses testifying before the petit jury are amenable to the court." Bacon, in his essay on Judicature, (No. LVI,) says: "The place of justice is an hallowed place; and therefore not only the bench, but the footpace and precincts and purprise thereof ought to be preserved against scandal and corruption." We are of opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court. It is true that the mode of proceeding for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye or within the view of the court, it may proceed "upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form," *Ex parte Terry*, 128 U. S. 289, 309; whereas, in cases of misbehavior of which the judge cannot have such personal knowledge, and is informed thereof only by the confession of the party, or by the testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished. 4 Bl. Com. 286. But this difference in procedure does not affect the question as to whether particular acts do not, within the meaning of the statute, constitute misbehavior in the presence of the court. If, while Flores was in the court-room, waiting to be called as a witness, the appellant had at-

tempted to deter him from testifying on behalf of the government, or had there offered him money not to testify against Goujon, it could not be doubted that he would have been guilty of misbehavior in the presence of the court, although the judge might not have been personally cognizant at the time of what occurred. But if such attempt and offer occurred in the hallway just outside of the court-room, or in the witness-room, where Flores was waiting, in obedience to the subpœna served upon him, or pursuant to the order of the court, to be called into the court-room as a witness, must it be said that such misbehavior was not in the presence of the court? Clearly not.

We are of opinion that the conduct of the appellant, as described in the final order of the District Court, was misbehavior in its presence, for which he was subject to be punished without indictment, by fine or imprisonment, at its discretion, as provided in § 725 of the Revised Statutes. And this view renders it unnecessary to consider whether, as argued, the words "so near thereto as to obstruct the administration of justice" refer only to cases of misbehavior, outside of the court-room, or in the vicinity of the court building, causing such open or violent disturbance of the quiet and order of the court, while in session, as to actually interrupt the transaction of its business.

It is, however, contended that the proceedings in the District Court were insufficient to give that court jurisdiction to render judgment. This contention is based mainly upon the refusal of the court to require service of interrogatories upon the appellant, so that, in answering them, he could purge himself of the contempt charged. The court could have adopted that mode of trying the question of contempt, but it was not bound to do so. It could, in its discretion, adopt such mode of determining that question as it deemed proper, provided due regard was had to the essential rules that obtain in the trial of matters of contempt.

This principle is illustrated in *Randall* v. *Brigham*, 7 Wall. 523, 540, which was an action for damages against the judge of a court of general jurisdiction, who removed the plaintiff from his office as an attorney at law, on account of malprac-

tice and gross misconduct in his office. One of his contentions was that the court never acquired jurisdiction to act in his case, because no formal accusation was made against him, nor any statement of the grounds of complaint, nor a formal citation against him to answer them. The court, after observing that the informalities of the notice did not touch the question of jurisdiction, and that the plaintiff understood from the notice received the nature of the charge against him, said: "He was afforded ample opportunity to explain the transaction and vindicate his conduct. He introduced testimony upon the matter, and was sworn himself. It is not necessary that proceedings against attorneys for malpractice, or any unprofessional conduct, should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause; or from what the court learns of the conduct of the attorney from its own observation. Sometimes they are moved by third parties upon affidavit; and sometimes they are taken by the court upon its own motion. All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defence. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation." So, in the present case, if the appellant was entitled, of right, to purge himself, under oath, of the contempt, that right was not denied to him; for it appears from the proceedings in the District Court, made part of the petition for *habeas corpus*, not only that he was informed of the nature of the charges against him by the testimony of Flores, taken down by a sworn stenographer at the preliminary examination, but that he was present at the hearing of the contempt, was represented by counsel, testified under oath in his own behalf, and had full opportunity to make his defence.

Our conclusion is that the District Court had jurisdiction of the subject matter, and of the person, and that irregularities, if any, occurring in the mere conduct of the case, do not affect

the validity of its final order. Its judgment, so far as it involved mere errors, cannot be reviewed in this collateral proceeding, and must be

Affirmed.

CUDDY, Petitioner.

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

No. 1552. Argued April 25, 1889. — Decided May 13, 1889.

When a judgment of a Circuit or District Court of the United States is attacked collaterally, every intendment will be made in support of jurisdiction, unless the want of it, either as to subject matter or as to parties, appears in some proper form; and this general rule applies to judgments punishing for contempt.

A petitioner for a writ of *habeas corpus* to obtain his discharge from imprisonment under the judgment and sentence of a District or Circuit Court of the United States for contempt, is at liberty to allege and to prove facts, not contradicting the record, which go to show that the court was without jurisdiction.

PETITION FOR A WRIT OF HABEAS CORPUS. The writ was refused, and the petitioner appealed. The case is stated in the opinion.

Mr. J. A. Anderson for petitioner.

Mr. Solicitor General and *Mr. George J. Denis*, United States attorney for the Southern District of California, opposing.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an appeal from a final judgment in the Circuit Court of the United States for the Southern District of California, denying an application for a writ of *habeas corpus*.

The appellant, in his petition for the writ, represented that he was detained and imprisoned contrary to the Constitution and laws of the United States, under and by virtue of a war-

rant of commitment based upon a pretended judgment of the District Court of the United States for the Southern District of California, adjudging him guilty of contempt of court, and sentencing him to six months' imprisonment in jail.

The petition purports to set out all the minutes, records and files of the court, in the proceedings for contempt, from which it appears that on the 12th day of February, 1889, the case of *United States* v. *W. More Young* coming on regularly for trial, a jury was ordered to be drawn and impanelled; that the names of twelve jurors were regularly drawn from the box, and they were sworn on their *voir dire;* that among the names so drawn was that of Robert McGarvin, who, being asked upon his examination if he had been approached or spoken to by any one about the above case, replied that he had been approached and spoken to about it by the appellant Cuddy; that, upon the testimony thus adduced, the court made an order directing a citation to be issued forthwith, requiring appellant to appear before the court, on the next day, to show cause why he should not be punished for contempt; and that such citation was accordingly at once issued.

It further appears from the minutes and orders, that the matter of contempt came on for hearing the next day, the appellant appearing in person and by counsel; that an exception to the proceedings was taken by him, "a general denial entered, and the hearing was proceeded with;" that after the witnesses on behalf of the government were examined, the appellant moved to dismiss the matter of contempt, and the motion was denied; that he testified, under oath, in his own behalf; and that upon the conclusion of all the testimony the matter was submitted. The court made the following order:

"Whereas, in the progress of the trial of the action of *The United States of America* v. *W. More Young*, on the 12th day of February, 1889, upon the examination of the term trial juror, Robert McGarvin, as to his qualification to sit as a trial juror in the said action, the said McGarvin testified, among other things, in effect that on the day previous he was approached by one Thomas J. Cuddy with the object on Cuddy's part to influence his, McGarvin's, actions as a juror in the

said case in the event that he should be sworn to try the said action; and

"Whereas, from the testimony, this court, on the said 12th day of February, 1889, entered an order directing the said Thomas J. Cuddy to show cause before this court, at the court-room thereof, at 10 o'clock, on the 13th day of February, 1889, why he should not be adjudged guilty of a contempt of this court; and

"Whereas, in response to the said citation, said Thomas J. Cuddy did, on the said 13th day of February, 1889, appear before the said court; and

"Whereas testimony was then and there introduced in respect to the matter both for and against him:

"The court, having duly considered the testimony, does now find the fact to be that the said Thomas J. Cuddy did, upon the 11th day of February, 1889, approach the said Robert McGarvin, at the time being a term trial juror duly impanelled in this court, with the view to improperly influence the said McGarvin's action in the case of the United States of America against the said Young in the event the said McGarvin should be sworn as a juror in said action.

"Now, it is here adjudged by the court that the said Thomas J. Cuddy did thereby commit a contempt of this court, for which contempt it is now here ordered and adjudged that the said Thomas J. Cuddy be imprisoned in the county jail of the county of Los Angeles for the period of six months from this date, and the marshal of this district will execute this judgment forthwith."

The petition for the writ sets out also the warrant of commitment, which recites that the appellant "was convicted of a contempt of the said court, committed on the 11th day of February, 1889, at the city of Los Angeles, county of Los Angeles, State of California, and within the jurisdiction of said court."

The appellant in his application claims "that said United States District Court had no jurisdiction or authority legally to try and sentence him in the manner and form above stated: (1) For the reason that the matters set out in said judg-

ment do not constitute any contempt of court provided for by § 725 of the Revised Statutes of the United States; (2) for the reason that the proceedings in said court were insufficient to give the court jurisdiction to proceed to judgment in said matter; (3) for the reason that said judgment is void, because not based or founded upon any proceedings in due course of law."

This is the whole case, as made by the petition for the writ of *habeas corpus*.

Although the testimony given on the hearing of the question of contempt was taken down by a stenographer, under oath, no part of it except the evidence of McGarvin, the substance of which is recited in the above order, appears in the transcript.

We are unable from the record before us to say that the Circuit Court erred in denying the application for the writ of *habeas corpus*.

The statute requires the application for a writ of *habeas corpus* to set forth "the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known." Rev. Stat., § 754. The return must specify the true cause of detention, and the petitioner, or the party imprisoned, "may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case." Such denials or allegations must be under oath, and amendments may be made, with the leave of the court, "so that thereby the material facts may be ascertained," and the matter disposed of "as law and justice require." Rev. Stat., §§ 757, 760, 761.

The present application does show in whose custody and by virtue of what authority the appellant is detained; but it sets forth the facts concerning his detention so far only as they are disclosed, as above, by the minutes, files and records of the District Court. It is stated in the brief of appellants' counsel, and the statement was repeated at the bar, that the difference between the Savin case, just determined, *ante*, 267, and the present case is, that the misbehavior constituting the contempt with which Savin is charged occurred in the court

building and while the court was in session; whereas, the misbehavior with which Cuddy is charged did not occur in the court building, nor, so far as the record of the District Court shows, while the court was in session. It was assumed in argument that, under no view of the facts, could the misbehavior of Cuddy be deemed to have occurred in the presence of the court or so near thereto as to obstruct the administration of justice, and therefore his offence, if punishable at all, was punishable only by indictment. But both the petition for *habeas corpus* and the record of the District Court are silent as to the particular locality where the appellant approached McGarvin, with a view of improperly influencing his actions in the event of his being sworn as a juror in the case of *United States* v. *Young*. That which, according to the finding and judgment, the appellant did, if done in the presence of the court, that is, in the place set apart for the use of the court, its officers, jurors and witnesses, was clearly a contempt, punishable, as provided in § 725 of the Revised Statutes, by fine or imprisonment, at the discretion of the court, and without indictment. *Savin, Petitioner, ante*, 267.

The District Court possesses superior jurisdiction, within the meaning of the familiar rule that the judgments of courts of that character cannot be assailed collaterally, except upon grounds that impeach their jurisdiction. In *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 173, 185, Chief Justice Marshall, after observing that the words "inferior court" apply to courts of special and limited authority, erected on such principles that their proceedings must show jurisdiction, said: "The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be totally disregarded." In *McCormick* v. *Sullivant*, 10 Wheat, 192, 199, where the question was, whether a decree in a suit in the Federal District Court of Ohio, which did not show that the parties were citizens of different States, was *coram non judice* and void, the court said that the reason assigned for holding that decree void

"proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction; but they are not, on that account, inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities." And in *Galpin* v. *Page*, 18 Wall. 350, 365, the court said: "It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject matter of the action in which the judgment is given, but of the parties also." The general rule that, unless the contrary appears from the record, a cause is deemed to be without the jurisdiction of a Circuit or District Court of the United States — their jurisdiction being limited by the Constitution and acts of Congress — has no application where the judgments of such courts are attacked collaterally.

Unless, therefore, the want of jurisdiction, as to subject matter or parties, appears, in some proper form, every intendment must be made in support of the judgment of a court of that character. The District Courts of the United States, invested with power to punish, without indictment, and by fine or imprisonment, at their discretion, contempts of their authority, are none the less superior courts of general jurisdiction, because the statute declares that such power to punish contempts "shall not be construed" to extend to any cases except misbehavior in the presence of the court, misbehavior so near thereto as to obstruct the administration of justice, and disobedience or resistance to its lawful writ, process, order, rule, decree, or command. Rev. Stat. 725. The only effect of this limitation is to narrow the field for the exercise of their general power, as courts of superior jurisdiction, to punish contempts of their authority.

The record in the present case shows that the appellant was before the court; that testimony was heard in respect to the matter of contempt; and that the appellant testified in his own behalf. The judgment being attacked collaterally, and the record disclosing a case of contempt, and not showing one beyond the jurisdiction of the court, it must be presumed, in this proceeding, that the evidence made a case within its jurisdiction to punish in the mode pursued here. We do not mean to say that this presumption as to jurisdictional facts, about which the record is silent, may not be overcome by evidence. On the contrary, if the appellant had alleged such facts as indicated that the misbehavior with which he was charged was not such as, under § 725 of the Revised Statutes, made him liable to fine or imprisonment, at the discretion of the court, he would have been entitled to the writ, and, upon proving such facts, to have been discharged. Such evidence would not have contradicted the record. But he made no such allegation in his application, and, so far as the record shows, no such proof. The general averment, in the petition, that he was detained in violation of the Constitution and laws of the United States, and that the District Court had no jurisdiction or authority to try and sentence him, in the manner and form above stated, is an averment of a conclusion of law, and not of facts, that would, if found to exist, displace the presumption the law makes in support of the judgment. As it was neither alleged nor proved that the contempt, which the appellant was adjudged, upon notice and hearing, to have committed, was not committed in the presence of the court, and as his misbehavior, if it occurred in its presence, made him liable to fine or imprisonment, at the discretion of the court, it must be held that the want of jurisdiction is not affirmatively shown; consequently, that it does not appear that error was committed in refusing the writ.

Whether the attempt to influence the conduct of the term trial juror McGarvin was or was not, within the meaning of the statute, misbehavior so near to the court "as to obstruct the administration of justice," however distant from the court building may have been the place where the appellant met

him, is a question upon which it is not necessary to express an opinion.

For the reasons stated, the judgment below is

Affirmed.

SEGRIST *v.* CRABTREE.

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

No. 115. Argued December 7, 10, 1888.— Decided May 13, 1889.

The instructions of the court below fairly left it to the jury to determine whether the sale of cattle, which is the subject of this controversy, was an absolute sale or a conditional sale.

Trover. Plea, the general issue. Verdict for plaintiff and judgment on the verdict.

Defendants sued out this writ of error.

The case is stated in the opinion.

Mr. O. D. Barrett, (with whom was *Mr. W. I. Thornton* on the brief,) for plaintiffs in error.

Mr. S. F. Phillips, (with whom were *Mr. W. H. Lamar* and *Mr. J. G. Zachry* on the brief,) for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

This is an action of trover. It was brought in the District Court of the First Judicial District of New Mexico, to recover damages for the conversion by the plaintiffs in error to their own use of certain cattle and horses of which the defendant in error, who was the plaintiff below, claimed to be the owner. The alleged unlawful conversion occurred in that Territory. The defendant Segrist, separately, and the defendants Stapp, Stoops and Holstine, jointly, pleaded not guilty. The record does not show service of process upon Bell, nor any appearance by him. There was a trial before a jury, resulting in a

verdict for $6033.04 in favor of the plaintiff against the defendants, followed — a motion for a new trial having been made and overruled — by a judgment for the above amount against Segrist, Stapp and Stoops. Upon appeal to the Supreme Court of the Territory the judgment was affirmed.

The bill of exceptions taken at the trial contains, though in very confused form, the entire evidence in the case. It is so stated as to render it difficult to understand the precise facts: but upon a careful scrutiny of all the testimony, we think that the general nature of the case is fairly indicated in the following extract from the opinion of the Supreme Court of the Territory, made part of the transcript:

"In 1880 the plaintiff bought of one Babb the remnant, as it is termed in the record, of the latter's herd of cattle, then to be found on certain ranges in Texas. The plaintiff came after said cattle and secured them.

"At the time of making this agreement plaintiff gave Babb notes for the amount agreed upon as the purchase money, and received from Babb a bill of sale for the cattle. Thereafter plaintiff secured and took possession of the cattle, but how many head there were does not appear from the evidence in the record before us.

"The only serious contention in the evidence is, as to whether this transaction was an absolute or merely a conditional sale, the plaintiff insisting and giving evidence tending to show that the sale was absolute, accompanied by a bill of sale absolute on its face, and by delivery of possession of the cattle as fast as they could be secured by him, and that his notes were given in full satisfaction. These notes consist of two promissory notes, each for the sum of eight hundred dollars, one payable in September, 1881, and the other in September, 1882. The defendant, however, insists and introduced evidence tending to show that the sale was conditional upon the payment of the notes at maturity, it being agreed between the plaintiff and Babb that the title to the cattle should remain in the latter until the notes were paid, and that if not paid when due he might assert his title and resume possession of the cattle. After the cattle were secured by the plaintiff he drove them

from the range in Texas, upon which they had been found by him, into Lincoln County, New Mexico.

"The notes were not paid at maturity, and thereafter, in January or February, 1882, Babb undertook to sell the cattle to the defendants. He sent his son, armed with a power of attorney, to take possession of the cattle. This son, accompanied by the defendants or some of them, went on the range in New Mexico, where the cattle were being herded in connection with other cattle belonging to the plaintiff, in charge of an employé of the plaintiff, and took possession of them and sold them to the defendants. It does not appear that this employé of the plaintiff had any authority to give up the possession of the cattle."

The Supreme Court of the Territory deemed it proper to consider only such questions as were brought to the attention of the trial court. This general rule, it said, was strengthened by this statutory provision, in force in that territory, that: "No exception shall be taken in an appeal to any proceeding in the District Court except such as shall have been expressly decided in that court." Prince's Laws, 68–9, § 5.

One of the principal questions arising upon the evidence was whether the two notes, payable respectively in September, 1881, and September, 1882, were received in actual payment, (in which event the remedy is upon the notes,) or only as evidence of the amount to be paid by Crabtree. In *Sheehy* v. *Mandeville*, 6 Cranch, 253, 264, Chief Justice Marshall said: "That a note, without a special contract, would not, of itself, discharge the original cause of action, is not denied. But it is insisted that if, by express agreement, the note is received as payment, it satisfies the original contract, and the party receiving it must take his remedy on it. This principle appears to be well settled. . . . Since, then, the plaintiff has not taken issue on the averment that the note was given and received in discharge of the account, but has demurred to the plea, that fact is admitted: and, being admitted, it bars the action for the goods." In *Peter* v. *Beverley*, 10 Pet. 532, 568, it was said that the acceptance of a negotiable note for an antecedent debt will not extinguish such debt, unless the

evidence is at least so clear and satisfactory as to leave no reasonable doubt that such was the intention of the parties. In *Layman* v. *Bank of the United States*, 12 How. 225, 243, it was held that the mere acceptance of the note by the creditor does not necessarily operate as satisfaction of the original debt, and whether or not there was an agreement at the time to receive it in satisfaction, or whether the circumstances attending the transaction warranted such an inference, were properly questions for the jury. In *The Kimball*, 3 Wall. 37, 45, the court said that "by the general commercial law, as well of England as of the United States, a promissory note does not discharge the debt for which it is given unless such be the express agreement of the parties; it only operates to extend until its maturity the period for the payment of the debt. The creditor may return the note when dishonored, and proceed upon the original debt. The acceptance of the note is considered as accompanied with the condition of its payment." These cases show the course of decision in this court. In some of the States the mere acceptance of a note for the amount of a debt raises a presumption of payment.

The contention of the appellants is that the instructions given at the request of the plaintiff, and the charge of the court, were in conflict with or did not conform to, the principles settled in the above cases. There is some slight ground for this contention, arising out of the multiplicity of the instructions given. All the instructions asked, except one on each side, were given, and they were supplemented by a charge covering substantially the same ground. But taking as a whole all the instructions given, and interpreting them in the light of the charge delivered by the court, they are not subject to the criticism of being so inharmonious or misleading as to justify a reversal. The question whether the notes were given and accepted in payment for the cattle was fairly left to the jury. And although they were not told, in words, that an express or special agreement was necessary before the notes could be deemed to have been received in satisfaction of the original debt, they were substantially so instructed. At the instance of the defendants, and in language of which, perhaps,

the plaintiff might complain, they were instructed that "a promissory note is never considered as payment, unless it is taken *absolutely* as payment; if there be any agreement that a note is not to be considered payment if unpaid at maturity, then it is no payment; but the payment of the note only will be the payment of the original claim; and in such case the original contract will remain independent of the notes." The court, upon its motion, said to the jury that if they "found from the evidence that Babb sold and delivered the stock on the range and took promissory notes in payment, this would be an absolute, unconditional sale, and Babb could not retake the stock. Babb's remedy in such case would be by suit to collect what might be due him upon said notes." The principal instruction given, at the instance of the plaintiff, left it to the jury to determine whether the notes were actually given and accepted in absolute payment for the cattle. That is one form of saying that they were so given and so accepted, pursuant to an understanding, that is, by special agreement between the parties, that the original debt should, in that mode, be extinguished. The instructions and the charge mean that if the sale was an unconditional one, and if the notes were given and accepted as absolute payment, the original debt was extinguished, and the remedy of the defendant was on the notes. There was in this no error to the prejudice of the defendants; for the facts thus hypothetically stated to the jury imported a special agreement between the parties that the notes were to be taken in payment.

Among the instructions given to the jury at the instance of the plaintiff was the following:

"If you find from the evidence that the plaintiff or the plaintiff and his brother purchased the cattle from W. M. Babb or W. T. Babb, and that he or they gave their promissory notes in payment therefor, and the same were accepted by the Babbs, although the notes were taken only as conditional payments, yet they would be *prima facie* evidence of payment, and the said Babbs, whilst holding said notes, could not proceed to take possession of the said cattle and horses as their own. Their remedy would be upon the notes or to cancel the trade;

and if you find from the evidence that said Babbs did, under the circumstances just mentioned, take possession of said cattle without authority of the plaintiff and dispose of them to the defendants, you will find for the plaintiff the value of the cattle and horses at the time of taking the same, with interest."

Taken in connection with other instructions, this was intended only to express the idea that, if the notes were taken as conditional payment only, they would be regarded as *prima facie* evidence of payment, so long as the Babbs held them, and until by non-payment they ceased to have any force, if the Babbs elected to so treat them. The court below properly held that they could not rightfully retake the cattle, while they retained the notes.

Nor, in our judgment, was any error committed by the instructions relating to the question of the title to the property, as affected by the contract of sale. In *Harkness* v. *Russell*, 118 U. S. 663, 668, this court, after a full examination of the adjudged cases, recognized the general rule — at least as between the original parties to a conditional sale, and where the subject is not controlled by local statutes — to be as stated by Mr. Benjamin in his treatise on sales of personal property, namely: "Where the buyer is by contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." Nothing was said in the instructions or charge in conflict with this doctrine. The jury were told that a bargain and sale of personal property, accompanied by delivery, divests the vendor of any lien for payment, unless such lien is secured by chattel mortgage or by agreement between the parties; that if the bill of sale in evidence was not given to pass the absolute title, but simply to enable plaintiff to use it in gathering the cattle, and that it was agreed that the cattle were to remain the property of Babb until paid for according to the terms of the notes, it must not be considered as transferring the title; and that, in such case, Babb had the right, upon the failure to pay

the notes when due, (if he did not elect to keep the notes,) to retake the cattle and sell them; but if there was no such agreement, and if the notes were given and accepted as absolute payment, without any reservation of a lien, that Babb, in order to enforce payment, would have no right to retake the cattle from the possession of the plaintiff or of his agent. And that there might be no confusion in the mind of the jury as to the right of Babb to resume possession of the cattle, they were instructed to find for the defendants, if they believed from the evidence that Carter, in whose possession they were when retaken, had authority from Crabtree to settle his debts and to sell and dispose of his cattle, and that he delivered them, under authority from Crabtree, in payment of the notes. In all this we do not perceive any error to the prejudice of the substantial rights of the defendants.

There are no other questions presented that we deem it necessary to notice, and the judgment must be

Affirmed.

VEACH *v.* RICE.

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

No. 208. Argued March 15, 18, 1889. — Decided May 13, 1889.

The judgments of Courts of Ordinary in Georgia in respect to subject matter within their jurisdiction are no more open to collateral attack than those of any other court.

The judgment of the Court of Ordinary allowing the resignation of one of two administrators upon proceedings had pursuant to statute, and discharging him after he had accounted to his co-administrator, and the latter had given a new bond, operated to exonerate the sureties upon the joint bond of both from liability for a *devastavit* committed after such order of discharge.

Cross-bills are necessary where certain defendants seek affirmative relief against their codefendants.

Where the Ordinary takes an administrator's bond in good faith, and it appears after liability has been incurred, that the names of some of the supposed sureties were signed thereto without authority, the mere fact

that the latter cannot be held, will not constitute a defence as to those who executed the bond without being misled or having relied upon the others being bound.

THE court, in its opinion, stated the case as follows:

James L. Rice and his wife, Ada S. Rice, citizens of the State of Tennessee, filed their bill of complaint, July 12th, 1881, in the Circuit Court of the United States for the Northern District of Georgia, against Frank P. Gray and his wife, Cora M., and also against said Gray as administrator of the estate of Lewis Tumlin, deceased, and also as guardian of the said Cora M., Napoleon B. Tumlin, George H. Tumlin, Lula T. Lyon, John S. Leake, John W. Gray, William T. Wofford, A. P. Wofford, Edwin M. Price, John G. B. Erwin, Henry C. Erwin, James M. Veach, Robert L. Rogers, W. I. Benham, John J. Howard, A. W. Mitchell, Mary L. Spencer, Francis M. Ford, Noah King, Thomas W. Leake, Henry C. Ramsauer, administrator, and others, all citizens of the State of Georgia, alleging that on the 2d day of June, 1875, one Lewis Tumlin, of the county of Bartow, Georgia, died intestate, leaving as his heirs-at-law, his wife Mary L. Tumlin, now Mary L. Spencer; his sons, Napoleon B. Tumlin and George H. Tumlin; his daughters, the said Ada S. Rice, formerly Ada S. Tumlin, Lula T. Lyon, formerly Lula T. Tumlin, Cora M. Gray, formerly Cora M. Tumlin; and one Lewis T. Erwin, the son of a deceased daughter, who has sold and conveyed his interest in said estate to John S. Leake, each of whom upon his death was entitled to one seventh part of his estate, his wife having elected to take a child's part in lieu of dower; that the estate was of the aggregate value of about $300,000; that Frank P. Gray and Napoleon B. Tumlin obtained temporary letters of administration on said estate on the 11th day of June, 1875, giving bond in the sum of $200,000, with Abda Johnson, William T. Wofford, John W. Gray, James M. Veach and Edwin M. Price as sureties; that on the second day of August, 1875, said Frank P. Gray and one John A. Erwin obtained permanent letters of administration on said estate and gave bond as such, in the sum of $600,000 with Abda Johnson, William

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T. Wofford, John W. Gray, James M. Veach, Edwin M. Price, Noah King, A. C. Trimble, Joel H. Dyer, William W. Rich, James C. Wofford, Nelson Gilreath, J. J. Howard, Robert L. Rogers, William I. Benham, John S. Leake, A. W. Mitchell, J. G. B. Erwin, Henry C. Erwin and Lewis R. Ramsauer, intestate of Henry C. Ramsauer, and one Thomas Stakley and one Thomas Tumlin as sureties; that John A. Erwin had since that time removed from the State of Georgia to the State of Tennessee, and the said Thomas Tumlin had removed to Alabama; that Stakley had died intestate and no letters of administration had been granted on his estate until within less than twelve months before the filing of this bill; that said Abda Johnson died July 10, 1881, and his estate is now unrepresented, and for these reasons said Erwin, Tumlin, Stakley and Johnson are not made parties; that said Lewis R. Ramsauer died intestate, and Henry C. Ramsauer has qualified as his administrator, and as such is made a party, and "that the joint administration of said Frank P. Gray and John A. Erwin continued from the second day of August, 1875, until the second day of May, 1876, when the said John A. Erwin resigned, and his resignation was accepted by the Court of Ordinary of the county of Bartow." Complainants are informed and believe that Erwin resigned to avoid "the consequences of said Gray's waste and mismanagement," and thereupon "said Gray became sole administrator, against the consent and at the protest of all the heirs except Cora M. Gray and Mary L. Spencer, and gave bond as sole administrator in the sum of $140,000, with the said Abda Johnson, William T. Wofford, Edwin M. Price, Noah King, William W. Rich, John W. Gray, Nelson Gilreath, James C. Wofford, John S. Leake and Thomas W. Leake as sureties;" that on the 18th day of October, 1877, said William T. Wofford, James C. Wofford and William W. Rich applied to be relieved from their suretyship on the bond aforesaid on account of their want of confidence in the said Gray, and were so relieved, and said Gray gave a new bond as such administrator for the same sum, "with the said Abda Johnson, Nelson Gilreath, Noah King, John S. Leake, Thomas W. Leake,

Thomas Tumlin, John W. Gray, Absalom P. Wofford and Francis M. Ford as sureties;" "that on the sixth day of May, 1878, said Noah King applied to be relieved on his bond last aforesaid, and was so relieved, and the said Frank P. Gray gave another bond as administrator in the sum of $140,000, with the said Abda Johnson, Nelson Gilreath, John W. Gray, Absalom P. Wofford, John S. Leake, Thomas W. Leake and Francis M. Ford as sureties;" and "that since that time said Gray has continued to act as administrator under the bond last aforesaid and is still in possession of the effects of said estate not heretofore disposed of."

Complainants show that Lewis Tumlin had made some advancements to some of his children, and on the second day of October, 1875, a distribution of property in kind was made, each of the heirs receiving $24,000, including the advancements; that since that time there has been no distribution, but some amounts have been received by some of the heirs; that Tumlin's estate was abundantly solvent and his liabilities should have been long since discharged and the estate wound up and the balance distributed, "which said Gray undertook and promised to do by his several bonds aforesaid," but he has not done it, and has refused to account or to pay over to complainants their distributive share; that Gray has been guilty of negligence, waste and fraud, which complainants proceed to charge in detail; and that said Lula T. Lyon heretofore filed her bill against said Gray as administrator, in the Superior Court of Bartow County, Georgia, seeking an account of her distributive share in said estate, and praying for an injunction to restrain said Gray from selling the real estate of said Tumlin, which he was, on or about the first day of January last, seeking to do, which injunction "had been granted by the judge of said court and had duly issued." After charging further acts of fraud and waste, the bill proceeds: "Complainants are unable to state in many instances the date at which the waste of said estate was committed by said Gray, but they are informed and believe that most of it occurred after the resignation of said Erwin, and after his present bond was given, to wit, the one bearing date the 6th of May, 1878;" that Gray is insol-

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vent; that A. P. Wofford, John W. Gray and Nelson Gilreath are insolvent; that Abda Johnson left considerable property, but his affairs are embarrassed; that John S. and Thomas W. Leake and Francis M. Ford are not worth exceeding $20,300; that large sums are due Tumlin's estate, which also owns several thousand dollars' worth of real estate; that many suits are pending in favor of the estate for the recovery of money and property, and also many suits against the estate, all of which should have been tried and disposed of long since; that the estate is solvent and Gray has ample means in his hands to pay off any recovery against it, but Gray has purposely delayed bringing the suits to trial in order to postpone the final settlement of the estate; that Gray has for several years been absent from Georgia, much of his time in Mississippi, and has declared his purpose to remove to that State; that on the 18th day of June, 1881, he filed in the office of the Ordinary of said county his resignation as administrator; that the heirs will be forced to suggest some other person as his successor, and whoever may be appointed the decision may be appealed from, and pending that, "a temporary administrator with limited powers would be the only representative of said estate;" and "that unless they can have the immediate aid of a court of equity by such suitable injunction and restraining order, and the early appointment of a receiver, the interests of said estate will suffer great and immediate loss, and complainants and the other heirs-at-law of Lewis Tumlin will be injured beyond remedy." They pray for answer but not upon oath, and for an injunction and an account, "and that complainants may have a decree for their distributive share in said estate against the said Frank P. Gray and his sureties on his administration bonds aforesaid, and that the respective liabilities of said several securities may be ascertained and fixed by said decree;" and for general relief.

Copies of the various bonds were filed as exhibits with the bill and also a copy of Gray's petition to resign as administrator, with citation to the heirs of Tumlin to appear before the Ordinary on the first Monday in July, 1881, to show cause why the resignation should not be allowed and James C. Wof-

ford appointed administrator in Gray's stead, with return of service on several of the heirs and on Wofford.

September 5th, 1881, defendants Napoleon B. Tumlin, George H. Tumlin, Mary L. Spencer, and Lula T. Lyon filed their answer, admitting the allegations of complainants' bill, and saying that they have a common interest with complainants in Tumlin's estate, and join in the charges and allegations of the bill against their codefendants, and unite in the prayers in said bill contained, and pray an account and for a decree against Gray and his securities.

October 3d, 1881, Gray and "his securities" answered, denying waste or maladministration by Gray; and on the same day, "the securities upon the alleged administration bond of John A. Erwin and Frank P. Gray" answered, denying any maladministration by Erwin and Gray, or either of them, during the period of their joint administration, and setting up Erwin's discharge, the giving of a new bond by Gray, and the settlement and accounting by Erwin. A demurrer for want of jurisdiction was also filed, and, having been argued, the circuit judge delivered an opinion assigning grounds for retaining the cause, the demurrer was overruled, a receiver appointed, and an injunction issued.

On the 20th of March, 1882, the case was referred to a special master to report upon the questions of law and fact raised by, or included in, the pleadings, and to state an account.

May 19th, 1883, complainants filed a petition stating that when the original bill was filed, they were informed and believed "the following state of facts to exist, to wit: That John A. Erwin had, in April, 1876, applied to the ordinary of Bartow County, Georgia, for leave to resign his office as a co-administrator on the estate of Lewis Tumlin, deceased; that orators in connection with N. B. Tumlin, G. H. Tumlin, Mary L. Spencer, and Lula T. Lyon had objected to said resignation, and upon the trial of their caveat to said application for leave to resign the ordinary had allowed said resignation, and all the other caveators heard had appealed from that decision, except orators, who gave the matter no further attention, and

were informed and believed that said resignation had been allowed, and they have all the time, until the filing of their bill, thought and believed that said Erwin had resigned his trust and his resignation had been allowed and accepted by the court;" that they believed said resignation could not release the sureties on the bond of Gray and Erwin, and since the reference of the case and during the hearing before the master defendants have put in evidence the record of said Erwin's resignation and the proceedings on appeal, from which it appears that Erwin's resignation has never been in fact or in law allowed; that "not being parties to said appeal, they had not given any attention to it, and did not know what had been done in it, except that the jury had found against the appeal, and they believed that all other legal steps had been taken to give effect to the verdict," which they now learn was not the case; and they ask to amend: "By an averment that John A. Erwin, though not a party to said bill by reason of the fact that he resided without the jurisdiction of the court, is not only bound as the security of said Frank P. Gray in common with all the other sureties of said Gray and Erwin on the first administration bond, as claimed in the original bill, and is still in law one of the administrators of said estate, and has never legally resigned his trust as a co-administrator with Frank P. Gray on said estate, and that complainants are entitled to relief accordingly against them and all the sureties on all the administration bonds on said estate, and they pray relief accordingly." Leave to amend was granted on the same day, and the bill as amended referred to the special master.

On the 13th of September, 1883, the joint and several answer of H. C. Erwin and J. G. B. Erwin, two of the defendants, was filed, by leave of court, averring that they never had become sureties on the bond of Erwin and Gray, because they had only authorized their names to be signed to the bond of Erwin.

On the 4th of October, 1883, Ramsauer, administrator, answered, stating that he is the administrator of L. R. Ramsauer, who signed a power of attorney authorizing respondent

to sign his name as one of the sureties to Erwin's bond, and he was also authorized by H. C. Erwin and J. G. B. Erwin to sign such bond for them as attorney in fact, and that the power of attorney was changed by interlineation so as to authorize the signing of the bond of Erwin and Gray.

October 9th, 1883, the answer of James M. Veach, Robert L. Rogers, A. C. Trimble, W. I. Benham, John J. Howard and A. W. Mitchell was filed, by leave, stating that they had signed the bond made jointly by John A. Erwin and F. P. Gray as the administrators of the estate of Lewis Tumlin; that John A. Erwin resigned his administratorship in May, 1876, and he, as well as his bondsmen, were discharged "by order of the Ordinary of Bartow County," and these respondents supposed that was the end of their connection with the administration of said estate. They insist that John A. Erwin is a necessary party to this bill as proposed to be amended; that they are informed that three of their co-sureties, namely, H. C. and J. G. B. Erwin and L. R. Ramsauer, are seeking release on the ground that they only authorized their names to be signed to the bond of Erwin, and not of Erwin and Gray, and respondents say "that they were particular to make inquiry as to whether the Erwins and Ramsauer would go on said bond, and they agreed to sign said bond only upon condition that the others did." They set up Erwin's resignation upon notice to the heirs and distributees, and his discharge, which they insist discharged them from further liability; and say they know nothing of the alleged maladministration of Gray.

Replication was filed November 24, 1883.

September 22, 1883, the special master filed his report stating the death of Tumlin, the names of his heirs-at-law, the election of the widow to take a child's part, the removal of Erwin to Tennessee, and of Thomas Tumlin to Alabama; the death of Stakley, of L. R. Ramsauer, and of Abda Johnson, the appointment of Gray and Tumlin as temporary administrators and of Gray and Erwin as permanent administrators, on the second day of August, 1875, and the giving of bond by them, in the usual form, in the penal sum of $600,000, which

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"bond was joint and several and payable to the Ordinary of Bartow County, Georgia, for the time being, and his successors in office." The report sets forth the return of the inventory, which alleged that "there were some wild lands and evidences of debt left out to be appraised as soon as they could be definitely ascertained;" the sale of personal property; the award of support for widow and minor; the appointment of commissioners to divide land and their return; the application by the administrators for a commission of 3 per cent on $114,456, as compensation for services in and about the division of the real estate; the allowance of the 3 per cent; the first annual return of Gray and Erwin and its approval; the application of Erwin for discharge; the order requiring the distributees to show cause; the order of discharge; the giving by Gray of a new bond; the final receipt of Gray to Erwin and the final discharge; and the appeal from the decision of the Ordinary permitting Erwin to resign and Gray to become sole administrator, to the Superior Court of Bartow County, where it was affirmed by verdict, August 4, 1876. The report says there is no record evidence that a judgment was entered upon said verdict. It further states that on June 16, 1876, Gray gave bond to Erwin reciting that Erwin transfers to Gray all commission and compensation which might be allowed Erwin for his services as administrator, and in consideration thereof Gray bound himself to pay any judgment against Erwin for any waste or loss occasioned by any act or failure of duty in any way by Erwin as administrator; sundry sales by Gray returned to the Ordinary; the discharge of W. T. Wofford, Rich, and James C. Wofford, sureties on Gray's administration bond; the new bond given by Gray, October 13, 1877; the new bond given by Gray, May 6, 1878; the second return by Gray, administrator, August 6, 1877, further time having been granted to him to make it; the return of 1878, in accordance with time given to make it; the return for 1879, 1880, and 1881; and the appointment of the receiver in this case, November 14, 1881. Various charges for commissions on interest are considered, and the subject of the inventory of wild lands, the failure to make and perfect return thereof being held to be

excusable and not to have damaged the estate. The master holds there was a valid resignation and discharge of Erwin from the office of administrator, dating from June 12, 1876, but that the sureties on the bond of Gray and Erwin were not discharged. He disallows the 3 per cent commissions on division of land, amounting to $3433.68, as excessive, and reduces it to five hundred dollars, which was subsequently disallowed by the court. He considers the state of the accounts elaborately, and holds the sureties on Gray and Erwin's bond liable "for the waste or default of the joint administration of Gray and Erwin, and since of the sole administration of Gray;" and he refers to the claim, September 20, 1883, of two of the sureties on the bond of Gray and Erwin, to wit, Henry C. and J. G. B. Erwin, that they never signed nor authorized any one to sign their names to a joint bond of Gray and Erwin, but he refused to hear evidence because the issue was not involved in the pleadings as they then stood. To this report defendants Veach, Rogers, Trimble, Benham, Howard, Mitchell, H. C., and J. G. B. Erwin, and Ramsauer filed their exceptions, and they subsequently petitioned the court to be allowed to file amended answers, which was allowed, and which amendments have heretofore been given.

November 26, 1883, the report was recommitted with directions, and sundry other reports made, and among them one, October 4, 1884, that H. C. Erwin, J. G. B. Erwin, and H. C. Ramsauer were not bound as sureties on the Gray and Erwin bond because they had not authorized their names to be signed to it, and holding that Benham, Rogers, Trimble, Mitchell, Veach and Howard were not thereby discharged. The master also reported that a judgment in the Bartow Superior Court had been entered February 16, 1884, *nunc pro tunc*, as of the July term, 1876, upon the verdict upon appeal from the discharge of Erwin by the Ordinary, but that his opinion remained unchanged that the release or discharge of Erwin as co-administrator with Gray did not discharge the sureties on said joint bond. The complainants excepted to the report of the master in favor of H. C. and J. G. B. Erwin, and Ramsauer. Defendants Veach, Howard, Trimble, Rogers, Benham

and Mitchell excepted to the master's report in discharging the two Erwins and Ramsauer and not discharging them, as well as to the forfeiture of certain commissions reported by him.

December 13, 1884, the defendant Cora M. Gray filed a supplemental answer, praying for a decree as a distributee, as did defendant John S. Leake, January 21, 1885.

Among the proofs in the case accompanying the master's reports were the petition of John A. Erwin for permission to resign his office of administrator, and the proceedings thereon. This petition was dated April 11, 1876, and set forth the issuing of letters of administration to Gray and Erwin; that Tumlin left as his heirs-at-law and distributees of his estate his widow, Mrs. Mary L. Tumlin, Napoleon Tumlin, Mrs. Lula T. Lyon, Mrs. Cora Gray, George Henry Tumlin, a minor, and Lewis T. Erwin; that Mrs. Gray is a minor, and Frank P. Gray her guardian; that Erwin is guardian of George Henry Tumlin and Lewis T. Erwin; that Mrs. Ada S. Rice, of Tennessee, is also one of the heirs-at-law of said Lewis Tumlin, and a distributee of his estate; that "your petitioner is in bad health, and from his physical infirmity is unable to give that attention to the management of said estate that he otherwise would, and that he ought to give as administrator; that most of the real estate belonging to said estate and a great portion of the personalty has been divided and delivered to the distributees of said estate; that Frank P. Gray, the co-administrator of your petitioner, is willing to give new bond and carry on said administration of said estate alone. Your petitioner, therefore, prays that he be permitted to resign his office as administrator on the estate of said Lewis Tumlin, upon a full and complete compliance with the law in such case made and provided, and your petitioner prays that each of said heirs-at-law of said Lewis Tumlin hereinbefore named may be cited by your honor to be and appear before your honor on the first Monday in May next, then and there to show cause, if any they have, why your petitioner should not resign his office of administrator as aforesaid, on his complying with the law in such case made and provided."

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On the 12th of April, 1876, citation in due form was issued upon said petition by the Ordinary to the heirs-at-law and distributees of the estate of Lewis Tumlin, deceased, and to the guardians of the minor heirs named in said petition, and it was "further ordered that each of said heirs-at-law who are of full age, and the guardians of the minor heirs, be served with a copy of the foregoing petition and this citation (unless they should acknowledge service) ten days before the time appointed for hearing said petition and passing on same." Service was acknowledged of the petition and citation and further service waived, April 13, 1876, by John A. Erwin as guardian for G. H. Tumlin and as guardian for L. T. Erwin, and by Frank P. Gray as administrator and as guardian for Cora Gray; service of petition and citation was also acknowledged by Mary L. Tumlin and N. Tumlin, April 17, 1876, and the petition and citation was served on Mrs. Lula T. Lyon, April 20, 1876; affidavit was also made that on the 7th [17th] day of April, 1876, a copy of the petition of Erwin and a copy of the citation signed by the Ordinary were handed to Mrs. Ada S. Rice in person, and that at the same time Mrs. Ada S. Rice wrote the following on the original, to wit: "I acknowledge service of the within petition this April 17, 1876."

On the 1st of May, 1876, Gray filed before the Ordinary a written expression of his willingness for Erwin to resign, Gray retaining the sole administration in his own name, and proposing to file "such bond in furtherance of the same as the Ordinary may deem proper in the premises."

May 1, 1876, the Ordinary entered the following order in open court:

Court of Ordinary, Bartow County. Regular Term, May 1, 1876.

John A. Erwin, one of the adm'rs of Lewis Tumlin, deceased,
v.
Frank P. Gray, adm'r; Frank P. Gray, guardian; Mary L. Tumlin, Napoleon Tumlin, *et al.*, heirs-at-law, etc.

Upon considering the above and foregoing application of John A. Erwin, one of the administrators on the estate of

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Lewis Tumlin, late of Bartow County, deceased, for leave to resign his said office of administrator, and all the heirs-at-law of Lewis Tumlin having been duly served with citation to show cause why John A. Erwin should not be allowed to resign the office of administrator on the estate of Lewis Tumlin, deceased, and all of said heirs being represented now before the court, and no sufficient cause being shown why said Erwin should not be allowed to resign his trust, as administrator as aforesaid, and it appearing to the court that the bodily health, physical infirmities, and the health of his wife are such that he is unable to give his attention to the management of the business of said estate, and Frank P. Gray being cited to appear before the court, and having been served with said citation, and now coming before the court and expressing a willingness to accept the office of administrator of the estate of Lewis Tumlin, deceased, and it appearing to the court that the allowing of said Erwin to resign his office of administrator will not injure the interest of said estate in any way: Therefore, ordered and adjudged by the court, that the resignation of the said John A. Erwin of the office of administrator on the estate of Lewis Tumlin, deceased, be, and the same is hereby, allowed, and it is hereby further ordered and adjudged by the court that Frank P. Gray, the co-administrator of the said John A. Erwin upon the estate of the said Lewis Tumlin, deceased, be, and he is hereby, declared and appointed the sole administrator of the estate of the said Lewis Tumlin, deceased, and the said Frank P. Gray is hereby required to give a new bond and security, for the faithful administration of said estate, in the sum of one hundred and forty thousand dollars, and upon said bond and security being given, and the said John A. Erwin, upon his settling and accounting with said Frank P. Gray, the sole and remaining administrator of the estate of Lewis Tumlin, deceased, his successor, of his accounts as administrator, and the filing of the receipt of his successor in the Ordinary's office, as provided by law, and upon so doing that the said John A. Erwin, as administrator and his securities, be, and they are hereby, discharged from any and all liability for any mismanagement of said estate in the future,

but not from any past liability of the said John A. Erwin, as administrator as aforesaid.

Granted in open court, May term, 1876.

J. A. HOWARD, *Ordinary.*

On the same day the petition of Gray and Erwin was filed, showing that they had distributed in kind real estate among the heirs-at-law of the deceased amounting to $114,456, specifying the parcels and amounts, and setting up that "the responsibility and the trouble in effecting the transfer has been considerable. Your petitioners allege that they have received no compensation at all for this service thus rendered said estate, and pray your honor to pass an order allowing them 3 per cent on said sum of $114,456 as commission on the same;" whereupon the court entered an order allowing the administrators "for extra compensation for delivering and dividing to the heirs-at-law the real estate in kind belonging to said deceased," 3 per cent on the above sum.

On the 6th of May a list and schedule of all the property which had come to the possession of Gray and Erwin as administrators, and which remained unadministered and in their possession May 6, 1876, not embracing the wild lands, which "have not yet been fully located," was filed, and a receipt from Gray to Erwin for all of said property, which was acknowledged before the Ordinary and filed in his office May 22, 1876. On the 2d of May, Gray gave a new bond, as required by the order of May 1, reciting the resignation of Erwin and its allowance, and the order for the new bond, the condition being: "Now, if the above bound Frank P. Gray shall well and truly administer the goods and chattels, rights and credits, lands and tenements of the said Lewis Tumlin, deceased, which remain to be administered, and which have come to the hands, possession or knowledge of the said Frank P. Gray, or in the hands or possession of any other person or persons for him," etc., etc., in the usual form; which bond was duly attested and approved by the Ordinary, and "filed in office May 2d, 1876."

On the 12th of June, 1876, the following order was entered in open court by the Ordinary:

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Court of Ordinary, Bartow County. Adjourned Term.
June 12, 1876.

John A. Erwin, Adm'r est. Lewis Tumlin, dec'd.

Upon considering the above application of John A. Erwin, one of the joint administrators of the estate of Lewis Tumlin, late of Bartow County, deceased, for a discharge, and the said John A. Erwin, as administrator, having by order of this court been permitted to resign said trust, and which resignation has been accepted by the court, and Frank P. Gray, his co-administrator, having consented to accept the entire administration of said estate, and having given new bond and security, as ordered by the court, and the said John A. Erwin having filed a return showing the property that has been administered belonging to said estate, and having filed the said Frank P. Gray's receipt for all the unadministered property belonging to said estate, and being satisfied that said return and receipt contain all the property administered and not administered belonging to said estate which has come into the hands of John A. Erwin, as administrator, it is therefore ordered that said John A. Erwin be, and he is hereby, fully discharged from the office of administrator on the estate of Lewis Tumlin, deceased, and that letters of dismission do issue to him.

Granted in open court June adj'd term, 1876.

J. A. Howard, *Ordinary.*

From this order Mrs. Mary L. Tumlin, Mrs. Lula T. Lyon and Napoleon Tumlin appealed to the Superior Court of Bartow County, where the appeal was dismissed as to Mrs. Mary L. Tumlin at her request, and upon trial the jury returned the following verdict, August 4, 1876: "That the jury find in favor of John A. Erwin, and that his resignation be allowed."

An order appears of record in the Superior Court, headed as follows:

"Appeal to the Superior Court of Bartow Co., Ga., from the order in the Ordinary's court of said county permitting John A. Erwin to resign and F. P. Gray to become sole adm'r of said estate, and required to give new bond, and Gray to become sole adm'r of said estate, and refusing to allow Theodore

Smith to be co-adm'r of said estate. Appeal from the above decision of the Ordinary made May 1st, 1876, and carried to the Superior Court of said Co., by whom the decision of said Ordinary was affirmed at the July term, 1876."

This order granted thirty days to the appellants to perfect their motion for a new trial and agree upon the evidence, the motion to be heard in vacation, so that if the motion for a new trial be refused the appellants can take the case to the Supreme Court of Georgia at the next January term. Nothing further appears to have been done in the premises, but at the January term, 1884, of the Bartow Superior Court, due notice having been given to the heirs and distributees and to the receiver in this case, the Superior Court entered judgment *nunc pro tunc* upon the verdict rendered in 1876, affirming the allowance of Erwin's resignation.

On the 22d day of January, 1885, a final decree was rendered, by which, after overruling the various exceptions to the reports of the special master, it was among other things adjudged and decreed that Gray was liable on his several administration bonds for the sum of $47,122.44, the sureties on the bond of Erwin and Gray being held liable for the whole amount, and the sureties on the other bonds for different parts of said gross sum, and from that decree appeal was prosecuted to this court by James M. Veach, J. J. Howard, W. I. Benham, R. L. Rogers, A. C. Trimble and A. W. Mitchell, a special order being entered allowing the appeal to the above named, as being those only of the sureties on the joint bond of Gray and Erwin, who excepted to the reports of the special master upon the grounds taken by them, and they alone of the defendants being interested in the questions made by their exceptions, and it being made to appear to the court that they had notified all the other defendants of their purpose to appeal.

The following sections from the Code of Georgia, third edition, 1882, were in force at the time of the transactions in question:

§ 331. Courts of Ordinary have authority to exercise original, exclusive and general jurisdiction of the following subjects matter:

Statement of the Case.

1. Probate of wills. 2. The granting of letters testamentary, of administration, and the repeal or revocation of the same. 3. Of all controversies in relation to the right of executorship or administration. 4. The sale and disposition of the real property belonging to, and the distribution of, deceased persons' estates. 5. The appointment and removal of guardians and minors and persons of unsound mind. 6. All controversies as to the right of guardianship. 7. The auditing and passing returns of all executors, administrators and guardians. 8. The discharge of former, and the requiring of new surety from administrators and guardians. 9. The issuing commissions of lunacy in conformity to law. 10. Of all such other matters and things as appertain or relate to estates of deceased persons, and to idiots, lunatics and insane persons. 11. Of all such matters as may be conferred on them by the constitution and laws. 12. [And concurrent jurisdiction with the county judge in the binding out of orphans and apprentices, and all controversies between master and apprentice.]

§ 2150. The contract of suretyship is one of strict law, and his liability will not be extended by implication or interpretation.

§ 2490. Administration *de bonis non* is granted upon an estate already partially administered, and from any cause unrepresented.

§ 2499. If administration has been granted to more than one, upon the death of either the right of administration survives to the other.

§ 2500. Administration may be granted to other persons than him in whose name the citation issues, and without a new citation being published.

§ 2505. Every administrator, upon his qualification, shall give bond, with good and sufficient security, to be judged of by the Ordinary, in a sum equal to double the amount of the estate to be administered; such bond shall be payable to the Ordinary for the benefit of all concerned, and shall be attested by him or his deputy, and shall be conditioned for the faithful discharge of his duty as such administrator, as required by law. A substantial compliance with these requisitions for the bond

shall be deemed sufficient, and no administrator's bond shall be declared invalid by reason of any variation therefrom, as to payee, amount, or condition, where the manifest intention was to give bond as administrator, and a breach of his duty as such has been proved.

§ 2510. If two or more administrators unite in a common bond, all the sureties are bound for the acts of each administrator, and the administrators themselves are mutual sureties for each other's conduct.

§ 2512. In all cases of removal of an administrator for any cause, the sureties on his bond are liable for his acts in connection with his trust, up to the time of his settlement with an administrator *de bonis non*, or the distributees of the estate.

§ 2514. If there are more administrators than one, and complaint is made against one only, and his letters are revoked, the entire trust remains in the hands of the other; and with him as to an administrator *de bonis non* the removed co-administrator must account.

§ 2610. Any administrator who, from age or infirmity, removal from the county, or for any other cause, desires to resign his trust, may petition the Ordinary, stating the reasons, and the name of a suitable person qualified and entitled to and willing to accept the trust; whereupon the Ordinary shall cite such person, and the next of kin of the intestate, to appear and show cause why the order should not be granted. If no good cause be shown, and the Ordinary is satisfied that the interest of the estate will not suffer, the resignation shall be allowed, and the administrator shall be discharged from his trust whenever he has fairly settled his accounts with his successor and filed with the Ordinary the receipt in full of such successor. Minors in interest shall be allowed five years from the time of their arrival at majority to examine into and open such settlement.

Mr. P. L. Mynatt and *Mr. N. J. Hammond* for appellants.

Mr. W. K. Moore, for appellees, contended as follows as to the points passed upon by the court in its opinion:

Argument for Appellees.

I. The minors were not parties to the proceedings upon Erwin's resignation, and not being parties, it was not effectual as against them. John A. Erwin, in seeking to resign his trust, and F. P. Gray, who wanted the sole administration, both had interest adverse to the three minor heirs. In such case the acknowledgment of service of John A. Erwin, as guardian for the minors, G. H. Tumlin and L. T. Erwin, was insufficient and ineffectual, as well as the acknowledgment of F. P. Gray, as guardian of Cora Gray, minor. This is the only service shown in the record and is the only service directed to be made in the citation itself. Code of Georgia, § 1821; Act of February 25, 1876, Session Acts of Georgia of 1876, 103.

II. Erwin's resignation, if valid, did not accomplish his release as security, nor the release of the appellants who were sureties on the joint and several bond of Frank P. Gray and John A. Erwin. Section 2510 of the Code of Georgia, which was the law at that time, provides that if two or more administrators unite in a common bond, all the sureties are bound for the acts of each administrator, and the administrators themselves are mutual sureties for each other's conduct. This provision of law is part of the bond, and should be read as if inserted in it. *Von Hoffman* v. *Quincy*, 4 Wall. 535, 550.

The act of February 10, 1854, incorporated into the Code of Georgia as § 2610, first made provision for the resignation of an executor. It seems to contemplate the resignation of a sole administrator, but is doubtless broad enough, under § 4 of the Code, paragraph 4, to include one of two or more joint administrators. That paragraph reads: "The singular or plural number shall each include the other, unless expressly excluded." Nevertheless it has no application to that case, because the whole trust remained in the survivor by operation of law. The common law is in force in Georgia, (Cobb's Digest, 721,) and by it the power of an executor survives on the death of his co-executor. And so, if administration is granted to two, and one dies, the other becomes sole administrator, and all the power of the office survives to him. 2 Williams on

Executors, citing *Jocomb* v. *Harwood*, 2 Ves. Sen. 267, 268; *Flanders* v. *Clark*, 1 Ves. Sen.; see also, *Hudson* v. *Hudson*, 1 Atk. 460, *S. C.*, *cas. temp.* Talb. 127; 2d Com. Dig. B. 7; Bac. Abr. 56, tit. Executors (G.). In case of death the entire interest vests in the survivor.

The Ordinary could not make a new appointment to the office of administrator while it was not vacant. *Griffith* v. *Frazier*, 8 Cranch, 9; *Kane* v. *Paul*, 14 Pet. 33; *Braxton* v. *State*, 25 Indiana, 82; *Pritchard* v. *State*, 34 Indiana, 137; Brandt on Suretyship and Guarantee, § 498, and cases cited; *Clarke* v. *State*, 6 G. & J. 288; *S. C.* 26 Am. Dec. 576; *Kirby* v. *Turner*, Hopk. Ch. 309; *Green* v. *Hanberry*, 2 Brock. 403. And in fact he did not attempt to exercise such a power. The order granted at May term declares that the resignation of Erwin be allowed, and that Frank P. Gray, the co-administrator of said John A. Erwin, be, and he is hereby, declared and appointed the sole administrator of the estate, and required to give new bond, etc. The Ordinary by this order declared just what the law declared in such cases. If he had regarded the office vacant and the appointment a new one it would have been his duty to administer to him the oath provided for every administrator in § 2504 of the Code, and it would also have been his duty to appoint and grant to him letters of administration *de bonis non* under § 2490 of Code. "Administration *de bonis non* is granted upon an estate already partially administered and from any cause unrepresented."

As to the discharge of the sureties, we admit that, as there was a law in force in Georgia at the date thereof authorizing the discharge of sureties, these sureties could have been discharged in the manner pointed out by that law without impairing the obligation of this contract, and that is so because such law then existing became part of the contract, as hereinbefore contended. We maintain, however, that the terms and conditions of that law must be strictly complied with; it is not only law but also contract.

Section 2509, Code of Georgia, makes the provisions of the code in reference to relief of sureties on guardians' bonds applicable to sureties on administrators' bonds, and said provis-

ions are found in the Code, § 1817. This section of the Code has been so fully construed and passed upon by the Supreme Court of Georgia that I refer to their decision to show that there was not and could not be any valid discharge of the sureties in this case. See *Dupont* v. *Mayo*, 56 Georgia, 304.

III. The second report of the special master was in error in holding that the discharge of J. G. B. Erwin, H. C. Erwin and L. S. Ramsauer because their names had been improperly signed to the joint bond of Gray and Erwin, administrators, by their attorney-in-fact, did not discharge all the sureties. *Lewis* v. *Gordon County*, 70 Georgia, 486; *Mathis* v. *Morgan*, 72 Georgia, 517; *Dair* v. *United States*, 16 Wall. 1; *State* v. *Lewis*, 73 North Carolina, 138; *Cutler* v. *Roberts*, 7 Nebraska, 4; *Nash* v. *Tugate*, 32 Grattan, 595; *Trustees of Schools* v. *Sheik*, 119 Illinois, 579; *Carroll County* v. *Ruggles*, 69 Iowa, 269.

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

By the order of the Ordinary of May 1, 1876, the resignation of John A. Erwin as administrator of the estate of Lewis Tumlin, deceased, was allowed, and Frank P. Gray was appointed sole administrator and required to give a new bond and security, which being given, and Erwin having settled and accounted with Gray, his successor in administration, and filed his receipt as provided by law, it was ordered that John A. Erwin as administrator and his securities be discharged from "any and all liability for any mismanagement of said estate in the future, but not from any past liability;" and this settlement having been made and receipt filed and new bond given by Gray, and these successive acts approved, by order of June 12, 1876, the discharge of Erwin as administrator was made absolute.

From the judgment of the Ordinary an appeal was prosecuted to the Superior Court of Bartow County by three of the heirs, one of whom dismissed her appeal, and, upon trial had, the decision of the Court of Ordinary was affirmed by

the verdict of a jury, and time taken to perfect a bill of exceptions with the view of carrying the case to the Supreme Court, which was not done. Judgment appears not to have been entered upon the verdict until pending this cause, when it was so entered *nunc pro tunc* as of July term, 1876. The Superior Court thus determined the order of the Ordinary to have been a proper one, and passed upon the question of jurisdiction.

Mrs. Ada S. Rice was duly served with Erwin's petition to be discharged, and citation to appear, but acquiesced in said orders, and did not participate in the appeal therefrom, and paid no further attention thereto, as she says in her petition to amend of May 19, 1883. Something over five years afterwards she filed the bill in this case, and by amendment, some two years after that, sought to hold the sureties on the bond of Erwin and Gray for alleged maladministration of the latter after the discharge of the former.

The Courts of Ordinary in Georgia are courts of original, exclusive and general jurisdiction over decedents' estates and the subject matter of these orders, and its judgments are no more open to collateral attack than the judgments, decrees or orders of any other court. *Davie* v. *McDaniel*, 47 Georgia, 195; *Barnes* v. *Underwood*, 54 Georgia, 87; *Patterson* v. *Lemon*, 50 Georgia, 231, 236; *Caujolle* v. *Ferrié*, 13 Wall. 465.

In *Jacobs* v. *Pou*, 18 Georgia, 346, it was held that "the judgment of dismissal, by the Court of Ordinary, in such cases, must operate as a discharge from all liability on the part of the administrator, unless the same be impeached in that court, for irregularity, or in the Superior Court, for fraud;" and in *Bryan* v. *Walton*, 14 Georgia, 185, that the order appointing an administrator, and in *Davie* v. *McDaniel*, 47 Georgia, 195, and *McDade* v. *Burch*, 7 Georgia, 559, that an order for sale of lands, could not be collaterally attacked.

It is argued, however, that upon Erwin's resignation the whole trust remained in Gray as survivor, and that the Ordinary could not make a new appointment while the office was not vacant, and § 2514 of the code is referred to, providing that, upon the revocation of the letters of one administrator, the trust remains in the hands of the other. The well-known

case of *Griffith* v. *Frazier*, 8 Cranch, 9, is also cited as in point, where letters of administration were held invalid, there being a qualified executor capable of exercising the authority with which he had been invested by the testator. But we think the position taken is untenable. Under the code, upon the death of an administrator, where there are more than one, the right of administration survives, (§ 2499,) but the Ordinary may apparently grant letters to others, (§ 2500;) and upon the revocation of the letters of one administrator, where there are more than one, the trust remains in the hands of the other, "and with him, as to an administrator *de bonis non*, the removed administrator must account," (§ 2514,) and his sureties are "liable for his acts in connection with his trust up to the time of his settlement with an administrator *de bonis non* or the distributees of the estate" (§ 2512). When an administrator resigns, and the resignation is allowed, he "shall be discharged from his trust whenever he has fairly settled his accounts with his successor and filed with the Ordinary the receipt in full of such successor" (§ 2610). This section uses the singular number, but undoubtedly covers the case of more than one administrator. Paragraph 4 of § 4 of the code reads: "The singular or plural number shall each include the other, unless expressly excluded." Code, 1882, p. 3.

Every administrator after the first is an administrator *de bonis non* in fact, and it is not important it should so appear of record. *Steen* v. *Bennett*, 24 Vermont, 303; *Grande* v. *Herrerra*, 15 Texas, 533; *Moseley's Administrators* v. *Martin*, 37 Alabama, 219; *Ex parte Maxwell*, 37 Alabama, 362.

The Ordinary in accepting the resignation of Erwin treated the case as he would have done if Erwin's letters had been revoked by removal, and entered the orders in respect to Gray, as successor of Erwin and Gray, and so administrator *de bonis non*, and the new bond was accordingly conditioned to secure the administration of the property which remained to be administered. It is said by counsel that prior to 1854 there was no provision in the laws of Georgia for the resignation of an administrator, but it would seem that if an administrator had resigned, and his resignation had been accepted, such action

on the part of the Ordinary would have been held equivalent to a revocation of his letters in the exercise of the power of removal. *Marsh* v. *The People*, 15 Illinois, 284.

As already stated, under the provisions of the Georgia code, where there are more than one administrator, and the letters of one are revoked, he must account to his co-administrator "*as to an administrator de bonis non*," and as, in the instance of the resignation of a sole administrator he must account to his successor, so where there are more than one, he who resigns must account to his co-administrator, as such successor, who would in effect in such case be an administrator *de bonis non*.

Irrespectively of statutory regulation, an administrator *de bonis non* could only administer upon the assets remaining unadministered, in specie; but under these provisions the retiring administrator must account to his successor, and such accounting is required before discharge.

It is urged that, as Erwin applied only for his own discharge as administrator and not as surety for Gray, and as the sureties made no application in their own behalf, the effect of Erwin's discharge was not to release the sureties. By § 2509 of the code, the provisions where a surety on a guardian's bonds desires to be relieved as surety are made applicable to sureties on administrators' bonds; and by § 1817 a mode is provided for obtaining such relief on complaint made by the surety to the Ordinary, citation to the guardian, hearing, and order of discharge. And in *Dupont* v. *Mayo*, 56 Georgia, 304, 306, it was held that where there was no petition, citation, or hearing, an order accepting a new bond already executed by the guardian and declaring a former surety discharged, could not be sustained. But those sections apply to a different state of case, namely, where the sureties are asking to be relieved from liability, and not where the administrator himself is requesting leave to retire.

Erwin proceeded in conformity with the statute in such case made and provided, and under the orders of May 1 and June 12, 1876, ceased to be administrator, and was discharged from further liability as such, as were the sureties who had signed the bond of Erwin and Gray.

Opinion of the Court.

In *Justices, etc.* v. *Selman*, 6 Georgia, 432, the second section of an act of 1812 came under consideration, which read as follows: "Any executor, executrix, administrator, administratrix, or guardian, whose residence may be changed from one county to another, either by the creation of a new county, removal or otherwise, shall have the privilege of making the annual returns required of them by this act, to the Court of Ordinary of the county in which they reside, by having previously obtained a copy of all the records concerning the estates for which they are bound as executors, executrix, administrators, administratrix, or guardian, and having had the same recorded in the proper office in the county in which they then reside, and having given new bond and security, as the law directs, for the performance of their duty."

The court held, Lumpkin, J. delivering the opinion, "that the mere taking of a new bond does not, necessarily, release the old sureties, and especially when the new bond is taken by authority of law, for the purpose of strengthening the existing security," but that when the second or subsequent bond is given for a new and different undertaking, it operates, *ipso facto*, as a discharge of the prior parties and hence that when the provisions of the act are fully complied with the sureties on the first bond are discharged from all further liability on account of their principal.

We are of opinion that the court erred in rendering a decree against the sureties on the joint bond of Erwin and Gray for a *devastavit* committed after June 12, 1876.

Counsel for appellees contend that the sureties on this bond were not discharged because the service of the petition and citation on the three minor heirs, on Erwin's petition to resign, was insufficient, and guardians *ad litem* should have been appointed; that the resignation, was not effectual as to them, and therefore not as to any of the others. This point was not passed upon by the special master or the Circuit Court, nor was a cross-bill filed on behalf of either of these defendants. They asked no relief as against complainants but affirmative relief against their co-defendants, these sureties, and under such circumstances cross-bills are necessary.

If, however, cross-bills were filed, as all the defendants are citizens of Georgia, and the complainants are citizens of Tennessee it is questionable whether the relief which the complainants could not obtain on their own case could be properly awarded by the Circuit Court, even though it could be successfully contended that these particular defendants were entitled to relief upon the ground suggested, and that their co-distributees could avail themselves of such conclusion, in respect to which we express no opinion, as these questions are not before us for decision in the present condition of the record.

It is assigned as error that the court decreed in accordance with the special master's report that the discharge of J. G. B. Erwin, H. C. Erwin and L. R. Ramsauer, because their names had been improperly signed to the joint bond of Erwin and Gray, did not discharge their co-sureties; but this was not urged on the argument. The master proceeded upon the ground that it was appellants' duty to see for themselves that the signatures of their co-sureties were binding upon them, if they intended to rely upon their being bound; and that it was the Ordinary's duty to see that valid signatures were made to the bond, but not to protect any one as surety, and that no fraud, concealment, or want of good faith could be charged on the Ordinary.

We do not regard the overruling of the exception, based as it is on the assumption of knowledge on the part of the Ordinary, and concealment misleading the other sureties, as erroneous. *Dair* v. *United States*, 16 Wall. 1; *Lewis* v. *Board of Commissioners*, 70 Georgia, 486; *Matthis* v. *Morgan*, 72 Georgia, 517; *Trustees* v. *Sheik*, 119 Illinois, 579.

It is further objected by appellants that the court erred in disallowing any commissions to Erwin and Gray, and particularly, the commissions of $3433.68 for distribution in kind. Upon a careful consideration of the proofs in the printed record and the various reports of the special master bearing upon this subject, we do not find such evidence of mismanagement on the part of Erwin and Gray as requires the forfeiture of all commissions, and, without entering upon any discussion of the details, we approve of the conclusions reached by the

master in his first report, and direct a modification of the decree accordingly, if, upon the return of the case to the Circuit Court, it is found, in view of our decision in respect to the discharge of Erwin and the sureties on the bond of Erwin and Gray, that Mrs. Rice is not concluded by the accounting at the time of such discharge.

Decree reversed, and cause remanded with directions to proceed in conformity with this opinion.

HAWKINS *v.* GLENN.

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

No. 266. Argued April 22, 23, 1889.— Decided May 13, 1889.

In the absence of fraud, stockholders are bound by a decree against their corporation in respect to corporate matters, and such a decree is not open to collateral attack.

Statutes of limitation do not commence to run as against subscriptions to stock, payable as called for, until a call or its equivalent has been had, and subscribers cannot object when an assessment to pay debts has been made, that the corporate duty in this regard had not been earlier discharged.

Rules applicable to a going corporation, remain applicable notwithstanding it may have become insolvent and ceased to carry on its operations, where, as in this case, it continues in the possession and exercise of all corporate powers essential to the collection of debts, the enforcement of liabilities and the application of assets to the payment of creditors.

Stockholders of record are liable for unpaid instalments, although they may have in fact parted with their stock, or may have held it for others.

The objection that too large an amount of interest has been included in a judgment cannot be raised for the first time in this court.

THE court stated the case in its opinion as follows:

John Glenn, trustee of the National Express and Transportation Company, brought an action at law, November 5, 1883, against William J. Hawkins, in the Circuit Court of the United States for the Eastern District of North Carolina, alleging

that Hawkins, on or about November 1, 1865, subscribed for two hundred and fifty shares of the capital stock of that company, a body corporate of the State of Virginia, and thereby undertook and promised to pay for each and every share so subscribed for by said defendant the sum of one hundred dollars, in such instalments and at such times as he might be lawfully called upon and required to pay the same, according to the law under which the company was incorporated; that on the 20th day of September, 1866, the express company, by its deed of that date, assigned and transferred to Hoge, O'Donnell, and Kelly, for the benefit of its creditors, all its property, rights, credits and effects of every kind, in trust for the payment of the debts of said company; that afterwards, in a certain cause instituted in the Chancery Court of the city of Richmond, in the State of Virginia, in which the official administrator of W. W. Glenn, deceased, and other persons, claiming to be creditors of the express company, were complainants, and said company, Kelly and Hoge, surviving trustees, and other persons, officers of said company, were defendants, it was, on the 14th day of December, 1880, decreed that plaintiff be, and he thereby was, appointed trustee to execute the trusts of the deed of trust in the room and stead of the trustees originally created by said deed; and it was further decreed that a large amount of the debts of the express company remained unpaid, and that, of the sum of one hundred dollars for each and every share of the stock of the company undertaken and promised to be paid for by the subscribers for said stock and their assigns, the sum of eighty dollars per share had never been called for or required to be paid by the president and directors of said company, and remained liable to be called for and required to be paid by the subscribers for said stock and their assigns; and it was further decreed that it was necessary and proper for a call of thirty per cent to be made, which call and assessment was accordingly ordered; and that, by force of his subscription and said call, the defendant was liable to pay the sum of $7500 on his shares of stock, with interest.

Hawkins filed his answer January 28, 1884, in which he said that he subscribed for two hundred of the two hundred and

fifty shares for other persons than himself, and that he was not liable thereon. He denied that he owed anything on account of any of said shares, and averred that the plaintiff was not the proper plaintiff, and "that the plaintiff's cause of action did not accrue within three years before the commencement of this action."

Upon the trial of the cause the plaintiff adduced evidence tending to show that in March, 1861, a corporation had been chartered by the legislature of the State of Virginia, to be known as the Southern Express Company, but that no organization was had thereunder; that in 1865 it was proposed to adopt the said charter as the basis of action for the formation of a new and larger enterprise of the same kind; that, accordingly, in November of that year, subscriptions having been made to the capital stock in many States, a provisional organization was effected in which the defendant Hawkins was named as one of the directors, and the business of the company was commenced and actively prosecuted; that on the 12th day of December, 1865, a new and amended charter was granted by the legislature of Virginia for a company to be known as the "National Express and Transportation Company," the defendant being named therein as one of the corporators; that the capital stock was authorized to be five million dollars, divided into shares of one hundred dollars each, of which a part was payable at the time of subscribing and the balance as called for by the president and directors; that in January, 1866, the provisions of the charter having been complied with, the corporation was duly organized, the defendant being one of the directors; that in September, 1866, having contracted many debts, and finding itself much embarrassed, it executed a deed of assignment, conveying and assigning in trust to trustees, for the benefit of all its creditors, all of its property, including the unpaid subscriptions to the capital stock, of which only twenty per cent had been called for by the president and directors; and that the trustees took possession of the assets November 1, 1866, and the business of the company ceased. Plaintiff further put in evidence the transcript of the record of the proceedings in the Chancery Court of the city of Rich-

mond, referred to in plaintiff's declaration, in which, upon a general creditor's bill brought in 1871, against the said company, and its president and directors, and the surviving trustees in said deed of assignment, the court had, by a decree entered on the 14th day of December, 1880, adjudicated the indebtedness of the said company to require an assessment of thirty per cent of the unpaid subscriptions for the payment of the same, and the necessity and propriety of an assessment of thirty per cent upon the unpaid subscriptions for the payment of the said indebtedness, and the substitution of the plaintiff as trustee to receive and collect the said assessment; and then the plaintiff introduced in evidence the stock books of said company showing the following entries as to the defendant Hawkins:

To whom transferred.		Transfer No.	Certificate No.	No. of shares.	Requisition drawn.		From whom transferred.	Certificate No.	No. of shares.	Requisition paid.
1886.						1865.				
Feb. 5	M. Bowes	436	302	10	50	Nov. 1	Company	299 to 303	250	$1250
" "	Geo. B. Waterhouse	437	302	10	50					
" "	B. P. Williamson .	438	302	10	50					
" "	R. H. Battle, Jr . .	439	302	10	50					
" "	Wm. E. Anderson .	440	302	10	50					

The defendant testified that he subscribed for two hundred and fifty shares under the following circumstances: That at the instance of three other citizens of North Carolina, viz., K. P. Battle, J. M. Hoge and B. P. Williamson, he went to Richmond in the fall of 1865, and proposed to the parties superintending the reception of subscriptions, to take fifty shares each for the above named persons, and one hundred shares for himself, having in contemplation other parties who might wish to take fifty shares of this one hundred; that the superintendent suggested that it would be more convenient to place his name only upon the books as subscriber for the whole two hundred and fifty shares, and this was done, the initials of the three persons being at the same time indorsed as a

memorandum on the subscription paper; that in January, 1866, when the company was organized, he, being one of the directors, informed the board of directors of the terms of his subscription as above, and no objection was made thereto; that he instructed the officer of the company whose business it was to issue certificates of stock to issue five for fifty shares each, three of them in the names of the above parties and two to himself, and at the same time paid two hundred and fifty dollars which had been assessed upon the two hundred and fifty shares, one hundred and fifty dollars of which he had received from his principals, but that he had receipted for such certificates upon the books of the company; that shortly afterwards the five certificates were transmitted to him in North Carolina, all five being made out in his name only; that he did not return either of them to the company, but immediately transferred each of the three in question to the party for whom it was intended; and that only one of the certificates was ever transferred upon the books of the company.

The court instructed the jury to find for the plaintiff, and the defendant excepted. The jury returned a verdict in favor of plaintiff for $9508.75, "of which $7500 is principal, and bears interest from June 1, 1885," upon which judgment was rendered and a writ of error prosecuted to this court.

The record of the Chancery Court of the city of Richmond shows that W. W. Glenn recovered judgment in the Superior Court of Baltimore City, against the express company, by default, June 8, 1869, which was entered up for $42,501.31, on assessment of damages, June 24, 1870, and that, on the 4th day of December, 1871, Glenn filed his bill on his own behalf and that of such other creditors of the express company as might become parties to the suit, against the express company, its president and directors, and the trustees named in the deed of trust, subpœnas having issued on the 28th of November, 1871, which were served on two directors of the company.

The bill sets forth the recovery of the judgment; that the trustees had collected little or nothing; that the visible property of the company had been seized by creditors in various States; that only twenty per cent had been called for from

the stockholders, of which the trustees had collected but little; that the validity and legal effect of the deed had been drawn in question in the courts of various States, and the operations of the trustees hindered; that it would be necessary to resort to the remainder of the subscription to pay the company's debts, and stockholders could not be sued until a call had been made by the company; that doubts had been expressed whether the subscriptions passed by the deed; that, if they did, the trustees could not sue without a call; and that equity demanded that money should be collected by a call and assessment upon all the stockholders. The bill prayed for a construction of the deed, the appointment of a receiver, an account, and the ascertainment of the amount necessary to be assessed for the purpose of paying the debts, etc., and for general relief.

Nothing further was done until August 4, 1879, when an amended and supplemental bill was filed asking that the trustees be removed and a new trustee be appointed, and that if the company should make no assessment upon the stockholders the court might make one. This amended bill charged that nothing had been done by the company or the trustees in execution of the trust, or to pay creditors; that the books of the company had been retained by one of the two surviving trustees, who were non-residents, the third trustee being dead, etc. It does not appear that process was issued against the company upon the original bill, but upon the amended and supplemental bill a subpœna was issued against it, its officers, directors, and trustees, and this was served upon two directors and a cashier of the company, and published for four weeks in a newspaper in the city of Richmond.

The surviving trustees, Hoge and Kelly, filed answers setting forth in detail a variety of causes which had operated to delay and impede their proceedings, and furnished excuses for their apparent *laches*, particularly litigation in Maryland and New York, in which injunctions were granted, and, in one of the suits, a receiver was appointed, to whom the books and papers of the company were consigned, and when returned, on the disposition of that case, after the lapse of some years, they were carried to New York.

Argument for Plaintiff in Error.

A decree *pro confesso* was taken against the company in September, 1879, and an interlocutory order entered on the 6th of October following, referring the case to one of the commissioners of the court to take an account of the debts due by the company and the priorities thereof, and an account of its assets, etc., upon giving due notice by publication, which he did. The commissioner made report ascertaining the total of indebtedness, and the whole amount of unpaid stock; and he recommended an assessment of twenty per cent. By a supplemental report an increase of the assessment was recommended, and a decree was finally rendered, December 14, 1880, sustaining the deed of trust, substituting John Glenn as trustee, holding that the power to make assessment remained with the company after the deed was executed, finding the amount of the indebtedness and that there was no property to pay the debts except the eighty per cent unpaid of the capital stock, and ordering an assessment of thirty per cent, payable to Glenn, trustee, who was thereby authorized to collect and receive the same.

Mr. Samuel F. Phillips (with whom were *Mr. W. H. Lamar* and *Mr. J. G. Zachry* on the brief) for plaintiff in error.

I. Interest upon the call accrued only from actual demand upon the defendant. The decree for a call was made nearly thirteen years after the company stopped business. The defendant was not a party to the suit. Under these circumstances he is not chargeable with neglect for non-compliance with the order, until actually notified of it. The language of this court in *Sanger* v. *Upton*, 91 U. S. 56, is to be taken in connection with the contention made in that case that a stockholder is not bound at all by a call made in a cause to which he is not a party. We do not deny that he is bound by it. We only maintain that he is not chargeable with *laches* for not obeying it until he is notified of its requirements. *Hunt* v. *Nevers*, 15 Pick. 500, 505; *S. C.* 26 Am. Dec. 616. A call by the court is not a decree for the money included in the call. *Glenn* v. *Saxton*, 68 California, 353.

II. The defendant is not responsible for the subscription to

the 150 shares taken by him for solvent and named principals and for which it was, at the time of the subscription, agreed between the parties that he should not be liable. As between him and the company he could not have been held liable. *Scovill* v. *Thayer*, 105 U. S. 143, 153. This action is brought by a substitute for the trustees who were created by the voluntary act of the company. That substitute is bound to all to which the company itself would have been bound, if it had been plaintiff. *Wisner* v. *Brown*, 122 U. S. 214.

The rule that if an agent bind himself upon the face of a written contract he cannot discharge himself therefrom by showing that he did so merely as agent, does not apply to cases like this, in which courts of law are authorized by statute to admit equitable pleas. *Wake* v. *Harrop*, 6 H. & N. 768; *S. C.* 1 H. & C. 202.

III. The cause of action did not accrue within three years. To consider the circumstances of the present case more closely:

(1) It is essentially unlike the case of a call made by the authorities of a corporation still doing business. For in that case the subscriber has contracted that such authorities may call as and when in their judgment the affairs of the company may require it; and the state of things contemplated at the time of subscription is still going on. Therefore in that case it may very well be that, although no call has been made upon unpaid subscriptions within ten years or more, the statute of limitations has no application. *Modus et conventio vincunt legem.* The case may be the same where a promise has been made to pay money so many days after demand and there is no context showing that such demand was to be made within a limited time; for there, if the holder makes no demand [*i.e.*, call] for ten years or more, he is authorized by the contract so to delay, and the statute is inapplicable for the reason just stated.

(2) The period of time in the present case whose lapse is supposed to have given effect to the statute of limitations was a period during the whole of which the provision in the subscription as affected by the Virginia statute, which submits the subscriber to the discretion of "the president and

directors" as to the time at which calls might be made, had become null, and the latter had, in respect of calls, become subject to the general principles of courts of justice. It is not because a debtor has contracted to be subject to the judgment of a court, whether for a call or otherwise, that such judgment is given. Judicial action, in that case only, supervenes upon the state of things which the contract had created, in the same way that it does upon like states created by torts. *In re Welsh Flannel and Tweed* Co., L. R. 20 Eq. 360; *In re Glen Iron Works*, 20 Fed. Rep. 674.

If the suit for a call is to be considered as a mere incident to the suit to recover the amount called, it follows that inasmuch as after the stoppage of business the time of making a call was no longer matter of discretion, but was subject to the notice and direction of the law, the lapse of time before making application for such call (the bringing suit therefor) is to be counted in reckoning, under the statute of limitations, whether the suit subsequently brought under such call has been brought in good time. *Diefenthaler* v. *New York City*, 111 N. Y. 331; *Borst* v. *Corey*, 15 N. Y. 505; *Glenn* v. *Dorsheimer*, 23 Fed. Rep. 695; *Atchison & Topeka Railroad* v. *Burlingame*, 36 Kansas, 628; *Chalfin* v. *Moore*, 9 B. Mon. 496; *S. C.* 50 Am. Dec. 525; *Pittsburg & Connellsville Railroad* v. *Byers*, 32 Penn. St. 22; *S. C.* 72 Am. Dec. 770; *Morrison* v. *Mullin*, 34 Penn. St. 12; *Keithler* v. *Foster*, 22 Ohio St. 27; *Palmer* v. *Palmer*, 36 Mich. 487.

Mr. Wilbur F. Boyle, by special permission of court, also addressed the court for plaintiff in error. *Mr. John W. Dryden* was with him on his brief.

Mr. Charles Marshall and *Mr. John Howard* for defendant in error. Their brief contained the following list of reported cases in which one or more of the questions involved in the present case had been tried and adjudicated.

In the Court of Appeals of Virginia. *Vanderwechen* v. *Glenn*, 6 S. E. Rep. 806; *Lewis's Adm'r.* v. *Glenn*, 6 S. E. Rep. 866; *Hambleton* v. *Glenn*, 13 Virginia Law Journal, 242.

In the Supreme Court of Alabama. *Glenn* v. *Semple*, 80 Alabama, 159; *Lehman, &c.* v. *Glenn*, 13 Virginia Law Journal, 302; *Semple* v. *Glenn*, 13 Virginia Law Journal, 305; *Sayre* v. *Glenn*, 13 Virginia Law Journal, 307; *Morris* v. *Glenn*, 13 Virginia Law Journal, 224.

In the Court of Appeals of Maryland. *Glenn* v. *Williams*, 60 Maryland, 93; *Glenn* v. *Clabaugh*, 65 Maryland, 65; *Glenn* v. *Howard*, 65 Maryland, 40; *Glenn* v. *Savage*, 65 Maryland, 40; *McKim* v. *Glenn*, 66 Maryland, 479.

In North Carolina. *Glenn* v. *Orr*, 96 North Carolina, 413.

In Georgia. *Glenn* v. *Howard*, 8 S. E. Rep. 636.

In California. *Glenn* v. *Saxton*, 68 California, 353.

In the Federal Courts. *Glenn* v. *Camden*, *Glenn* v. *Bennett*, *Glenn* v. *Bland*, in the Circuit Court of the United States for the District of West Virginia, reported in Parkersburg State Journal of June 25th and 26th of 1886. *Glenn* v. *Jackson* and *Glenn* v. *Calaway*, before the late Judge Baxter, reported in the Louisville Courier-Journal, October 31, 1885. *Glenn* v. *Dorsheimer*, 23 Fed. Rep. 695; *S. C.* 24 Fed. Rep. 536; *Glenn* v. *Springs*, 26 Fed. Rep. 494; *Glenn* v. *Scott*, 28 Fed. Rep. 804; *Glenn* v. *Coyle*, 22 Fed. Rep. 417; *Glenn* v. *Soule*, 22 Fed. Rep. 417; *Foote* v. *Glenn*, 36 Fed. Rep. 824.

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

Counsel for plaintiff in error contends that the decree of the Richmond Chancery Court making the call and assessment was void as against him, because he was not a party to the suit; that the cause of action was barred by the statute of limitations; that he was not responsible upon one hundred and fifty shares of the stock; and that interest should not have been allowed from the date of the call, but only from the time of the filing of the complaint.

The jurisdiction of the Richmond Chancery Court to settle the construction of the deed of trust, to remove the original trustees and substitute another, and to ascertain the extent of the liabilities and assets of the corporation, is not denied. It

is conceded that the balance remaining unpaid on subscriptions to stock is a trust fund for the payment of corporate debts and that a judgment obtained against a corporation cannot be impeached except for fraud.

But it is said that a binding assessment cannot be levied without the presence of the stockholders or service of process or notice upon them.

Under the charter of this company a call could only be made by the president and directors and was a corporate question merely, and in the situation of the company's affairs it was a duty to make it, failing the discharge of which by the president and directors, creditors could set the powers of a court of equity in motion to accomplish it.

Executing in that regard a corporate function for a corporate purpose, it is difficult to see upon what ground it could be held that the court could not order an assessment operating upon stockholders, who would be bound if the president and directors had ordered it.

Sued after such an order of court, the defendant does not deny the existence of any one of the facts upon which the order was made, but contends that there has been no call as to him, because he was not a party to the cause between creditor and corporation. We understand the rule to be otherwise, and that the stockholder is bound by a decree of a court of equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company.

A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member. *Sanger* v. *Upton*, 91 U. S. 56, 58, in which case it is also said: "It was not necessary that the stockholders should be before the court when it [the order] was made, any more than that they should have been there when the decree of bankruptcy was pronounced. That decree gave the jurisdiction and authority to make the order. The plaintiff in error could not, in this action, question the validity of the decree; and for the same reasons she could not draw into question the validity of the

order. She could not be heard to question either, except by a separate and direct proceeding had for that purpose." As against creditors there is no difference between unpaid stock "and any other assets which may form a part of the property and effects of the corporation," (*Morgan County* v. *Allen*, 103 U. S. 498, 509,) and "the stockholder has no right to withhold the funds of the company upon the ground that he was not individually a party to the proceedings in which the recovery was obtained." *Glenn* v. *Williams*, 60 Maryland, 93, 116. In the last cited case, which was an action to recover upon the assessment controverted here, the Court of Appeals of Maryland passed upon the question now before us, and held in an able opinion by Alvey, J., that the Richmond Chancery Court acquired jurisdiction over the express company and the trustee; that that court had power and jurisdiction to make assessments upon the unpaid subscriptions to raise funds to pay the corporation's debts, and its decree making such assessment was binding and effective "upon the stockholders who were not in their individual capacities parties to the cause;" that Glenn was legally appointed trustee; and that the statute of limitations began to run only from the time the assessment was made by the decree of the court in Virginia and could form no bar to the right to recover in the action. *Sanger* v. *Upton*, *supra*, is quoted from, and it is correctly stated that that decision "was made not in pursuance of any express provision of the bankrupt law, but in analogy to the powers and procedure of a court of equity and to meet the requirements and justice of the case."

In *Hambleton* v. *Glenn*, 13 Virginia Law Journal, 242, [decided in the Court of Appeals of Virginia March 14, 1889, and not yet reported in the official series,] the rejection by the Circuit Court of Henrico County, Virginia, to which the suit in the Richmond Chancery Court had been removed, of a petition of certain stockholders to be made parties, and for a rehearing of the cause, came under review in the Supreme Court of Appeals of Virginia, and that court among other things said: "The first question raised in this court is that the appellants are entitled to be made parties to the suit of *Glenn* v.

National Express and Transportation Company, because the relief sought is against them. The suit of *Glenn* v. *The National Express and Transportation Company* is a creditor's suit against a corporation, and, by the terms of its charter and the laws of this State applicable to said company, it was lawfully sued as such by its corporate name, and the individual stockholders were not proper parties to such a suit, the president and directors being by their selection their representatives for this purpose. The appellants admit this as to any live and going corporation, and claim, as the corporation is dead, that by its deed of trust it assigned to trustees and ceased to exist; that in a suit by a creditor, or by creditors generally, the suit against the corporation is in fact one not against the corporation, but against them as stockholders, and they are not represented by the company nor by the trustees. By the law of this State, (Code of 1873, c. 56, § 31,) 'when any corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property, and debts due to it, shall be subject to the payment of debts due by it, and then to distribution among the members according to their respective interests; *and such corporation may sue and be sued as before*, for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, *and enforcing its liabilities*, and distributing the proceeds of its works, property and debts, among those entitled thereto.' By which it is provided that, notwithstanding its death, it stands, for the purpose of being sued by creditors, just as it did while live and going, and may sue and be sued as before, and that the directory has assigned to trustees alters the case only so far as to make the trustees necessary parties."

The section quoted from the Code of 1873 is identical with section 30 of chapter 56 of the Code of 1860; and as the corporation, notwithstanding it may have ceased the prosecution of the objects for which it was organized, could still proceed in the collection of debts, the enforcement of liabilities, and the application of its assets to the payment of its creditors, all corporate powers essential to these ends remained unimpaired. We concur in the decision to this effect of the highest

tribunal of the State where the corporation dwelt, in reference to whose laws the stockholders contracted, (*Canada Southern Railway* v. *Gebhard*, 109 U. S. 527,) and in whose courts the creditors were obliged to seek the remedy accorded. *Barclay* v. *Tallman*, 4 Edw. Ch. 123; *Bank of Virginia* v. *Adams*, 1 Parsons Sel. Cas. 534; *Patterson* v. *Lynde*, 112 Illinois, 196.

We think it cannot be doubted that a decree against a corporation in respect to corporate matters, such as the making of an assessment in the discharge of a duty resting on the corporation, necessarily binds its members in the absence of fraud, and that this is involved in the contract created in becoming a stockholder.

The decree of the Richmond Chancery Court determined the validity of the assessment; and that the lapse of time between the failure of the company and the date of the decree did not preclude relief, by creating a bar through statutes of limitation or the application of the doctrine of *laches*. And so it has been held in numerous cases referred to on the argument. The court may have erred in its conclusions, but its decree cannot be attacked collaterally, and, indeed, upon a direct attack, it has already been sustained by the Virginia Court of Appeals. *Hambleton* v. *Glenn*, *supra*.

Some further observations may not inappropriately be added. Unpaid subscriptions are assets, but have frequently been treated by courts of equity as if impressed with a trust *sub modo*, upon the view that, the corporation being insolvent, the existence of creditors subjects these liabilities to the rules applicable to funds to be accounted for as held in trust, and that therefore statutes of limitation do not commence to run in respect to them, until the retention of the money has become adverse by a refusal to pay upon due requisition.

But the conclusion as to the statute need not be rested on that ground; for, although the occurrence of the necessity of resorting to unpaid stock may be said to fix the liability of the subscriber to respond, he cannot be allowed to insist that the amount required to discharge him became instantly payable though unascertained, and though there was no request, or its equivalent, for payment.

Opinion of the Court.

And here there was a deed of trust made by the debtor corporation for the benefit of its creditors, and it has been often ruled in Virginia, that the lien of such a trust deed is not barred by any period short of that sufficient to raise a presumption of payment. *Smith* v. *Virginia Midland Railroad*, 33 Grattan, 617; *Bowie* v. *The Poor School*, 75 Virginia, 300; *Hambleton* v. *Glenn*, 13 Virginia Law Journal, 242. This deed was not only upheld and enforced by the decree of December 14, 1880, but also the power of the substituted trustee to collect the assessment by suit in his own name, was declared by the Court of Appeals of Virginia, in *Lewis's Administrator* v. *Glenn*, 6 S. E. Rep. 866. See also *Baltimore & Ohio Railroad* v. *Glenn*, 28 Maryland, 287.

By the deed the subscriptions, so far as uncalled for, passed to the trustees, and the creditors were limited to the relief which could be afforded under it, while the stockholders could be subjected only to equality of assessment, and as the trustees could not collect except upon call, and had themselves no power to make one, rendering resort to the president and directors necessary, or, failing their action, then to the courts, it is very clear that the statute of limitations could not commence to run until after the call was made.

The rule laid down in *Scovill* v. *Thayer*, 105 U. S. 143, 155, applies. In that case it was said by Mr. Justice Woods, speaking for the court: "There was no obligation resting on the stockholder to pay at all until some authorized demand in behalf of creditors was made for payment. The defendant owed the creditors nothing, and he owed the company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company, his obligation was to pay to the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete." And it was held, "that when stock is subscribed to be paid

upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The court will do what it is the duty of the company to do. . . . But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment; and it is clear the statute of limitations does not begin to run in his favor until such order or demand."

Constituting, as unpaid subscriptions do, a fund for the payment of corporate debts, when a creditor has exhausted his legal remedies against the corporation which fails to make an assessment, he may, by bill in equity or other appropriate means, subject such subscriptions to the satisfaction of his judgment, and the stockholder cannot then object that no call has been made. As between creditor and stockholder, "it would seem to be singular if the stockholders could protect themselves from paying what they owe by setting up the default of their own agents." *Hatch* v. *Dana*, 101 U. S. 205, 214. The condition that a call shall be made is, under such circumstances, as Mr. Justice Bradley remarks in the matter of *Glen Iron Works*, 20 Fed. Rep. 674, 681, "but a spider's web, which the first breath of the law blows away." And as between the stockholder and the corporation, it does not lie in the mouth of the stockholder to say, in response to the attempt to collect his subscription, for the payment of creditors, that the claim is barred because the company did not discharge its corporate duty in respect to its creditors earlier. *County of Morgan* v. *Allen*, 103 U. S. 498.

These considerations dispose of the alleged error in not sustaining the defence of the statutory bar.

By § 26, c. 57, Tit. 18, "Chartered Companies" of the Virginia Code of 1873, (p. 551,) it is provided that "no stock shall be assigned on the books without the consent of the company, until all the money which has become payable thereon shall have been paid; and on any assignment the assignee and assignor shall each be liable for any instalments which may

have accrued, or which may thereafter accrue, and may be proceeded against in the manner before provided." And this was the provision of the Code of 1860, (c. 57, Tit. 18, § 24,) and in *Hambleton* v. *Glenn*, *supra*, it was held "that under that section the assignee and assignor are liable for any instalment which may have accrued or which may hereafter accrue," and to the same effect is *McKim* v. *Glenn*, 66 Maryland, 479.

Defendant claims that of the two hundred and fifty shares for which he subscribed, he took one hundred and fifty shares for three other persons. The stock ledger shows that five certificates of fifty shares each were sent to defendant, made out in his name; and it appears from his evidence that he transferred three certificates for fifty shares each to Hoge, Battle and Williamson, though they failed to have them transferred to their own names on the books of the company. Of the remaining one hundred shares, defendant retained fifty and transferred the other fifty to five other persons whom he had anticipated, when he subscribed, might take them. So far as appears from the stock register the plaintiff remained the original owner of two hundred shares and the assignor of fifty, and no error is assigned as to this fifty.

Section 25 of c. 57, Tit. 18, of the Code of Virginia of 1860, is as follows: "A person in whose name shares of stock stand on the books of a company shall be deemed the owner thereof as it regards the company." Code of 1873, Tit. 18, c. 57, § 27.

So far as creditors were concerned, Hawkins remained a shareholder as to the two hundred shares. *Pullman* v. *Upton*, 96 U. S. 328; *Richmond* v. *Irons*, 121 U. S. 27; *Upton* v. *Tribilcock*, 91 U. S. 45.

The judgment of the Circuit Court cannot be disturbed because the defendant was held liable on two hundred and fifty shares.

It is also objected that interest upon the amount called should have been allowed from the date of the commencement of the suit and not from the date of the decree, but the difficulty with this contention is, that there was no motion for a new trial in the case. The court, so far as appears, gave

no instruction on the subject of the amount of the interest, and the exception to the instruction to find for the plaintiff does not question the amount found by the jury. The Code of Virginia of 1860 provides: "If the money, which any stockholder has to pay upon his shares, be not paid as required by the president and directors, the same, with interest thereon, may be recovered by warrant, action or motion as aforesaid." (Code of 1860, Tit. 18, c. 57, § 21; Code of 1873, Tit. 18, c. 57, § 23.) Interest would, therefore, seem chargeable from the date of the call.

The judgment of the Circuit Court is

Affirmed.

EMBREY *v.* JEMISON.

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

No. 235. Argued April 3, 4, 1889. — Decided May 13, 1889.

A contract for the purchase of "future-delivery" cotton, neither the purchase or delivery of actual cotton being contemplated by the parties, but the settlement in respect to which is to be upon the basis of the mere "difference" between the contract price and the market price of said cotton futures, according to the fluctuations in the market, is a wagering contract and illegal and void, as well under the statutes of New York and Virginia, as generally in this country.

The original payee cannot maintain an action upon a note, the consideration of which is money advanced by him upon or in execution of a contract of wager, he being a party to such contract, or having directly participated in the making of it in the name, or on behalf of one of the parties.

The statute of Virginia, (Code of 1873, c. 146, § 20,) provided that when a right of action accrues "against a person who had before resided in this State, if such person shall, by departing without the same, or by absconding or concealing himself, or by any other indirect ways or means, obstruct the prosecution of such right, the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted;" *Held*, that this was inapplicable when the defendant, although once a resident of that State, removed therefrom before any right of action accrued against him, and before the transactions occurred out of which the plaintiff's cause of action arose.

Statement of the Case.

THIS was an action of debt to recover from the plaintiff in error, who was the defendant below, the amount of four negotiable notes executed by him, January 21, 1878, and payable at the office of E. S. Jemison & Co., in the city of New York, to the order of Moody & Jemison, by whom they were indorsed, before maturity, to the plaintiff, Jemison. Each note was for the sum of $7594.15, two of them payable six months, and the remaining two twelve months, after date. There was a trial before a jury, resulting in a verdict and judgment in favor of the plaintiff for the amount demanded in the declaration. The case was brought here for review, the defendant contending that the court committed such errors of law as entitled him to a reversal of the judgment and to a new trial.

In addition to a plea of *nil debet*, the defendant filed a special plea of wager, in which it was averred, in substance, that on the last of February, or the first of March, in the year 1877, he contracted with the firm of Moody & Jemison, brokers and commission merchants of the city of New York, and members of the Cotton Exchange, to purchase for him, through the plaintiff, one of that firm, "on a margin," in said Cotton Exchange, not actual cotton, but four thousand bales of "future-delivery" cotton, for May delivery, commonly called "futures," which he did; that at the time of the purchase the defendant had in the hands of Moody & Jemison about eight thousand dollars as a margin to protect said purchase against fluctuations in the market; that in the first few days of the month of March the plaintiff, as a member of the firm of Moody & Jemison, reported that the margin was about exhausted by a decline in the market, and called for more margin, which defendant informed him he was unable to put up; that no agreement or contract was at that time, or afterwards, made with the firm of Moody & Jemison to have the said "cotton futures" carried for his account; that no report was afterwards made to him of any sale of such futures; that on the 21st day of January, 1878, in the city of New York, the plaintiff called on him for his four notes for losses which he alleged the firm of Moody & Jemison had sustained by carrying said "cotton

futures," which notes the defendant executed, and which are the identical notes described in the declaration; "that the purchase or delivery of actual cotton was never contemplated, either by the defendant or the said Moody & Jemison, and it was understood between them that the settlement was to be made between said parties by one party paying to the other the difference between the contract price and the market price of said cotton futures, according to the fluctuations in the market; and, therefore, the defendant says that the said contract was a wagering contract, and that it and the said four notes for the consideration aforesaid are void and of no force in law."

A demurrer to this plea was sustained, the defendant taking his exception in proper form.

On the trial of the case on the plea of *nil debet* the plaintiff, to maintain the issue upon his part, gave in evidence the four notes described in the declaration, and the defendant testified to the facts set forth in the above special plea of wager. And this was all the evidence before the jury. Thereupon the defendant asked the court to instruct the jury as follows: "If the jury shall believe from the evidence that it was not the intention of either party that a contract should be made by the plaintiff to buy and hold the bales of cotton for delivery to the defendant, but that it was the real intention and understanding of the parties that a contract should be made which should be closed at a future day, not by delivery of the cotton and payment of purchase price, but by payment of money to the one party or the other, the party to receive the same and the amount to be paid to be determined upon a basis of the difference between the agreed purchase price on the —— day of ——, 18—, and the actual market value of the cotton on the day when the contract was to be closed, then the jury are instructed that such a contract is invalid in law and void, and that they must find for the defendant." The court refused to give this instruction, and the defendant duly excepted.

Although the notes in suit are dated at the city of New York, and were payable at the office of E. S. Jemison & Co., in that city, it does not clearly appear whether the original

contract between Embrey and the firm of Moody & Jemison, referred to in the special plea of wager, and in the above instruction, was made in Virginia, or in New York. There was, consequently, some discussion as to whether the statute of Virginia or that of New York should control the determination of the question as to the illegality of that contract. The statute of Virginia provides that "every contract, conveyance, or assurance, of which the consideration, or any part thereof, is money, property, or other thing won or bet at any game, sport, pastime or wager, or money lent or advanced at the time of any gaming, betting or wagering, to be used in being so bet or wagered, (when the person lending or advancing it knows that it is to be so used,) shall be void." Code of Va. 1873, 984, Title 43, c. 140, § 2. By the statute of New York it is provided that "all wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful. All contracts for or on account of any money or property, or things in action, so wagered, bet, or staked, shall be void." 1 Rev. Stat. N. Y., Part I, Title 8, art. 3, § 8.

The defendant also pleaded the statute of limitations to the amended declaration; that the cause of action did not "accrue to the said plaintiff at any time within five years next before the commencement of this suit." To this the plaintiff replied, (setting up the Code of 1873, c. 146, § 20,) "that he ought not to be barred by reason of anything by the said defendant in his said plea of the statute of limitations alleged, because he says that at the time when the said several causes of action in the declaration mentioned, and each and every of them did accrue to the said plaintiff, the said defendant had before resided in the State of Virginia, and did by departing without the same obstruct the said plaintiff in the prosecution of his said several causes of action, and of each and every of them for several, to wit, two or more years next after the same accrued as aforesaid; and the said plaintiff says that the time that such obstruction continued is not to be computed as any part of the time within which the said several causes of action

and each and every of them ought to have been prosecuted, and that, excluding the said time that such obstruction continued, the plaintiff brought this said action within five years next after the accruing of the said several causes of action and of each and every of them."

The defendant rejoined "that the plaintiff ought not by reason of anything in his replication alleged to have and maintain his action against him, because he says that by his removal from the State of Virginia and departing without the same, as in his said replication is alleged, he did not obstruct the said plaintiff in the prosecution of his suit upon the alleged causes of action in the declaration mentioned, because he says that his removal from the State of Virginia and departing without the same was in the year 1859, a long time before any of the alleged causes of action existed or accrued to the plaintiff against this defendant, and that when said causes of action accrued to the plaintiff he was, and still considers himself, a citizen of the State of Louisiana."

Other issues were made by the pleadings, which the opinion of the court makes unimportant.

Mr. Joseph Christian and *Mr. James M. Matthews* for plaintiff in error.

Mr. Henry M. Herman for defendant in error.

I. The court below did not err in sustaining the demurrer to the defendant's amended plea of wager.

There was no error in the action of the court below striking out the plea of wager, for there is at the very threshold of this case a well-settled principle of law which excludes it from consideration entirely, viz.: that when parties, having mutual matters of account between them growing out of a contract, deliberately come together and state a balance, and the party who on such accounting is found indebted to the other, pays the debt or gives a written obligation for its payment, this settlement is so far conclusive between the parties that it cannot be re-opened or gone into either at law or equity except upon clear proof of fraud or mistake, or of an express under-

standing that certain matters were left open for settlement. *Oil Co.* v. *Van Etten*, 107 U. S. 325; *Perkins* v. *Hart*, 11 Wheat. 237; *Hager* v. *Thomson*, 1 Black, 80; *Bull* v. *Harris*, 31 Illinois, 487; *Lee* v. *Reed*, 4 Dana, 109; *Hodges* v. *Hosford*, 17 Vermont, 615; *Martin* v. *Beckwith*, 4 Wisconsin, 219; *Gibson* v. *Hanna*, 12 Missouri, 162; *Cogswell* v. *Whittlesey*, 1 Root, 384; *Sergeant* v. *Ewing*, 36 Penn. St. 156; *Nicholson* v. *Pelanne*, 14 La. Ann. 508. And when such an account is settled, the presumption is that all the previous dealings between the parties relating to the subject matter of the account are adjusted. *Bourke* v. *James*, 4 Michigan, 336; *Mills* v. *Geron*, 22 Alabama, 669.

It is a well-settled principle in the Federal courts that a party to a negotiable instrument is not a competent witness to prove any fact existing at the time of his accrediting the paper, tending to invalidate it. *Bank of the United States* v. *Dunn*, 6 Pet. 51; *Bank of the Metropolis* v. *Jones*, 8 Pet. 12; *Scott* v. *Lloyd*, 12 Pet. 145; *Henderson* v. *Anderson*, 3 How. 73; *Smyth* v. *Strader*, 4 How. 404; *Saltmarsh* v. *Tuthill*, 13 How. 229; *Sweeney* v. *Easter*, 1 Wall. 166; *Davis* v. *Brown*, 94 U. S. 423.

It has also been settled in this court that a continued recognition of a debtor's liability and his agreement to discharge it, after he has full knowledge of all the facts in relation to the matter, estop him from pleading a want of consideration or setting up fraud as a defence to an action on the promise. *Fitzpatrick* v. *Flannagan*, 106 U. S. 648; *McCreary* v. *Parsons*, 31 Kansas, 447; *Stebbins* v. *Crawford County*, 92 Penn. St. 289; *Negley* v. *Lindsay*, 67 Penn. St. 217. A negotiable note or bill of exchange is an extinguishment of a simple contract debt, the maker being liable to pay the money to a third person. 2 Bac. Abr. Debt, G. 290; *Kearslake* v. *Morgan*, 5 T. R. 513.

These promissory notes are evidence of an account stated. And after giving them, Embrey cannot go into evidence to impeach the charges in the first account, which has been settled. *Laycock* v. *Pickles*, 4 B. & S. 497; *Milward* v. *Ingram*, 2 Mod. 44.

Argument for Defendant in Error.

The only statute in Virginia as to wagers, enacted in 1849, is the following: "Every contract, conveyance or assurance, of which the consideration, or any part thereof, is money, property or other thing won, or bet, at any game, sport, pastime or wager, or money lent or advanced at the time of any gaming, betting or wagering, to be used in being so bet or wagered, (when the person lending or advancing it knows that it is to be so used,) shall be void."

This statute is a penal statute, and must be strictly construed. It must be limited in its application to the object the legislature had in view, and cannot be extended to matters that did not exist when the statute was made. Penal statutes cannot be enlarged by intendment, and acts not expressly forbidden by them cannot be reached merely because they resemble the offences provided against, or are equally, or in the same way demoralizing or injurious. They cannot be made to embrace anything which was not within the intent of the legislature. *Shaw* v. *Clark*, 49 Michigan, 384; *United States* v. *Clayton*, 2 Dillon, 219; *Griffiths* v. *Sears*, 112 Penn. St. 523; *United States* v. *Morris*, 14 Pet. 464; *McCormick* v. *Nichols*, 19 Bradwell (Ill. App.) 334; *United States* v. *Wiltberger*, 5 Wheat. 76; *Reed* v. *Davis*, 8 Pick. 514; *United States* v. *Sheldon*, 2 Wheat. 119; *Sprague* v. *Birdsall*, 2 Cowen, 419; *Ferrett* v. *Atwill*, 1 Blatchford, 151; *Jenkinson* v. *Thomas*, 4 T. R. 665; *Fletcher* v. *Lord Sondes*, 3 Bing. 501; *Rex* v. *Handy*, 6 T. R. 286; *Rex* v. *Hymon*, 7 T. R. 536; *Walwin* v. *Smith*, 1 Salk. 177; *United States* v. *Ragsdale*, Hemp. 497. On this point see especially *Brown* v. *Speyers*, 20 Grattan, 296, 308, where this question is fully discussed.

Though an illegal contract will not be enforced, yet, when it has been executed by the parties, and the illegal object has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise express or implied. *Planters' Bank* v. *Union Bank*, 16 Wall. 483; *Brooks* v. *Martin*, 2 Wall. 70; *Cook* v. *Sherman*, 20 Fed. Rep. 167. The transaction alleged to be illegal is completed and closed, and will not be affected by what the court is asked to do, between the parties. *McBlair* v. *Gibbes*, 17 How. 232; *Brooks* v. *Martin*, *ubi supra*.

II. The court below correctly construed the statute of limitations. The construction given by a state court to a statute of the State is received as true; and enforced in all Federal courts unless it conflicts with the Constitution or laws of the United States. *Leffingwell* v. *Warren*, 2 Black, 599. State statutes of limitation, no rule being given by Congress, form the rule of decision in United States courts and the like effect is there given as in the state courts. *McCluny* v. *Silliman*, 3 Pet. 270; *Ross* v. *Duval*, 13 Pet. 45; *Harpending* v. *Dutch Church*, 16 Pet. 455; *Moores* v. *National Bank*, 104 U. S. 625; *Henderson* v. *Griffin*, 5 Pet. 151; *Goldenberg* v. *Murphy*, 108 U. S. 162. The state statutes of limitations govern in common law cases in the Federal courts unless Congress has provided otherwise. Rev. Stat. § 721. In *Ficklin* v. *Carrington*, 31 Gratt. 224 to 227, the Court of Appeals of Virginia passed on precisely the same plea of the statute of limitations as that set up by the plaintiff in error in this case, and the opinion in that case delivered by Christian, Judge, is identical with the construction given to it by the court below, in this case.

And this is the construction placed upon similar statutes in other States and by this court. It applies when the party is without the limits of jurisdiction of the State where the action is brought. *Murray* v. *Baker*, 3 Wheat. 541; *Bank of Alexandria* v. *Dyer*, 14 Pet. 141; *Brent* v. *Tasker*, 1 Harr. & McH. 89; *Forbes* v. *Foot*, 2 McCord, 331; *S. C.* 13 Am. Dec. 732; *Denham* v. *Holeman*, 26 Georgia, 182; *S. C.* 71 Am. Dec. 198; *White* v. *Bailey*, 3 Mass. 271; *Byrne* v. *Crowninshield*, 1 Pick. 263; *Galusha* v. *Cobleigh*, 13 N. H. 79.

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

Whether the validity of the original contract for the purchase of future-delivery cotton must depend upon the New York statute or upon the Virginia statute, it is not important to determine; for, if such contract, as alleged, is a wagering contract, it is void under the law of either State. The plea makes a case of money advanced by the plaintiff's firm solely for the purpose of carrying "cotton futures," for which he

or they contracted, when, according to the averments of the rejected plea, neither party contemplated the purchase or delivery in fact of cotton, and when it was understood that any settlement, in respect to such purchases, should be exclusively upon the basis of one party paying to the other only "the difference between the contract price and the market price of said cotton futures, according to the fluctuations in the market." If this be not a wagering contract, under the guise of a contract of sale, it would be difficult to imagine one that would be of that character. The mere form of the transaction is of little consequence. If it were, the statute against wagers could easily be evaded. The essential inquiry in every case is as to the necessary effect of the contract and the real intention of the parties. Mr. Benjamin, in his Treatise on Sales, (vol. 2, 717, 6th Amer. ed. by Corbin, § 828,) after stating that at common law wagers that did not violate any rule of public decency or morality, or any recognized principle of public policy, were not prohibited, says: "It has already been shown that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them." "But such a contract," he proceeds to say, "is only valid where the parties really intend and agree that the goods are to be delivered to the seller, and the price to be paid by the buyer. If, under guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void under the statute." The statute referred to by the author is that of 8 and 9 Vict. c. 109, § 18, which provides "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which should have been deposited in the hands of any person, to abide the event on which any wager should have been made."

Opinion of the Court.

In *Irwin* v. *Williar*, 110 U. S. 499, 508, 510, the general subject of wagering contracts was carefully considered, and in the opinion, delivered by Mr. Justice Matthews, we expressed approval of the doctrine as announced by Mr. Benjamin, observing that generally, in this country, all such contracts are held to be illegal and void as against public policy. It was there said: "It makes no difference that a debt or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade." Referring to the decision in *Rountree* v. *Smith*, 108 U. S. 269, it was further said: "It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction." In the present case, according to the averments in the plea of wager, the plaintiff was the broker who effected the purchases of future-delivery cotton. He was privy to the unlawful design of the parties; represented one of them in all the transactions; and advanced the money necessary to carry, and for the express purpose of carrying, these cotton "futures" on account of the defendant. His position, therefore, was not that of a person merely advancing money to or for one of the parties to a wager, without having himself any direct connection with the making or execution of the contract of wager itself. He was, in every sense, *particeps criminis*.

In *Bigelow* v. *Benedict*, 70 N. Y. 202, 206, the Court of Appeals of New York said that "where an optional contract for the sale of property is made, and there is no intention on the one side to sell or deliver the property, or on the other to buy or take it, but merely that the difference should be paid

according to the fluctuation in market values, the contract would be a wager within the statute." In *Story* v. *Salomon*, 71 N. Y. 420, 422, which was an action upon a written contract for an option to buy or sell certain shares of stock, and the defence was that it was illegal and void under the statute of New York against gaming, the court said: "If it had been shown that neither party intended to deliver or accept the shares, but merely to pay differences according to the rise or fall of the market, the contract would have been illegal." The same principle was announced in *Kingsbury* v. *Kirwan*, 77 N. Y. 612. There are many other authorities to the same effect, but in view of our decision in *Irwin* v. *Williar*, with which we are entirely satisfied, it is not necessary to cite them.

The plaintiff relies upon *Brown* v. *Speyers*, 20 Grattan, 296, as expressing a different view of this question. But we do not so understand that case. The Supreme Court of Appeals of Virginia did not there indicate its opinion as to the validity of a contract for the purchase of "futures," the settlement in respect to which was to be upon the basis of paying simply the difference, according to the fluctuations in the market, between the contract price and the market price.

It is contended that this is not an action upon the original contract, but upon the notes executed by Embrey after the business transacted for him by Moody & Jemison was closed, and with full knowledge, upon his part, of all the facts. In such a case, it is argued, the principles announced in *Irwin* v. *Williar* cannot be applied. This argument concedes, at least for the purposes of the present case, that, as the law, for the protection of the public, and in the interest of good morals, declares a wagering contract to be void, the plaintiff could not maintain an action for the moneys advanced in execution of the original contract to carry these "futures." And yet it is insisted that he ought to have judgment on the notes in suit, although it appears they have no other consideration than the moneys so advanced. A judgment upon the notes would, in effect, be one for the amount claimed by the plaintiff, under the original contract, at the time he demanded their execution

by the defendant. Indeed, it has been held that a note could not of itself discharge the original cause of action, unless, by express or special agreement, it was received as payment. *Sheehy* v. *Mandeville*, 6 Cranch, 253, 264; *Peter* v. *Beverly*, 10 Pet. 532, 568; *The Kimball*, 3 Wall. 37, 45.

While there are authorities that seem to support the position taken by the defendant in error, we are of opinion that, upon principle, the original payee cannot maintain an action on a note the consideration of which is money advanced by him upon or in execution of a contract of wager, he being a party to that contract, or having directly participated in the making of it in the name of or on behalf of one of the parties.

In *Steers* v. *Lashley*, 6 T. R. 61, it appeared that the defendant was engaged in stock-jobbing transactions with different persons, in which one Wilson was employed as his broker, and had paid the "differences" for him. A dispute having arisen as to their amount, the matter was referred to the plaintiff and others, who awarded a certain sum as due from the defendant. For a part of that sum the broker drew a bill on the defendant, and after it had been accepted indorsed it to the plaintiff. Lord Kenyon said: "If the plaintiff had lent this money to the defendant to pay the differences, and had afterwards received the bill in question for that sum, then, according to the principle announced in *Petrie* v. *Hannay*, 3 T. R. 418, he might have recovered. But here the bill on which the action was brought was given for these very differences; and therefore Wilson himself could not have enforced payment of it. Then the security was indorsed over to the plaintiff, he knowing of the illegality of the contract between Wilson and the defendant; for he was the arbitrator to settle their accounts; and under such circumstances he cannot be permitted to recover on the bill in a court of law."

In *Amory* v. *Meryweather*, 2 B. & C. 573, 578, which was an action of debt on bond, conditioned for the payment of money by instalments, the plea in substance was that the bond was given in place of a promissory note previously executed in payment for moneys advanced by an agent of the obligor in discharge of differences arising upon contracts for

buying and selling shares in the public stocks, against the form of the statute; the plaintiff having knowledge, when he received the bond, that the note had been made by the defendant on the occasion and for the purpose stated. Abbott, C. J., after observing that there was no period of time when the plaintiff could have maintained an action upon the note, said: "We are all of opinion that as it appears upon the plea that the bond was given as a substitute for a note which was taken by the plaintiffs subject to an infirmity of title of which they had full notice before the bond was taken, the latter instrument is void." In *Fisher* v. *Bridges*, 3 El. & Bl. 642, 649, which was an action upon a covenant in a deed to pay a certain sum, and which covenant was given as security for payment of a part of the purchase money of real estate sold by the plaintiff to the defendant, to be by the latter disposed of by lottery, as the plaintiff knew, the court said: "It is clear that the covenant was given for the payment of the purchase money. It springs from and is the creature of the illegal agreement and, as the law would not enforce the original illegal contract, so neither will it allow the parties to enforce a security for the purchase money, which, by the original bargain, was tainted with illegality." See also *Fareira* v. *Gabell*, 89 Penn. St. 89; *Griffiths* v. *Stears*, 112 Penn. St. 523; *Flagg* v. *Baldwin*, 38 N. J. Eq. 218, 227; *Cunningham* v. *Bank of Augusta*, 71 Georgia, 400; *Tenney* v. *Foote*, 95 Illinois, 991; *Rudolf* v. *Winters*, 7 Nebraska, 126; *Lowry* v. *Dillman*, 59 Wisconsin, 197; *S. C.* 18 N. W. Rep. 4.

Assuming the averments of the plea of wager to be true, it is clear that the plaintiff could not recover upon the original agreement without disclosing the fact that it was one that could not be enforced or made the basis of a judgment. He cannot be permitted to withdraw attention from this feature of the transaction by the device of obtaining notes for the amount claimed under that illegal agreement; for they are not founded on any new or independent consideration, but are only written promises to pay that which the obligor had verbally agreed to pay. They do not, in any just sense, constitute a distinct or collateral contract based upon a valid considera-

tion. Nor do they represent anything of value, in the hands of the defendant, which, in good conscience, belongs to the plaintiff or to his firm. Although the burden of proof is on the obligor to show the real consideration, the execution of the notes could not obliterate the substantive fact that they grew immediately out of, and are directly connected with, a wagering contract. They must, therefore, be regarded as tainted with the illegality of that contract, the benefits of which the plaintiff seeks to obtain by this suit. That the defendant executed the notes with full knowledge of all the facts is of no moment. The defence he makes is not allowed for his sake, but to maintain the policy of the law. *Coppell* v. *Hall*, 7 Wall. 542, 558.

We are of opinion that the special plea of wager presented a good defence to the action, and ought not to have been rejected; also, that the instruction asked by the defendant should have been given.

The case presents another question, which it is necessary to consider. The defendant in one of his pleas alleged that the plaintiff's cause of action did not accrue within five years next before the commencement of suit. That is the time within which, by the general statute of limitations of Virginia, actions like the present one must be brought. Virginia Code, 1873, § 8, p. 999, § 14, p. 1001. To this plea the plaintiff replied, specially, that he ought not to be bound by anything therein alleged, because when the several causes of action in the declaration mentioned, and each of them, accrued to him, the defendant "had before resided in the State of Virginia," and by departing without the same obstructed him in the prosecution of his several causes of action, for several, to wit, two or more years next after the same accrued as aforesaid; that the time such obstruction continued is not to be computed as any part of the period within which his causes of action, and each of them, ought to have been prosecuted; and that, excluding such time, the plaintiff brought this action within five years next after the accruing of his several causes of action. This replication was based upon the following provision in the Virginia statute of limitations: "Where any such

right as is mentioned in this chapter shall accrue against a person who had before resided in this State, if such person shall, by departing without the same, or by absconding or concealing himself, or by any other indirect ways or means, obstruct the prosecution of such right, the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted. But this section shall not avail against any other person than him so obstructed, notwithstanding another might have been jointly sued with him if there had been no such obstruction. And upon a contract which was made and was to be performed in another State or country, by a person who then resided therein, no action shall be maintained after the right of action thereon is barred by the laws of such State or country." Code of Virginia, 1873, 1002, c. 146, § 20. The defendant rejoined that the plaintiff ought not, by reason of anything in the replication alleged, to have and maintain his action, because by his removal from the State of Virginia and departing without the same, as alleged, he did not obstruct the plaintiff in the prosecution of his suit upon the alleged causes of action in the declaration mentioned, because such removal occurred in the year 1859, a long time before any of the alleged causes of action existed or accrued, and that, when said causes of action accrued to the plaintiff, the defendant was, and still considers himself, a citizen of the State of Louisiana.

Upon plaintiff's motion, the rejoinder of the defendant was rejected upon the ground that the above section excepted from the general act of limitation a case in which the cause of action accrued against a person previously, no matter how long before, residing in Virginia, although he may have left the State before the contract sued upon was made, and, therefore, before any cause of action thereon accrued. This construction of the statute was supposed to be required by the decision in *Ficklin's Executor* v. *Carrington*, 31 Grattan, 219. We are satisfied, upon a careful examination of that case, that it was misinterpreted by the learned district judge who presided at the trial below. That was an action of assumpsit to recover the amount of a note dated April 1, 1865. The defendant Car-

rington pleaded the statute of limitations. The plaintiff replied that he ought not to be bound by reason of anything in that plea alleged, because "on the first day of April, 1865, *when the said several promises and undertakings in the plaintiff's declaration mentioned were made and entered into, and previous thereto*, the defendant was and had been a resident of the State of Virginia, and that *afterwards*, to wit, on or before the 15th day of November, 1866, the said defendant departed without the State, and thereafter resided in the State of Maryland, and thereby the said defendant obstructed the said B. F. Ficklin, deceased, in his lifetime, and the plaintiff since his death, in the prosecution of his suit upon the said several promises and undertakings, until the 13th day of June, 1874, when this suit was instituted." The defendant replied, specially, that by his removal he had not obstructed, etc. The court held that the removal of the defendant, *as stated in the replication*, did, within the meaning of the statute, obstruct the bringing of the suit, and, consequently, the time subsequent to such removal was not to be counted in his favor. It also held that the above statute, although somewhat different in its phraseology and structure from previous enactments, made no substantial change in the previous statutes, one of which, (that of 1819, 1 Rev. Code of Virginia, 491, § 14,) provided that "if any defendant shall abscond or conceal himself, or by removal out of the country or the county where he resides *when the cause of action accrued*, or by any other indirect ways or means, defeat or obstruct the plaintiff, *then* the defendant shall not be admitted to plead the statute of limitations."

We are of opinion that the defendant's rejoinder to the plaintiff's replication to the plea of limitations was improperly rejected. It shows upon its face that the defendant's removal from Virginia occurred nearly twenty years *before the contract in question was made*, and that when the plaintiff's causes of action accrued he was not a citizen or resident of Virginia, but of Louisiana. The statutory provision upon which the plaintiff based his replication has no application to this case, if, as shown by the rejoinder, the defendant removed from Virginia before he made any contract with the plaintiff. We

cannot suppose that his removal from that State, nineteen years before that contract was made, can be regarded, under the statute of Virginia, as an *obstruction* to the plaintiff's prosecution of his action. The statute, so far as it relates to obstructions caused by a defendant having departed from the State, means that, being a resident of Virginia when the cause of action accrues against him, and being then suable in that State, the defendant shall not, in computing the time in which he must be sued, have the benefit of any absence caused by his departure after such right of action accrued, and before the expiration of the period limited for the bringing of suit. The plaintiff was at liberty to sue the defendant wherever he could find him. Having elected to sue him in Virginia, the courts sitting there must give effect to the limitation prescribed by her law, without any saving in favor of the plaintiff on account of the defendant's removal prior to the making of any contract whatever with the plaintiff.

The judgment is

Reversed, with directions to grant a new trial, and for further proceedings in conformity with this opinion.

MELLEN *v.* MOLINE MALLEABLE IRON WORKS.

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

No. 250. Argued April 16, 1889. — Decided May 13, 1889.

A suit instituted by a creditor of a corporation, on his own behalf and on behalf of other unsecured creditors, to set aside a conveyance of its real estate and a mortgage of its personal property, both made by the corporation in trust to secure certain preferred creditors, including among them a director of the corporation, and also to procure a dissolution of the corporation, and the closing up of its business, is a suit brought to remove an incumbrance or lien or cloud upon the title to such property within the meaning of § 8 of the act of March 3, 1875, 18 Stat. 472, c. 137, which authorizes a Circuit Court of the United States to summon in an absent defendant, and to exercise jurisdiction over his rights in the property in suit within the jurisdiction of the court.

Statement of the Case.

It is not necessary that the creditor of an insolvent corporation should obtain judgment on his claim, and take out execution and exhaust his remedies at law, in order to invoke the jurisdiction of a court of equity in his favor to remove an incumbrance or cloud or lien upon the title of the corporation's property, under the act of March 3, 1875, 18 Stat. 470, c. 137.

An adjudication that a particular case is of equitable jurisdiction is not void, even if erroneous, and cannot be disturbed by a collateral attack.

A sale of the trust property which is in dispute in a cause pending in a court of equity, made by the receiver by order of court, and after full compliance with its directions as to notice, is not open to attack by one who is subsequently summoned into the suit, if there has been no fraud, no sacrifice of the property, or no improvidence; since the proceeds of the sale take the place of the property, and all his rights in the latter are transferred to the former.

The proceedings in this case to remove the incumbrance upon the property of the Moline Iron Works, which are set forth and described in the opinion of the court, conformed to the requirements of the act of March 3, 1875, 18 Stat. 470.

Purchasers of property involved in a pending suit may be admitted as parties, in the discretion of the court; but they cannot demand, as of absolute right, to be made parties, nor can they complain if they are compelled to abide by whatever decree the court may render, within the limits of its power, in respect to the interest their vendor had in the property purchased by them *pendente lite*.

This was an appeal from a final decree sustaining a plea in bar to a suit brought by the appellants, and dismissing their bill of complaint for want of equity.

On the 23d of June, 1883, the Moline Malleable Iron Works, an Illinois corporation doing business at Moline, in that State, executed a deed, which was duly acknowledged and recorded, conveying to Charles F. Hemenway several lots or parcels of land in that city. The deed recited that S. W. Wheelock and A. L. Carson had been induced by the grantor, which was in need of money to carry on its business, to guarantee, by indorsing, its commercial paper to the extent of $49,000, (of which $48,500 was then outstanding and unpaid,) by the promise to protect the same by a lien on those premises; and that George H. Hill, of Ohio, and the J. S. Keator Lumber Company, had been induced by it to guarantee, in the same way, other of its commercial paper, the former to the extent of $20,000, and the latter to the extent of $1000. It also recited

that the grantor had agreed with each of the guarantors to meet said paper as it fell due, so that neither of them should be subjected to any liability, loss, cost, damage, or expense, by reason of having severally made such guarantees or indorsements. The conveyance to Hemenway was in trust to secure and protect said guarantors, respectively, against all liability arising from such indorsements, with power in the trustee, upon the request of either guarantor, or of his legal representatives — if, at the time of such request, there existed any liability upon the part of the person so requesting — to foreclose the deed and sell and convey the property, and out of the proceeds, after paying the expenses of foreclosure and sale and reasonable solicitors' fees, to pay the guarantors all costs, damages and expenses to which they may have been subjected; "it being the intention that the property conveyed hereby shall be understood to be for and shall stand for security to each of the parties aforesaid, viz., Wheelock, Carson, Hill and Keator Lumber Company, alike in proportion to the ultimate liability to which each may be subjected; and that they shall receive the benefit and protection, *pro rata*, according to the extent of their liability and in proportion thereto."

As part of the same transaction, the Moline Malleable Iron Works executed its chattel mortgage, which was duly acknowledged and recorded, conveying to Hemenway, upon like trusts and conditions, certain personal property in Illinois, consisting, in part, of malleable iron, manufactured and in process of manufacture by the grantor.

The Moline Malleable Iron Works made default in the payment of the notes, and in the performance of its obligations as set forth in the trust deed and chattel mortgage.

On the 12th of April, 1884, George H. Hill sold and conveyed his entire interest in the trust deed and chattel mortgage, and in the said indebtedness of $20,000, to the appellant Mellen, in trust for the sole use and benefit of the appellant Sophia H. Boyd.

The present suit was commenced by an original bill exhibited May 5, 1884, by said Mellen and Boyd, citizens of Ohio, against the Moline Malleable Iron Works, Hemenway, Whee-

lock, Stephen T. Walker, Carson, and Jeremiah S. Keator and Ben. C. Keator, late partners as J. S. Keator & Son, all citizens of Illinois. The bill showed that Hill was compelled to pay and did pay off the debt of $20,000, with the interest accruing on the several notes, aggregating that sum.

It stated that in a suit in equity, instituted in the Circuit Court of the United States for the Northern District of Illinois, on the 2d day of July, 1883, by the National Furnace Company, a corporation of Wisconsin in behalf of itself and other general, unsecured creditors of the Moline Malleable Iron Works against the last-named corporation, George H. Hill, and others, the said trust deed and chattel mortgage were assailed as null and void, as against the general creditors of the Moline Malleable Iron Works, upon the following grounds:

"First. Because they constitute a partial assignment for the benefit of creditors by which said corporation seeks to prefer the indorsers therein named in preference to the other creditors of the corporation, which said attempt your orator is advised and believes is fraudulent and unlawful under the statutes of the State of Illinois.

"Second. Because the said assignment does not purport to put the said assignee in possession of said property, and the said assignee has not actually taken possession thereof and has not given bond to the county court of Rock Island County, as provided by law in the case of assignments for the benefit of creditors, and it is not intended to file such bond or distribute the said assigned property under the provisions of the statutes in such cases made and provided.

"Third. That the two assignments constitute a part of the same transaction, and that the chattel mortgage upon the personal property therein described is void as against the creditors of the said corporation, because the said corporation has been and still is allowed by the said assignee to manage, control, and use the property therein described in the usual and ordinary course of business to the same extent and in the same manner as the same were used by the said corporation before the execution of the said chattel mortgage.

"Fourth. Because the said documents operate, and were designed to operate, to hinder and delay the creditors of the said Moline Malleable Iron Works in the collection of their debts.

"Fifth. Because, as against the fair and honest creditors of the said corporation, the preference sought to be given to the said Hill and the said Carson, two of the directors of the said corporation, is null and void.

"Sixth. For divers other reasons your orator has been advised that all of the aforesaid acts and doings of the said Moline Malleable Iron Works, as against your orator and the other *bona fide* creditors of said corporation, are null and void."

The object of that suit, as the bill in the present case averred, was to obtain a decree dissolving the Moline Malleable Iron Works as a corporation, closing up its business, ascertaining the amount, as well of its assets applicable to the payment of debts, as the extent to which its directors and officers were liable to creditors, and adjudging that the said conveyances executed by that corporation were fraudulent and void as to the National Furnace Company and other creditors.

It was further alleged that the debt of the last-named corporation was not, nor was any part of it, due when it brought said suit, and was not secured by any attachment or other process against the property of the debtor corporation; that it had not exhausted its legal remedies for the collection of its debt, and had no lien or claim to the property covered by said trust deed or mortgage; and, consequently, that the court could not and did not acquire jurisdiction to make any valid decree affecting the interest of said Hill.

The relief sought in the present suit, by original bill, was the foreclosure of said trust deed and chattel mortgage, the sale of the property, and the disposition of the proceeds according to the rights of the parties for whose protection those instruments were executed; and this, without reference to the proceedings and final decree in the suit of *National Furnace Company* v. *Moline Malleable Iron Works, etc.*

The defendants Stillman W. Wheelock, A. L. Carson, Charles

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F. Hemenway, J. S. Keator and Ben. C. Keator filed a plea in bar of this suit. As the correctness of the decree below depends entirely upon the sufficiency of that plea, it is here given in full:

"That long prior to the time when said George H. Hill sold and conveyed to said complainant Mellen in trust, for the use and benefit of said Sophia H. Boyd, his interest in said trust deed and chattel mortgage, as alleged in said bill of complaint, to wit, on the 2d day of July, 1883, the said National Furnace Company, in its own behalf and on behalf of all the creditors of the Moline Malleable Iron Works, exhibited its original bill of complaint in this honorable court and made parties defendant thereto said Moline Malleable Iron Works, Stillman W. Wheelock, George H. Hill, Amaziah L. Carson, Charles F. Hemenway, Henry H. Hill, Stephen T. Walker, Walter J. Entriken and the J. S. Keator Lumber Company, thereby stating, among other things, that said National Furnace Company was a creditor of said Moline Malleable Iron Works, and that at the time when the said Moline Malleable Iron Works executed the said trust deed and chattel mortgage it was insolvent and its indebtedness was largely in excess of its capital stock, and that its officers and directors had assented to the creation of its indebtedness, and that the said conveyances were fraudulent and void as against creditors of said Moline Malleable Iron Works, and therein and thereby prayed, among other things, that a receiver might be appointed to take charge of and manage the property of the said corporation under the orders of this court, and that the said trust deed and chattel mortgage might be held and adjudged fraudulent and void as against said National Furnace Company and creditors of said Moline Malleable Iron Works; to which said bill these defendants put in their several answers, and said Moline Malleable Iron Works, Henry H. Hill, and Stephen T. Walker interposed their several demurrers; that after exhibiting said bill of complaint, to wit, on the 1st day of August, 1883, upon the application of said National Furnace Company, for the preservation of the property of the said corporation pending the said suit, and for the benefit of all parties inter-

ested therein and in the proceeds thereof, this honorable court entered an order in said cause, as appears of record in this court, appointing one Robert E. Jenkins receiver of the said Moline Malleable Iron Works, and of its property, and directing him to take and hold possession thereof under the orders of this honorable court, and directing the said Moline Malleable Iron Works to transfer and convey to said receiver its entire property, both real and personal, and to deliver up to said receiver the possession thereof; and that thereupon the said Moline Malleable Iron Works did transfer, convey and deliver up to said receiver its property and the possession thereof, and said receiver did enter into and take possession thereof.

"That thereafter and long prior to the time when said George H. Hill sold and conveyed to said complainant Mellen his interest in said trust deed and mortgage, to wit, on the 28th day of November, 1883, the defendant Stillman W. Wheelock, by leave of this honorable court, filed his cross-bill of complaint in the aforesaid cause, made parties defendant to said cross-bill said Moline Malleable Iron Works, the National Furnace Company, George H. Hill, Charles F. Hemenway and said Carson, and therein stated, among other things, that in the year 1880 the said Moline Malleable Iron Works requested that he and the said Carson should become guarantors for it upon its commercial paper, and promised to give them security from any liability to loss by reason thereof by liens on its property, and that at this request and in reliance upon this promise they became guarantors for it from time to time to the amount of about fifty thousand dollars ($50,000); that afterwards, on November 12, 1882, a resolution was adopted by said corporation authorizing its officers to execute proper instruments to secure them from loss, and that thereafter, at the request of said Wheelock, said corporation executed said trust deed and mortgage, and that neither Wheelock nor Carson were in any way interested in or connected with said company when they incurred this liability at its request; that after the said resolution of November 12, 1882, was adopted by said company, said George H. Hill, who

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was a stockholder and director, became a guarantor for said company, and that by and through his influence as an officer of said company he was named a beneficiary under said trust deed and mortgage; that the said company was then largely indebted in excess of its capital stock, and that said George H. Hill had assented to the creation of this indebtedness and was liable to its creditors for this excess, and that said trust deed and mortgage were a valid security to said Carson and the J. S. Keator Lumber Company, but that said Hill was not entitled to have and receive the security thereof; that the said property covered by the said trust deed and chattel mortgage was rapidly depreciating in value and should be sold as soon as possible; and praying, among other things, that the said trust deed and chattel mortgage might be declared valid; that the said receiver might be directed to sell immediately the property described in said trust deed and mortgage, together with the other property of said company, and the proceeds of the sale of the property described in said trust deed and mortgage might be applied in satisfaction of and to relieve said Wheelock, Carson and J. S. Keator Lumber Company from the liabilities assumed by them as indorsers for said Moline Malleable Iron Works and the balance disbursed *pro rata* among the creditors of said company; that thereupon, to wit, on the 28th day of November, 1883, it was ordered by this honorable court, as appears of record in this court in said cause, that said National Furnace Company, the Moline Malleable Iron Works, Hemenway, Carson and George H. Hill plead, answer or demur to the said cross-bill on or before the 20th day of December, 1883, and that a copy of said order be served on said Hill on or before December 5, 1883, and that in case said Hill did not appear and plead, answer or demur to said cross-bill as aforesaid the same should be taken as confessed by him; that said order was duly served on said Hill on the 1st day of December, 1883, to wit, long prior to the making of the said assignment to said Mellen; that the said defendants, the National Furnace Company, Hemenway and Carson, answered said cross-bill, as directed by said order, but that said Hill and said Moline Malleable Iron Works failed to

appear in said cause and to plead, answer or demur to said cross-bill therein, as directed by said order; that thereafter, to wit, on the 22d day of December, 1883, the said receiver filed his petition in said cause, alleging, among other things, that the property of said Moline Malleable Iron Works in his possession as such receiver (and including therein the said property covered by said trust deed and chattel mortgage) was rapidly depreciating in value, and that for the interests of all persons who might be interested therein, and to realize anything for the creditors therefrom, it should be sold at once, and praying that he might be authorized to offer the said property for sale, and that thereupon it was ordered, on said petition being filed, by this honorable court, as appears of record in said cause in this court, that the said receiver should offer and advertise for sale, in the manner directed by said order, all of said property and should report bids therefor to this court.

"That thereafter, to wit, on the 20th of February, 1884, said receiver filed in said cause his report, stating therein, in substance, that he had advertised and offered said property for sale in the manner and as directed by said order, and that the highest bid received by him therefor was that of Stillman W. Wheelock, in the amount of thirty thousand dollars ($30,000); that it was thereupon ordered by this honorable court, as appears of record in this court, that all persons should show cause, by the 28th day of February, 1884, why said bid of said Wheelock should not be accepted; and that thereafter, to wit, on the 3d day of March, 1884, it was ordered by this honorable court in said cause, as appears of record in this court, that the said bid of said Wheelock for said property be accepted, and that said receiver sell and convey the same to him, and that thereupon said receiver did sell and convey the said property to said Wheelock in accordance with said order.

"That thereafter, to wit, on the 3d day of March, 1884, it appearing to this honorable court that said George H. Hill resided beyond the jurisdiction of this court, it was ordered by this honorable court, as appears of record in this court, that said George H. Hill do appear and plead, answer, or demur to

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the said original and supplemental bill of complaint in said cause on or before the 15th day of April, 1884, and that a copy of said order should be served upon said Hill on or before the 15th day of March, 1884, and that in case he did not appear, plead, answer, or demur to said bill as directed the same should be taken as confessed by him; and that thereafter, to wit, long prior to the time when said Hill sold and conveyed to said Mellen his interest in said trust deed and mortgage, a certified copy of said order was served on said Hill; and thereafter, to wit, on the 22d day of April, 1884, said Hill not appearing and pleading, answering, or demurring to said original and supplemental bill, as directed by said order, it was ordered by this honorable court in said cause, as now appears of record therein in this court, that said original and supplemental bill be taken as confessed by said Hill.

"That thereafter, to wit, on the 23d day of April, 1884, long prior to the filing of the said bill of complaint by said William S. Mellen, said Hill not having appeared and pleaded, answered or demurred to said cross-bill, by the order of this court entered in said cause, and now appearing of record in this court, it was ordered that the said cross-bill of said Wheelock be taken as confessed by said George H. Hill; and afterwards, to wit, on the 26th day of June, 1884, the said cause came on to be heard upon the said original and supplemental bills of complaint and answers and replications thereto, and upon the said cross-bill of said Wheelock and the answers and replications thereto, and upon the testimony taken in said cause, and a final decree was then rendered therein, which now appears of record in this court, and it was therein found by this honorable court, among other things, that the indebtedness of said Moline Malleable Iron Works was in excess of its capital stock in the sum of $75,000; that the said trust deed and chattel mortgage were valid in so far as they gave to said Wheelock, Carson and the J. S. Keator Lumber Company a first lien on the property therein described; and that said George H. Hill was not entitled to any lien or security by reason of said trust deed and mortgage; and that the same were invalid as to him, because the liabilities of said company

in excess of its capital stock were incurred while he was one of the directors and its vice-president, and with his knowledge and assent thereto, and because he was named in said trust deed and chattel mortgage as a beneficiary thereunder through his influence and control over said corporation as an officer thereof; and it was thereby decreed, among other things, that said Wheelock, Carson and the J. S. Keator Lumber Company were entitled to have and receive the proceeds derived from the sale of the property conveyed by said trust deed and mortgage in part satisfaction of the sums paid by them for said company.

"All of which matters and things these defendants do aver and plead in bar to said bill of complaint, and do pray judgment of this honorable court whether they should make any further answer to said bill of complaint, and to be hence dismissed with their costs and charges in this behalf most wrongfully sustained."

This plea was sustained, the present bill was taken for confessed by the Moline Malleable Iron Works and Walker, for want of plea, demurrer or answer, and the suit was dismissed for want of equity.

Mr. Thomas McDougall for appellants.

I. The Circuit Court never acquired jurisdiction of Hill, or of his interest in the property, in the National Furnace Company's suit. He was a citizen of Ohio; he never voluntarily appeared; he could not be brought in under the provisions of Rev. Stat. § 739, unless the case was within the provisions of Rev. Stat. 2d ed. § 738 (the act of March 3, 1875, 18 Stat. 470). Neither he nor his interest in the property was before the court in that case for adjudication.

The bill in this case which, for the purposes of the plea, is taken as admitted to be true, shows that the National Furnace Company had neither a legal nor an equitable lien upon, or claim to the property covered by the trust deeds. It shows that the Furnace Company was only a general unsecured creditor of the Moline Malleable Iron Works, and that its debt

as such creditor was not due at the time it filed its bill of complaint in the Circuit Court. Its claim against the Iron Works had not been reduced to judgment, nor had it exhausted the property of the Iron Works, its debtor, by execution or other legal process, nor had any attachment or other process been issued by the Circuit Court or any other court, whereby any lien on or claim to the property covered by the trust deeds had been acquired. The case presented by that bill was not one covered by § 738, and, as attempting to enforce any lien on or claim to the property covered by the trust deeds, it could not have been sustained. *Jones* v. *Green*, 1 Wall. 330; *Van Weel* v.. *Winston*, 115 U. S. 228, 245; *Freedman's Saving & Trust Co.* v. *Earle*, 110 U. S. 710; *Shainwald* v. *Lewis*, 6 Fed. Rep. 510; *Pacific Railroad Co.* v. *Missouri Pacific Railway Co.*, 3 Fed. Rep. 772; *Lovejoy* v. *Hartford Fire Ins Co.*, 11 Fed. Rep. 63; *Hyde Park Gas Co.* v. *Kerber*, 5 Bradwell (Ill. App.) 132; *Wincock* v. *Turpin*, 96 Illinois, 135.

Supposing, however, for the purposes of the argument, that it was such a bill, this suit is not one contemplated by § 738 of the Revised Statutes of the United States. An unsecured creditor bringing such a suit, whose claim is not in judgment, has no claim to and can have no lien on any part of the real or personal property of the corporation, such as is contemplated by § 738. In the event that the corporation is not dissolved, (and a creditor is not entitled to a decree to wind it up,) his bill necessarily must be dismissed. No receiver could be appointed who would have the right to sell the property until such action was taken by the court, and it does not appear by the record in this case that the Moline Malleable Iron Works ever was dissolved, or that the court found that the National Furnace Company was entitled to have the corporation dissolved and the relief granted as provided by § 25, c. 32, of the Revised Statutes of Illinois.

II. The Circuit Court had no authority to make the order of sale that it made in the case brought by the National Furnace Company. The bill in that case showed and advised the court at the time it was making these orders, and confirming said sale, that Hill was a citizen of the State of Ohio, and a

resident thereof. Any order made by the court affecting his interest before jurisdiction had been acquired of him or of his interest in the property, must be void. *Webster* v. *Reed*, 11 How. 437, 457; *Windsor* v. *McVeigh*, 93 U. S. 274; *United States* v. *Walker*, 109 U. S. 258; *Bigelow* v. *Forrest*, 9 Wall. 339; *Ex parte Lange*, 18 Wall. 163.

III. The cross-bill in that case did not enlarge the jurisdiction of the court over Hill's interest in the property, or over him personally. *Cross* v. *De Valle*, 1 Wall. 1; *Putnam* v. *New Albany*, 4 Bissell, 365; *Weaver* v. *Altee*, 3 Woods, 152; *Shields* v. *Barrow*, 17 How. 130; *Ayers* v. *Carver*, 17 How. 591.

IV. The complainants are entitled to the relief they pray for in their bill in this case.

If we are mistaken in our contention therefor, and if the court did acquire jurisdiction over Hill and his interest in the property, nevertheless appellant was entitled to be made a party to that proceeding, and to have his rights protected; because at that time no decree had been taken on the merits of the bill, and he was interested in the proceeds of the sale and the questions touching the validity of the trust deeds.

If, on the other hand, the court did not acquire jurisdiction of Hill's interest in said property by the original and supplemental bills, and the jurisdiction of the court was not enlarged by the cross-bill, the complainants are entitled to the relief sought in the bill herein, if we are correct in our assumption as to the lack of jurisdiction by the court, in the case brought by the National Furnace Company, over the interest of said Hill in the property covered by the trust deeds. *The Minnesota Co.* v. *The St. Paul Co.*, 2 Wall. 609; *Pacific Railroad of Missouri* v. *Missouri Pacific Railway*, 111 U. S. 505.

Mr. Samuel A. Lynde (with whom was *Mr. Charles M. Osborn* on the brief) for appellees.

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

Was the decree in the suit instituted by the National Furnace Company (to be hereafter called the Furnace Company)

against the Moline Malleable Iron Works (to be hereafter called the Iron Works) and others, declaring that Hill was not entitled to a lien or security by reason of the trust deed and chattel mortgage of June 23, 1883, void for want of jurisdiction in the court that rendered it? This is the principal question in the present case. Its solution depends upon the construction of the eighth section of the act of March 3, 1875, determining the jurisdiction of the Circuit Court of the United States. 18 Stat. 472, c. 137, § 8.

That section authorizes an order to be made directing an absent defendant in any suit brought in a Circuit Court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title, to real or personal property *within the district where such suit is brought* — such defendant not being an inhabitant of or found therein, and not voluntarily appearing in the suit — to appear, plead, answer or demur, by a designated day. The order must be served upon the absent defendant, if practicable, wherever found, and upon the person, if any, in charge or possession of the property. If such personal service be not practicable, the order must be published in such manner as the court may direct, not less than once a week for six consecutive weeks. If the defendant does not appear, plead, answer or demur, within the time limited, or within such further time as may be allowed, the court — proof being made of service or publication of the order, and of the performance of the directions therein contained — may "entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district." "But," the act declares, "said adjudication shall, as regards said absent defendant or defendants without appearance, *affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district.*" A defendant, not personally notified as provided in the act, may within one year after final judgment enter his appearance in the suit; whereupon, the court must make an order setting aside the judgment and permitting him to plead, on payment of such costs as shall

be deemed just; the suit then to proceed to final judgment, according to law. The previous statute gave the above remedy only in suits "to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought," while the act of 1875 gives it also in suits brought "to remove any incumbrance or lien or cloud upon the title to" such property. Rev. Stat. § 738; 18 Stat. 472, c. 137, § 8.

We are of opinion that the suit instituted by the Furnace Company against the Iron Works and others belonged to the class of suits last described. The trust deed and chattel mortgage in question embraced specific property within the district in which the suit was brought. The Furnace Company, in behalf of itself and other creditors of the Iron Works, claimed an interest in such property as constituting a trust fund for the payment of the debts of the latter, and the right to have it subjected to the payment of their demands. In *Graham* v. *Railroad Company*, 102 U. S. 148, 161, this court said that "when a corporation becomes insolvent, it is so far civilly dead, that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his." See also *Mumma* v. *Potomac Company*, 8 Pet. 281, 286; *County of Morgan* v. *Allen*, 103 U. S. 498, 509; *Wabash &c. Railway* v. *Ham*, 114 U. S. 587, 594; 2 Story's Eq. Jur. § 1252; 1 Perry on Trusts, § 242. The trust deed and chattel mortgage executed by the Iron Works created a lien upon the property, in favor of Wheeler, Carson, Hill, and the Keator Lumber Company, superior to all other creditors. The Furnace Company, in behalf of itself and other unsecured creditors, as well as Wheelock, denied the validity of Hill's lien as against them. That lien was therefore an incumbrance or cloud upon the title, to their prejudice. Until such lien or incumbrance was removed, they could not know the extent of their interest in the property or in the proceeds of its sale. The case made by the original, as well as cross-suit, seems to be within both the letter and the spirit of the act of 1875.

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It is, however, contended, that the Furnace Company could not rightfully invoke the aid of a court of equity to remove this lien or incumbrance, until it had, by obtaining judgment for its debt and suing out execution, exhausted its legal remedies. *Jones* v. *Green*, 1 Wall. 330; *Van Weel* v. *Winston*, 115 U. S. 228, 245. But that was one of the questions necessary to be determined in the suit brought by that company, and any error in deciding it would not authorize even the same court, in an original, independent suit, to treat the decree as void. Besides, the removal of alleged liens or incumbrances upon property, the closing up of affairs of insolvent corporations, and the administration and distribution of trust funds, are subjects over which courts of equity have general jurisdiction.

It is, also, suggested that the court proceeded in the suit instituted by the Furnace Company upon the theory that it was maintainable under the provisions of the Illinois statute giving courts of equity "full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor who shall have authority, by the name of the receiver of such corporation, to sue in all courts and do all things necessary to closing up its affairs, as commanded by the decree of such court." 1 Starr & Curtis Rev. Stat. Ill. 618, Title "Corporations," c. 32, § 25. The appellants earnestly insist that no case was made that would bring that suit within these provisions of the Illinois statute, or that would give the Furnace Company any right to have the Iron Works dissolved as a corporation, and its business closed up. And on behalf of the appellees it is contended that the suit brought by the Furnace Company was not an ordinary creditor's suit, but one for the administration and distribution of a trust fund. In the view we take of the case it is not necessary to determine the soundness of any of these propositions; for, if the court erroneously ruled upon any of them, its decree could not for that reason be assailed in a collateral proceeding as void for want of jurisdiction. An adjudication that a particular case is of equitable cognizance, cannot be disturbed by an original suit. Such adjudication is not void, even if erroneous.

This brings us to the question whether the steps taken in

the suit brought by the National Furnace Company were such as authorized a decree that would affect Hill's interest in the property covered by the trust deed and chattel mortgage. We lay out of view the fact that Hill was a citizen of Ohio, and neither appeared, nor was served with process within the district in which the suit was brought. He was personally served with copies of the orders requiring him to plead, answer, or demur, and the decree only affects his interest in property within the territorial limits of that district.

It appears from the plea upon which the cause was heard, that on the 1st of August, 1883, after the present appellees had answered the original bill in most part, and after the Iron Works had demurred, the court, upon the application of the Furnace Company, appointed a receiver to take possession of the property of the first named company, including that covered by the trust deed and chattel mortgage, for the benefit of all parties interested in it; and that, on the 28th of November, 1883, Wheelock, by leave, filed his cross-bill against the Iron Works, the Furnace Company, Geo. H. Hill, Hemenway, and Carson, asking a decree declaring said trust deed and mortgage valid as to himself, Carson and the Keator Lumber Company, and void as to Hill. He alleged that the property embraced in the trust deed and chattel mortgage was rapidly depreciating in value, and ought to be sold, and the proceeds applied, primarily, to relieve himself, Carson and the Keator Lumber Company from the liabilities assumed by them as indorsers for the Iron Works. On the same day an order was entered requiring the defendants to the cross-bill to plead, answer, or demur to the same on or before December 20, 1883, and providing that if Hill (being served with a copy of the order on or before December 5, 1883) did not appear, plead, answer, or demur to the cross-bill, by the time fixed, the same would be taken as confessed by him. Hill was served — presumably in Ohio, where he resided — on the 1st of December, 1883, with such copy; but neither he nor the Iron Works appeared, pleaded, answered, or demurred to the cross-bill. It appearing from the petition of the receiver, filed December 22, 1883, that the property covered by the trust deed and mort-

gage was rapidly depreciating in value, he was authorized by an order of court to advertise and sell it. He did sell it, and, February 20, 1884, reported a sale, by him, to Wheelock, pursuant to and in the manner directed by the court. That sale was approved, time being given to show cause why it should not be confirmed. The property was conveyed by the receiver to Wheelock. On the 3d of March, 1884, Hill was required by order of court to appear on or before April 15, 1884, and plead, answer, or demur to the original and supplemental bill, and it was ordered that if he did not, on or before the latter day, being previously served with a copy of such order, appear and plead, answer or demur, the bill would be taken as confessed by him. Long prior to the sale to Mellen of Hill's interest in the trust and mortgage the latter was served with a copy of the order of March 3, 1884, and on the 22d of April, 1884, the original and supplemental bills, Hill not having appeared, and answered, pleaded or demurred, were taken as confessed by him. On the succeeding day a like order was entered against him as to the cross-bill, he not having appeared, pleaded, answered or demurred thereto. The cause came on to be heard on the 26th of June, 1884, upon the original and supplemental bill, upon the cross-bill, upon the answer and replications thereto, and upon the testimony taken in the cause, when the final decree was rendered as set forth in the plea embraced in the statement of facts preceding this opinion.

A large part of the argument on behalf of the appellants is in support of the proposition, that, as the order requiring Hill to appear and plead, answer or demur, to the original and supplemental bills was not made until after the receiver had, by order of the court, sold the property, the sale was a nullity. We do not assent to this view. Whether the condition of the property was such as to require, for the protection of the parties, that it be sold, was a matter for the court, in its discretion, to determine. There is nothing to show that the order of sale was even improvidently made, much less that it was procured by fraud, or that the property was sacrificed. If the circumstances justified immediate action, the court had power to order a sale in advance of a final decree. The sale

was not ordered or made until after Hill had been duly served with a copy of the order of November 28, 1883, to appear and plead, answer or demur, to the cross-bill by the day fixed in that order. If the sale was irregular, by reason of its being ordered and made before Hill was directed to appear and plead, answer or demur, to the original and supplemental bills, that is not a matter affecting the jurisdiction of the court to render a final decree in respect to his interest in the property; for the proceeds took the place of the property, and whatever rights Hill had in the latter were transferred to the former.

So that the real question, upon this part of the case, is whether the proceedings in question conformed to the act of March 3, 1875. We are of opinion that they did. Before the final decree was rendered, Hill had been served with a copy of the several orders requiring him to appear and plead, answer and demur, as well to the original and supplemental bills as to the cross-bill, and was in default in respect to each order. It may not have been in accordance with the usual or proper practice to take the cross-bill for confessed before he had been duly served with the order to appear and plead, answer or demur, to the original and supplemental bills. But if that was an irregularity it was one that did not affect the power of the court to make a final decree and constitutes no ground for disregarding that decree in this collateral proceeding.

We have considered the case just as if the present suit had been brought by Hill. The appellants have no greater rights than he would have, if the present suit had been instituted by him; for Mellen, the trustee for Sophia H. Boyd, acquired his rights *pendente lite*. Hill sold and conveyed to him, after he had been personally served with copies of the order to appear and plead, answer or demur, to the original and supplemental bills, and only three days before the time fixed for his appearance to the original suit. His sale was more than three months after he was required to appear, and plead, answer, or demur to the cross-bill. That sale and conveyance could not affect the power of the court to proceed to a final decree, so far as his interest in the property was concerned. Nor by such sale and conveyance did Mellen and his *cestui que trust*

acquire any absolute right to become a party to the suit instituted by the Furnace Company. Purchasers of property involved in a pending suit may be admitted as parties, in the discretion of the court; but they cannot demand, as of absolute right, to be made parties, nor can they complain if they are compelled to abide by whatever decree the court may render, within the limits of its power, in respect to the interest their vendor had in the property purchased by them *pendente lite*. *Eyster* v. *Gaff*, 91 U. S. 521, 524; *Union Trust Co.* v. *Inland Navigation and Improvement Co.*, 130 U. S. 565; 1 Story's Eq. Jur. § 406; *Murray* v. *Ballou*, 1 Johns. Ch. 566. As said by Sir William Grant, in *Bishop of Winchester* v. *Paine*, 11 Ves. 194, 197, "the litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them, it is as if no such title existed. Otherwise, such suits would be indeterminable; or, which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined." The present proceeding is an attempt, upon the part of a purchaser *pedente lite*, to relitigate, in an original, independent suit, the matters determined in the suit to which his vendor was a party. That cannot be permitted, consistently with the settled rules of equity practice.

There is no error in the decree, and it is

Affirmed.

PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY *v.* KEOKUK AND HAMILTON BRIDGE COMPANY.

PENNSYLVANIA RAILROAD COMPANY *v.* KEOKUK AND HAMILTON BRIDGE COMPANY.

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

Nos. 11, 13. Argued January 25, 1888. — Decided May 13, 1889.

A contract made by the president of a railroad corporation, in its behalf, and within the scope of its chartered powers, to pay certain sums to the

proprietors of a railway bridge for the use thereof, and made known to the directors and stockholders, and not disapproved by them within a reasonable time, binds the corporation.

A contract to pay certain sums for the use of a railway bridge across the Mississippi River, between Illinois and Iowa, is not *ultra vires* of a railroad corporation of Illinois or of Pennsylvania, whose road connects, by means of intervening railroads, with the bridge as part of a continuous line of transportation.

A being a railroad corporation of Ohio, Indiana and Illinois, B a railroad corporation of Pennsylvania and Ohio, and C a railroad corporation of Pennsylvania, these three corporations, for the purpose of establishing a continuous line of transportation, entered into an indenture, by which A leased its railroad to B for ninety-nine years, B covenanted to pay to A a proportion of the earnings of that road, and to assume and carry out certain transportation contracts existing between A and other companies, receiving and enjoying the benefits thereof, and C guaranteed the performance of B's covenants. Before the execution of the lease, a contract was drawn up, by which a corporation of Iowa and Illinois, authorized by its charter to build a railway bridge across the Mississippi River from Keokuk in Iowa to Hamilton in Illinois, agreed to build such a bridge, and granted to A and three other railroad corporations in perpetuity the right to use it for the passage of their trains; and they agreed to pay monthly to the bridge company stipulated tolls, and, if those should fall below a certain sum, to make up the deficiency, each contributing in proportion to the tonnage passed by it over the bridge. After the execution of the lease, and upon a formal request of the presidents of B and C in their behalf, undertaking that they should assume all the liabilities and be entitled to all the benefits of the bridge contract, as if it had been specifically named in and made part of the lease, A's president, in its behalf, executed the bridge contract, and reported to his directors that he had done so, and they never took any action upon the subject. C's president and directors, in two printed annual reports to their stockholders, declared the settled policy of the company to secure a continuous line of traffic from Philadelphia to Keokuk and westward, and stated that through B this object had been accomplished. A subsequent modification of the bridge contract, by which a deficiency in the tolls was to be borne equally by the four railroad corporations parties thereto, was executed by A's president, pursuant to a similar request and undertaking of the presidents of B and of C. The bridge was then opened for use, and was afterwards used by B and C; and the sums payable by A under the modified bridge contract for tolls and deficiencies were semi-annually demanded by the bridge company from B, and, after examination of the accounts, paid by B's comptroller for three years. *Held*, that B and C were liable to the bridge company for the amount of subsequent deficiencies payable by A under that contract, whether the lease was valid or invalid.

Statement of the Case.

THIS was a bill in equity, filed July 25, 1881, by the Keokuk and Hamilton Bridge Company against the Pittsburgh, Cincinnati and St. Louis Railway Company and the Pennsylvania Railroad Company, to recover deficiencies in tolls for the use of the plaintiff's bridge, under a contract executed at the request of the presidents of those two railroad companies by the Columbus, Chicago and Indiana Central Railroad Company, which was made by amendment a party to the bill.

The Keokuk and Hamilton Bridge Company was a corporation organized under the laws of Iowa and of Illinois. The Pennsylvania Railroad Company was a corporation organized under the laws of Pennsylvania. The Pittsburgh, Cincinnati and St. Louis Railway Company was formed in 1868 by the consolidation of the Pan-Handle Company, a corporation organized under the laws of Pennsylvania, the Holiday's Cove Railroad Company, a corporation organized under the laws of West Virginia, and the Steubenville and Indiana Railroad Company, a corporation organized under the laws of Ohio. The Columbus, Chicago and Indiana Central Railroad Company was a corporation formed in 1867 by the consolidation of the Columbus and Indiana Central Railroad Company, a corporation existing under the laws of Ohio and Indiana, and the Chicago and Great Eastern Railway Company, a corporation existing under the laws of Indiana and Illinois.

The railroads of the Pennsylvania Railroad Company from Philadelphia to Pittsburgh in Pennsylvania, of the Pittsburgh, Cincinnati and St. Louis Railway Company from Pittsburgh to Columbus in Ohio, of the Columbus, Chicago and Indiana Central Railroad Company from Columbus to the State line between Indiana and Illinois, and of the Toledo, Peoria and Warsaw Railway Company from that State line to Hamilton in Illinois, with the bridge of the Keokuk and Hamilton Bridge Company across the Mississippi River between Hamilton and Keokuk, and the road of the Des Moines Valley Railroad Company from Keokuk to Des Moines in the State of Iowa, form a continuous line of railroad transportation from Philadelphia, on the east, to Des Moines, on the west. For the sake of brevity, we shall speak of those companies respec-

tively as the Pennsylvania Company, the Pittsburgh Company, the Indiana Central Company, the Peoria Company, the Bridge Company and the Des Moines Company.

The bridge was built under a contract, dated January 19, 1869, made by the Bridge Company with the Indiana Central Company, the Peoria Company, the Des Moines Company, and a fourth railroad company (the Toledo, Wabash and Western Railway Company) whose railroad connected with the bridge at Hamilton. By that contract, the Bridge Company agreed to begin to construct forthwith across the Mississippi River at Keokuk, and to complete by January 1, 1870, "a substantial wrought-iron bridge, suitable for the running of railway trains;" "to lay a track upon said bridge, and connect the same with railways belonging to the parties hereto, in such manner and at such points as may hereafter be agreed upon;" and "to maintain and keep in repair in perpetuity the said bridge and track, so that trains may safely cross at all times, except when repairs make it necessary that crossing should be temporarily suspended, or when it shall be necessary to have the draw open for the passage of boats;" and granted to those four railroad companies, in perpetuity, the right to use the bridge for the purpose of passing their trains across the Mississippi River; and they agreed to pay monthly stipulated rates for the transportation of passengers and freight, and, if the gross amount of the rates for freight for any year should fall below the sum of $80,000, making up the deficiency, each of the four railroad companies contributing in proportion to the tonnage passed by it over the bridge; for which, by a subsequent modification of the contract in June, 1871, was substituted one fourth of such deficiency.

This suit was brought to recover from the Pittsburgh Company and the Pennsylvania Company such deficiencies in the sums payable by the Indiana Central Company under the modified bridge contract since September 1, 1874, amounting to $118,076.89, and interest. The Circuit Court entered a decree for the plaintiff, in accordance with the prayer of the bill; and the Pittsburgh and Pennsylvania Companies each appealed to this court.

Statement of the Case.

The facts on which the Bridge Company sought to charge the Pittsburgh and Pennsylvania Companies for these sums were as follows:

After the original bridge contract had been drawn up, and before it had been executed, the Indiana Central Company entered into an indenture with the Pittsburgh and Pennsylvania Companies, by which it leased its franchises and road, and all lands and property connected with the use thereof, to the Pittsburgh Company for ninety-nine years, and the Pennsylvania Company guaranteed the performance of all the covenants of the Pittsburgh Company as lessee.

The thirteenth and the sixteenth articles of that lease clearly manifest that one of its chief objects was to establish a continuous line for quick transportation from Pennsylvania to the West, and to procure freight and passengers at each end of the line; and they contain special provisions calling for action of the Pennsylvania Company, as well as of the Pittsburgh Company, so as to promote that object.

The sixteenth article of the lease declares that it is in consideration of the benefits so accruing to the Pennsylvania Company, by reason of the covenants of the lessor and of the lessee, "in the forming, maintaining and operating of a continuous line of railway in connection with the road or roads of" the Pennsylvania Company, that this company guarantees to the Indiana Central Company that the Pittsburgh Company will keep and perform all its covenants, and that, upon its failure or default to do so, the Pennsylvania Company will, upon written notice of the kind and nature of such failure or default, keep and perform those covenants; in which event it is agreed that it shall be entitled to all the benefits that might accrue therefrom to the Pittsburgh Company.

Among those covenants of the Pittsburgh Company, as lessee, which the Pennsylvania Company thus guaranteed the performance of, were the covenant in the sixth article to pay to or for the benefit of the Indiana Central Company three tenths of the gross earnings of the property leased, and the covenant in the ninth article, by which the Indiana Central Company assigns to the Pittsburgh Company certain existing

contracts for transportation over other railroads not mentioned above, and the Pittsburgh Company "assumes, and agrees at its own risk and expense to carry out, each and all of said contracts, according to their respective tenors and legal liabilities, receiving and enjoying all benefits to be derived therefrom."

The lease was executed in behalf of each of the three companies, parties thereto, by its president and secretary, under its seal, and was approved by votes of the directors and of the stockholders of the Indiana Central Company and of the Pittsburgh Company, on or before February 1, 1869, so as to make it valid under the laws of Ohio, and the Pittsburgh Company forthwith took possession of and has since operated the railroad so leased.

The lease does not appear to have been approved by formal vote of the directors or stockholders of the Pennsylvania Company. But, immediately after its execution, the president and directors of this company, in their printed annual report to their stockholders of February 10, 1869, stated that the Pennsylvania Company controlled the railway of the Pittsburgh Company, "as an indispensable connection for the Pennsylvania Railway with the West and Southwest," by means of the ownership by the Pennsylvania Company of more than five millions of the stock and bonds of the Pittsburgh Company, and of the lease from the Indiana Central Company to the Pittsburgh Company, "guaranteed by this company;" and expressed the settled policy of the Pennsylvania Company thereby to secure a continuous line of traffic to Keokuk and westward.

The bridge contract was not one of the transportation contracts specified in the ninth article of the lease. But on February 16, 1869, the presidents of the Pittsburgh and Pennsylvania Companies, in their behalf, jointly addressed a formal letter to the president of the Indiana Central Company, referring to the bridge contract as having been under negotiation, but unexecuted by the Indiana Central Company, at the date of the final execution of the lease, and requesting him, in his official capacity, to execute the bridge contract, "it being

understood that the said lessee and Pennsylvania Railroad Company shall assume all the liabilities and obligations and be entitled to all the benefits of said bridge contract, the same as if it had been specifically named and made a part of the ninth article of the said lease."

The president of the Indiana Central Company thereupon, in its name and under its seal, executed the bridge contract, and reported to its board of directors at the next meeting, in March, 1869, that he had done so; and the board never in any way repudiated or disapproved his act or took any action upon the subject.

On February 1, 1870, an amendment of the lease, defining the gross earnings to be accounted for as the annual gross earnings of the road, after deducting, among other things, "the *pro rata* bridge tolls" and "terminal expenses allowed to other railroad corporations on through business between the East and the West," was executed by the presidents of the three companies, and approved by votes of the directors and stockholders of the Indiana Central Company and of the Pittsburgh Company.

This amendment, like the original lease, does not appear to have been approved by formal vote of the directors or stockholders of the Pennsylvania Company. But the annual report made in print by its president and directors to the stockholders a year after, on February 18, 1871, spoke of this company's control of the western traffic, through the Pittsburgh Company, and by means of the lease of the Indiana Central Railroad, as an established fact.

On June 6, 1871, the bridge contract was modified so as to have the deficiency in tolls paid to the Bridge Company by the Indiana Central Company and the three other railroad corporations, parties to that contract, one fourth each, instead of in proportion to tonnage; and the modification was executed by the president of the Indiana Central Company, pursuant to a request of the presidents of the Pittsburgh and Pennsylvania Companies, similar in terms to their request upon which the original bridge contract had been executed.

It was on June 13, 1871, after all these transactions had

taken place, that the bridge was accepted by the Bridge Company, and was opened for use; and thenceforward it was used by the Pittsburgh and Pennsylvania Companies, in the exercise of the control asserted by them under the various contracts above mentioned. From that time the Bridge Company, acting in accordance with the understanding expressed in the letters from the presidents of the Pittsburgh and Pennsylvania Companies to the president of the Indiana Central Company, upon which the latter, in behalf of his company, had executed the bridge contract and the modification thereof, as well as the original lease and the amendment thereof, demanded payment directly from the Pittsburgh Company, semi-annually, of the sums payable by the Indiana Central Company for tolls and deficiencies under the modified bridge contract; and for more than three years, from June, 1871, to September, 1874, the comptroller of the Pittsburgh Company, after examining the books of account of the Bridge Company, paid to the Bridge Company the amount both of such tolls and of such deficiencies. Since that time like payments were demanded by the Bridge Company of the Pittsburgh Company, and the tolls only were paid.

Mr. George Hoadly for appellants.

I. The lease and amended lease were *ultra vires* of both lessor and lessee.

(1) *As to the lessor.* The Columbus, Chicago and Indiana Central Railway Company was a corporation of Ohio, Indiana and Illinois. By repeated decisions of this court, it is settled that this made it a separate corporation of each of the States, *quoad* the franchises conferred by and the property situate within such State. *Ohio & Mississippi Railroad Co.* v. *Wheeler*, 1 Black, 286; *Railway Co.* v. *Whitton*, 13 Wall. 270; *Muller* v. *Dows*, 94 U. S. 444, 447; *Kansas Pacific Railroad* v. *Atchison, Topeka &c. Railroad Co.*, 112 U. S. 414. In order, therefore, that it might lease its entire road, the power must have been conferred by all the States through which its line ran. Doubtless, it might lease that part of its road lying in

Ohio separately, if it had authority so to do under the laws of Ohio, and the same is true as to the portions of its line within the other States; but to sustain a lease of its entire line, such as this was, the power must be shown to have been conferred by all these States. As that portion of the line situate within the State of Indiana, 424½ miles in length, separating the portions of the railroad lying in Ohio and Illinois from each other by the entire width of the State of Indiana, was necessarily an integral part thereof, it has been established by the decision of this court in the case of *Pennsylvania Railroad* v. *St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 630, that there was no law of Indiana at the time this lease was made, conferring on the lessor company power to make it.

(2) *As to the lessee.* The State of Ohio could not confer this power upon the Pittsburgh, Cincinnati and St. Louis Railway Company, because it was a power to be exercised with reference to property within the local jurisdiction and state sovereignty of Indiana alone.

This is a necessary result of the limitations of the powers of the several States within the boundaries of those States. The United States, not the States severally, have the right to pass laws which shall operate in more than one State. I do not deny that the State of Ohio has authorized the lease, by one railroad company to another, of a railroad, part of which may be outside of the State of Ohio; but, as the power of the State is *infra*-territorial, this legislation is not in itself alone sufficient.

II. Neither party to the lease had legal authority to enter into the bridge contract or either of the amendments thereto. This proposition is established by the decision in the case of *Pennsylvania Railroad Co.* v. *St. Louis, Alton &c. Railroad, ubi supra.*

Neither the Columbus, Chicago and Indiana Central railway nor the Pittsburgh, Cincinnati and St. Louis railway approaches within two hundred miles of the bridge, whose receipts were attempted to be guaranteed by the contracts in question.

Neither Ohio, Indiana nor Illinois have conferred the power

on any of the parties to this case to enter into the bridge contracts. The Indiana statutes were before this court in the case of the St. Louis, Alton and Terre Haute Railroad Company, and need no further reference. The form of the statute of Ohio, in force at the time the contract was made, will be found in 1 Swan & Critchfield, 281. It carefully limits the power to railroad companies whose lines of railroad connect or are continuous, and does not extend to bridge companies at all. *Pearce* v. *Madison and Indianapolis Railroad*, 21 How. 441. See also *Davis* v. *Old Colony Railroad*, 131 Mass. 258; *York and Maryland Line Railroad* v. *Winans*, 17 How. 30; *Green Bay and Minnesota Railroad* v. *Union Steamboat Co.*, 107 U. S. 98; *Eastern Counties Railway* v. *Hawkes*, 5 H. L. Cas. 331; *Ashbury Railway Carriage & Iron Co.* v. *Riche*, L. R. 7 H. L. 653; *McGregor* v. *Dover and Deal Railway*, 18 Q. B. 618; *East Anglian Railway Co.* v. *Eastern Counties Railway*, 11 C. B. 775; *Downing* v. *Mount Washington Road Co.*, 40 N. H. 230; *Pittsburgh & Steubenville Railroad* v. *Allegheny County*, 79 Penn. St. 210.

III. Neither lessor nor lessee authorized its officers to execute the bridge contract or either of the amendments thereto. This court in *Thomas* v. *Railroad Co.*, 101 U. S. 71, at p. 86, uses this language: "In regard to corporations, the rule has been well laid down by Comstock, C. J., in *Parish* v. *Wheeler*, 22 N. Y. 494, that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it." It may be contended that this case is within this rule. To which we answer: (1), in the words of Mr. Justice Miller, following the passage just quoted: "But what is sought in the case before us is the enforcement of the unexecuted part of this agreement." (2) Had the bridge contract stood as originally executed, and without amendments, we should not be here complaining of an adverse decision in the Circuit Court; for that contract required the Columbus, Chicago and Indiana Company to pay only in proportion to its use of the bridge.

IV. The lease and amended lease, and with them all liability upon the bridge contracts, were determined by eviction,

January 1st, 1875. The view taken by the court in its opinion makes it unnecessary to elaborate the argument on this point.

Mr. Lyman Trumbull and *Mr. Melville W. Fuller* for appellee.

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

The principal positions taken in the argument for the appellants were, that the Indiana Central Company, the Pittsburgh Company and the Pennsylvania Company never authorized their officers to execute the bridge contract, or to bind them by it; and that the contract was beyond the scope of their corporate powers. But the court is of opinion that upon the facts of this case neither of these positions can be maintained.

When the president of a corporation executes, in its behalf, and within the scope of its charter, a contract which requires the concurrence of the board of directors, and the board, knowing that he has done so, does not dissent within a reasonable time, it will be presumed to have ratified his act. *Indianapolis Rolling Mill* v. *St. Louis &c. Railroad*, 120 U. S. 256. And when a contract is made by any agent of a corporation in its behalf, and for a purpose authorized by its charter, and the corporation receives the benefit of the contract, without objection, it may be presumed to have authorized or ratified the contract of its agent. *Bank of Columbia* v. *Patterson*, 7 Cranch, 299; *Bank of United States* v. *Dandridge*, 12 Wheat. 64; *Zabriskie* v. *Cleveland &c. Railroad*, 23 How. 381; *Gold Mining Co.* v. *National Bank*, 96 U. S. 640; *Pneumatic Gas Co.* v. *Berry*, 113 U. S. 322, 327. This doctrine was clearly and strongly stated by Mr. Justice Story, delivering the judgment of this court, in each of the first two of the cases just cited.

In *Bank of Columbia* v. *Patterson*, which was an action brought against a corporation by an administrator to recover for work done by his intestate under contracts with the committee of the corporation, he said: "Wherever a corporation

is acting within the scope of the legitimate purposes of its institution, all parol contracts, made by its authorized agents, are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie." 7 Cranch, 306. "Let us now consider what is the evidence in this case, from which the jury might legally infer an express or an implied promise of the corporation. The contracts were for the exclusive use and benefit of the corporation, and made by their agents for purposes authorized by their charter. The corporation proceed, on the faith of those contracts, to pay money from time to time to the plaintiff's intestate. Although, then, an action might have lain against the committee personally, upon their express contract, yet, as the whole benefit resulted to the corporation, it seems to the court that from this evidence the jury might legally infer that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the plaintiff's intestate had accepted their engagement." 7 Cranch, 307.

In *Bank of United States* v. *Dandridge*, the point decided was that the approval of a cashier's bond by the board of directors of a bank, as required by statute, need not appear upon the records of the board, but might be proved by presumptive evidence, in the same manner as similar facts might be proved in the case of private persons, not acting as a corporation or as the agents of a corporation. The general doctrine was affirmed, that the presumptions, which, by the general rules of evidence, "are continually made, in cases of private persons, of acts even of the most solemn nature, when those are the natural result or necessary accompaniment of other circumstances," are equally applicable to corporations; and it was said: "Persons, acting publicly as officers of the corporation, are to be presumed rightfully in office; acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted; and slight acts on their

part, which can be reasonably accounted for only upon the supposition of such acceptance, are admitted as presumptions of the fact. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed." 12 Wheat. 70.

The original bridge contract was executed by the president of the Indiana Central Company, in its behalf, upon the formal request of the presidents of the Pittsburgh and Pennsylvania Companies, undertaking that these two corporations should assume all the liabilities and obligations of that contract and be entitled to all its benefits. The board of directors of the Indiana Central Company, having been informed by its president that he had executed the contract, never dissented, and must therefore be presumed to have concurred. The modification of the bridge contract was executed by the president of that company, in its behalf, upon a similar request and undertaking of the presidents of the Pittsburgh and Pennsylvania Companies in their behalf.

After all this, the bridge was opened for use, and was used by the Pittsburgh and Pennsylvania Companies. For more than three years, semi-annual accounts for the sums payable by the Indiana Central Company were rendered directly by the Bridge Company to the Pittsburgh Company, and settled by the latter, after examination by its comptroller. It must be presumed, although not affirmatively proved, that the comptroller reported his action in this respect to the board of directors, as well as to the stockholders at their annual or other meetings. There is no difficulty, therefore, in holding that the Pittsburgh Company was bound by the bridge contract and the modification thereof, if within its corporate powers.

The evidence that the directors or stockholders of the Pennsylvania Company authorized or ratified the action of its president in this regard is not so full and conclusive, but is quite sufficient to bind this company. After the execution of

the original bridge contract, the directors of the Pennsylvania Company twice joined with the president in a printed annual report to the stockholders, declaring in unequivocal terms the settled policy of this company to secure a continuous line of traffic from Philadelphia to Keokuk and westward, and stating that this object had been accomplished through the Pittsburgh Company.

The reasonable inference from this evidence, which there is nothing in the record to control or qualify, is that the Pennsylvania Company had the benefit of the original bridge contract, and either authorized or ratified its execution; and, under the circumstances of this case, the president must be considered as having authority to procure and assent to the modification of that contract as to the proportion of the deficiency in tolls to be borne by the Pittsburgh Company as principal and the Pennsylvania Company as guarantor.

From all the facts of the case, the conclusion is inevitable that the Pittsburgh and the Pennsylvania Companies were the real, though not the formal, parties to the bridge contract executed by the Indiana Central Company at their request and for their benefit, and that this contract, as well as the lease, bound the Pittsburgh and Pennsylvania Companies, if within the scope of their corporate powers.

The outlines of the doctrine of *ultra vires*, and the reasons on which it rests, have been clearly stated in previous judgments of this court.

The reasons why a corporation is not liable upon a contract *ultra vires*, that is to say, beyond the powers conferred upon it by the legislature, and varying from the objects of its creation, as declared in the law of its organization, are: 1st. The interest of the public, that the corporation shall not transcend the powers granted. 2d. The interest of the stockholders, that the capital shall not be subjected to the risk of enterprises not contemplated by the charter, and therefore not authorized by the stockholders in subscribing for the stock. 3d. The obligation of every one, entering into a contract with a corporation, to take notice of the legal limits of its powers.

These three reasons are clearly brought out in the unani-

mous judgment of this court, delivered by Mr. Justice Campbell, in the leading case of *Pearce* v. *Madison & Indianapolis Railroad*, 21 How. 441, in which it was held that a railroad corporation was not liable to be sued upon promissory notes which it had given in payment for a steamboat received and used by it, and running in connection with its railroad.

So it has been repeatedly adjudged by this court that a lease made by one railroad corporation to another, either of which is not expressly authorized by law to enter into the lease, is *ultra vires* and void. *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Pennsylvania Railroad* v. *St. Louis &c. Railroad*, 118 U. S. 290, 630; *Oregon Railway* v. *Oregonian Railway*, 130 U. S. 1.

But while the charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation, yet whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited. Accordingly, where the charter of a railroad corporation, or the general laws applicable to it, manifest the intention of the legislature, for the purpose of securing a continuous line of transportation of which its road forms part, to confer upon it the power of making contracts with other railroad or steamboat corporations to promote that end, such contracts are not *ultra vires*. *Green Bay & Minnesota Railroad* v. *Union Steamboat Co.*, 107 U. S. 98. See also *Branch* v. *Jesup*, 106 U. S. 468, 478.

Whether, in view of the previous decisions of this court, the lease from the Indiana Central Company could be upheld it is unnecessary to consider, because the validity of the bridge contract does not appear to us to depend upon the validity or invalidity of the lease.

The bridge contract and the lease were separate and distinct agreements. The bridge contract was in form between the Bridge Company and the Indiana Central Company. The lease was between the Indiana Central Company and the Pittsburgh

and Pennsylvania Companies, and the Bridge Company was not a party to the lease.

The Bridge Company was organized under the laws of Iowa and Illinois, and was authorized by those laws and by the act of Congress of July 25, 1866, c. 246, § 7, (14 Stat. 245,) to construct and maintain the bridge; and its power to enter into the bridge contract is undoubted. The power of the Indiana Central Company, as an Illinois corporation, to enter into that contract is made equally clear by the statutes of Illinois, collected in the brief of the appellee.

By the statute of February 28, 1854, all railroad companies of Illinois, having their termini fixed by law, and their roads intersecting by continuous lines, are authorized to consolidate their property and stock with each other, or with companies out of the state, whose lines connect with theirs; and when, by reason of such consolidation, or of such extension into or through an adjoining state, it is necessary for the construction of any railroad to cross any stream of water, it may be done by bridges or viaducts. By the statute of February 12, 1855, all railroad corporations of Illinois have the power to make all necessary and convenient "contracts and arrangements with each other, and with railroad corporations of other states, for leasing or running their roads, or any part thereof;" as well as the "right of connecting with each other and with the railroads of other states, on such terms as shall be mutually agreed upon by the companies interested." By the statute of February 16, 1865, "it shall be lawful for the directors of any railroad company created by the laws of this state to contract for the use and operation of any railroad connecting with their line beyond the limits of the state; and in all contracts for the use and operation of any railroad by another corporation, it shall be lawful for the parties to provide for the use of any of the powers and privileges of either or both of the corporations parties thereto." And by the statute of February 25, 1867, "railroads terminating or to terminate at any point, on any line of continuous railroad thoroughfare, where there now is or shall be a railroad bridge for crossing of passengers and freight in cars over the same as part of such thoroughfare,

shall make convenient connections of such railroads, by rail, with the rail of such bridge; and such bridge shall permit and cause such connections of the rail of the same with the rail of such railroads, so that by reason of such railroads and bridge there shall be uninterrupted communication over such railroads and bridge as public thoroughfares." See also Stats. of February 12, 1853, March 5, 1867, and March 11, 1869. Gross's Stats. (3d ed.) 536–539.

The bridge contract was therefore a lawful and valid contract as between the Bridge Company and the Indiana Central Company. Upon the question of its effect to bind the Pittsburgh and Pennsylvania Companies, some other facts attending its execution are worthy of consideration.

The bridge contract was not in existence as an executed and binding contract when the lease was made. But it was signed after the execution of the lease and the delivery of possession of the road by the Indiana Central Company to the Pittsburgh Company, and at the formal request of the Pittsburgh and Pennsylvania Companies, embodying an express agreement on their part with the Indiana Central Company to "assume all the liabilities and obligations, and be entitled to all the benefits of said bridge contract." The reference in that request and agreement to the ninth article of the lease was for the purpose of defining the extent of the liabilities and benefits assumed, and perhaps of indicating that the Pittsburgh Company alone was bound as principal, and the Pennsylvania Company as guarantor only; but it did not make the bridge contract a part of the lease.

The reasonable inference is that, according to the original intent and by the subsequent action of the parties, the Pittsburgh and Pennsylvania Companies were understood and treated as directly liable to the Bridge Company for the proportion of tolls and deficiencies, which, by the terms of the bridge contract, was chargeable to the Indiana Central Company.

By the laws of Illinois, as we have seen, the bridge contract was valid, and might lawfully be made between the Bridge Company and the Indiana Central Company; and it appears

to us equally clear that the laws of Pennsylvania authorized the Pittsburgh and Pennsylvania Companies to assume the obligation of that contract with the Bridge Company, either directly or through the intervention of the Indiana Central Company.

By the statute of Pennsylvania of April 23, 1861, it is enacted that "It shall and may be lawful for any railroad company, created by and existing under the laws of this commonwealth, from time to time to purchase and hold the stock and bonds, or either, of any other railroad company or companies chartered by, or of which the road or roads is or are authorized to extend into, this commonwealth; and it shall be lawful for any railroad companies to enter into contracts for the use or lease of any other railroads upon such terms as may be agreed upon with the company or companies owning the same, and to run, use and operate such road or roads in accordance with such contract or lease: Provided, that the roads of the companies so contracting or leasing shall be, directly or by means of intervening railroads, connected with each other." Purdon's Digest (11th ed.) 1439.

While the first provision of that statute authorizes any railroad company of Pennsylvania to purchase and hold stock and bonds of such railroad companies as either are chartered by the State or have roads extending into it, the second clause makes it lawful for railroad companies of Pennsylvania to contract for the use or lease, not merely of railroads of the two classes defined in the first clause, but of any railroads whatever, provided only "the roads of the companies so contracting or leasing shall be, directly or by means of intervening railroads, connected with each other." The only reasonable construction of the words "any other railroads," in the second clause, is that it includes all railroads, whether within or without the State, coming within the description of the proviso.

But any question of the construction of that statute in this regard is removed, or rendered immaterial, by the statute of Pennsylvania of February 17, 1870, (passed more than a year before the modified bridge contract was executed, or the bridge completed or used,) which, in the clearest terms, authorizes

any railroad company of Pennsylvania to enter into a lease or any other contract on such terms and conditions as may be agreed upon, or to guarantee the payments or covenants thereof, as to any railroads, whether "within the limits of this state, or created by or existing under the laws of any other state or states," provided they are connected, either directly or by means of intervening lines, with its road, and form a continuous route for the transportation of persons and property. Purdon's Digest (11th ed.) 1441.

Nor can we have any doubt that the Bridge Company was a railroad company, and the bridge a railroad, within the meaning of these statutes. The principal purpose and use of the bridge was the passage of railroad trains. It was, in substance and effect, a railroad built over water, instead of upon land; and, strictly speaking, it was a railway viaduct rather than a bridge. *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116.

The necessary conclusion from the foregoing considerations is that it was rightly held by the Circuit Court that the Bridge Company was entitled to recover from the Pittsburgh Company, and it having declined to pay upon due demand, to recover from the Pennsylvania Company also, the amount of the deficiencies in tolls which, by the modified bridge contract, was payable by the Indiana Central Company.

It is proper to add that our judgment does not rest in any degree upon the ground suggested in argument, that the bridge contract and the lease having been executed, the Pittsburgh and Pennsylvania Companies, having received the benefits of them, are estopped to deny their validity; because, according to many recent opinions of this court, a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid, but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received the benefit of. *Louisiana* v. *Wood*, 102 U. S. 294; *Parkersburg* v. *Brown*, 106 U. S. 487, 503; *Chapman* v. *Douglas County*, 107 U. S. 348, 360; *Salt*

Lake City v. *Hollister*, 118 U. S. 256, 263; *Pennsylvania Railroad* v. *St. Louis &c. Railroad*, 118 U. S. 290, 317, 318.

The sole ground of our decision is that the bridge contract is independent of the lease, and is valid and binding as between the parties to this suit, whether the lease is valid or invalid. This being so, the question argued at the bar, whether the appellants, by reason of eviction, are no longer liable on the lease, becomes immaterial; and the judgment of the Circuit Court in a former suit, affirming the validity of the lease, has no effect upon our decision, for the same reason, as well as because the Bridge Company was not a party to that judgment, and therefore neither bound by it nor entitled to the benefit of it.

Decree affirmed.

Mr. Chief Justice Fuller and the late Mr. Justice Matthews, having been of counsel, took no part in the consideration or decision of this case.

WILLIAMS *v.* CONGER.

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

No. 105 of October Term, 1887. — Decided October 22, 1888.

A renewal of an application for a rehearing after the close of the term at which judgment was rendered, and for reasons which have been passed upon by the court, is not in order, and does not commend itself to the favorable consideration of the court.

This was a petition to correct a clerical mistake in the opinion of this court, delivered April 2, 1888, *Williams* v. *Conger*, 125 U. S. 397, citing in support of the power to make the amendment *Bank of Kentucky* v. *Wistar*, 3 Pet. 431. To this petition was appended a petition for a rehearing which had been presented and overruled at October Term, 1887, accompanied by a "demand upon the court" to give it a hearing.

Mr. Eugene Williams for both petitions.

Mr. Justice Bradley delivered the opinion of the court.

Leave to file a motion for rehearing in this case is asked for on the ground of clerical error in the opinion. A motion for rehearing was made at the last term upon precisely the same brief now sought to be filed, and notwithstanding the alleged misconception in the opinion of the point made by the plaintiff in error, the court was satisfied with the conclusion it had reached, and that no modification of the judgment was required, and no rehearing was necessary or called for. The motion was therefore denied. The persistent renewal of the application at this time, after the close of the term at which judgment was rendered, and especially upon the same reasons once overruled, is not in order, and does not recommend itself to the favorable consideration of the court.

MARSHALL *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 57. Argued November 1, 1888. — Decided November 19, 1888.

Marshall v. *United States*, 124 U. S. 391, is affirmed on rehearing.

This case was heard at October Term 1887, and the judgment below was affirmed. 124 U. S. 391. A petition for rehearing was granted April 30, 1888, 127 U. S. 786, and the cause was reargued at this term.

Mr. W. D. Davidge for appellants.

Mr. Assistant Attorney General Howard for appellees.

Mr. Chief Justice Fuller, on the 19th of November, 1888, announced that a majority of the court adhered to the views expressed by Mr. Justice Harlan in the opinion of the court in this case delivered at the last term, affirming the judgment of the Court of Claims.

Affirmed.

Argument for the Motion.

MR. JUSTICE HARLAN stated that he now believed that that opinion was wrong and that he dissented from the judgment of the court.

RADFORD *v.* FOLSOM.

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

No. 1014. Submitted November 5, 1888. — Decided November 26, 1888.

The final decree in a suit in equity, entered October 10, 1885, adjudged and decreed that there was due to the administratrix of J. F. a sum named in the decree, and that if, within ninety days from that date the court should be satisfied that a certain other sum named as paid for the purchase of notes, etc., had inured to the benefit of J. F. or his estate, that sum should be credited on the amount so decreed to be paid; *Held*, that for the purpose of an appeal the date of the decree was October 10, 1885.

THIS was a motion made by the administratrix of Jeremiah Folsom, deceased, to dismiss an appeal. The reasons for the dismissal, given in the motion were:

"That the decree appealed from was made and entered of record in the Circuit Court of the United States for the Southern District of Iowa, Western Division, on the 10th day of October, 1885;

"That the appeal in the above entitled cause was not taken until the 30th day of December, 1887, more than two years after the entry of the decree, as aforesaid."

Mr. H. H. Trimble and *Mr. Joseph G. Anderson* for the motion, submitted on their brief.

This motion is based on § 1008 of the Revised Statutes, providing that no decree of a Circuit Court, in equity, shall be reviewed in the Supreme Court on appeal unless the appeal is taken within two years *after the entry of such decree.* That the appeal in this case was taken more than two years after the entry of the decree is plain. The decree was entered

Argument against the Motion.

October 10, 1885. The appeal was not taken until December 30, 1887. This is clearly not within two years.

Mr. Walter H. Smith (with whom was *Mr. M. F. Sapp*) opposing.

The essential part of the decree was as follows:

"The court doth further adjudge and decree that there is due from the plaintiff to the defendant, Agnes Folsom, as administratrix of the estate and effects of Jeremiah Folsom, deceased, the sum of fourteen thousand six hundred and forty-five dollars and thirty-two cents, with interest thereon from the twentieth day of December, A.D. 1884, at the rate of six per cent per annum, being the amount of rents received by the receiver in the cause in the state court mentioned in the said report with interest less taxes, and the court doth adjudge and decree that the complainant, George W. Radford, as assignee in bankruptcy of the estate and effects of Simeon Folsom and Frank Folsom, bankrupts, pay to the defendant, Agnes Folsom, as administratrix of the estate and effects of Jeremiah Folsom, deceased, the said sum of fourteen thousand six hundred and forty-five dollars and thirty-two cents ($14,645.32) with interest thereon at six per cent per annum, from the twentieth day of December, A.D. 1884, and that execution issue therefor."

* * * * *

"And it is further ordered, adjudged and decreed, that if the complainant shall satisfy the court, within ninety days from this date," (that date being October 10, 1885,) "that the amounts paid by Simeon Folsom for the purchase of the incumbrances and notes specified in the master's report, and particularly in Schedules No. 1 and 2 thereto, amounting, in the aggregate, to fourteen thousand and eighty-four dollars and seventy-seven cents, ($14,084.77,) or any part thereof, have enured to the benefit of Jeremiah Folsom or his estate, by the production and cancellation or discharge of said incumbrances and notes, in such manner as to terminate all liability thereon, then, and in such case, there shall be credited on the amount

hereinbefore ordered to be paid by the complainant the amount of such incumbrances and notes so produced and cancelled or discharged."

Then follows a decree involving title to sundry tracts of land in Iowa, covering six pages of the record in descriptions.

This decree must be construed as an entirety. Taken as a whole, it shows that it was not to go into effect until the period of ninety days had expired from the time of its rendition. It first provides that the sum of $14,645.32 shall be paid by the complainant to the administratrix of Jeremiah Folsom, deceased, and that execution shall issue therefor. It then proceeds to provide that the complainant shall have ninety days from the date of the decree in which to satisfy the court that the sum of $14,084.77, or any part thereof, had been applied by Simeon Folsom for the purchase of certain incumbrances and notes therein specified, and had inured to the benefit of the said Jeremiah Folsom, or his estate, then such amount "*shall be credited on the amount hereinbefore ordered to be paid by the complainant.*"

That amount was the $14,645.32 above stated. It is manifest that this could not be done if the decree took effect from its date, for its payment might have been coerced by the issuing of an execution, before the expiration of the ninety days.

PER CURIAM: This case is dismissed for want of jurisdiction.

PACIFIC EXPRESS CO. *v.* MALIN.

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

No. 1203. Submitted November 19, 1888. — Decided November 26, 1888.

When the defendant below sues out the writ of error, the matter in dispute here is the judgment rendered against him.

In a case which had been dismissed for want of jurisdiction, no opposition

having been made thereto, the court allowed a mandate, notwithstanding notice of the motion for the mandate had not been given.

MOTION TO DISMISS for want of jurisdiction.

The defendant in error was plaintiff below, and brought his action at law against the plaintiff in error in the District Court of Mitchell County, Texas, for an injury done to his property by the defendant in error, and claimed damages in the sum of $5850. An answer was filed by the express company. On the 6th January, 1887, the case was removed on the defendant's petition to the Circuit Court of the United States for the Western District of Texas, and there entered as No. 24. Certain proceedings were had in that court, and the case being at issue was tried before a jury on the 12th April, 1888, who rendered a verdict for plaintiff for $3000. Judgment was entered on this verdict. The plaintiff, at the suggestion of the court, entered on it a remittitur of $350, thus reducing the judgment from $3000 to $2650. The writ of error was sued out by the plaintiff in error to reverse this judgment.

Mr. William Hallett Phillips for the motion.

No one opposing.

PER CURIAM: This case is dismissed for want of jurisdiction.

Dismissed.

Mr. Phillips, at a later day, moved the court for the issuance of a mandate, and, as cause therefor, he stated that no notice of the motion for the mandate had been served on the opposite party; but that no opposition had been made to the dismissal of the case, and, as the dismissal had been made for want of jurisdiction, there would seem to be no reason why the mandate should be withheld.

PER CURIAM: Sufficient cause has been shown, and the mandate may issue at once.

Mandate issued.

LIST *v.* PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 984. Decided December 10, 1888.

The death of the accused in a criminal case brought here by writ of error abates the suit.

THE case is stated in the opinion.

Mr. W. P. Potter for plaintiff in error.

Mr. W. D. Porter for defendant in error.

PER CURIAM: The death of George B. List, the plaintiff in error in this cause, having been suggested in a communication from counsel for defendant in error to the clerk, and it appearing to the court that this is a criminal case, it is considered by the court that this cause has abated. Therefore, it is ordered and adjudged by the court that the writ of error in this cause be, and the same is hereby,

Dismissed.

CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY *v.* GRAY.

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

No. 876. Submitted March 11, 1889. — Decided March 18, 1889.

Since the act of March 3, 1887, 24 Stat. 552, c. 373, took effect, no appeal or writ of error lies to this court from a decision of a Circuit Court remanding a cause to a state court which had been removed from it, although the order remanding it was made before that act took effect.

MOTION TO DISMISS for want of jurisdiction.

Statement of the Case

Mr. John F. Lacey for the motion.

There is only one point involved in this motion. The plaintiff in error caused the removal of the cause from the District Court of Iowa to the United States Circuit Court.

The defendant in error moved to remand the cause to the state court. This motion was submitted before Justice Miller and Judge Lorr and the motion sustained. The cause was removed and also remanded prior to the act of March 3d, 1887, but the writ of error was not sued out until after the passage of that act. It follows that when the right to sue out a writ of error in a cause that had been remanded was cut off by the statute, there being no reservation in relation to any past orders the jurisdiction was cut off, and so writ of error will not lie.

No one opposing.

PER CURIAM: This case is dismissed for want of jurisdiction.

Dismissed.

DENT *v.* FERGUSON.

ORIGINAL MOTION IN AN APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

No. 269. Submitted March 18, 1889. — Decided April 1, 1889.

Under the circumstances set forth in the motion papers below, the court, as to so much of the record as was printed by order of the court below, dispenses with the filing of ten of the twenty-five copies required by Rule 10 to be printed for the use of the court and counsel, and remits the clerk's fees for supervision of printing.

THIS was a motion, entitled in No. 269, "to suspend section 2, rule 10, and so much of the rules, as requires 25 copies to be filed, and allowing 15 copies to be filed instead." The motion and supporting papers were as follows:

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States.

PETITION OF APPELLANTS

To suspend Section 2, Rule 10, and so much of Rule as requires 25 copies to be filed, and allowing 15 copies to be filed instead.

George G. Dent, Sarah L. Dent, H. G. Dent, Jr., Susan Dent, appellants herein, respectfully state to your Honors, that when this cause was heard in the court below, before Mr. Justice Stanley Matthews and the Hon. E. S. Hammond, it was ordered by them that the entire record be printed out of the funds in the hands of the Receiver, which was done at a cost of about one thousand dollars, ($1000,) and the records were printed in size and form required by the rules of this court, with the assurance that when the cause came to this court a reprint would not be required of any portion of the record, except such as might be made after the cause was heard, and such printing was accordingly done under the supervision of the Clerk of the United States Circuit Court at Memphis, who was paid therefor the sum of $500.

Since the cause came to this court, and on the 7th day of July, 1888, the Clerk of this court sent petitioners a notice that it would require $1825 to print the record, to wit:

Clerk's Fees	$ 800.00
Printing	1050.00
	$1850.00
Less sum deposited	25.00
	$1825.00

A copy of which letter is made Exhibit A hereto.

They further represent that the Clerk of this court has notified them that if they could furnish twenty-five copies and $100 to print the record, not already printed, and his fee of $800 for supervising the whole record, that the transcript could be gotten ready.

Petitioners can furnish fifteen copies of the record as already

printed, and can raise the $100 to pay the additional printing, but are powerless to raise the $800 charge of the Clerk for supervising the printing, which petitioners insist should only include so much of the record as has not been heretofore printed, and which the Clerk estimates at $100.

They are poor, and are informed and believe they will be able to so change the decree as made, as to give them substantial relief.

They file herewith the certificates of the Hon. E. S. Hammond, Judge, and J. B. Clough, Clerk of the court, in corroboration of this their statement, and ask that upon the filing of fifteen copies of the record so printed and depositing the $100 estimated cost of printing the balance of the record, and whatever is proper cost to the Clerk of this court for supervising the printing of the remaining unprinted record, that they be allowed to have the record printed and their rights determined. All of which is respectfully submitted.

D. H. Poston,
Solicitor for Petitioners.

At the request of counsel, I will state that at the time the printing was ordered in the Circuit Court Mr. Justice Matthews stated in substance that he would see that the printing need not be duplicated in the Supreme Court, by which I understood that he would ask that court to so direct.

E. S. Hammond,
U. S. District Judge.

January 24, 1889.

Memphis, Tennessee, January 24, 1889.

I was not Clerk of the United States Circuit Court when the record in the above case was printed, but under an order of the court, (printed record, p. 130,) as Master in Chancery, had the record as it then existed, printed, and for my services in that regard was paid by the Receiver, by direction of the court, the sum of five hundred dollars.

John B. Clough.

Statement of the Case.

I, T. B. EDGINGTON, counsel for Isaac Ferguson and others, complainants in cause No. 269, October Term, 1888, acknowledge service of a copy of this record, and notice, and consent that the record as made may be handed to the Supreme Court of the United States for its action, waiving any objections that I may be entitled to.

January 23, 1889.

EXHIBIT A.

SUPREME COURT OF THE UNITED STATES.

WASHINGTON, D. C., July 7, 1888.

SIR — It becomes necessary, under the provisions of Rule 10, that your clients immediately provide the money necessary to pay for printing the record and the clerk's fees, in the case of Geo. G. Dent, *et al.*, appellants, *v.* Isaac A. Ferguson, *et al.*, No. 269, October Term, 1888. This is the only notice that will be given you by the clerk, and if the parties fail to comply, the case when reached in the regular call of the docket will be dismissed pursuant to section 2 of said rule.

In this case the amount estimated is as follows, viz.:

Clerk's fees	$800 00
Printing	1050 00
Total	$1850 00
Deduct amount on deposit	$25 00
Total amount to be furnished	$1825 00

The amount paid for printing and clerk's fees, in case of a reversal of the judgment or decree, will be taxed on the mandate, and be recoverable from the unsuccessful party.

The fees accruing to the clerk belong to the United States, and it is his duty to collect them.

See Rule 10, secs. 2 and 6, and an extract from the decision of the court in *Steever* v. *Rickman*, printed on the back of this notice.

Respectfully, etc.,

JAMES H. MCKENNEY, *Clerk.*

Syllabus.

January 24, 1889.

Mr. Edgington:

I send petition and agreement written by Dave Poston, who left last night for New York. He will be in Washington in three days, and said you would sign and I must forward to him.

Respectfully,

C. W. Frazer.

January 24, 1889.

Col. C. W. Frazer:

Dear Sir — On considering of this matter, I don't believe I could sign this waiver of notice. The matter has now been delayed so long that we could not get ready to try the case at this term after printing the record. I would like to accommodate both you and Poston, but I am satisfied that I could not secure the approval of my clients at this late day in the course suggested.

Yours truly,

T. B. Edgington.

Mr. A. B. Browne and *Mr. D. H. Poston* for the motion.

No one opposing.

Per curiam: On consideration of the motion for leave to furnish fifteen copies of the record as already printed, and for a remission of the clerk's fee for supervising the printing, it is now here ordered by the court that, upon the appellants' filing fifteen copies of the record as already printed, and making payment of $100 as for cost of additional printing required, that the balance of the estimated costs be remitted.

NICHOLS, SHEPARD AND COMPANY *v.* MARSH.

ORIGINAL MOTION IN A CASE BROUGHT UP BY APPEAL.

No. 95. Submitted March 18, 1889. — Decided April 1, 1889.

M. filed a bill in equity against S. for the infringement of letters patent. S. answered and filed a cross-bill. The decree dismissed the original bill

Statement of the Case.

from which M. appealed. Thereupon S. took an appeal in the cross suit from rulings excluding evidence. In this court the clerk required S. to pay one half the cost of printing the record. This court, after argument, affirmed the decree dismissing the original bill, and dismissed the cross-appeal. 128 U. S. 605. *Held*, that S. was entitled to recover of M. the amount so paid.

After the entry of the decrees in *Marsh* v. *Nichols* and *Nichols* v. *Marsh*, 128 U. S. 605, the following motion was made, entitled in the two causes.

And now comes the said defendant, Nichols, Shepard & Co., by Charles F. Burton, their solicitor, and moves the court now here, that they, the said Nichols, Shepard & Co., do recover against the said Elon A. Marsh, Minard Lefever and James Scott, as costs to be taxed in their favor, one half of the amount required for printing the record and supervising the printing of the record in said causes, in addition to the amount, taxable and to be taxed in their favor, in the first above entitled cause.

This motion is based on the records in said causes and on the affidavit of Charles F. Burton, hereto attached, and will be brought on for hearing on Monday, the 25th day of February, at the opening of said court.

To R. A. Parker, Esq.,
Solicitor for Marsh Lefever and Scott.

Charles F. Burton,
Solicitor for Nichols, Shepard & Co.

State and Eastern District of Michigan, } ss.
County of Wayne, }

Charles F. Burton, duly sworn, deposes and says, that he is the solicitor for Nichols, Shepard & Co., in the above entitled appeal and cross appeal, and that in response to a request from the clerk of this court, he sent to said clerk, on the 16th day of November, 1887, the sum of two hundred and seventy-five dollars, which the said clerk notified him was the amount of money required to defray the portion of the expense properly

to be borne in the first instance, by said Nichols, Shepard & Co., as one half the cost of printing the record in said cases.

CHARLES F. BURTON.

Subscribed and sworn to before me, this 21st day of January, 1889.

CHARLES H. FISK,
Notary Public.
Wayne County, Michigan.

Mr. Charles F. Burton for the motion.

Mr. R. A. Parker opposing.

PER CURIAM: On consideration of the motion for a retaxation of costs in this cause, and of the argument of counsel thereupon, had as well in support of as against the same:

It is now here ordered by the court that the amount advanced by the appellants in this cause towards printing the record be recoverable by them from the appellees herein.

[This order is entitled only in the cross-suit of *Nichols* v. *Marsh.*]

HUNT *v.* BLACKBURN.

ORIGINAL MOTION IN A CAUSE APPEALED FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 16. Submitted January 22, 1889.— Decided April 8, 1889.

The counsel for appellees having undertaken to appear for the heirs and representatives of the original appellee, deceased, and having filed in the office of the clerk of this court a waiver of publication, and having failed to appear, and the cause having been heard and having proceeded to final hearing, (128 U. S. 464;) *Held*, that the decree be made absolute against the heirs and representatives of the deceased appellee.

THE previous proceedings in this case are reported in 127 U. S. 774; and 128 U. S. 464. On the 22d January, 1889, the following motion was made in the cause:

Statement of the Case.

The appellant, by his counsel, moves the court to enter the decree in this cause, reversing the decree below; on the ground that the waiver of publication is equivalent to the publication; and that the undertaking of counsel to appear, is an appearance, or will justify the clerk in entering the appearance; and in this case, an order will follow for publication, to show cause why the appellant should not have the decree certified — or otherwise why execution should not issue. It is submitted, however, that if this latter is the proper course, the *sci. fa.* should issue from the court below after remand.

If this be held by the court inadmissible, he then moves in the alternative, that an order be entered for publication, in such form as the court may order, and submits the following for the consideration of the court, as a proper order:

U. S. Supreme Court, Oct. Term, 1888.

Hunt
v.
Blackburn, *et al.* } No. 16.

This case having been heard on the undertaking of counsel for appellees to appear for the heirs and representatives of the original appellee, and upon a waiver of publication by the said counsel, filed in this court; and the said counsel having failed to appear, though requested by appellant's counsel. It is on motion of appellant's counsel ordered that publication be made in the Eastern District of Arkansas, weekly, in some newspaper published in said district, for four successive weeks; the first publication not to be later than the first day of February next, requiring Belle Buck, as administratrix of S. S. Buck, appellee, and in her own right, Willie Buck and Eddie Blackburn, children and heirs at law of Sallie S. Buck, appellee, and all other heirs or representatives of said Sallie S. Buck, to appear before this court, on or before the first Monday in April, 1889, and show cause, if any they have, why a decree shall not be entered in this cause, reversing the decree in the court below, and remanding the said cause, with directions to enter such decree as this court may order.

Syllabus.

Mr. J. B. Heiskell, for the motion, cited *Lorymer* v. *Hollister*, Strange, 693 ; 1 Tidd's Practice, 241, 1163 ; *Green* v. *Watkins*, 6 Wheat. 260 ; *Wicket* v. *Cremer*, 1 Ld. Raym. 439 ; *State* v. *McLean*, 8 Heiskell, 289.

PER CURIAM : It is ordered that

The decree of this court of November 26, 1888, be made absolute against the heirs and representatives of Sallie S. Blackburn, deceased.

MENKEN *v.* ATLANTA.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 674. Decided April 18, 1889.

The death of the accused in a criminal case brought here by writ of error abates the suit.

THE case is stated in the opinion.

Mr. Hoke Smith for plaintiff in error.

Mr. S. W. Packard for defendant in error.

PER CURIAM : The death of Fritz Menken, the plaintiff in error in the cause having been suggested by *Mr. Pope Barrow*, in behalf of *Mr. Hoke Smith* of counsel for the said plaintiff in error, and it appearing to the court that this is a criminal case, it is considered by the court that this cause has abated. Therefore, it is ordered and adjudged by the court that the writ of error in this cause be, and the same is hereby,

Dismissed.

FREELAND *v.* WILLIAMS.

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

No. 267. Argued April 17, 18, 1889. — Decided May 13, 1889.

The provision in the constitution of West Virginia of 1872 that the property of a citizen of the State should not " be seized or sold under final process

issued upon judgments or decrees heretofore rendered, or otherwise, because of any act done according to the usages of civilized warfare in the prosecution of 'the war of the rebellion,' by either of the parties thereto," does not impair the obligation of a contract, within the meaning of the Constitution of the United States, when applied to a judgment previously obtained, founded on a tort committed as an act of public war.

A bill in equity to invalidate a judgment obtained against the defendant for a tort committed under military authority, in accordance with the usages of civilized warfare and as an act of public war and to also enjoin its enforcement, is "due process of law" and is not in conflict with the Constitution of the United States.

In equity in a state court of West Virginia to enjoin the enforcement of a judgment obtained against the complainant. Decree for the complainant. The defendant brought the case here by writ of error. The Federal question is stated in the opinion of the court.

Mr. W. L. Cole (with whom was *Mr. C. C. Cole* on the brief) for plaintiff in error.

Mr. Charles J. Faulkner and *Mr. Robert White* for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

This case is brought before us by a writ of error directed to the judges of the Supreme Court of Appeals of the State of West Virginia.

We can, perhaps, best present the questions of Federal cognizance, which are supposed to give this court jurisdiction, by a short statement of its history.

David Freeland, the present plaintiff in error, brought, in the Circuit Court of Preston County, in the State of West Virginia, against Joseph V. Williams and his brother Charles Williams, an action of trespass *de bonis asportatis* for the taking and conversion of cattle which were the property of the plaintiff; and on the 22d day of December, 1865, he recovered a judgment in that court against Joseph V. Williams, for $1110, with interest and costs, there being a verdict in favor of the other defendant. From that judgment the

defendant took a writ of error, on which it was affirmed in the Supreme Court of Appeals of the State of West Virginia. *Williams* v. *Freeland*, 2 West Virginia, 306. The trespass took place while the late civil war was flagrant in that part of the country. The records of the Circuit Court of Preston County, in which this judgment was rendered, have been destroyed by fire, and no transcript of the proceedings of that case is to be found in the record presented to us, except that a certified copy of the judgment of the Supreme Court of Appeals, affirming the judgment of the Circuit Court, is appended as an exhibit to the answer of Freeland made in the suit now under consideration.

The judgment thus recovered remaining unsatisfied, the defendant in that case, Joseph V. Williams, on the 15th day of August, 1883, filed his bill in chancery in the Circuit Court of Preston County, which, as it is short and contains the matter which we are called upon to review, will be here inserted, as follows:

"The bill of complaint of Joseph V. Williams, plaintiff, against David Freeland, defendant, filed in the Circuit Court of Preston County.

"*To the Honorable Wm. T. Ice, Judge of the Circuit Court of Preston County:*

"The plaintiff complains and says that the defendant instituted in the Circuit Court of said county his action of trespass against the plaintiff and a certain Charles Williams, and on the 22d day of December, 1865, recovered a judgment therein against the plaintiff alone for $1110, with interest thereon from the 4th day of January, 1864, and for the costs of the plaintiff therein expended. The record of said judgment has been destroyed by the burning of the court-house of said county. From said judgment the plaintiff obtained a writ of error and supersedeas, and the said judgment was by the Supreme Court of Appeals, at the July Term thereof, in the year 1867, affirmed; and thereafter, on the —— day of ———, 1875, the said defendant sued out an execution on said sum of

$———, with interest from the —— day of ———, and for costs and damages as was in said case then provided for by law; that the plaintiff then proceeded to invalidate and have said judgment set aside, according to an act of the legislature of the State of West Virginia, on the —— day of ———, and said judgment was by the Circuit Court of said county, by order entered in said proceedings, set aside, and a new trial ordered in said original action; that from said order an appeal was taken by said Freeland, and said order was reversed and said proceedings to set aside said judgment were dismissed; and so, therefore, the said original judgment is apparently in force, although, in fact, void, for reasons hereinafter stated. The plaintiff further states that said action in which said judgment was obtained was not an action *ex contractu*, but was an action *ex delicto;* that it was, in fact, for cattle or other personal property alleged by the defendant to belong to him taken by the military authorities of the Confederate States, and taken by the soldiery and military authorities aforesaid during the late war between the government of the United States and a part of the people thereof; and the plaintiff says that said judgment was for acts done according to the usages of civilized warfare in the prosecution of said war by the said Confederate States and the military power and authority thereof. The plaintiff further states that during said war he was a citizen of the State of Virginia until the formation of the State of West Virginia, and thereafter was and has been continually since a citizen of the State of West Virginia, and is now a citizen of the State of West Virginia; that he aided and participated in said war in the armies of the said Confederate States from the time he entered the service thereof, in the year 1862, until the termination thereof. The plaintiff further states that he resides in the county of Grant, and is the owner of real estate therein; that said judgment has been docketed in his said county, as he believes, and has occasioned a cloud upon his title to said property. The plaintiff further says that he is advised that said judgment is void, and that his property is not liable to be seized or sold therefor, and, notwithstanding said judgment is void, he is threatened

and is in danger of having his property so seized and sold to satisfy said judgment, and the value and salable character of his said real estate by reason of the cloud on the title thereof as aforesaid is greatly impaired. The plaintiff further states that he has not full or adequate relief against said judgment, except by this his bill and the due process of law thereby, and by the enforcement of the protection afforded by the 35th section of the 8th article of the constitution of this State in his behalf, and to have said judgment by judicial authority declared void and inoperative. The plaintiff therefore prays that said judgment be declared void; that the defendant be perpetually enjoined and restrained from collecting the same and every part thereof, whether of principal, interest, cost, or damages, and from suing out execution thereon; and that he may have such other relief as the court may see fit to grant.

"JOSEPH V. WILLIAMS,
"*By Counsel.*"

To this bill there was a demurrer by Freeland, and also an answer. The demurrer relies upon the proposition that the 35th section of article 8 of the constitution of the State, which the plaintiff in that case sets up as the foundation of his relief, is in conflict with the 10th section of the first article of the Constitution of the United States, and also with the 1st section of the 14th article of amendment to that constitution, and is therefore null and void. The answer sets out the same matter, and also says that the judgment was for a lot of cattle owned by Freeland and taken and converted by the plaintiff, but *not* in accordance with the usages of civilized warfare; and that Williams went to trial on the plea of not guilty to the action of trespass for the recovery of the value of these cattle, though the plaintiff might have waived the trespass and declared in assumpsit.

To this there was a replication, and testimony by way of depositions was taken on the issue as to whether the taking, on which the original judgment for the plaintiff rested, was an exercise of belligerent rights, and was done according to the usages and principles of public war. There can be no question

that these depositions establish the fact that Williams, the defendant in the original action, was a soldier under the command of General Fitzhugh Lee, whose force was dominant in that part of West Virginia in January, 1864, and that it was under his orders that the cattle were seized while Lee was on a raid through that county, the object of which was to get beef cattle, and the order of the commanding officer was to take beef cattle and surplus horses.

Upon the final hearing the Circuit Court rendered its decree in the following language:

"It is therefore considered by the court that the judgment in the bill mentioned in favor of the defendant, against the plaintiff, described as a judgment rendered by the Circuit Court of Preston County, on the 22d day of December, 1865, for $1110, with interest thereon from the 4th day of January, 1864, and the costs, is void, and that the defendant be perpetually enjoined and restrained from the enforcement and collection of the same and every part thereof, and that the defendant do pay to the plaintiff his costs herein."

Thereupon Freeland, the present plaintiff in error, made application, according to the laws of West Virginia, by a petition, for an appeal, which petition was denied. This denial, as in the case of similar proceedings in the State of Virginia, this court has held to be a final judgment of the highest court of the State, which can be reviewed in this court in a proper case.

The errors assigned, and the questions presented by counsel and by this record, are substantially two: 1st. That the new constitution of West Virginia, relied on as the foundation of relief by the defendant in error, is a violation of that clause of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts. Section 10, Art. I, of the original Constitution. 2d. That it violates the provision of the 1st section of the 14th article of amendment, viz., that no State shall "deprive any person of life, liberty or property without due process of law."

It is proper to observe that counsel have commented upon the fact that the defendant Williams, in the original action

of trespass, filed certain pleas setting up the fact that what he did in the way of seizing the cattle was under order of superior military authority, and in the exercise of belligerent rights, and that, therefore, he was not personally liable to the plaintiff for the alleged trespass. But there is no evidence in this record that any such pleas were ever offered to be filed, or were rejected by the trial court; nor is any such fact stated by Williams in the bill which is the foundation of the suit now before us.

It is very true that this circumstance is mentioned in some of the opinions of the Supreme Court of Appeals of the State, in one of the cases where this matter was before it; but this could not be received as evidence of a fact not found in the record, even if those opinions and judgments had been made a part of this case by reference or otherwise. But this matter is, we think, immaterial in regard to the issue presented here. The defence which Williams now says he offered to make by those pleas was competent under the plea of not guilty, on which the case was tried; and in the depositions taken in the present case on the bill for an injunction it is made quite clear that such a defence was offered, but held to be insufficient by the court.

The constitutional provision of the State of West Virginia, adopted by vote of the people on the 22d of August, 1872, on which the defendant in error mainly relies in support of the decree rendered in this case, is the 35th section of the 8th article of that instrument, and reads as follows:

"No citizen of this State who aided or participated in the late war between the government of the United States and a part of the people thereof, on either side, shall be liable in any proceeding, civil or criminal; nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore rendered, or otherwise, because of any act done, according to the usages of civilized warfare, in the prosecution of said war, by either of the parties thereto. The legislature shall provide, by general law, for giving full force and effect to this section by due process of law."

The legislature of West Virginia undertook to discharge the

duty imposed by this constitutional provision, by section 3 of chapter 58 of the acts of 1872–3, which is in the following language:

"That if it shall be alleged by petition, under oath of the defendant, or his personal representative, to the court in which any judgment or decree shall have been rendered, or to any court to which such judgment or decree shall be transferred, that such judgment or decree was recovered or rendered by reason of an act done by the defendant according to the usages of civilized warfare in the prosecution of said war, a copy of which having been served on the plaintiff, his agent or attorney at law, or, if he be dead, upon his personal representative, ten days prior to filing the same, the court shall suspend proceedings upon such judgment or decree; and being satisfied of the truth of said allegation, or if it appears by the record that a plea, setting forth that the matters complained of were done in accordance to the usages of civilized warfare in the prosecution of said war, was filed, or offered to be filed, by the defendant, and rejected or overruled by the court, *shall set aside the judgment or decree, and award a new trial therein*, which shall be governed by the provisions of this act; and in case the judgment or decree upon the new trial be in favor of the defendant, and he shall have paid the said judgment or decree, or any part thereof, the court shall render a judgment or decree that the same shall be restored to the defendant, with interest, and shall enforce such restitution by execution or other proper process."

The Supreme Court of Appeals of the State of West Virginia, in the case of *Peerce* v. *Kitzmiller*, 19 West Va. 564, held in a case precisely similar to this, that while the constitutional provision of that State was not in violation of any provision of the Constitution of the United States, the mode prescribed by the legislature for obtaining the relief which the new constitution authorized was not due process of law, and that the statute was void. But it also held that the provisions of the constitution, and the relief which it intended to give, might be carried into effect by proceedings in courts, which would be due process of law, and intimated that a proceeding in chan-

cery for an injunction against the execution of the original judgment might be such due process of law. We are, therefore, relieved from any further consideration of the special provisions of this statute, and are remitted to the question of conflict between the constitutional provision of 1872 of the State of West Virginia and the Constitution of the United States.

As we have already said, the first of the questions thus presented is whether that constitutional provision, in its application to a judgment like the present, in existence when this state constitution was adopted, impairs the obligation of a contract.

On this question the court has very little difficulty. The proposition that a judgment, duly rendered in a court of law, in an action of tort, is protected by this provision of the Federal Constitution, has been before us more than once in recent years, and was before this court also many years ago.

In the case of *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285, the precise question was presented and very fully considered. In that case, a judgment was recovered against the city of New Orleans for injuries received by the riotous proceedings of a mob. At the time when this judgment was rendered the laws of Louisiana authorized taxes to be levied to pay all judgments rendered against the city. Afterwards changes were made in the laws on the subject of taxation, so that the power of the city to levy taxes was limited in such a manner that no taxes could be raised that could be appropriated to the payment of this judgment. An application was made to the Supreme Court of Louisiana to compel the city authorities of New Orleans to levy taxes to pay this judgment, which was denied by that court. The case was brought here on a writ of error, on the ground that the statute, under which the court of Louisiana denied the writ of mandamus, impaired the obligation of the contract found in the judgment in favor of the plaintiffs against the city. This court held, however, that that judgment was not a contract, and was not evidence of a contract within the meaning of the constitutional provision. The whole question of the nature of judgments, as

being founded upon torts, or founded upon contracts, as they relate to that provision, was very fully discussed; and, while it was conceded that such a judgment might be declared upon as a specialty, or a contract of record, under the old authorities, such a proposition could not "convert a transaction, wanting the assent of parties, into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and, as observed by the court below, are imposed upon the losing party by a higher authority against his will and protest. The prohibition of the Federal Constitution was intended to secure the observance of good faith in the stipulation of parties, against any state action. Where a transaction is not based upon any assent of parties it cannot be said that any faith is pledged with respect to it; and no case arises for the operation of the prohibition. *Garrison* v. *City of New York*, 21 Wall. 203. There is, therefore, nothing in the liabilities of the city, by reason of which the relators recovered their judgments, that precluded the State from changing the taxing power of the city, even though the taxation be so limited as to postpone the payment of the judgments."

The case of *Garrison* v. *City of New York*, 21 Wall. 196, above referred to, sustains the proposition for which it is quoted. In that case a proceeding to condemn certain real estate in the city of New York, for the purpose of widening Broadway, had been carried to its end, and an assessment was made in favor of Garrison for taking his property to the amount of $40,000. On this a judgment or order of confirmation was entered in the proper court. The legislature of New York subsequently passed a statute authorizing an appeal from the order of confirmation, to be taken by the city at any time within four months, and made it a duty of the court to which such application should be made that, if it should appear there was any error, mistake or irregularity at any stage of the proceedings, or that the assessments or awards had been unfair and unjust, to vacate the order of confirmation and refer the matter back to new commissioners, who should proceed to amend and correct the report.

This court said, in reviewing the judgment of the Circuit

Court for the Southern District of New York on that question, that "the objection to the act of 1871, that it impairs the vested rights of the plaintiff, and is, therefore, repugnant to the constitution of the State, is already disposed of by what we have said upon the first objection. There is no such vested right in a judgment, in the party in whose favor it is rendered, as to preclude its reëxamination and vacation in the ordinary modes provided by law, even though an appeal from it may not be allowed; and the award of the commissioners, even when approved by the court, possesses no greater sanctity." The language there used, and the circumstances of that case, are eminently applicable to the one now before us.

In the earlier case of *Satterlee* v. *Matthewson*, 2 Pet. 380, in an action of ejectment between the parties, twice tried before the Supreme Court of the State of Pennsylvania, that court had held the law to be, as it undoubtedly was in that State, that the doctrine that a tenant was estopped to deny the title of his landlord was inapplicable to cases where the title originated under the claim of the State of Connecticut to lands in the State of Pennsylvania. While a third trial, of the same case, between the same parties, was pending, the legislature of the State of Pennsylvania passed a statute to the effect that the "relation of landlord and tenant shall exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between other citizens of this commonwealth, on the trial of any cause *now pending*, or hereafter to be brought within this commonwealth, any law or usage to the contrary notwithstanding."

The Supreme Court of the State of Pennsylvania conformed its judgment to this statute, which was at variance with the rights established by the two former judgments. The case came to the Supreme Court of the United States, and was argued before that court on the ground that the statute impaired the obligation of the contract between the tenant and the landlord, and also the obligation of the contract by which one party derived his title from the Connecticut claim. The court held that no such question was raised; that there was no contract in the case affected by this provision of the statute.

The opinion, however, is more remarkable, and more pertinent to the present case, in its discussion of the doctrine of vested rights under judgments of a court, and under the condition of the title to the property existing at the time the statute was passed.

We are of opinion that the constitution of West Virginia of 1872, in its provision for this class of cases, does not violate the obligation of a contract, where the judgment was founded on a tort committed as an act of public war.

The other question which we are called upon to decide presents more difficulty. Ever since the case of *Dow* v. *Johnson*, 100 U. S. 158, the doctrine has been settled in the courts, that in our late civil war each party was entitled to the benefit of belligerent rights, as in the case of public war, and that, for an act done in accordance with the usages of civilized warfare, under and by military authority of either party, no civil liability attached to the officers or soldiers who acted under such authority. The case as it is now presented to us shows that the trespass for which the original judgment was rendered was of that character; and it is argued with much force that the court which rendered that judgment had no jurisdiction of the case, or, at all events, had no jurisdiction to render such a judgment, and that it is therefore void.

It follows from this view of the subject that the court in which it was originally rendered had jurisdiction to set it aside or annul it without the aid of the constitutional provision of the State of West Virginia, and that, on that ground alone, the decree we are called upon to review must be affirmed. In this view of the subject some of the judges of this court concur.

On the other hand, it is argued that, from what appears to have been done in that court, it was an action of which the the court had jurisdiction when it was brought; that the case presented to it by the pleadings was a simple act of trespass *de bonis asportatis*, in which the defendant wrongfully seized and carried off the cattle of the plaintiff. On the issue of not guilty, judgment was rendered for the plaintiff. Whether the question of belligerent rights was there presented and tried is not to be ascertained from its records, 1st, because no record

of the proceeding exists in that court; and, 2dly, because it does not appear from anything of record now to be found that the question of belligerent rights was there considered. Nor are we prepared to admit, if it was considered and decided against the defendant, that the judgment is wholly and absolutely void. It is not here denied that the doctrine of *Dow* v. *Johnson* is correct, and that parties are protected by that doctrine from civil liability for any act done in the prosecution of a public war. But one of the very things to be decided, when an act like this is brought in question, and the defence is that it was done in the exercise of belligerent rights, is whether this defence is established by the evidence.

As regards the case now before us, we are of opinion that the judgment rendered by the Circuit Court of Preston County in this case is *prima facie* a valid judgment. On the face of the record, if the record now existed, as set forth in the case before us, it would be *prima facie* valid. It is only the facts proved by the evidence taken in the present case which impeach that judgment and establish that it was rendered on account of acts done in pursuance of the powers of a belligerent in time of war.

Without, therefore, considering whether this judgment is absolutely void, or whether there existed any rule of law known to the court by which its validity could be inquired into before the adoption of the constitutional provision of the State of West Virginia, we proceed to inquire how the matter stands with the aid of that provision and under all the circumstances of this case. The proposition of the plaintiff in error is, that by the judgment of the Circuit Court of Preston County he had acquired a vested right in that judgment; that the judgment was his property; and that any act of the State which prevents his enforcing that judgment, in the modes which the law permitted at the time it was recovered, is depriving him of property without due process of law, and, therefore, forbidden by the 14th Amendment of the Federal Constitution. This right of the plaintiff to enforce that judgment is insisted upon as a vested right with which no authority can lawfully interfere.

It is to be observed, in the first place, that the language of the prohibition against state interference with life, liberty or property is that the deprivation of these precious rights shall not be had without due process of law. This phrase, "due process of law," has always been one requiring construction; and, as this court observed long ago, never has been defined, and probably never can be defined, so as to draw a clear and distinct line, applicable to all cases, between proceedings which are by due process of law and those which are not.

Judgments, however solemn, however high the court which rendered them, and however conclusive in a general way between the parties, have been subject to review, to reconsideration, to reversal and to modification by various modes. Among these are motions for new trials, appeals, writs of error and bills of review; and these have always been held to be due process of law. So, also, judgments of courts of law have been subject to be set aside, to be corrected and the execution of them enjoined, by bills in chancery, under circumstances appropriate to such relief. This also must be held to be due process of law.

The present case is a bill in chancery to enjoin the execution of a judgment, and such was the relief granted by the decree of the court. In that respect it is one of the recognized processes of law for reëxamining the matters on which a judgment is founded and making such corrections, even to setting aside the whole judgment or perpetually enjoining its execution, as by the rules of equity jurisprudence are just and appropriate to the occasion. Undoubtedly the mode pursued in this case of obtaining relief against the judgment of the Circuit Court of Preston County is in its form due process of law. It is by an appeal to the courts in their regular course of procedure, and is not by any summary or unusual process applied to the determination of the rights of parties.

If it be true that, when the original action was presented to the Circuit Court of Preston County, the thing complained of was found to be an act in accordance with the usages of civilized war, during the existence of a war flagrant in that part of the country, that court should have proceeded no further,

and its subsequent proceedings may be held to have been without authority of law. While it is not necessary to hold that the judgment, as presented by the record, is absolutely void, it may be conceded that a court of equity, in a proper case, can prevent the enforcement of it. But the application of this remedy may have been, and probably was, embarrassed in this case by circumstances which would render it unavailing. There might be raised against it the proposition that the defence had been presented and considered by the court in which the case was tried. Lapse of time might have prevented a court of equity from redressing the wrong inflicted by the judgment. It may have been doubtful whether the case was one of equitable cognizance; it may have been insisted that the jury passed upon the facts of the case adversely to the defendant; and it is undoubtedly true that the Supreme Court of Appeals of the State of West Virginia had decided, in this class of cases, that the defence that the party was acting in accordance with belligerent rights was not a sufficient defence.

These reasons, and probably the latter one mainly, were those upon which the constitutional convention of West Virginia acted, in framing the provision which we have already cited on this subject. Was it competent for that convention to establish a rule of law which is now the recognized rule of this court, and perhaps of all the courts of the United States, which is commended by the highest authorities, and which is eminently adapted to the purpose of quieting strife and securing repose after the turmoils of a civil war, although the principle asserted was in opposition to that held by the Supreme Court of Appeals of the State? That this principle would govern all cases where the act for which the party was sued occurred after its establishment does not admit of question. That it was the law of the country before its adoption by the state constitution there is as little doubt. Shall it be held to be incapable of enforcement and forbidden by the Constitution of the United States because it is made to cover judgments already rendered in violaton of the principle asserted? The constitution of the State remedies the defects of the proceeding by bill in chancery; it creates no new process of law; it

makes that which has always been due process of law efficient by removing objections and obstructions to its operation. It simply declares that a judgment for a wrong or tort, which in itself was erroneous, is a voidable judgment, and may be avoided, if it can be brought within the due processes of the law already existing, and shall by this means be inquired into, and if it is against right, justice and law, shall be no longer in force, and the judgment plaintiff shall be forever enjoined from putting it into execution.

Prior to the adoption of the 14th Amendment the power to provide such remedies, although they may have interfered with what were called vested rights, seems to have been fully conceded. The cases in which this had been decided in this court are *Calder* v. *Bull*, 3 Dall. 386; *Satterlee* v. *Matthewson*, 2 Pet. 380; *Sampeyreac* v. *United States*, 7 Pet. 222; *Watson* v. *Mercer*, 8 Pet. 88; and *Freeborn* v. *Smith*, 2 Wall. 160. In the latter case, Mr. Justice Grier, when the Congress of the United States had allowed an appeal where the judgment would have otherwise been final, used this language: "If the judgment below was erroneous, the plaintiff in error had a moral right at least to have it set aside, and the defendant is only claiming a vested right in a wrong judgment." And he thus quotes the language of Chief Justice Parker, in *Foster* v. *Essex Bank*, 16 Mass. 245: "The truth is there is no such thing as a vested right to do wrong; and a legislature, which, in its acts not expressly authorized by the constitution, limits itself to correcting mistakes, and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority."

Many other cases might be cited in which it was held that retrospective statutes, when not of a criminal character, though affecting the rights of parties in existence, are not forbidden by the Constitution of the United States.

We do not think that the Supreme Court of Appeals of West Virginia, which seems to have carefully considered the question of due process of law in the case of *Peerce* v. *Kitzmiller*, and held that the statute of the State in carrying out the provisions of the constitution did not provide due

process of law, was in error when it also held that the remedy provided by the constitution of the State as carried out by the ancient proceeding of a bill in a court of equity, was not void for want of due process of law, nor in conflict with the Constitution of the United States.

Its judgment is therefore *Affirmed.*

Mr. Justice Harlan dissenting.

In *Ford* v. *Surget*, 97 U. S. 574, 605, this court, speaking by the writer of this opinion, said that to the Confederate army was "conceded, in the interest of humanity, and to prevent the cruelties of reprisals and retaliation, such belligerent rights as belonged under the laws of nations to the armies of independent governments engaged in war against each other — that concession placing the soldiers and officers of the rebel army, as to all matters directly connected with the mode of prosecuting the war, 'on the footing of those engaged in lawful war,' and exempting 'them from liability for acts of legitimate warfare.'" It necessarily results from this doctrine, without reference to the provision of the Constitution of West Virginia, that Williams was not civilly responsible for the value of the cattle in question, if, at the time he took them, he was regularly enlisted as a soldier in the Confederate army, and if his taking of them was consistent with the usages of civilized warfare." If the taking was not an act of war, but a mere trespass, his being a soldier in the Confederate army would not have constituted a defence. But whether he was or was not a soldier in that army, and whether his act was or was not one of legitimate warfare, were questions determinable in the action of trespass instituted against him in the Circuit Court of Preston County. It is not disputed that it was open to him, in that action, to prove every fact relied upon in the present suit as establishing immunity from civil responsibility for the taking of Freeland's cattle. There was a verdict and judgment against him, and that judgment, upon writ of error to the Supreme Court of Appeals of West Virginia, was affirmed in 1867. No writ of error was prosecuted to this court.

If the taking of the cattle was illegal, the right to recover from the wrongdoer their reasonable value was an absolute one, of which the owner could not be deprived by a legislative enactment of the State, or by an amendment of its constitution. The judgment obtained by Freeland was an adjudication that the taking was illegal. He acquired by that judgment a vested right to have and demand the amount named in it, as well as the benefit of such remedies as the law gave for the enforcement of personal judgments for money. The judgment was, therefore, property of which the State could not deprive him, except by due process of law. And a constitutional provision, subsequently enacted, declaring that the defendant's property should not be seized or sold under final process on such judgment, is not due process of law. I cannot agree that a State may, by an amendment of its fundamental law, prevent a citizen from recovering the value of property, of which, according to the final judgment of its own courts, he has been illegally deprived by a mere trespasser. That would be sheer spoliation under the forms of law. If the amendment in question had, in terms, given the defendant a right to a new trial of the action of trespass in the same court, after the time had passed within which, according to the settled modes of procedure, he could, of right, apply for a new trial, it would have accomplished, in respect to the judgment against him, precisely what, in effect, has been held in this case to be consistent with the Fourteenth Amendment.

The present case is unlike *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285, 290, where the court sustained the validity, so far as the Constitution of the United States was concerned, of a state enactment so changing the laws for raising money by municipal taxation as to prevent, for the time, the enforcement of a judgment obtained against the city of New Orleans, for damages done to private property by a mob. But, even in that case, the court was careful to say that the relator was not deprived of his judgment, or of the right of himself or assignee to use it as a set-off against any demands of the city. It is, also, said: "The question of the effect of legislation upon the means of enforcing an ordinary judgment for damages for

a tort rendered against the person committing it, in favor of the person injured, may involve other considerations, and is not presented by the case before us." The radical difference between that and the present case is, that the right to sue the city of New Orleans for damages on account of private property destroyed by a mob was given by statute; whereas, the right to claim compensation from a wrongdoer for his illegal conversion of private property to his own use is inherent in the owner, and cannot be taken from him by the State.

Nor, in my opinion, is the ruling in the present case sustained by *Dow* v. *Johnson*, 100 U. S. 158, 166. That was an action in the Circuit Court of the United States for the District of Maine, upon a judgment rendered by default in 1863 against General Dow while he was in the active discharge, within the lines of military operations, of his duties as a brigadier-general in the army of the United States. The judgment was rendered in a court of the city and parish of New Orleans. That officer was sued in the latter court for the taking of certain personal property by soldiers under his command. He was served with process, but did not appear and make defence. "The condition of New Orleans," this court said, "and of the district connected with it, at the time of the seizure of the property of the plaintiff and the entry of judgment against Dow, was not that of a country restored to its normal relations to the Union, by the fact that they had been captured by our forces, and were held in subjection. . . . The country was under martial law, and its armed occupation gave no jurisdiction to the civil tribunals over the officers and soldiers of the occupying army. They were not to be harassed and mulcted at the complaint of any person aggrieved by their action. The jurisdiction which the District Court was authorized to exercise over civil causes between parties, by the proclamation of General Butler, did not extend to cases against them. The third special plea alleges that the court was deprived by the general government of all jurisdiction except such as was conferred by the commanding general, and that no jurisdiction over persons in the military service for acts performed in the line of their duty was ever thus conferred upon it. It was not for their

control in any way, or the settlement of complaints against them, that the court was allowed to continue in existence. It was, as already stated, for the protection and benefit of the inhabitants of the conquered country and others there not engaged in the military service." General Dow, when thus sued in a local tribunal, existing by military sufferance in a country governed by martial law, was not bound, as this court said, to leave his troops and attend upon that tribunal, for the purpose of justifying his military orders, by showing that the acts complained of were authorized by the necessities of war. It was consequently held that the New Orleans court was without jurisdiction to proceed against him. There is no analogy between that case and the present one; for, the action of trespass against Williams was brought in a Superior Court of general jurisdiction, after the war closed, and when he was at liberty to appear and make defence. And it was determined by a court whose existence was independent of military authority.

The only possible ground upon which the judgment below can be sustained, consistently with the law of the land, is to hold that no court of any State had jurisdiction, in the year 1867, even with the parties before it, to inquire, in an action of trespass, whether an alleged taking of the private property of a citizen was a mere trespass, or was an act of war upon the part of the defendant, a Confederate soldier, and to give judgment according to the result of that inquiry.

But as the primary object in creating judicial tribunals is to provide a mode for the determination of controversies between individuals, and between individuals and the government, can it be said that no court had jurisdiction to inquire whether Freeland's cattle were taken by Williams without authority of law? Was the mere averment that the latter was a Confederate soldier, and that what he did was an act of war, sufficient to preclude all investigation as to the truth of that averment? If not, how was such an investigation to be had, in any effective mode, except in a court of justice? It is suggested that when the Preston Circuit Court ascertained that the taking of these cattle was legitimate warfare upon the part of Williams as a Confederate soldier, it ought to have dis-

missed the action, or directed a verdict to be rendered in his favor. But even if it erred in this respect, the judgment was not void. Its error, if any there was, could have been corrected in an appellate court. The affirmance of the judgment by the highest court of the state is to be taken as conclusive that no error was committed by the inferior state court in respect to any matter put in issue, or which was embraced by the issue tried. So if Williams failed to prove, under his plea of not guilty, that he *was* a Confederate soldier, and that his taking the cattle *was* an act of legitimate warfare, it was not in the power of the State, by an amendment of its constitution, and after a final judgment against him, to give a new trial. In legal effect, that is what was done.

According to the doctrines announced by the court, if the present and similar suits in West Virginia had been decided adversely to the several defendants therein, and such decisions had been affirmed by the highest court of that State, it would be consistent with "due process of law" for the people of that State to make a further amendment of their constitution, and give the unsuccessful litigants still another opportunity to retry the very questions of law and fact determined against them in previous actions. And so on, indefinitely, until the alleged trespasser obtained a decision in his favor. I had supposed that a final judgment, and the right of the party in whose behalf it was rendered to have the benefit of it, rested upon a firmer basis than the popular will, expressed either in a constitutional amendment or in a legislative enactment.

Without considering whether the judgment obtained by Freeland is not "a contract of the highest nature, being established by the sentence of a court of judicature," (2 Bl. 465; *Taylor* v. *Root*, 4 Keyes, 335, 344,) I place my dissent from the opinion and judgment in this case upon the ground that the state court, in the action of trespass, had jurisdiction as to person and subject matter, and that the constitutional amendment of 1872 taking from Freeland, upon the identical grounds involved in that action, the benefit of his judgment against the defendant, after it had been affirmed in the highest court of the State, deprived the former of his property without due process of law.

CASES ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES,

AT OCTOBER TERM, 1888, NOT OTHERWISE REPORTED, INCLUDING CASES DISMISSED IN VACATION PURSUANT TO RULE 28.

No. 103. ADAMS *v.* HATCH. Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. December 4, 1888: Dismissed, with costs, pursuant to the 10th rule. *Mr. W. G. Griffith* for appellant. *Mr. F. P. Prichard* for appellee.

No. 509. ADAMS *v.* TOWN OF LANSING. Error to the Circuit Court of the United States for the Northern District of New York. January 4, 1889: Dismissed, with costs, per stipulation, on motion of Mr. Clarence A. Seward in behalf of counsel. *Mr. James R. Cox* for plaintiff in error. *Mr. Francis Kernan* for defendant in error.

No. 78. AMBROSE *v.* BOARD OF COMMISSIONERS OF PILOTS. Error to the Supreme Court of the State of New York. May 19, 1888: Dismissed pursuant to the 28th rule. *Mr. Coles Morris* and *Mr. Michael H. Cardozo* for plaintiffs in error. *Mr. Wm. Allen Butler* for defendant in error.

No. 741. AMERICAN DIAMOND ROCK BORING COMPANY *v.* SHELDON *et al.* No. 742. SAME *v.* RUTLAND MARBLE COMPANY. No. 957. SAME *v.* GILSON *et al.* No. 958. SAME *v.* SUTHERLAND FALLS MARBLE COMPANY. No. 959. SAME *v.* SHERMAN *et al.* No. 960. SAME *v.* HAWLEY *et al.* No. 961. SAME *v.* FLINT *et al.* No. 962. SAME *v.* KELLEY. No. 963. SAME *v.* HOLLISTER. No. 964. SAME *v.* FREEDLEY *et al.* No. 965. SAME *v.* COLUMBIAN MARBLE COMPANY. No. 966. SAME *v.*

Cases not Otherwise Reported.

CUTTER MARBLE COMPANY. Appeals from the Circuit Court of the United States for the District of Vermont. December 20, 1888: Dismissed, with costs, pursuant to the 10th rule. *Mr. E. G. Thompson* for appellants. *Mr. E. T. Rice* for appellees.

No. 146. AMERICAN DIAMOND DRILL COMPANY *v.* SULLIVAN MACHINE COMPANY. Appeal from the Circuit Court of the United States for the Southern District of New York. December 20, 1888: Dismissed, with costs, pursuant to the 16th rule, on motion of *Mr. E. T. Rice* of counsel for appellee. *Mr. E. G. Thompson* for appellant. *Mr. E. T. Rice* for appellee.

No. 228. AMERICAN NATIONAL BANK OF NASHVILLE *v.* MAYOR AND CITY COUNCIL OF NASHVILLE. Appeal from the Circuit Court of the United States for the Middle District of Tennessee. March 29, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. Edward Baxter* for appellant. No appearance for appellees.

No. 9. AMERICAN RAILWAY IMPROVEMENT COMPANY *v.* CARPENTER. Error to the Circuit Court of the United States for the Eastern District of Louisiana. April 22, 1889: Dismissed, with costs, per stipulation, on motion of *Mr. William A. McKenney* in behalf of counsel. *Mr. W. W. Howe* for plaintiff in error. *Mr. A. H. Leonard* for defendants in error.

No. 1125. ARBUCKLE *v.* QUIGLEY. Error to the Supreme Court of the State of Tennessee. March 18, 1889: Judgment reversed, with costs, and cause remanded with instructions to enter judgment for the plaintiff in error pursuant to a stipulation of counsel. *Mr. T. B. Turley* and *Mr. Luke E. Wright* for plaintiff in error. *Mr. Isham G. Harris* for defendant in error.

No. 289. ARNSON *et al. v.* MERRITT. Error to the Circuit Court of the United States for the Southern District of New

York. March 5, 1889: Dismissed on motion of *Mr. Edwin B. Smith* for plaintiffs in error. *Mr. Attorney General* for defendant in error.

No. 1179. ARTHUR'S EXECUTORS *v.* RICHARD AND BOAS. Error to the Circuit Court of the United States for the Southern District of New York. January 28, 1889: Judgment affirmed, with costs, and interest, by a divided court. *Mr. Attorney General* and *Mr. Assistant Attorney General Maury* for plaintiffs in error. *Mr. Stephen G. Clarke* for defendants in error.

No. 216. BALDWIN *v.* MARYE. Error to the Circuit Court of the United States for the Eastern District of Virginia. March 19, 1889: Dismissed, with costs, on authority of counsel for the plaintiff in error. *Mr. William L. Royall* for plaintiff in error. *Mr. R. A. Ayers* for defendant in error.

No. 1166. BALTIMORE AND POTOMAC RAILROAD COMPANY *v.* CROWN. No. 1167. SAME *v.* KNIGHT. No. 1168. SAME *v.* ANDERSON. No. 1169. SAME *v.* ROWLAND. No. 1170. SAME *v.* STROEBEL. No. 1171. SAME *v.* NEITZY. No. 1172. SAME *v.* RICHARDS. Error to the Supreme Court of the District of Columbia. April 17, 1889: Dismissed for the want of jurisdiction on the authority of the decision of this court in the case of *Baltimore and Potomac Railroad* v. *Hopkins*, 130 U. S. 210, on motion of *Mr. S. S. Henkle* for defendants in error, as per stipulation. *Mr. Enoch Totten* for plaintiffs in error. *Mr. Samuel Maddox* and *Mr. S. S. Henkle* for defendants in error.

No. 1174. BALTIMORE AND POTOMAC RAILROAD COMPANY v. KENT. Appeal from the Supreme Court of the District of Columbia. April 1, 1889: Dismissed, per stipulation, on motion of *Mr. William A. McKenney* in behalf of counsel for appellant. *Mr. Enoch Totten* for appellant. *Mr. Linden Kent* for appellees.

Cases not Otherwise Reported.

No. 1438. BATCHELDER *v.* BRICKELL. Error to the Supreme Court of the State of California. November 19, 1888: Docketed and dismissed, with costs, on motion of *Mr. James Lowndes* for defendant in error. No one opposing.

No. 136. BAUER, A MINOR, ETC. *v.* TEXAS AND PACIFIC RAILROAD COMPANY. Error to the Circuit Court of the United States for the Eastern District of Arkansas. January 7, 1889: Judgment affirmed with costs, by a divided court. *Mr. Sol. F. Clark* and *Mr. Samuel W. Williams* for plaintiffs in error. *Mr. J. C. Brown*, *Mr. John F. Dillon* and *Mr. Winslow S. Pierce* for defendants in error.

No. 654. BIER *v.* NEW ORLEANS. Error to the Circuit Court of the United States for the Eastern District of Louisiana. October 22, 1888: Dismissed, with costs, as per stipulation, on motion of *Mr. E. B. Kruttschnitt* of counsel for plaintiff in error. *Mr. E. H. Farrar* and *Mr. E. B. Kruttschnitt* for plaintiff in error. *Mr. Henry C. Miller* for defendant in error.

No. 252. BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY *et al. v.* UNITED STATES *ex rel. Moulton.* Error to the Circuit Court of the United States for the District of Kansas. April 16, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. B. W. Perkins* for plaintiffs in error. No appearance for defendant in error.

No. 731. BONN *v.* MCLANE. Error to the Supreme Court of the State of Iowa. April 22, 1889: Dismissed, with costs, pursuant to authority of counsel for plaintiff in error, on motion of *Mr. William A. McKenney* in behalf of counsel. *Mr. P. Henry Smyth* for plaintiff in error. *Mr. W. E. Blake* and *Mr. S. W. Packard* for defendant in error.

No. 1414. BOUGHTON *v.* CHARTER OAK LIFE INSURANCE COMPANY. Appeal from the Supreme Court of the District of Co-

lumbia. October 22, 1888: Docketed and dismissed, with costs, on motion of *Mr. S. R. Bond* for appellees. No one opposing.

No. 1200. BROOKS *v.* AHRENS. Error to the Court of Appeals of the State of Maryland. November 26, 1888: Dismissed, with costs, on motion of *Mr. Frank P. Clark*, in behalf of counsel for the plaintiff in error. *Mr. Skipwith Wilmer* for plaintiff in error. No appearance for defendant in error.

BRYANT *et al. v.* WHITE. Appeal from the Circuit Court of the United States for the Northern District of Illinois. December 19, 1888: Dismissed, with costs, pursuant to the 10th rule. *Mr. O. H. Horton* and *Mr. Hugh L. Mason* for appellants. *Mr. Thomas Dent* and *Mr. Robert T. Lincoln* for appellees.

No. 451. BULLION, BECK, AND CHAMPION MINING COMPANY *v.* EUREKA HILL MINING COMPANY. Appeal from the Supreme Court of the Territory of Utah. September 29, 1888: Dismissed pursuant to the 28th rule. *Mr. Arthur Brown* for appellant. *Mr. Moses Kirkpatrick* for appellees.

No. 1528. CASE *v.* MCARTHUR. Appeal from the Circuit Court of the United States for the Southern District of Ohio. March 21, 1889: Docketed and dismissed, with costs, on motion of *Mr. Lawrence Maxwell, Jr.*, for the appellees. No opposition.

No. 171. CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY *v.* DENNISON. Appeal from the Circuit Court of the United States for the Northern District of Illinois. January 22, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. Wm. Armstrong* for appellant. *Mr. Edwin Walker* for appellee.

No. 172. CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY *v.* SANGER. Appeal from the Circuit Court of the United

States for the Northern District of Illinois. January 22, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. Wm. Armstrong* for appellant. *Mr. Edwin Walker* for appellee.

No. 852. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY *v.* LOURDEN. Error to the Circuit Court of the United States for the Northern District of Illinois. January 2, 1889: Dismissed, with costs, on motion of *Mr. Edwin Walker* of counsel for plaintiffs in error. *Mr. Edwin Walker* for plaintiffs in error. No counsel entered for defendant in error.

No. 104. CHRIST *v.* FITZSIMMONS. Error to the Circuit Court of the United States for the Western District of Pennsylvania. December 4, 1888: Dismissed, with costs, pursuant to the 10th rule. *Mr. H. C. Parsons* for plaintiffs in error. No appearance for defendant in error.

No. 301. CLARKE *v.* REYBURN. Appeal from the Circuit Court of the United States for the Northern District of Illinois. December 10, 1888: Dismissed, per stipulation, on motion of *Mr. C. M. Osborn* of counsel for appellees. *Mr. George W. Smith* for appellant. *Mr. C. M. Osborn* for appellees.

No. 139. CONTINENTAL INSURANCE COMPANY OF NEW YORK *v.* WRIGHT. Error to the Circuit Court of the United States for the Southern District of Illinois. January 7, 1889: Judgment affirmed, with costs and interest, by a divided court. *Mr. John M. Palmer* and *Mr. Henry Jackson* for plaintiff in error. *Mr. L. H. Bisbee*, *Mr. John P. Aherns* and *Mr. Henry Decker* for defendant in error.

No. 753. CONTINENTAL LIFE INSURANCE COMPANY, ETC. *v.* RHOADS. Error to the Circuit Court of the United States for the Eastern District of Pennsylvania. October 25, 1888:

Dismissed, as per stipulation, on motion of *Mr. Joseph K. McCammon* in behalf of counsel for the plaintiff in error. *Mr. Samuel C. Perkins* for plaintiff in error. *Mr. R. T. Cornwell* for defendant in error.

No. 272. CREHORE *v.* OHIO AND MISSISSIPPI RAILWAY COMPANY. Error to the Circuit Court of the United States for the District of Kentucky. April 24, 1889: Judgment reversed, with costs, (from the bench,) and cause remanded with directions to remand the case to the state court. *Mr. John Mason Brown*, *Mr. Alexander Pope Humphrey* and *Mr. George M. Davie* for plaintiff in error. *Mr. W. M. Ramsey*, *Mr. Lawrence Maxwell, Jr.*, and *Mr. Mortimer Matthews* for defendant in error.

No. 696. CRAPSEY *v.* GAGE COUNTY. Error to the Circuit Court of the United States for the District of Nebraska. May 13, 1889: Dismissed, per stipulation, on motion of *Mr. William A. McKenney*, in behalf of counsel. *Mr. J. M. Woolworth* for plaintiff in error. *Mr. Charles F. Manderson* and *Mr. Robert S. Bibb* for defendant in error.

No. 156. DAVEY *v.* DUGGAN. Appeal from the Supreme Court of the Territory of Dakota. January 8, 1889: Dismissed, with costs, pursuant to the 10th Rule. *Mr. William R. Steele* for appellants. No appearance for appellees.

No. 161. DAVIS *v.* SOUTH CAROLINA. Error to the Supreme Court of the State of South Carolina. January 10, 1889: Dismissed, with costs, pursuant to the 10th Rule. *Mr. James Lowndes* for plaintiff in error. No appearance for defendant in error.

No. 192. DE LA MOTHE *v.* ANGUS. Appeal from the Circuit Court of the United States for the Southern District of

Illinois. March 12, 1889: Dismissed, with costs, pursuant to the 10th Rule. *Mr. A. L. Merriman* and *Mr. J. H. Graham* for appellant. *Mr. David Fales*, *Mr. F. W. Hackett* and *Mr. Guy C. Noble* for appellee.

No. 251. Des Moines Navigation and Railroad Company *v.* Candee. Appeal from the Circuit Court of the United States for the Northern District of Iowa. April 16, 1889: Dismissed, with costs, per stipulation. *Mr. C. H. Gatch* for appellants. *Mr. George Crane* for appellee.

No. 424. De Vries *v.* Marsh. Appeal from the Circuit Court of the United States for the Northern District of Illinois. May 13, 1889: Decree reversed on the stipulation of the parties and cause remanded for such order as the Circuit Court may see fit to make in the premises. *Mr. N. T. N. Robinson* and *Mr. J. S. Stevens* for appellant. *Mr. Attorney General* and *Mr. W. G. Ewing* for appellees.

No. 153. Du Bois *v.* Boarman. Appeal from the Supreme Court of the District of Columbia. December 20, 1888: Dismissed, with costs, pursuant to the 10th rule. *Mr. S. S. Henkle* for appellant. No counsel entered for appellees.

No. 1431. District of Columbia *v.* Brewer. Appeal from the Supreme Court of the District of Columbia. May 13, 1889: Dismissed for the want of jurisdiction, the amount involved being below the jurisdictional sum. Motion to dismiss submitted April 22, 1889, by *Mr. A. L. Merriman* and *Mr. W. Willoughby* for appellee. No one opposing. *Mr. Henry E. Davis* entered for appellant.

No. 84. Eames *v.* Bickford. Error to the Supreme Judicial Court of the State of Maine. November 15, 1888: Dismissed, with costs, on the authority of counsel for the plaintiff

in error. *Mr. George F. Holmes* for plaintiff in error. No counsel appearing for defendant in error.

No. 83. EAMES *v.* SAVAGE. Error to the Supreme Judicial Court of the State of Maine. November 15, 1888: Dismissed, with costs, on the authority of counsel for the plaintiff in error. *Mr. G. F. Holmes* for plaintiff in error. No counsel appearing for defendant in error.

No. 299. EVANSVILLE *v.* AUGUSTA SAVINGS BANK. Error to the Circuit Court of the United States for the District of Indiana. April 26, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. John M. Butler* for plaintiff in error. No appearance for defendant in error.

No. 297. EVANSVILLE *v.* MOULTON. Error to the Circuit Court of the United States for the District of Indiana. January 24, 1889: Dismissed, with costs, per stipulation, on motion of *Mr. Walter H. Smith* in behalf of counsel. *Mr. John M. Butler* for plaintiff in error. *Mr. T. C. Mather* for defendant in error.

No. 298. EVANSVILLE *v.* POST. Error to the Circuit Court of the United States for the District of Indiana. April 26, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. John M. Butler* for plaintiff in error. *Mr. T. C. Mather* for defendant in error.

No. 1485. FARMER *v.* COBBAN. Error to the Supreme Court of the Territory of Dakota. January 14, 1889: Docketed and dismissed, with costs, on motion of *Mr. S. S. Burdett* for defendant in error. No one opposing.

No. 140. FIRE ASSOCIATION OF PHILADELPHIA *v.* WRIGHT. Error to the Circuit Court of the United States for the Southern District of Illinois. January 7, 1889: Judgment affirmed,

with costs and interest, by a divided court. *Mr. John M. Palmer* and *Mr. Henry Jackson* for plaintiff in error. *Mr. L. H. Bisbee*, *Mr. John P. Ahrens* and *Mr. Henry Decker* for defendant in error.

No. 538. First National Bank of St. Johnsbury *v.* Hendee. Error to the Circuit Court of the United States for the District of Vermont. October 18, 1888: Judgment affirmed for the sum of twenty-nine thousand four hundred and fifty-four dollars and eighty-four cents, without costs, on motion of *Mr. J. D. Rouse*, in behalf of the parties, as per stipulation signed by the parties.

No. 332. Fisher *v.* Union Trust Company. Appeal from the Circuit Court of the United States for the District of Minnesota. April 22, 1889: Dismissed, with costs, per stipulation, on motion of *Mr. William A. McKenney* in behalf of counsel. *Mr. F. B. Hart* and *Mr. F. H. Boardman* for appellants. *Mr. H. C. Whitney* and *Mr. Consider H. Willett* for appellee.

No. 270. Frankfort and State Line Railroad Company *v.* Leonard. Appeal from the Circuit Court of the United States for the District of Indiana. April 23, 1889: Dismissed, with costs, pursuant to authority from counsel for appellant. *Mr. A. C. Harris*, *Mr. W. H. Calkins* and *Mr. Clarence Brown* for appellant. *Mr. Robert G. Ingersoll* for appellees.

No. 337. Gaff *v.* Kiefer. Error to the Circuit Court of the United States for the Eastern District of New York. March 15, 1889: Dismissed, with costs, on motion of *Mr. N. Dumont* in behalf of counsel for the plaintiffs in error, as per stipulation. *Mr. Miron Winslow* for plaintiffs in error. *Mr. M. L. Towns* for defendant in error.

No. 1429. Gest *v.* South Covington and Cincinnati Street Railway Company. Error to the Circuit Court of the United

States for the Southern District of Ohio. March 28, 1889: Dismissed, with costs, on motion of *Mr. George Hoadly* for plaintiff in error. No appearance for defendant in error.

No. 241. GIBSON *v.* MILL CREEK DISTILLING COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Virginia. September 14, 1888: Dismissed pursuant to the 28th rule. *Mr. Legh R. Page* for appellant. *Mr. Jno. A. Coke* for appellee.

No. 587. GOODELL *v.* KRIECHBAUM. Error to the Supreme Court of the State of Iowa. December 14, 1888: Judgment reversed, with costs, per stipulation, on motion of *Mr. J. M. Wilson* in behalf of counsel, and cause remanded with an instruction to enter a judgment discharging the plaintiff in error from custody. *Mr. Wirt Dexter* for plaintiff in error. *Mr. A. J. Baker* for defendant in error.

No. 328. GRAIN DRILL MANUFACTURERS COMPANY *v.* REINSTEDLER. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. November 19, 1888: Dismissed with costs, on motion of *Mr. Edward Boyd* for appellant. *Mr. E. E. Wood* and *Mr. Edward Boyd* for appellant. *Mr. Arthur Stem* for appellee.

No. 160. GRAIN DRILL MANUFACTURING COMPANY *v.* RUDE. Appeal from the Circuit Court of the United States for the District of Indiana. November 19, 1888: Dismissed, with costs, on motion of *Mr. Edward Boyd* for appellant. *Mr. E. E. Wood* and *Mr. Edward Boyd* for appellant. *Mr. Arthur Stem* for appellees.

No. 177. GRANT *v.* CENTRAL TRUST COMPANY OF NEW YORK. Appeal from the Circuit Court of the United States for the District of Indiana. January 25, 1889: Dismissed, with costs,

pursuant to the 10th rule. *Mr. Bluford Wilson* for appellant. *Mr. R. G. Ingersoll* for appellees.

No. 430. GRAVES *v.* CORBIN. Appeal from the Circuit Court of the United States for the Northern District of Illinois. October 29, 1888: Appeal of James M. Flower, Curtis H. Remy and Stephen S. Gregory, three of the appellants in this cause, dismissed with costs, as per stipulation, on motion of *Mr. J. M. Flower* for appellants. *Mr. J. M. Flower* for appellants. *Mr. Wm. J. Manning* for appellee.

No. 1529. GRAY *v.* MCARTHUR. Appeal from the Circuit Court of the United States for the Southern District of Ohio. March 21, 1889: Docketed and dismissed, with costs, on motion of *Mr. Lawrence Maxwell, Jr.*, for appellees. No opposition.

No. 702. GREEN *v.* HAYES. Error to the Supreme Court of the State of California. March 6, 1889: Dismissed, with costs, on motion of *Mr. W. J. Johnston* for plaintiff in error. *Mr. W. J. Johnston* for plaintiff in error. *Mr. G. Wiley Wells* and *Mr. Walter Van Dyke* for defendants in error.

No. 1452. HILL *v.* SHARON. Appeal from the Circuit Court of the United States for the Northern District of California. December 14, 1888: Docketed and dismissed, with costs, on motion of *Mr. Henry E. Davis* of counsel for appellee. No one opposing.

No. 363. HOCKETT *v.* INDIANA. Error to the Supreme Court of the State of Indiana. March 15, 1889: Dismissed, with costs, on motion of *Mr. Joseph E. McDonald* for plaintiff in error. *Mr. Joseph E. McDonald* and *Mr. John M. Butler* for plaintiff in error. No one entered for defendant in error.

Cases not Otherwise Reported.

No. 601. HUBBARD *v.* CRANE. Appeal from the Circuit Court of the United States for the Northern District of Iowa. December 18, 1888: Dismissed, with costs, per stipulation, on motion of *Mr. D. B. Henderson* in behalf of counsel. *Mr. C. H. Gatch* and *Mr. William Connor* for appellant. *Mr. George Crane* for appellee.

No. 102. JACKSON COUNTY *v.* NINTH NATIONAL BANK. Error to the Circuit Court of the United States for the Western District of Missouri. December 17, 1888: Judgment affirmed, with costs and interest, by a divided court. *Mr. C. O. Tichenor* and *Mr. E. P. Gates* for plaintiff in error. *Mr. John B. Henderson* for defendant in error.

No. 257. KAHLER *v.* HOE. Appeal from the Circuit Court of the United States for the Southern District of New York. January 23, 1889: Dismissed, per stipulation, on motion of *Mr. B. F. Lee*, of counsel for appellant. *Mr. B. F. Lee* for appellant. *Mr. M. B. Philipp* for appellees.

No. 126. KENTUCKY CENTRAL RAILROAD COMPANY *v.* BOURBON COUNTY. Error to the Court of Appeals of the State of Kentucky. December 12, 1888: Dismissed, with costs, pursuant to the 10th rule, on motion of *Mr. Alvin Duvall* of counsel for defendant in error. *Mr. J. W. Stevenson* for plaintiff in error. *Mr. Alvin Duvall* for defendant in error.

No. 184. LEONARD *v.* CHATFIELD. Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. March 6, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. T. W. Brown* for appellants. *Mr. Van H. Manning*, *Mr. Jno. B. Jones* and *Mr. J. W. C. Watson* for appellee.

No. 185. LEONARD *v.* OZARK LAND COMPANY. Appeal from the Circuit Court of the United States for the Eastern District

of Arkansas. March 6, 1889: Dismissed, with costs, per stipulation of counsel. *Mr. T. W. Brown* for appellants. *Mr. Van H. Manning*, *Mr. Jno. B. Jones* and *Mr. J. W. C. Watson* for appellee.

No. 600. LEWIS *v.* CLARK. Appeal from the Circuit Court of the United States for the District of Nebraska. June 5, 1888: Dismissed pursuant to the 28th rule. *Mr. J. M. Woolworth* for appellant. *Mr. Nathan S. Harwood* and *Mr. John H. Ames* for appellee.

No. 1365. LEWIS *v.* WITTERS. Appeal from the Circuit Court of the United States for the District of Vermont. May 13, 1889: Dismissed, per stipulation, on motion of *Mr. William A. McKenney*, in behalf of counsel. *Mr. A. G. Safford* for appellants. *Mr. Albert P. Cross* for appellee.

No. 111. LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY *v.* SWITZERLAND MARINE INSURANCE COMPANY. Error to the Circuit Court of the United States for the Southern District of Ohio. December 10, 1888: Judgment affirmed, with costs, by a divided court. *Mr. T. D. Lincoln* for plaintiff in error. *Mr. C. B. Matthews* for defendant in error.

No. 906. LOUISVILLE CITY RAILWAY COMPANY *v.* CENTRAL PASSENGER RAILROAD COMPANY. Appeal from the Circuit Court of the United States for the District of Kentucky. April 22, 1889: Dismissed, with costs, per stipulation, on motion of *Mr. John Mason Brown* for appellee. *Mr. Alexander Pope Humphrey* for appellant. *Mr. John Mason Brown* for appellee.

No. 170. MCHENRY *v.* NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY. Error to the Circuit Court of the United States for the Southern District of New York. June 19, 1888: Dismissed pursuant to the 28th rule. *Mr. Henry*

Arden for plaintiff in error. *Mr. Wm. G. Choate* for defendant in error.

No. 242. MACKINNEY *v.* ROSENBAND. Error to the Circuit Court of the United States for the Southern District of New York. April 10, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. S. F. Kneeland* for plaintiff in error. No appearance for defendants in error.

No. 314. MATTHEWS *v.* FLOWER. Appeal from the Circuit Court of the United States for the Eastern District of Michigan. January 10, 1889: Dismissed, with costs, per stipulation, on motion of *Mr. George L. Roberts* of counsel for appellants. *Mr. George L. Roberts* for appellants. *Mr. E. J. Hill* for appellees.

No. 237. MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as reorganized) *v.* OVERTON. Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. April 5, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. John F. Dillon* and *Mr. B. C. Brown* for appellant. *Mr. U. M. Rose* for appellees.

No. 748. MILLER *v.* COLE. Error to the Circuit Court of the United States for the District of Nebraska. August 10, 1888: Dismissed pursuant to the 28th rule. *Mr. Geo. E. Pritchett* for plaintiff in error. *Mr. J. M. Woolworth* for defendant in error.

No. 62. MYERS *v.* SMITH. Appeal from the Circuit Court of the United States for the Eastern District of New York. November 5, 1888: Dismissed, as per stipulation, on motion of *Mr. George Ticknor Curtis* of counsel for the appellant. *Mr. John A. Grow* and *Mr. George Ticknor Curtis* for appellant. *Mr. Samuel A. Duncan* for appellee.

Cases not Otherwise Reported.

No. 87. NASHUA MANUFACTURING COMPANY *v.* SOUTH CAROLINA RAILWAY COMPANY. Error to the Circuit Court of the United States for the District of South Carolina. November 16, 1888: Dismissed, with costs, pursuant to the 16th rule, on motion of *Mr. Theodore G. Barker* of counsel for the defendant in error. *Mr. William E. Earle* for plaintiff in error. *Mr. William Allen Butler*, *Mr. Samuel Lord*, and *Mr. Theodore G. Barker* for defendant in error.

No. 89. NATCHEZ, JACKSON AND COLUMBUS RAILROAD COMPANY *v.* STONE. Error to the Supreme Court of the State of Mississippi. November 20, 1888: Dismissed, with costs, on the authority of counsel for the plaintiff in error. *Mr. W. L. Nugent* for plaintiff in error. No counsel entered for defendants in error.

No. 258. NATIONAL FEATHER DUSTER COMPANY *v.* DEARBORN FEATHER DUSTER COMPANY. Appeal from the Circuit Court of the United States for the Northern District of Illinois. April 17, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. J. A. Sleeper* and *Mr. H. K. Whiton* for appellant. *Mr. J. H. Peirce* and *Mr. G. P. Fisher, Jr.*, for appellees.

No. 248. NORTHERN PACIFIC RAILROAD COMPANY *v.* GATES. Error to the Supreme Court of the State of Wisconsin. December 3, 1888: Dismissed, with costs, on motion of *Mr. James McNaught* of counsel for the plaintiff in error. *Mr. James McNaught* for plaintiff in error. No appearance for defendant in error.

No. 138. OSMER *v.* THE J. B. SICKLES SADDLERY COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. November 16, 1888: Dismissed, with costs, on motion of *Mr. R. A. Bakewell* in behalf of counsel for the appellant. *Mr. William H. Bliss* and *Mr. Paul Bakewell* for appellant. No counsel appearing for appellee.

Cases not Otherwise Reported.

No. 1464. PACETTI *v.* FREY. Appeal from the Circuit Court of the United States for the District of Maryland. March 28, 1889: Dismissed, with costs, on motion of *Mr. George Hoadly* in behalf of counsel for appellant. *Mr. John H. Handy* for appellant. No appearance for appellee.

No. 158. PARKER *v.* DENNY. Appeal from the Supreme Court of the Territory of Washington. January 8, 1889: Dismissed, with costs, on motion of *Mr. John H. Mitchell* of counsel for appellant. *Mr. John H. Mitchell* for appellant. No appearance for appellee.

No. 1486. PARKER *v.* DENNY. Appeal from the Supreme Court of the Territory of Washington. January 15, 1889: Docketed and dismissed, with costs, on motion of *Mr. James H. Hoffecker, Jr.*, for the appellee. No one opposing.

No. 312. PHILADELPHIA AND READING RAILROAD COMPANY *v.* PATENT. Error to the Court of Common Pleas of the city of Philadelphia, State of Pennsylvania. January 7, 1889: Dismissed, with costs, on motion of *Mr. William A. McKenney* in behalf of counsel for the plaintiff in error. *Mr. Thomas Hart, Jr.*, for plaintiff in error. No counsel entered for defendant in error.

No. 120. PILLA *v.* GERMAN SCHOOL ASSOCIATION AND FREE COMMUNITY OF ST. LOUIS AND BREMEN. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. December 19, 1888: Dismissed, with costs, pursuant to the 10th rule, on motion of *Mr. Linden Kent* in behalf of counsel for the appellee. *Mr. W. H. Clopton* and *Mr. W. Hallett Phillips* for appellants. *Mr. Henry Hitchcock* and *Mr. G. A. Finkelnburg* for appellee.

No. 124. PINCKNEY *v.* SOUTH CAROLINA. Error to the Supreme Court of the State of South Carolina. December 12,

1888: Dismissed, with costs, pursuant to the 10th rule. *Mr. Jno. Ficken* for plaintiff in error. No appearance for defendant in error.

No. 274. Post *v.* T. C. Richards Hardware Company. Appeal from the Circuit Court of the United States for the District of Connecticut. April 23, 1889: Dismissed, with costs, per stipulation. *Mr. Wm. E. Simonds* for appellants. *Mr. C. E. Mitchell* for appellee.

No. 655. Prentiss *v.* New Orleans. Error to the Circuit Court of the United States for the Eastern District of Louisiana. October 22, 1888: Dismissed, with costs, as per stipulation, on motion for *Mr. E. B. Kruttschnitt* for plaintiff in error. *Mr. E. H. Farrar* and *Mr. E. B. Kruttschnitt* for plaintiff in error. *Mr. Henry C. Miller* for defendant in error.

No. 1554. Prescott *v.* Adams. Error to the Circuit Court of the United States for the Western District of Pennsylvania. April 22, 1889: Docketed and dismissed, with costs, on motion of *Mr. William A. McKenney* for the defendant in error. No opposition.

No. 32. Pullman's Palace Car Company *v.* Pennsylvania. Error to the Supreme Court of the State of Pennsylvania. October 18, 1888: Judgment reversed, with costs, as per stipulation. *Mr. E. S. Isham*, *Mr. William Burry* and *Mr. M. E. Olmsted* for plaintiff in error. *Mr. W. S. Kirkpatrick* and *Mr. John F. Sanderson* for defendant in error.

No. 491. Randolph *v.* Quidneck Company. Appeal from the Circuit Court of the United States for the District of Rhode Island. November 19, 1888: Motion to dismiss, in pursuance of the 15th rule, submitted on behalf of appellee, no one opposing. November 26th: Motion granted, and cause dismissed with costs. *Mr. B. F. Butler* and *Mr. A. D. Payne*

for appellant. *Mr. C. Frank Parkhurst* and *Mr. Charles H. Parkhurst* for appellee. December 3, 1888: Motion to rescind and annul the decree of dismissal of November 26, 1888, and to restore cause to the docket, submitted by *Mr. Benjamin F. Butler* in behalf of the executors of Evan Randolph, deceased. December 10, 1888: Motion to rescind and annul the decree of dismissal of November 26, 1888, granted upon the executors of Evan Randolph, deceased, being duly made parties, and their appearance, under the rule, within thirty days, and the payment of costs. December 12, 1888: John S. Jencks, William H. Jencks and Charles Rhoades, executors of Evan Randolph, deceased, made the parties appellants in this cause and decree of dismissal of November 26, 1888, vacated and set aside and cause restored to the docket.

No. 286. Republican Valley Railroad Company *v.* State of Nebraska *ex rel.* Mattoon. Error to the Supreme Court of the State of Nebraska. April 25, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. T. M. Marquette* for plaintiff in error. *Mr. T. F. Burke* for defendants in error.

No. 162. Richardson *v.* Bresnahan. Appeal from the Circuit Court of the United States for the District of Massachusetts. September 17, 1888: Dismissed pursuant to the 28th rule. *Mr. William A. Macleod* for appellant. *Mr. Chas. Allen Taber* for appellees.

No. 671. Robertson *v.* Pinkus. Error to the Circuit Court of the United States for the Southern District of New York. November 19, 1888: Dismissed, with costs, on motion of *Mr. Assistant Attorney General Maury* for plaintiff in error. *Mr. Attorney General* for the plaintiff in error. *Mr. S. G. Clarke* for the defendant in error.

No. 930. Rodgers *v.* Seventh National Bank of Philadelphia. Appeal from the Circuit Court of the United States

for the Western District of Virginia. January 31, 1889: Dismissed, with costs, on motion of *Mr. J. Randolph Tucker* for appellant. No counsel entered for appellees.

No. 1447. ROGÉ, INDIVIDUALLY AND AS ADMR. *v.* BORIE *et al.* Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. December 3, 1888: Docketed and dismissed, with costs, on motion of *Mr. J. Hubley Ashton* for the appellees. No opposition.

No. 143. EX PARTE: IN THE MATTER OF MAX ROSENGARTEN, APPELLANT. Appeal from the Circuit Court of the United States for the Northern District of Illinois. December 20, 1888: Dismissed, with costs, on authority of counsel for appellant. *Mr. Robert Hervey* and *Mr. C. Stuart Beattie* for appellant.

No. 761. ROOKE, ETC. *v.* SHREWSBURY. Appeal from the District Court of the United States for the District of West Virginia. April 22, 1889: Dismissed, with costs, per stipulation, on motion of *Mr. William A. McKenney* in behalf of counsel. *Mr. W. P. Hubbard* for appellants. *Mr. E. B. Knight* for appellees.

No. 155. SCHAEFFER *v.* GOODRICH. Appeal from the Circuit Court of the United States for the Western District of Missouri. January 8, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. John C. Gage* for appellant. No counsel entered for appellees.

No. 131. SEIBERT *v.* UNITED STATES *ex rel.* WINTER. Error to the Circuit Court of the United States for the Eastern District of Missouri. January 21, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. Jeff. Chandler*, *Mr. E. John Ellis*, *Mr. John Johns* and *Mr. D. A. McKnight* for plaintiff in error. *Mr. Clinton Rowell* for defendant in error.

Cases not Otherwise Reported.

No. 219. SHEEDER *v.* BICKING. Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. September 27, 1888: Dismissed pursuant to the 28th rule. *Mr. S. S. Hollingsworth* and *Mr. Samuel W. Pennypacker* for appellant. *Mr. Henry R. Edmunds* for appellee.

No. 218. SHEEDER *v.* SHANNON. Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. September 27, 1888: Dismissed pursuant to the 28th rule. *Mr. S. S. Hollingsworth* and *Mr. Samuel W. Pennypacker* for appellant. *Mr. Henry R. Edmunds* for appellee.

No. 91. SHENFIELD *v.* SCHIRMER. Appeal from the Circuit Court of the United States for the Southern District of New York. November 21, 1888: Dismissed, with costs, pursuant to the 10th rule. *Mr. E. N. Dickerson* for appellant. *Mr. Edmund Wetmore* for appellees.

No. 212. SIMPKINS *v.* PETERSEN. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. November 16, 1888: Dismissed, with costs, on motion of *Mr. R. A. Bakewell* in behalf of counsel for the appellant. *Mr. Paul Bakewell* for appellant. No counsel appearing for appellees.

No. 1063. SMITH *v.* DEWIRE. Error to the Supreme Court of the State of Kansas. March 18, 1889: Dismissed, with costs, on motion of *Mr. A. B. Browne* for defendant in error, per stipulation of counsel. *Mr. Oscar Forest* for plaintiff in error. *Mr. A. T. Britton* and *Mr. A. B. Browne* for defendant in error.

No. 494. SMITH *v.* HOLT. Error to the Circuit Court of the United States for the Northern District of Texas. March 11, 1889: Dismissed, with costs, on motion of *Mr. W. Hallett Phillips* for plaintiffs in error. *Mr. Jno. D. Templeton* and

Mr. W. Hallett Phillips for plaintiffs in error. *Mr. L. S. Dixon* for defendant in error.

No. 1436. SMITH *v.* MILLER. Appeal from the Circuit Court of the United States for the District of Rhode Island. November 9, 1888: Docketed and dismissed, with costs, on motion of *Mr. Fillmore Beall* of counsel for the appellees. No one opposing.

No. 275. SMITH *v.* OVERTON. Appeal from the Circuit Court of the United States for the Southern District of Iowa. April 24, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. N. M. Hubbard* for appellants. No appearance for appellee.

No. 259. TAFT *v.* STEERE. Appeal from the Circuit Court of the United States for the District of Rhode Island. April 17, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. A. K. P. Joy* for appellant. No appearance for appellees.

No. 112. UNION TUBING COMPANY *v.* PATTERSON COMPANY (Limited). Appeal from the Circuit Court of the United States for the Southern District of New York. December 7, 1888: Dismissed, with costs, pursuant to the 10th rule. *Mr. Edmund Wetmore* for appellants. *Mr. Benjamin F. Thurston* for appellees.

No. 151. UNION PACIFIC RAILWAY COMPANY *v.* BOWERS. Error to the Supreme Court of the Territory of Utah. August 10, 1888: Dismissed pursuant to the 28th rule. *Mr. John F. Dillon* for plaintiff in error. *Mr. Arthur Brown*, *Mr. J. G. Sutherland* and *Mr. J. R. McBride* for defendant in error.

No. 668. UNION PACIFIC RAILWAY COMPANY *v.* LAKE. Error to the Circuit Court of the United States for the District of Colorado. August 10, 1888: Dismissed pursuant to the 28th

rule. *Mr. John F. Dillon* for plaintiff in error. *Mr. W. S. Decker* for defendant in error.

No. 467. UNITED STATES *ex rel.* DREW *v.* VALENTINE. Appeal from the Circuit Court of the United States for the Northern District of Florida. June 14, 1888: Dismissed pursuant to the 28th rule. *Mr. Attorney General* for appellants. *Mr. H. Bisbee* for appellees.

No. 25. VACUUM OIL COMPANY *v.* BUFFALO LUBRICATING OIL COMPANY (Limited). Appeal from the Circuit Court of the United States for the Northern District of New York. October 16, 1888: Dismissed as per stipulation. *Mr. Theodore Bacon* and *Mr. Wm. F. Cogswell* for appellant. *Mr. James A. Allen* for appellee.

No. 783. VENNER *v.* ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY. Appeal from the Circuit Court of the United States for the District of Kansas. January 7, 1889: Dismissed, per stipulation, on motion of *Mr. Sigourney Butler* of counsel for the appellees. *Mr. W. A. Underwood* for appellant. *Mr. George R. Peck* and *Mr. Sigourney Butler* for appellees.

No. 276. WAGNER *v.* LEMEN. Appeal from the Circuit Court of the United States for the Southern District of Iowa. April 24, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. N. M. Hubbard* for the appellants. No appearance for appellees.

No. 506. WALL *v.* DISTRICT OF COLUMBIA. Appeal from the Supreme Court of the District of Columbia. January 21, 1889: Dismissed with costs. Motion to dismiss submitted January 14, 1889, by *Mr. Henry E. Davis* in support of motion, and by *Mr. J. W. Douglass* in opposition thereto.

Cases not Otherwise Reported.

No. 356. WARREN, SUBSTITUTED FOR KELSEY, TREASURER OF LUCAS COUNTY, OHIO *v.* FIRST NATIONAL BANK OF TOLEDO, OHIO. No. 357. SAME *v.* SECOND NATIONAL BANK OF TOLEDO, OHIO. No. 358. SAME *v.* TOLEDO NATIONAL BANK OF TOLEDO, OHIO. No. 359. SAME *v.* MERCHANTS NATIONAL BANK OF TOLEDO, OHIO, No. 360. SAME *v.* NORTHERN NATIONAL BANK OF TOLEDO, OHIO. Appeals from the Circuit Court of the United States for the Northern District of Ohio. November 26, 1888: Dismissed for the want of jurisdiction, the amount involved in each case being less than five thousand dollars. Motion to dismiss submitted November 19, 1888, by *Mr. John H. Doyle* in support of motion. No counsel appearing in opposition thereto. *Mr. Isaac P. Pugsley* entered for appellants. *Mr. John H. Doyle* for appellees.

No. 1534. WEBBER *v.* PENNSYLVANIA. Error to the Supreme Court of the State of Pennsylvania. March 28, 1889: Docketed and dismissed, with costs, on motion of *Mr. George S. Graham* for defendant in error. No opposition.

No. 904. WESTERN AIR LINE CONSTRUCTION COMPANY *v.* MCGILLIS. Error to the Circuit Court of the United States for the Northern District of Illinois. January 2, 1889: Dismissed, per stipulation, each party to pay its own costs in this court, on motion of *Mr. Edwin Walker* of counsel for the plaintiff in error. *Mr. Edwin Walker* for plaintiff in error. *Mr. John S. Cooper* for defendants in error.

No. 7. WESTERN UNION TELEGRAPH COMPANY *v.* BALTIMORE AND OHIO RAILROAD COMPANY. Appeal from the Circuit Court of the United States for the District of Maryland. October 12, 1888: Dismissed, with costs, pursuant to the 19th rule. *Mr. Wager Swayne* and *Mr. C. J. M. Gwinn* for appellant. *Mr. John K. Cowen* for appellee.

Cases not Otherwise Reported.

No. 27. WESTERN UNION TELEGRAPH COMPANY *v.* BALTIMORE AND OHIO TELEGRAPH COMPANY. Appeal from the Circuit Court of the United States for the District of Indiana. October 16, 1888: Dismissed, with costs, pursuant to the 19th rule. *Mr. J. E. McDonald*, *Mr. J. M. Butler* and *Mr. Wager Swayne* for appellant. *Mr. John K. Cowen* and *Mr. W. H. H. Miller* for appellee.

No. 656. WHITEHEAD *v.* NEW ORLEANS. Error to the Circuit Court of the United States for the Eastern District of Louisiana. October 22, 1888: Dismissed, with costs, as per stipulation, on motion of *Mr. E. B. Kruttschnitt* of counsel for the plaintiff in error. *Mr. E. H. Farrar* and *Mr. E. B. Kruttschnitt* for plaintiff in error. *Mr. Henry C. Miller* for defendant in error.

No. 1364. WILDE *v.* BIRCHER. Error to the Circuit Court of the United States for the District of Colorado. May 13, 1889: Dismissed, per stipulation, on motion of *Mr. William A. McKenney* in behalf of counsel. *Mr. B. M. Hughes* and *Mr. Joseph W. Taylor* for plaintiff in error. *Mr. J. H. McGowan* and *Mr. Charles E. Gast* for defendant in error.

No. 1392. WILSON *v.* HARDING. Error to the Circuit Court of the United States for the Southern District of Iowa. January 7, 1889: Dismissed, per stipulation, on motion of *Mr. William A. McKenney*, in behalf of counsel. *Mr. Charles A. Clark* and *Mr. N. M. Hubbard* for plaintiffs in error. *Mr. B. F. Kauffman* for defendant in error.

No. 603. WOLCOTT *v.* CRANE. Appeal from the Circuit Court of the United States for the Northern District of Iowa. December 18, 1888: Dismissed, with costs, per stipulation, on motion of *Mr. D. B. Henderson* in behalf of counsel. *Mr. C. H. Gatch* and *Mr. William Connor* for appellant. *Mr. George Crane* for appellee.

Cases not Otherwise Reported

No. 217. WRIGHT *v.* MILLER. Appeal from the Circuit Court of the United States for the Middle District of Tennessee. March 19, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. Thomas L. Dodd* for appellants. *Mr. John P. Murray* for appellees.

No. 277. YOUNG *v.* SHELDON. Appeal from the Circuit Court of the United States for the Northern District of New York. April 24, 1889: Dismissed, with costs, pursuant to the 10th rule. *Mr. F. I. Allen* for appellants. *Mr. Jno. R. Bennett* for appellees.

No. 64. ZIHLMANN *v.* LA BELLE GLASS COMPANY. Appeal from the Circuit Court of the United States for the Southern District of Ohio. November 2, 1888: Dismissed, with costs, pursuant to the 10th rule. *Mr. John F. Kelly* for appellant. *Mr. G. H. Christy* for appellee.

In Memoriam.

STANLEY MATTHEWS, LL.D.

SUPREME COURT OF THE UNITED STATES.

MONDAY, April 15, 1889.

Present: The Hon. MELVILLE W. FULLER, *Chief Justice.*
SAMUEL F. MILLER,
STEPHEN J. FIELD,
JOSEPH P. BRADLEY,
JOHN M. HARLAN,
HORACE GRAY,
SAMUEL BLATCHFORD,
LUCIUS Q. C. LAMAR,
Associate Justices.

MR. ATTORNEY GENERAL addressed the court as follows:

MAY IT PLEASE THE COURT: At a meeting of the bar of this court, on the 6th instant, resolutions were adopted touching the death of the late JUSTICE MATTHEWS.[1] These resolutions,

[1] Mr. Justice Matthews died at Washington, on the morning of the 22d March, 1889. On convening on that day, the court adjourned until the 28th March. On the 25th, the funeral services took place, in Washington, and the body was taken to Ohio for interment. Justices Harlan, Gray, Blatchford and Lamar accompanied it.

On the 30th of March, at 12 M., a meeting of the bar of the Supreme Court of the United States was held in the court room, to take action upon his death. Mr. William M. Evarts was elected chairman, and Mr. James H. McKenney, secretary of the meeting. Messrs. George F. Edmunds, Benjamin Butterworth, George F. Hoar, W. C. P. Breckenridge, George Ticknor Curtis, Samuel Shellabarger, George A. Jenks and Joseph E. McDonald were appointed a committee to prepare suitable resolutions; whereupon the meeting adjourned to April 6, at 11 A.M., at the same place.

On the 11th April, at 11 A.M., Mr. Evarts took the chair. Mr. Edmunds,

as the representative of the Department of Justice, of which STANLEY MATTHEWS, both at the bar and on the bench, was so conspicuous an ornament, I was directed to present to this court. I beg leave to read the resolutions:

"*Resolved*, That the bar of the Supreme Court of the United States deeply deplores the decease of the late MR. JUSTICE MATTHEWS, whereby the country has lost an always patriotic and respected citizen, alike eminent in his private and public career; the bar one of its long-time leaders, conspicuous as an example of the best relations of our profession with the administration of justice; and the court itself a member fitted by character, temperament, learning, and industry to the place he held in the highest judicial tribunal of a great nation. His name is rightly enrolled among those honored by their countrymen.

"*Resolved*, That the bar presents to the family of the departed Justice its sincere sympathy and condolence in their bereavement.

"*Resolved*, That the Attorney General be requested to present these resolutions to the court for such consideration as may be fit.

"*Resolved*, That the chairman be requested to transmit a copy hereof to Mrs. Matthews."

MAY IT PLEASE THE COURT: In this august presence all human visitors stand uncovered and bow with reverence. But now and again your precincts are invaded by the herald of a Power which knows no rank or dignity, in whose court magistrate and private citizen, jurist and rustic, are upon a plane of absolute equality.

Answering the summons of this Power, your eminent asso-

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on behalf of the committee, reported the resolutions which are printed above. Remarks were made by Mr. Edmunds, Mr. George Hoadly, Mr. R. D. Mussey, Mr. William S. Flippin, Mr. William C. P. Breckenridge, Mr. Joseph E. McDonald, and Mr. Evarts, when the resolutions were unanimously adopted, and the meeting adjourned.

The remarks made by these speakers had not been finally corrected and printed when this volume was made ready for the press.

ciate, a worthy successor of the long line of illustrious men whose virtues and learning have adorned this great tribunal, has gone to that country whose mystery, so far as human effort is concerned, is no nearer solution than when in the childhood of the race Death snatched a brother's life by a brother's hand, or when the Poet King, bewailing his child, said all that can now be said, "I shall go to him, but he shall not return to me." We mourn the departure of your associate, our brother, not for his own, but for the country's sake. True, his life has gone out when at the zenith of its brightness.

While not a young man, JUSTICE MATTHEWS was upheld by a spirit so buoyant, mastered difficult questions and wrote great decisions so easily, that no one thought of him as old in years.

It is the dull, uneventful day which drags and seems long. The day or the life full of great thoughts crystallizing into great deeds seems always too short.

Even the pagan had a better measure of life than years. Seneca says:

"We must not care for length of life, but for life sufficient for its duties. Life is long if it is full; but it is full when the soul hath completed its development and hath shown all its latent powers."

Measured by this standard, the life we mourn had no further need of years on earth.

For ourselves and the country, we regret that we could not have the benefit of further exertions of his splendid powers; but for himself, his life was full.

He has gone over to the majority: to the majority of the great and good of all time; to the majority of the associates of his early life, that period in which most lasting attachments are formed; to the majority of his own kindred; to the majority, I had almost said, of those who, as associates, extended to him the hand of welcome when he first took his seat as a justice of this court.

My personal acquaintance with JUDGE MATTHEWS was slight. While he was at the bar I occasionally met him, but only as a young man at the bar meets a great lawyer; since he has

been upon the bench I have only seen him in the discharge of his high duties. Of his personality, therefore, it does not become me to speak.

Nor is this the time, nor am I the person, to indulge in extended eulogy on his career and character. Others, better fitted by intimate personal and professional association and by gifts of speech, have already performed this pleasing duty. This much, however, I may say in the way of characterization. The mind of STANLEY MATTHEWS seemed to me to be deeply original. He pioneered. He studied principles more than precedents; he surveyed the field of jurisprudence with the eye of a statesman as well as lawyer; he took his direction in the law by the compass and the stars, rather than by uncertain foot-prints or marks on the trees blazed by his predecessors.

In conclusion, I ask that the resolutions of the bar be spread at large on your records, as a memorial to our children of our high appreciation of the virtues, learning and eminent character of our departed brother.

The CHIEF JUSTICE responded as follows:

The court entirely concurs in the sentiments expressed in the resolutions which have just been read and in the observations of the Attorney General accompanying their presentation.

Before he came to grace a seat upon this bench, MR. JUSTICE MATTHEWS had, in high public place, political, professional and judicial, acquired eminent distinction and displayed the qualities which invite attention and command admiration and respect, while as a member of the bar his conspicuous ability, faithfulness and integrity had given him a rank second to none; and the felicity was also his of having rendered his country gallant service as a soldier.

He brought here the garnered wisdom of years of varied experience, and constantly added to it the fruit of cultivation in this exalted field of exertion, whose margin faded before him as he moved, growing in strength with exigencies requiring the putting forth of all his powers.

Mr. Justice Matthews.

In listening, patient and sympathetic; in intercourse with counsel, cordial but dignified; conscientious in investigation; honest and impartial in judgment; full of resource in supporting given conclusions by accurate and discriminating reasoning; ample in learning and comprehensive in scholarship; luminous in exposition and apt in illustration, he demonstrated such fitness for this sphere of action, that his removal in the midst of his usefulness cannot but be regarded as a severe loss to the bar, the judiciary, and the country.

To the associates of years of personal companionship in the administration of justice that loss is quite unspeakable. The ties between those thus thrown into close intimacy are extremely strong, and when one is taken away upon whose painstaking scrutiny, clearness in explanation, and fulness of knowledge, reliance has been justly reposed by his brethren, and whose amenity of temper and kindliness of heart have naturally inspired affection, a keen sense of personal bereavement mingles with the common sorrow.

In view of a life like this, crowned with the success that waits upon absolute devotion to duty, how false the desponding exclamation of the Preacher, that "that which now is, in the days to come shall be forgotten."

The remembrance of the just and the wise is with the generations always, and the works of his faithful public servant will follow him, "in the days to come," now that he rests from his labors.

The court has heretofore adjourned as a mark of respect to the memory of the deceased and attended the funeral ceremonies in Ohio. The resolutions just presented and the remarks of the Attorney General will be spread upon the records, and the tribute of the bar of Saint Louis, which has been transmitted to the court, and such other commemorative proceedings as may be received, will be placed upon the files with a proper minute in regard to them.

In Memoriam.

JOHN ARCHIBALD CAMPBELL, LL.D.

SUPREME COURT OF THE UNITED STATES.

FRIDAY, April 12, 1889.

Present: The Hon. MELVILLE W. FULLER, *Chief Justice.*
SAMUEL F. MILLER,
STEPHEN J. FIELD,
JOSEPH P. BRADLEY,
JOHN M. HARLAN,
HORACE GRAY,
SAMUEL BLATCHFORD,
LUCIUS Q. C. LAMAR,
Associate Justices.

MR. ATTORNEY GENERAL MILLER addressed the court as follows:

MAY IT PLEASE THE COURT: On the 13th of March last JOHN ARCHIBALD CAMPBELL, a very distinguished lawyer and ex-Justice of this court, departed this life.

For fifty years, a full half of the life-time of the government, this eminent man has been intimately and conspicuously associated with the interpretation of the laws of the land and the administration of justice.

Nor is the length of JUDGE CAMPBELL'S professional career its only striking feature. The manner of his coming to the bar was unusual.

In the first year of the first term of President Jackson, by a special act of the legislature of Georgia, his native State, MR. CAMPBELL, with Robert Toombs and three or four others, was "admitted to practise law and equity" in that State.

Removing to the city of Montgomery, he at once took the same rank at the bar which he had maintained in school and college, among the foremost, and at the age of thirty he had no superior at the bar of Alabama.

At forty-two he was appointed, and was worthy to be appointed, Associate Justice of this court.

Not one of the learned and eminent jurists who sat with him here on the bench or in the consultation room now remains to bear witness to his virtues or his talents; but the opinions he wrote, found in Howard's Reports, volumes 15 to 24 inclusive, testify, and will testify so long as American jurisprudence shall last, of his industry, his great abilities and profound learning.

A disciple, an admirer, and a friend of Mr. Calhoun, in 1861 JUDGE CAMPBELL followed, though it is believed reluctantly followed, the teachings of the apostle of state sovereignty to their logical results.

Since the war he has easily maintained a place at the bar, and, as a scholar and publicist, among the most eminent of the land.

Having no personal acquaintance with JUDGE CAMPBELL, it is not fitting that I should speak of his private life and personal character.

Fully appreciating his great and good qualities, both of head and heart, the members of this bar, on the 6th instant, adopted resolutions expressive of our sentiments on the melancholy occasion of his death. These resolutions[1] are as follows:

"The bar of the Supreme Court of the United States have

[1] At a meeting of the bar of the Supreme Court of the United States held in the court room on Saturday, the 6th of April, 1889, at 2 P.M., on motion of Mr. George F. Edmunds, Mr. George Ticknor Curtis was called to the chair and Mr. James H. McKenney was elected secretary. Mr. Assistant Attorney General Maury offered the resolutions which are printed above; and after appropriate remarks by Mr. Maury, the Rev. Alfred C. Powell of Grace Church, Baltimore, Mr. George Hoadly, Mr. William M. Evarts, Mr. George F. Edmunds and Mr. George Ticknor Curtis, they were unanimously adopted; and the meeting thereupon adjourned. The remarks made by these speakers had not been corrected and printed when this volume went to press.

assembled for the purpose of giving expression to their sense of the loss which they, in common with the whole country, have sustained in the death of JOHN ARCHIBALD CAMPBELL.

"It is but just to his memory to say that he was a jurist of extensive and varied learning in the common law, and civil law as well, and accustomed to resort to the great sources of jurisprudence, which are the school, we are told, where proficiency can best be acquired in the difficult art of applying the abstract principles of the law to actual cases.

"His learning in constitutional law and in international law, and his large acquaintance with the political history of the country, added to his vast reading in general history and literature, fitted him admirably to sit in the Supreme Court of the United States, where for nearly eight years he was an honored and influential associate: Therefore, be it resolved:—

"1. That the bar of the Supreme Court of the United States do hereby attest their admiration and appreciation of the great career of JOHN ARCHIBALD CAMPBELL as a leading practising lawyer and as a judge of the first rank, and do hereby commemorate his many public and private virtues, and that modesty and simplicity which were the chaste setting of his great intellect and learning.

"2. That we tender the family of the deceased our sympathy; and that the Chairman be, and he is hereby, requested to send them a copy of these proceedings.

"3. That the Chairman be, and he is hereby, requested to transmit a copy of these proceedings to the Attorney General of the United States, with the request to present the same to the Supreme Court of the United States for such action as may be deemed proper."

MAY IT PLEASE THE COURT: I move that these resolutions be incorporated in your record as permanent evidence of the high estimation in which JUDGE CAMPBELL was held by his brethren of the bar.

THE CHIEF JUSTICE responded as follows: The court recognizes in the decease of MR. JUSTICE CAMPBELL the departure

John Archibald Campbell.

of an eminent citizen, who through his power of intellect, profound learning and unremitting diligence, coupled with integrity of mind and sincere love of justice, deservedly achieved high reputation as a jurist and reflected corresponding credit upon this bench during the years he adorned it.

His accession here had been preceded, as his regretted retirement was followed, by distinguished service in the legal profession.

It is proper that marks of respect should be shown to his memory, now that, in the fulness of years, he has peacefully fallen asleep —

> "Men must endure
> Their going hence, even as their coming hither:
> Ripeness is all."

The remarks of the Attorney General and the resolutions will be spread upon the record.

APPENDIX

TO THE

REPORTS OF THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES

FROM SEPTEMBER 24, 1789, TO THE END OF
OCTOBER TERM, 1888.

BY

J. C. BANCROFT DAVIS, LL.D.,
REPORTER TO THE COURT.

NEW YORK AND ALBANY:
BANKS & BROTHERS.
1889.

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JUSTICES OF THE SUPREME COURT COMMISSIONED DURING THE PERIOD COVERED BY THIS APPENDIX.

JOHN JAY of New York, Chief Justice. Commissioned September 26, 1789. Resigned June 29, 1795.

JOHN RUTLEDGE of South Carolina, Associate Justice. Commissioned September 26, 1789. Declined. He was Chief Justice of South Carolina.

WILLIAM CUSHING of Massachusetts, Associate Justice. Commissioned September 27, 1789. Died September 13, 1810.

ROBERT H. HARRISON of Maryland, Associate Justice. Commissioned September 28, 1789. "Resigned." He was Chief Judge of the General Court. Died in office April 20, 1790.

JAMES WILSON of Pennsylvania, Associate Justice. Commissioned September 29, 1789. Died August 28, 1798.

JOHN BLAIR of Virginia, Associate Justice. Commissioned September 30, 1789. Resigned 1796.

JAMES IREDELL of North Carolina, Associate Justice, "in the place of Robert H. Harrison resigned." Commissioned February 10, 1790. Died October 20, 1799.

THOMAS JOHNSON of Maryland, Associate Justice, "*vice* John Rutledge resigned." Commissioned August 5, 1791, in the recess. Recommissioned on confirmation November 7, 1791. Resigned March 4, 1793.

WILLIAM PATERSON, "Governor of the State of New Jersey," Associate Justice, "*vice* Thomas Johnson resigned." Commissioned March 4, 1793. Died September 9, 1806.

The judiciary act of 1789, 1 Stat. 73, provided for a Chief Justice and five Associate Justices. President Washington, on the 24th September, 1789, nominated for Chief Justice Mr. Jay, and for Associate Justices, Messrs. Rutledge, Wilson, Cushing, Harrison and Blair, (in that order,) and they were all confirmed on the 26th of that month.

JOHN RUTLEDGE of South Carolina, Chief Justice, in the place of John Jay resigned. Commissioned July 1, 1795, in the recess. December 10, 1795, the nomination was sent to the Senate, and on the 15th of that month the Senate, by a vote of 10 yeas to 14 nays, refused to advise and consent to it.

WILLIAM CUSHING of Massachusetts, Chief Justice, in the place of John Jay resigned. Commissioned January 27, 1796. Declined.

SAMUEL CHASE of Maryland, Associate Justice, "*vice* John Blair resigned." Commissioned January 27, 1796. Died June 19, 1811.

OLIVER ELLSWORTH of Connecticut, Chief Justice, "*vice* William Cushing declined." Commissioned March 4, 1796. In October, 1799, he was commissioned one of three Envoys Extraordinary and Ministers Plenipotentiaries to France, and resigned the office of Chief Justice from Paris in November, 1800. He died November 26, 1807.

BUSHROD WASHINGTON of Virginia, Associate Justice, in the place of James Wilson deceased. Commissioned September 29, 1798, in the recess. Recommissioned on confirmation December 20, 1798. Died November 26, 1829.

ALFRED MOORE of North Carolina, Associate Justice, "in the room of Mr. Justice Iredell deceased." Commissioned December 10, 1799. Resigned in 1804.

JOHN JAY of New York, Chief Justice, "in the place of Oliver Ellsworth, who has resigned." Commissioned December 19, 1800. Declined. Died May 17, 1829.

JOHN MARSHALL of Virginia, Chief Justice, "in place of John Jay, who has declined his appointment." Commissioned January 31, 1801. Died July 6, 1835.

WILLIAM JOHNSON of South Carolina, Associate Justice, "in the place of Alfred Moore resigned." Commissioned March 26, 1804. Died August 11, 1834.

BROCKHOLST LIVINGSTON of New York, Associate Justice, "in the room of William Paterson deceased." Commissioned in the recess November 10, 1806. Recommissioned on confirmation January 16, 1807. Died March 18, 1823.

THOMAS TODD of Kentucky, Associate Justice. (This appointment was made under the act of February 24, 1807, 2 Stat.

421, c. 16, § 5, authorizing the appointment of an additional Associate Justice.) Commissioned March 3, 1807. Died February 7, 1826.

Levi Lincoln of Massachusetts, Associate Justice "in the room of William Cushing deceased." Commissioned January 7, 1811. Declined.

John Quincy Adams of Massachusetts, Associate Justice. Commissioned February 22, 1811. Declined.

Joseph Story of Massachusetts, Associate Justice, "in the place of John Quincy Adams declined." Commissioned November 18, 1811. Died September 10, 1845.

Gabriel Duvall of Maryland, Associate Justice, "in the room of Samuel Chase deceased." Commissioned November 18, 1811. Resigned January, 1835. Died March 6, 1844.

Smith Thompson of New York, Associate Justice, "in the place of Brockholst Livingston deceased." Commissioned in the recess, September 1, 1823. Recommissioned on confirmation December 9, 1823. Died December 18, 1843.

Robert Trimble of Kentucky, Associate Justice, in the place of Thomas Todd deceased. Commissioned May 9, 1826. Died August 25, 1828.

John McLean of Ohio, Associate Justice, in the place of Robert Trimble deceased. Commissioned March 7, 1829. Died April 4, 1861.

Henry Baldwin of Pennsylvania, Associate Justice, in the place of Bushrod Washington deceased. Commissioned January 6, 1830. Died April 21, 1844.

James M. Wayne of Georgia, Associate Justice, in the place of William Johnson deceased. Commissioned January 9, 1835. Died July 5, 1867.

Roger B. Taney of Maryland, Chief Justice, in the place of John Marshall deceased. Commissioned March 15, 1836. Died October 12, 1864.

Philip P. Barbour of Virginia, Associate Justice, in the place of Gabriel Duvall resigned. Commissioned March 15, 1836. Died February 24, 1841.

William Smith of Alabama, Associate Justice. (This appoint-

ment was made under the act of March 3, 1837, 5 Stat. 176, c. 32, which added two Associate Justices to the court.) Commissioned March 8, 1837. Declined.

JOHN CATRON of Tennessee, Associate Justice. (This appointment was also made under the act of March 3, 1837.) Commissioned March 8, 1837. Died May 30, 1865.

JOHN MCKINLEY of Alabama, Associate Justice, in the place of William Smith declined. Commissioned in the recess April 22, 1837. Recommissioned on confirmation September 25, 1837. Died July 19, 1852.

PETER V. DANIEL of Virginia, Associate Justice, in the place of Philip P. Barbour deceased. Commissioned March 3, 1841. Died June 30, 1860.

SAMUEL NELSON of New York, Associate Justice, in the place of Smith Thompson deceased. Commissioned February 13, 1845. Retired November 28, 1872, under the provision of the act of April 10, 1869, 16 Stat. 45, c. 22. Died December 13, 1873.

LEVI WOODBURY of New Hampshire, Associate Justice, in the place of Joseph Story deceased. Commissioned in the recess September 20, 1845. Recommissioned on confirmation January 3, 1846. Died September 4, 1851.

ROBERT C. GRIER of Pennsylvania, Associate Justice, in the place of Henry Baldwin deceased. Commissioned August 4, 1846. Retired January 31, 1870, under the provision of the act of April 10, 1869, 16 Stat. 45, c. 22. Died September 26, 1870.

BENJAMIN ROBBINS CURTIS of Massachusetts, Associate Justice, in the place of Levi Woodbury, deceased. Commissioned in the recess September 22, 1851. Recommissioned on confirmation December 20, 1851. Resigned in 1857. Died September 15, 1874.

JOHN A. CAMPBELL of Alabama, Associate Justice, in the place of John McKinley deceased. Commissioned March 22, 1853. Resigned in 1861.

NATHAN CLIFFORD of Maine, Associate Justice, in the place of Benjamin R. Curtis resigned. Commissioned January 12, 1858. Died July 25, 1881.

NOAH H. SWAYNE of Ohio, Associate Justice, in the place of John McLean deceased. Commissioned January 24, 1862. Re-

tired under the provision of Rev. Stat. § 714, January, 1881. Died June 8, 1884.

Samuel F. Miller of Iowa, Associate Justice, to fill a vacancy. Two vacancies existed when Mr. Justice Miller was appointed; one caused by the death of Mr. Justice Daniel, the other by the resignation of Mr. Justice Campbell. Mr. Justice Miller was not named specially for either. Commissioned July 16, 1862.

David Davis of Illinois, Associate Justice, to fill a vacancy. Commissioned in the recess October 17, 1862. Recommissioned on confirmation December 8, 1862. Resigned March, 1877. Died June 26, 1886.

Stephen J. Field of California. (This appointment was made under the act of March 3, 1863, c. 100, 12 Stat. 794, authorizing the appointment of an additional Associate Justice.) Commissioned March 10, 1863.

Salmon P. Chase of Ohio, Chief Justice, in the place of Roger B. Taney deceased. Commissioned December 6, 1864. Died May 7, 1873.

Edwin M. Stanton, Associate Justice, in the place of Robert C. Grier retired. Commissioned December 20, 1869, "to take effect from and after February 1, 1870," at which time Mr. Justice Grier's retirement was to take effect. Died December 24, 1869, before his commission took effect.

William Strong of Pennsylvania, Associate Justice, to fill a vacancy. Two vacancies existed; one the new judgeship created by the act of April 10, 1869, the other caused by the retirement of Mr. Justice Grier. President Grant sent the names of Mr. Bradley and Mr. Strong to the Senate in that order without specifying to which vacancy either was to be assigned. Mr. Justice Strong was commissioned February 18, 1870. Retired under the provisions of Rev. Stat. § 714, December, 1880.

Joseph P. Bradley of New Jersey, Associate Justice to fill a vacancy. Commissioned March 21, 1870.

Ward Hunt of New York, Associate Justice, in the place of Samuel Nelson retired. Commissioned December 11, 1872. Retired January 7, 1882, under the provisions of an act of that date. Died March 24, 1886.

Morrison R. Waite of Ohio, Chief Justice, in the place of Salmon

P. Chase deceased. Commissioned January 21, 1874. Died March 23, 1887.

JOHN M. HARLAN, Associate Justice, in the place of David Davis resigned. Commissioned November 29, 1877.

WILLIAM B. WOODS of Georgia, Associate Justice, in the place of William Strong retired. Commissioned December 21, 1880. Died May 14, 1887.

STANLEY MATTHEWS of Ohio, Associate Justice, in the place of Noah H. Swayne retired. Commissioned May 12, 1881. Died March 22, 1889.

HORACE GRAY of Massachusetts, Associate Justice, in the place of Nathan Clifford deceased. Commissioned December 20, 1881.

SAMUEL BLATCHFORD of New York, Associate Justice, in the place of Ward Hunt retired. Commissioned March 22, 1882.[1]

LUCIUS Q. C. LAMAR of Mississippi, Associate Justice, in the place of William B. Woods deceased. Commissioned January 16, 1888.

MELVILLE W. FULLER, Chief Justice, in the place of Morrison R. Waite, deceased. Commissioned July 20, 1888.

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[1] ROSCOE CONKLING was nominated to the Senate and confirmed as an Associate Justice in the place of Mr. Justice Hunt; but no commission issued, as Mr. Conkling declined.

APPENDIX.

THE "Act to Establish the Judicial Courts of the United States" (1 Stat. 73) was approved by President Washington, in the city of New York, on the 24th day of September, 1789. It provided, in its opening words, "that the Supreme Court of the United States shall consist of a Chief Justice and five Associate Justices, any four of whom shall be a quorum, and shall hold annually, at the seat of government, two sessions, the one commencing the first Monday of February, and the other the first Monday of August."[1]

On the 26th of the same month, John Jay, Esq., of New York, was appointed to be the Chief Justice of the new court, and John Rutledge, of South Carolina, an Associate Justice. William Cushing, Esq., of Massachusetts, was appointed Associate Justice on the 27th; Robert H. Harrison, of Maryland, on the 28th; James Wilson, Esq., of Pennsylvania, on the 29th; and John Blair, Esq., of Virginia, on the 30th of the same month. The court organized itself in the city of New York, on the first Monday of the following

[1] The act of February 24, 1807, c. 16, § 5, 2 Stat. 421, authorized the appointment of a sixth Associate Justice. The act of March 3, 1837, 5 Stat. 176, authorized the appointment of two more Associate Justices, making eight Associate Justices in all. The act of March 3, 1863, 12 Stat. 794, added a ninth Associate Justice. Under the act of July 23, 1866, 14 Stat. 209, the number of Associate Justices was to be reduced to six, by not filling vacancies. The death of Justices Catron and Wayne reduced the number of Associate Justices to seven before this act was repealed. On the 10th April, 1869, 16 Stat. 44, it was enacted that "the Supreme Court of the United States shall hereafter consist of the Chief Justice of the United States and eight Associate Justices," which law still remains in force.

By the act of 1802, 2 Stat. 156, the August Term was dispensed with. By the act of May 4, 1826, 4 Stat. 160, the second Monday of January was substituted for the first Monday of February as the day for beginning. By the act of June 17, 1844, 5 Stat. 676, the first Monday of December was substituted for the second Monday of January; and by the act of January 24, 1873, 17 Stat. 419, the second Monday of October was made the day for the beginning of the Term, as it still continues to be.

February (the 1st), and adjourned *sine die* on February 10, 1790. On the day of the adjournment, Mr. James Iredell, of North Carolina, was appointed an Associate Justice in the place of Mr. Harrison, who declined. He qualified August 2, 1790, at the opening of the August Term.

Thus it will be seen that the first century of the existence of this court expires between the close of the present term and the opening of October Term, 1889. In view of this fact, after consultation with friends in whose judgment I place confidence, I have gathered together several matters connected with the judicial history and decisions of the highest courts of the United States prior to the adoption of the Constitution; and I have placed them in this Appendix, in order that they may be preserved in connection with the decisions of the highest court since its adoption, and in the belief that they will prove interesting and useful to the practising constitutional lawyer, as well as to the student of our judicial system.

I have also, under like advice, caused the original records in the office of the clerk of this court to be carefully searched, in order to ascertain what opinions of the court have been omitted in the published reports; and I have printed all such opinions in this Appendix, either in full or in substance.

With these several papers incorporated into the official series of Reports, it is substantially complete, both as to the work done by the highest Federal courts before the adoption of the Constitution, and as to the decisions of this court.

The ninth Article of the "Articles of Confederation and Perpetual Union" contained these provisions:

"The United States in Congress assembled shall have the sole and exclusive right and power of . . . appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no Member of Congress shall be appointed a judge in any of the said courts.

"The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other cause whatever. . . . All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions as they

may respect such lands and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States."

These Articles were finally "agreed to" by Congress, in the session of Saturday, the 15th of November, 1777, and it was ordered that they should "be proposed to the Legislatures of all the United States, to be considered, and if approved of by them, they are advised to authorize their delegates to ratify the same in the Congress of the United States; which being done, the same shall become conclusive." On the 9th day of July, 1778, "the ratification of the Articles of Confederation, engrossed on a roll of parchment," was laid before Congress, and was signed "on the part and in behalf of their respective States by the delegates of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, Pennsylvania, Virginia and South Carolina." The ratification of North Carolina was made on the 21st July, 1778; of Georgia on the 24th July, 1778; of New Jersey on the 26th November, 1778; and of Delaware on the 5th of May, 1779. Maryland delayed, in the hope of securing a provision for the holding of the unsettled public lands for the benefit of all the States. The negotiations on this point took shape in a paper which was submitted to Congress by the delegates from that State on behalf of the State, and spread upon the Journals on the 21st May, 1779. Things continued in this way, without anything being done to meet the wishes of Maryland, until February 12, 1781; when the delegates from that State presented to Congress a resolution of the legislature of the State, in which, after reciting that "it hath been said that the common enemy is encouraged by this State not acceding to the Confederation, to hope that the union of the sister States may be dissolved, and therefore prosecutes the war" as a reason why the State should give its adhesion, the delegates were authorized to affix their signatures. On the 1st of March following, the delegates from Maryland signed the engrossed parchment, and on that day the whole was entered in full on the Journal of Congress as it now stands. The value of these dates, as bearing upon the action of Congress on these subjects, will appear later.

Congress took jurisdiction of appeals from the judgments of State Courts of Admiralty in prize cases some years before the ratification

and adoption of the Articles of Confederation; and it created a court with like jurisdiction about a year before that date. An account of its doings in this respect, and of the court which it created for this purpose, will be found in the paper entitled "I. *Courts of Appeal in Prize Cases.*"

What Congress and the courts which it established did, under the power conferred upon it concerning disputes and differences between two or more States, is shown in the paper entitled "II. *Courts for determining Disputes and Differences between two or more States concerning Boundary, Jurisdiction, or any other Cause whatever.*"

The power conferred upon it to appoint courts for the trial of piracies and felonies committed on the high seas it exercised in the following manner: On the 5th April, 1781, it passed an ordinance in which it was provided that persons charged with such offences should be "enquired of, tried and judged by grand and petit juries, according to the course of the common law, in like manner as if the piracy or felony were committed upon the land, and within some county, district, or precinct of one of these United States. The justices of the supreme or superior court of judicature and judge of the court of admiralty of the several and respective States, or any two or more of them, are hereby constituted and appointed judges for hearing and trying such offenders." "If there shall be more than one judge of the admiralty in any of the United States, then, and in such case, the supreme executive power of such State may and shall commission one of them exclusively to join in performing the duties required by this ordinance."

This ordinance was amended on the 4th of March, 1783, by providing that "the justices of the supreme or superior court of judicature, and the judge of the admiralty, or any two or more of them, including the judge of the admiralty in the several and respective States; or, in case there shall be several judges of the admiralty in a State, the justices of the supreme or superior court of judicature, and a judge of the admiralty, to be commissioned for that purpose by the executive power of such State, or any two of them, including a judge of the admiralty, are hereby constituted and appointed a court for hearing and trying all offenders who, in and by an ordinance entitled an ordinance," etc., "passed the 5th day of April, 1781, are triable," etc., etc.

I have not thought that any good purpose would be served by hunting up and printing a list of the persons tried under these ordinances.

Some decisions of this court, made since the adoption of the Constitution, are also necessary, as has already been said, in order to make the series complete. These will be found in the paper entitled "*Omitted Cases in the Reports of the Decisions of the Supreme Court of the United States.*" A word of explanation in regard to this paper may be advisable.

When this court assembled in New York at February Term, 1790, for the purpose of organizing under the Judiciary Act of 1789, only one volume of American Reports had appeared. Kirby's Cases decided in the Supreme Court of Connecticut was published at Litchfield, in that State, in 1789. It contained cases from 1758 to 1788; and of these cases, all after 1785 were decided subject to the provisions of a statute of that year which required the judges of the highest court in the State to give their opinions in writing. So far as I know, this is the first volume of Common Law or Equity Reports containing such written opinions.

In the Ecclesiastical Courts of Great Britain the judges had been in the habit of giving written reasons for the judgments which they pronounced. See Cases *temp.* Lee; Hagg. Con. In the Admiralty Courts, also, there were exceptional instances of the same thing. See Marriott. That it had been done occasionally in Massachusetts, is evident from two cases in Quincy, first published in 1865. Harris & McHenry's Reports, published in 1809, show that there had been early examples of the same practice in Maryland; and from the first volume of Dallas, which made its appearance between the February and August Terms of this court in 1790, it would seem that it obtained in the State of Pennsylvania, also, before the Revolution. From Hopkinson's Judgments, (Philadelphia, 1789–1792,) it is apparent that this had been done at times in the Admiralty Court of Pennsylvania. In 2 Dallas, published about the close of the century, there are a few written opinions delivered by the judges in the Court of Appeals in cases of capture (1781–1787); but this was not the practice of that court.

Mr. Cranch was the first regular reporter of this court. The cases reported by Mr. Dallas were mostly decided before the series under Mr. Cranch began; but they appeared in the last three volumes of Dallas at irregular intervals, in company with cases from other courts, and some of them as late as about the time of the issue of the third volume of Cranch.

It is apparent from the cases in Dallas that in the outset this court did not reduce its opinions to writing except in important cases, especially in cases involving novel questions of constitutional

law. Dallas probably published all the opinions that were filed. In the condition of the archives this cannot be accurately determined. It was not until the 14th of March, 1834, that an order was made requiring all opinions to be filed with the clerk. See 8 Pet. vii.[1] Under this rule the manuscript record of opinions begins with January Term, 1835. The printed record does not commence until December Term, 1857. From 1863 to 1881, both inclusive, there are two records of opinions, one in print and one in manuscript. Then the rule which is printed in 108 U. S. 588, as § 3 of Rule 25, took effect, and, from 1882 on, there is only the printed record. Prior to 1835, as there was no rule requiring the manuscript of the opinions to be filed in the office of the clerk of the Court, the Reports of Dallas, Cranch, Wheaton and Peters furnish the only accessible evidence for determining what opinions were delivered in writing.

It is to be presumed, from the evidence, that the practice of delivering opinions in writing, which, in the beginning had been exceptional, had become the rule when Mr. Cranch was made reporter. Indeed, he tells us himself that he was "relieved from much anxiety, as well as responsibility, by the practice which the court had adopted of reducing their opinion to writing in all cases of difficulty or importance." As in Mr. Dallas's case, so here, there is no means of knowing whether, during the time covered by the nine volumes of Cranch, (August T. 1801 to February T. 1815,) the court delivered any opinion in writing which the reporter failed to report.

In Mr. Wheaton's time, which extends from February T. 1816 to January T. 1827, we know that some cases were omitted. He says in his preface that "discretion has been exercised in omitting to report cases turning on mere questions of fact, and from which no important principle or general rule could be extracted;" but what those cases were, it is impossible to determine from the records or minute books in the clerk's office. Possibly an examination of the original rolls might disclose something that has not been printed; on the other hand, however, there is a greater probability, for reasons already suggested, that it would disclose the absence of opinions in cases that have been reported.

Mr. Peters, who began with January T. 1828, probably reported

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[1] As late as January T. 1830, it was held that certified copies of the opinions of the court were to be given by the reporter, and not by the clerk of the court. *Anonymous*, 3 Pet. 397.

nearly everything. He said in his preface that it was his "earnest endeavor" "to exhibit the facts of *each* case presented to the court." An examination of the records from the commencement of January T. 1835, when the record of opinions begins, to the end of his term of office, (the close of January T. 1842,) shows that he reported all the cases in which there are recorded opinions, and several *per curiam* decisions, of which there are no records among the opinions. Only one case has been found (*West* v. *Brashear*) which seems to merit publication; and that does not contain a written opinion with the name of the justice delivering it.

Mr. Howard, so far as I can find, omitted but few opinions. His time extends from the commencement of January T. 1843 to the close of December T. 1860.

With the end of Mr. Howard's time we come to the commencement of the war, and the consequent great increase in the business of the court. Mr. Black, (December Terms, 1861, 1862,) Mr. Wallace, (December T. 1863 to the close of October T. 1874,) and Mr. Otto, (October T. 1875 to the close of October T. 1882,) each, in the exercise of his discretion, omitted to report many cases with printed opinions. When I was appointed reporter, (October T. 1883,) I was directed to publish all the cases of the previous term "not included in the volumes already published by Mr. Otto." Regarding this as an indication of the desire of the court that thenceforward nothing should be omitted, I have since caused every opinion of the court to be published, however brief.

Thus the omitted cases, taken in connection with the Reports of Dallas, Cranch, Wheaton, Peters, Howard, Black, Wallace, and the United States Reports, complete the reports of the decisions of this court, so far as a careful research enables us to call them complete. They now contain minutes of several cases which are not reported elsewhere.

Some published opinions in Wallace and Otto differ from the opinions in the same cases on file in the clerk's office. The records of the court are silent on the subject of these changes. If we assume that they were made by the reporter, we must infer that they were acceptable to the court. For it is not for a moment to be supposed that they escaped observation as volume after volume appeared, and it is certain that there is no repudiation of them in the records, on the part of the court, or of any justice. They therefore stand, and must continue to stand, in the published books, as the latest and accepted authoritative expression of the will of the court;

and this, all the more, that in many cases both the judge who delivered the opinion, and the reporter who reported it, have since died.

But it cannot be true that these changes were all made by the reporter. Judges frequently correct their opinions in the hands of a reporter, after a printed copy has been filed with the clerk. When this is done, it is the habit of the present reporter to see to it that an order is made for like corrections in the records of the court; but his predecessors may not have done so, and probably did not.

If one curious in such things would know how long this corrective practice has existed, let him look as far back as the 7th of Cranch, 1st ed., where, in a memorandum following the Table of Cases Cited, he will find some corrections by Mr. Justice Story in the opinion of the court, delivered by him, in *Barnitz' Lessee* v. *Casey*, 7 Cranch, 456. (In later editions, the changes are incorporated in the text.) If he would further know how absolutely unaltered in sense the opinion is left, after it has been subjected to literary changes dictated by taste or fancy, let him compare *McLaughlin* v. *United States*, 107 U. S. 526, with *Western Pacific Railroad Company* v. *United States*, 108 U. S. 510. These are two reports of the same case. Mr. Otto made the first report. When the present reporter was appointed, he was, as already stated, directed to publish reports of all the cases at October Term, 1882, not reported by Mr. Otto. This case was put into his hands by the clerk by mistake, the record title having been changed by Mr. Otto, in the exercise of his undoubted right, in order to make the names of the parties conform to those of the real contestants in the case. The report in 108 U. S. agrees with the opinion as recorded. That in 107 U. S., although varying from the other, sometimes in phrase or point or expression, and sometimes in the break of the paragraphs, in reality and at bottom differs from it less than tweedledum differs from tweedledee.

In addition to these papers I have added, at the end of the Appendix, a list of cases in which statutes or ordinances have been held by the court to be repugnant, in whole or in part, to the Constitution or laws of the United States. The period covered by this table begins with 2 Dall. and ends with the present volume.

It only remains to say that all this matter has been laid before the justices of the court individually; and it is now respectfully submitted to the judgment of the members of our common profession.

FEDERAL COURTS PRIOR TO THE ADOPTION OF THE CONSTITUTION.

I. *COURTS OF APPEAL IN PRIZE CASES.*

The idea of a Federal Court, with a jurisdiction coextensive with the limits of what were then the United Colonies and Provinces of Great Britain in North America, originated with Washington some months before Congress put off British rule. On the 11th of November, 1775, he wrote from Cambridge, in Massachusetts, to the President of Congress, enclosing a copy of an act then just passed by the Council and House of Representatives of that Province[1] for the establishment of a Prize Court, and he added: "Should not a court be established by authority of Congress, to take cognizance of prizes made by the Continental vessels? Whatever the mode is which they are pleased to adopt, there is an absolute necessity of its being speedily determined on."

This letter was communicated to Congress on Friday, the 17th day of the same November, whereupon it was "*Resolved*, That a committee of seven be appointed to take into consideration so much of the General's letter as relates to the disposal of such vessels and cargoes belonging to the enemy, as shall fall into the hands of, or be taken by, the inhabitants of the United Colonies." A committee was chosen, consisting of Mr. George Wythe of Virginia, Mr. Edward Rutledge of South Carolina, Mr. John Adams of Massachusetts, Mr. William Livingston of New Jersey, Dr. Franklin and Mr. James Wilson of Pennsylvania, and Mr. Thomas Johnson of Maryland.

Again, on the 4th of December, 1775, Washington, not having heard of this action of Congress, wrote to its President as follows: "It is some time since I recommended to the Congress that they would institute a court for the trial of prizes made by the Continental armed vessels, which I hope they have ere now taken into

[1] This act is remarkable as having been the first which was passed by any of the colonies for fitting out vessels of marque and reprisal, and for establishing a court to try and condemn the captured vessels of the enemy. 3 Sparks' Washington, 154. See also 1 Curtis' Hist. Constitution, 75–77.

their consideration; otherwise I should again take the liberty of urging it in the most pressing manner."

On the 23d of November, 1775, the committee to whom his letter of November 11th was referred brought in their report. After hearing it read, Congress "ordered that the same lie on the table for the perusal of the members." It was "debated by paragraphs" on the 24th and the 25th, and the resolutions which accompanied it were adopted on the latter date. They authorized the capture of prizes on the high seas; legalized those already made; settled a rate of distribution of prize money (a settlement which was afterwards modified); provided that suits for condemnation should be commenced in the first instance in Colonial courts, and, further, contained the following section respecting appeals:

"6. That in all cases an appeal shall be allowed to the Congress, or such person or persons as they shall appoint for the trial of appeals, provided the appeal be demanded within five days after definitive sentence, and such appeal be lodged with the Secretary of Congress within forty days afterwards, and provided the party appealing shall give security to prosecute the said appeal to effect; and in case of the death of the Secretary during the recess of Congress, then the said appeal to be lodged in Congress within twenty days after the meeting thereof."

When Washington learned of this action he wrote to the President of Congress (December 14, 1775): "The resolves relating to captures made by Continental armed vessels only want a court established for trial to make them complete. This I hope will soon be done, as I have taken the liberty to urge it often to the Congress."

The Colonies and States responded very generally to the suggestion of Congress that they should organize courts for this purpose; but they did it with jealous reservations. The collection of statutes in the library of Congress enables us to get a general outline of this legislation.

In New Hampshire the statute was passed on the 3d of July, 1776, which is set forth at length in *Penhallow* v. *Doane*, 3 Dall. pp. 57–59. In it the right of appeal to Congress was limited to cases in which the capture was made by an armed vessel, fitted out at the charge of the United Colonies; and in 1779 it was further limited to cases in which the claim should be made by a subject of a foreign government in amity with the United States.

Federal Courts before the Constitution.

In Massachusetts the State was divided into three districts, in each of which a court was established by the statute which Washington sent to Congress. (Act of November 1, 1875, 5 Acts and Resolutions of the Province of Massachusetts Bay, 436.) Boston, being occupied by the enemy, was not included in this division. On the 13th of April, 1776, (Id. 474, 477,) Boston having come into Federal possession, the districts were re-organized, and an appeal was given to Congress in cases of vessels captured by vessels fitted out at the charge of the United Colonies. On the 29th April, 1778, provision was made for a trial by jury in all cases. (Id. 806.) On the 30th of June, 1779, the right of appeal was extended to all cases of maritime capture. (Id. 1077.) This was declared to be done in consequence of the resolution of Congress of March 6, 1779 (which will be found on pages xxxii–xxxiii, *infra*): "the reasons upon which the said resolves are founded appearing to this court, in many instances, to arise out of the greatest political convenience and necessity."

In Rhode Island a Maritime Court was established in January, 1776. The act was amended in October, 1776. On the 9th of May, 1780, it was replaced by a Court of Admiralty, and the right of appeal to Congress was curtailed.

In Connecticut County Maritime Courts were created in the counties bordering upon Long Island Sound. In New York the maritime counties being occupied by the enemy after the summer of 1776, there was no necessity for a court.

New Jersey passed an act to establish a Court of Admiralty on the 5th day of October, 1776. In 1778 an act was passed continuing this court. In 1781 a general statute was enacted to regulate and establish Courts of Admiralty, which was amended in 1782, and repealed in 1799.

A Court of Admiralty for the port of Philadelphia was created by the legislature of Pennsylvania by the act of September 9, 1778. In this act it was provided that "the finding of a jury shall establish the facts without re-examination or appeal." On the 8th of March, 1780, a further act was passed which repealed this clause.

In Delaware such a court must have been established before May 20, 1778, as on that day an act was passed recognizing it as an existing court, and conferring upon it additional jurisdiction over stranded vessels.

In Maryland an Admiralty Court existed under a Colonial law of

Courts of Appeal in Prize Cases.

1763. The convention responded to the call of Congress, May 25, 1776, by an ordinance giving the desired jurisdiction, providing for trial by jury, and giving an appeal to Congress in all cases. There does not appear to have been any further legislation on the subject, except that a statute of November, 1779, settled the fees of the officers of the court.

Virginia, by an act entitled "An ordinance for establishing a mode of punishment for the enemies to America in this Colony," created a Court of Commissioners in Admiralty in December, 1775. In October, 1776, this was replaced, so far as prizes were concerned, by a Court of Admiralty, organized under a statute which provided for the supremacy of the laws of Congress and for an appeal to any appellate court which might be created by Congress. In 1779 this right of appeal was taken away when the controversy should be between two citizens of the State.

In North Carolina the legislature passed the act of 1777, c. 16, "to empower the Court of Admiralty of this State to have jurisdiction in all cases of capture of the ships and other vessels of the inhabitants and subjects of Great Britain, and to establish the trial by jury in said court in cases of capture." This act remained in force until the adoption of the Constitution.

South Carolina created a Court of Admiralty on the 11th of April, 1776, and reconstructed it February 13, 1777, giving a right of appeal to Congress. Georgia, on the 16th of September of the same year, passed an act entitled, "An act regulating captures and seizures made in this State or on the high seas under and by virtue of the resolves and regulations of Congress." Under this act a Court of Admiralty was instituted.

In nearly all these States the right of trial by jury was reserved in prize cases. We shall see later that this caused trouble.

The purpose of Congress to take only appellate jurisdiction was apparently misunderstood in the beginning. The first two applications to it, one by a Mr. Barbain, on the 31st of January, the other relating to the brigantine Nancy and her cargo, on the 27th of February, 1776, prayed for the exercise of its original jurisdiction; but in each case Congress referred the applicant to the Colonial courts. On the 4th of the next April, however, it did undertake to regulate the sale of a prize vessel which had been run ashore within the county of Burlington, and the disposition of the proceeds arising from the sale. The vessel was the sloop Sally, James McKnight,

prize master. The sale took place as ordered; but, on the 22d of the following month, Congress repealed its resolution of April 4th, alleging that McKnight had proceeded in the sale contrary to the mode prescribed, and without authority from Congress. After that time it only exercised an appellate jurisdiction through committees, sometimes styled commissioners, and abandoned even this when it established an appellate court.

The case of the *Schooner Thistle*, the first appellate case under the new law, came before it on the 5th of August, 1776. Congress attempted to hear the appeal itself, but eventually referred it to a special committee, whose report, reversing the condemnation, was received and approved September 25th, 1776. The next three cases, *The Elizabeth*, *The Charming Peggy* and *The Betsey*, Nos. 2, 3 and 4 in the accompanying list, were referred to special committees, the same gentlemen being chosen as members in each case. Then came a case, *Hopkins* v. *Derby*, No. 6, which was referred to "the Committee on Appeals," without naming any members. Then followed two others, Nos 7 and 8, which were referred to the same special committee, naming them; but by this time (January 4, and January 11, 1777) it had apparently become necessary to substitute two new members in the place of those who had been formerly named. This brings events up to the appointment of a standing Committee on Appeals.

Under date of January 30th, 1777, the Journal of the Continental Congress contains this entry: "*Resolved*, That a standing committee, to consist of five members, be appointed to hear and determine upon appeals brought against sentences passed on libels in the Courts of Admiralty in the respective States, agreeable to the resolutions of Congress; and that the several appeals, when lodged with the secretary, be by him delivered to them for their final determination." The members then selected and chosen for this duty were Mr. James Wilson of Pennsylvania, Mr. Jonathan D. Sergeant of New Jersey, Mr. William Ellery of Rhode Island, Mr. Samuel Chase of Maryland and Mr. Roger Sherman of Connecticut.

On the 8th day of the following May this committee was formally discharged, because it had been represented that it was too numerous; and it was "*Resolved*, That a new committee of five be appointed, they or any three of them to hear and determine upon appeals brought to Congress." Congress chose as this committee Mr. Wilson and Mr. Sergeant, as before, Mr. James Duane of New

York, Mr. John Adams of Massachusetts, and Mr. Thomas Burke of North Carolina. On the 12th of that month, this committee was "authorized to appoint a register to attend said committee" and apparently soon made the appointment. Again, on the 13th of the following October, "a number of the members of the committee being absent," it was "*Resolved*, That a new committee, to consist of five members, be appointed, and that they, or any three of them, be empowered to hear and finally determine upon appeals brought to Congress." Mr. John Adams, Mr. Joseph Jones of Virginia, Mr. Richard Law of Connecticut, Mr. Henry Marchant of Rhode Island and Mr. Henry Laurens of South Carolina, (who was at that time the President of Congress,) were chosen as the new committee.

On the 17th of November, 1777, Mr. John Harvie of Virginia, Mr. Francis Dana of Massachusetts and Mr. Ellery of Rhode Island were elected as members of the committee in place of the President, Mr. Adams, and Mr. Marchant; and on the 10th day of the following December Mr. Benjamin Rumsey of Maryland was chosen as another member.

On the 17th of February, 1778, Mr. Thomas McKean of Delaware, Mr. Samuel Huntington of Connecticut, Mr. John Henry, Junior, of Maryland and Mr. James Smith of Pennsylvania were added to the committee.

On the 27th of July, 1778, it was "*Resolved*, That three members be added to the committee for hearing and determining appeals and that any three of said committee be empowered to hear and finally determine appeals to Congress from the judgments of Courts of Admiralty." Mr. Joseph Reed of Pennsylvania, Mr. William Drayton of South Carolina, and Mr. Elias Boudinot of New Jersey were duly elected as such new members. It further appears by the same record that, notwithstanding the numerous recruits brought into the committee by the various elections, Congress had been informed that but two members were then present, and that sundry causes were then ready for trial.

On the 23d of September, 1778, Mr. John Matthews of South Carolina and Mr. Marchant of Rhode Island were added to the committee, and on the 26th of the following October Mr. Oliver Ellsworth of Connecticut was made a member.

On the 9th of March, 1779, the record again says that the committee is reduced to three — Messrs. Drayton, Ellery and Henry —

and Mr. Jesse Root of Connecticut and Mr. William Paca of Maryland were accordingly chosen to complete it.

On the 29th of July, 1779, Mr. Marchant (again) and Mr. Edmund Randolph of Virginia were elected members in the places of Mr. Ellery and Mr. Paca, who were said to be absent. On the 27th of the next month Mr. Paca was again elected a member in the place of Mr. Randolph, who was said to be absent. On the 7th of December, 1779, Mr. Ezra L'Hommedieu of New York and Mr. Ellery were chosen to be members in the places of Mr. Marchant and of Mr. Root; and on the 5th of January, 1780, Mr. Ellsworth was again elected as a member, in the place of Mr. Paca, who was absent.

These frequent changes in a body entrusted with judicial powers could not but prove injurious to the interests of suitors. They certainly vindicate the wisdom of Washington in urging Congress to complete its work by instituting a regular court. They also seem to show that the committee was well supplied with work, and sometimes failed to secure the requisite quorum for doing it. The time had now come when the whole subject was to be taken out of Congress and sent to a court for judicial determination.

As early as Tuesday, the 5th of August, 1777, it was "*Resolved*, That Thursday next be assigned to take into consideration the propriety of establishing the Court of Appeals." When Thursday came the matter was postponed, and it was not until January 15th, 1780, that Congress, "*Resolved*, That a court be established for the trial of all appeals from the Courts of Admiralty in these United States, in cases of capture, to consist of three judges appointed and commissioned by Congress, either two of whom, in the absence of the other, to hold the said court for the despatch of business; that the said court appoint their own register; that the trials therein be according to the usage of nations, and not by jury;" and "that the said judges hold their first session as soon as may be at Philadelphia, and afterwards at such times and places as they shall judge most conducive to the public good, so that they do not at any time sit further eastward than Hartford in Connecticut, or southward than Williamsburg in Virginia." Mr. George Wythe of Virginia, Mr. William Paca of Maryland, and Mr. Titus Hosmer of Connecticut were elected as judges January 22d, 1780. A letter was read in Congress March 13th, 1780, from Mr. Wythe, declining the office, and Mr. Cyrus Griffin of Virginia was thereupon

elected in his place, April 28, 1780. Mr. Paca accepted on the 9th of February, and Mr. Hosmer and Mr. Griffin on the 4th of May, 1780. The great delay in creating the court probably arose from the reluctance of Congress to take such power to itself until the ratification of the Articles of Confederation should be substantially assured; which was done, as already seen, before the passage of this resolution.

The resolution of January 15th, 1780, creating the court, made no general provision for the transfer of cases to it. On the 9th of May, an appeal being brought before Congress, (No. 65 on the list,) it was referred to the new court, and on the 24th of that month Congress resolved "that the stile of the Court of Appeals appointed by Congress be 'the Court of Appeals in cases of capture;'" "that appeals from the Courts of Admiralty in the respective States be, as heretofore, demanded within five days after definitive sentence, and in future such appeals be lodged with the register of the Court of Appeals in cases of capture within forty days thereafter;" and "that all matters respecting appeals in cases of capture now depending before Congress, or the Commissioners of Appeals, be referred to the newly erected Court of Appeals, to be there adjudged and determined according to law; and that all papers touching appeals in cases of capture lodged in the office of the Secretary of Congress, be delivered to and lodged with the register of the Court of Appeals."

Simultaneously with this, an appeal, presented that day to Congress, (No. 67 on the list,) was ordered referred to the court; and after that time I cannot find that any appeal, that had been properly taken, reached the court through the action of Congress. That body acted in a few cases, but only to give the court a jurisdiction which it could not have taken under the general law.

Mr. Hosmer died in office on the 4th of August, 1780. On the 21st of November, 1782, Mr. Paca resigned, having been elected Governor of Maryland. At an election held on the 5th of December, 1782, Mr. George Read of Delaware was elected by Congress in the place of Mr. Paca, and Mr. John Lowell of Massachusetts in the place of Mr. Hosmer; and, on the 15th of that month, lots were drawn in Congress for precedence, with a result in favor of Mr. Read.

In view of the provision in the Articles of Confederation that "no member of Congress shall be appointed a judge of any of said

courts," it may be noted that Mr. Read and Mr. Lowell, the only judges elected after the ratification of the Articles by all the States, were members of Congress when elected. Congress thus construed that instrument as meaning only that no person could act in both capacities at the same time.

On the 23d of December, 1784, Congress being then in session at Trenton, in New Jersey, Mr. Griffin and Mr. Lowell addressed to its President the following letter:

"TRENTON, *Dec.* 23*d*, 1784.

"SIR: We had the Honour, immediately after our last sitting, to inform Congress by a letter directed to the President, that all the Causes which had been brought before the Court of Appeals were determined, and altho' some motions had been made for Rehearings, they had not been admitted. Since that Time no further applications have been made to us; of this we also think it our Duty to inform Congress, that they may take such order concerning the Court as they may think proper.

"We have the Honour to be, with great Respect, your Excellency's Most obedient Servants,

"C. GRIFFIN.
"J. LOWELL.

"His Excellency, the President of Congress."

This letter was referred to a committee, and on the 1st of July, 1785, the committee, consisting of Mr. Pinckney, Mr. R. R. Livingston, Mr. King, Mr. Monroe, and Mr. Johnson, reported "that in their opinion the present Judges of the Court of Appeals are still in commission, and that it will be necessary that the Court of Appeals should remain upon its present establishment, except with respect to the salaries of the judges, which should cease from the —— day of ——, and that in lieu thereof they shall be entitled to —— dollars per day during the time they shall attend the sitting of the courts, and including the time they shall be necessarily employed in travelling to and from said courts."

"A motion was made by Mr. King, seconded by Mr. Smith, to postpone the consideration of the report, to take up the following: That the commission of the judges of the Court of Appeals be vacated and annulled: and that in all cases which have been

decided by the Court of Appeals, upon application to Congress, within ——, for a rehearing or new trial, the same shall be granted where justice and right may require it." This being lost, the report was recommitted, and, immediately following, the Journal reads: "On motion of Mr. Smith, seconded by Mr. Ramsay, *Resolved*, That the salaries of the Judges of the Court of Appeals shall henceforth cease."

Mr. Griffin apparently remonstrated against this: for, on the 9th of February, 1786, the first entry in the Journal reads: "On the report of a committee, consisting of Mr. Pinckney, Mr. King, Mr. Johnson, Mr. Grayson, and Mr. Hindman, to whom was referred a letter from Cyrus Griffin, Esq., *Resolved*, That Congress are fully impressed with a sense of the ability, fidelity and attention of the judges of the Court of Appeals in the discharge of the duties of their office; but that, as the war was at an end, and the business of that court in a great measure done away, an attention to the interests of their constituents made it necessary that the salaries of the said judges should cease."

After that the Journals of Congress show but two entries respecting the court. On the 27th June, 1786, on the report of a committee "to whom were referred several memorials and petitions from persons claiming vessels in the Courts of Admiralty in some of the States, praying for hearings and rehearings before the Court of Appeals, *Resolved*, That the judges of the Court of Appeals be, and hereby are, authorized and directed, in every cause which has been or may be brought before them, to sustain appeals and grant rehearings or new trials of the same wherever justice and right may in their opinion require it."

After a provision respecting suspense of execution, and one respecting a *per diem* pay to the judges while holding court and travelling, it was further "*Resolved*, That the said court assemble at the city of New York on the first Monday of November next, for the despatch of such business as may then and there be before them; and that the Secretary of Congress take order for publishing these resolutions for the information of all persons concerned."

The last entry in the Journals of Congress relating to this court is on the 24th July, 1786, empowering it to hear an appeal against a decree in the Court of Admiralty of South Carolina, condemning the sloop Chester. Soon after this the judges appeared in other capacities; and it would seem, from some cases reported in the 1st

of Dallas, that the appellate courts of the States gradually resumed jurisdiction over all such appeals. On the 20th November, 1787, Mr. Griffin presented his credentials as a member of Congress from Virginia, and on the 22d January, 1788, (the first meeting thereafter with a quorum of States,) was elected President of that body. Mr. Lowell, on the 11th of November, 1784, was appointed by Massachusetts a commissioner to represent it in Federal proceedings to adjudicate upon rival claims of Massachusetts and New York to certain territory, and he appears to have been occupied with this from time to time until October 8, 1787, when an amicable settlement was reported to Congress. Mr. Read was named as a member of the court to settle the controversy between New York and Massachusetts, which appointment did not take effect, as the controversy was settled amicably. He was a member of the Convention at Annapolis in 1786, and of the Convention which framed the Constitution. All three judges, however, met in New York in 1787, as appears by the reports of the cases, *Luke* v. *Hulbert* and *The Experiment*, in 2 Dall. 40 and 41, and by original opinions and decrees bearing their signatures on file in the office of the Clerk of this court.

The weak point of this whole judicial system was this: that it necessarily depended upon state officers to enforce the judgment of the appellate tribunal when it reversed the decree of a state court. State courts refused to enforce the rights of property acquired under Federal decrees. *Doane* v. *Penhallow*, 1 Dall. 218. How powerless the appellate court was left may be seen by examining the facts respecting the Susannah, captured by the McClary, reported in *Penhallow* v. *Doane*, 3 Dall. 54; and by the following report of the proceedings in regard to the sloop Active, gathered partly from the Journal of Congress, partly from the original archives in the custody of the Clerk of this court, and partly from *United States* v. *Peters*, 5 Cranch, 115.

In the Admiralty Court of Pennsylvania the Active and cargo were libelled at the instance of Thomas Houston, libellant; Gideon Olmstead and others appearing as claimants. A trial was had by jury, whose verdict was as follows: "One-fourth of the net proceeds of the sloop Active and her cargo to the first claimants; three-fourths of the net proceeds of the said sloop and her cargo to the libellant and the second claimant as per agreement between them." Judgment was entered on the verdict, from which an appeal was taken by Olmstead and others to the Committee on Appeals.

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On the 15th of December, 1778, the Committee, in a decree in which they style themselves "Commissioners," reversed the judgment, and directed the court below to issue process commanding the marshal to sell the sloop and her cargo, and to pay the residue remaining after payment of costs, charges and expenses to the appellants. On the 3d January, 1779, they received the following letter from General Benedict Arnold, commanding in Philadelphia, (evidently dated by mistake January 3, 1778:)

"PHILADELPHIA, 3*d Jan'y*, 1778.

"GENTLEMEN: Such are the extraordinary and unprecedented attempts of the Judge and Court of Admiralty for this State and the appellees in the case of the prize sloop Active and cargo to baffle the attempt of the Court of Appeals to do justice and to prevent your determination from taking effect, that while the matter is under consideration in the Superior Court the judge is about getting possession of the money with the avowed and declared purpose of standing out obstinately against any orders that may be given. He has issued his orders to the Marshal to deliver the amount of sales to him, which is to be done by appointment at nine o'clock to-morrow morning, and positively declares that no order of the Court of Appeals shall take it out of his hands or be obeyed. Also from some other matters just come to my knowledge there is reason to fear that much trouble will ensue unless some steps can be fallen upon to stop the case from falling into his hands. Such a daring attempt as this to evade the Justice of the Superior Court at a time too when the matter is under consideration, will, I doubt not, apologize for my troubling you with a request to meet this evening at such time and place as you may think proper in order to determine upon what process shall issue at so early an hour to-morrow morning as will tend to the carrying into execution the decree above.

"This I have wrote by the advice of the claimants' counsel and hope you will think the necessity of the case a justification.

"I am with great respect and esteem, gentlemen,

"Your most obed't humble serv't, B. ARNOLD.

"P. S. I am informed from good authority that a member of *the* Assembly has applied to get the money paid into his hands, and if he should succeed in this it will probably be paid into the Treasury, and the claimants will have the whole State to contend with in their own government.

"The Hon'ble, the Court of Appeals."

Federal Courts before the Constitution.

On the morning of the 4th of January Andrew Robeson the register of the Court of Admiralty of Pennsylvania, appeared before the commissioners and deposed "that he, as register aforesaid, received notice from the judge of the said court, by the marshal of said court, to attend at the chambers of the said judge at nine o'clock this morning for the purpose of making a minute or record of the said marshal's having paid into the said court the moneys arising from the sale of the cargo of the sloop Active, lately libelled against in the said court by Thomas Houston, etc."

Thereupon the commissioners issued an order of injunction against the marshal of that court, in which, after reciting the proceedings in the court below, the appeal, and the reversal, they said, "and whereas a copy of the decree of this court hath been regularly transmitted to the judge of the said Court of Admiralty, and by a certified copy of the proceedings of the said court since receiving the said decree it appeareth manifestly to this court that the said judge hath refused to pay obedience to the said decree, and did, on the twenty-eighth day of December last, issue process returnable on the seventh day of January instant commanding you, as marshal of the said Court of Admiralty, to make sale of the said sloop, her cargo, etc., and, after deducting the cost and charges aforesaid, to lodge the residue of the monies arising from the said sale in the court aforesaid, ready to abide the further order of the said court; and whereas, on the twenty-eighth day of December aforesaid, a motion was made in this court for a writ to issue to the said marshal, commanding him to execute the decree of this court, and further argument on the said motion was appointed to be heard at five o'clock this evening; and whereas it is testified to this court, on oath, that this day at nine o'clock in the forenoon, is, by special order of the said judge, appointed for you to lodge the monies arising from the said sale in the said court, whereby the writ, upon the motion aforesaid, if this court shall think proper to issue such, will be eluded; these are therefore to command and firmly enjoin you to detain and keep in your hand and custody the whole of the monies arising from the said sale of the said sloop and her cargo, etc., saving and excepting the costs and charges aforesaid until the further order of this court be made known unto you, as you will answer the contrary at your peril. Given at Philadelphia, in the State of Pennsylvania, the fourth day of January, in the year of our Lord one thousand seven hundred and seventy-nine."

This paper being duly served, the marshal on the same day made return as follows: "In obedience to a writ under the hand and seal of the Honorable George Ross, Esquire, judge of the Court of Admiralty for the State of Pennsylvania, I have deposited in the said court the monies arising from the sale of the cargo of the sloop Active, within mentioned. The said sloop being yet unsold, no monies have come into my hands on account of her."

"Whereupon the court declared and ordered to be entered upon record, that, as the judge and marshal of the Court of Admiralty of the State of Pennsylvania had absolutely and respectively refused obedience to the decree and writ regularly made in and issued from this court, to which they and each of them were and was bound to pay obedience, this court, being unwilling to enter upon any proceedings for contempt lest consequences might ensue at this juncture dangerous to the public peace of the United States, will not proceed farther in this affair, nor hear any appeal, until the authority of this court shall be so settled as to give full efficacy to their decrees and process."

"*Ordered*, That the Register do prepare a statement of the proceedings had upon the decree of this court in the case of the sloop Active, in order that the Commissioners may lay the same before Congress."

Congress referred this statement, when presented, to a committee consisting of Mr. Floyd, Mr. Ellery, and Mr. Burke, who reported, March 6, 1779, that the judge of the Court of Admiralty had refused to obey the mandate of the committee because the Pennsylvania act organizing the court "had declared that the finding of a jury shall establish the facts in all trials in the Courts of Admiralty, without re-examination or appeal, and that an appeal was permitted only from the decree of the judge." On the recommendation of the committee Congress thereupon passed the following resolutions, Pennsylvania only objecting:

"*Resolved*, That Congress, or such person or persons as they appoint to hear and determine appeals from the Courts of Admiralty, have necessarily the power to examine as well into decisions on facts as decisions on the law, and to decree finally thereon, and that no finding of a jury in any Court of Admiralty, or court for determining the legality of captures on the high seas, can or ought to destroy the right of appeal and the re-examination of the facts reserved to Congress.

Federal Courts before the Constitution.

"That no act of any one State can or ought to destroy the right of appeals to Congress in the sense above declared:

"That Congress is by these United States invested with the supreme sovereign power of war and peace:

"That the power of executing the law of nations is essential to the sovereign supreme power of war and peace:

"That the legality of all captures on the high seas must be determined by the law of nations:

"That the authority ultimately and finally to decide in all matters and questions touching the law of nations does reside and is vested in the sovereign supreme power of war and peace:

"That a control by appeal is necessary in order to compel a just and uniform execution of the law of nations:

"That the said control must extend as well over the decisions of juries as judges in courts for determining the legality of captures on the sea; otherwise the juries would be possessed of the ultimate supreme power of executing the law of nations in all cases of captures, and might at any time exercise the same in such manner as to prevent a possibility of being controlled; a construction which involves many inconveniences and absurdities, destroys an essential part of the power of war and peace entrusted to Congress, and would disable the Congress of the United States from giving satisfaction to foreign nations complaining of a violation of neutralities, of treaties or other breaches of the law of nations, and would enable a jury in any one State to involve the United States in hostilities; a construction which for these and many other reasons is inadmissible:

"That this power of controlling by appeal the several admiralty jurisdictions of the States has hitherto been exercised by Congress by the medium of a committee of their own members."[1]

"*Resolved*, That the committee before whom was determined the appeal from the Court of Admiralty for the State of Pennsylvania, in the case of the sloop Active, was duly constituted and authorized to determine the same."

A committee was twice appointed by Congress to confer with a committee of the Pennsylvania legislature, and on the 8th March, 1780, the statute admitting juries to decide admiralty causes was

[1] This is the resolution referred to in the Massachusetts act of June 30, 1779.

repealed. But it was left to this court, at its February Term in 1809, to settle the matter in dispute in this case, by deciding that the power exercised by the committee of the Continental Congress to reverse the judgment of the state court in this case was properly exercised. *United States* v. *Peters*, 5 Cranch, 115.[1]

Sixty-four cases in all were submitted to the committees of Congress, of which forty-nine were decided by them, four seem to have disappeared, and eleven went over to the Court of Appeals for decision. Fifty-six cases in all, including the eleven which went over, were submitted to the Court of Appeals, and all were disposed of. Appeals were heard from every maritime State except New York. None came from that State; doubtless because its maritime counties were occupied by the enemy from the autumn of 1776 to the end of the war.

It is possible, perhaps probable, that this showing is not quite accurate. No record is known to be left of the doings of either body, and only very incomplete dockets. It was their habit to draw decrees to be signed by the members of the committee or the court, and to place them on file with the other original papers. In some cases the decree is wanting, but its character and date are found in a minute on the file wrapper. In other cases where there is neither a decree nor a minute of one, there may nevertheless have been a decision. The records in the courts below, perhaps, would show. I have not felt justified, however, in entering upon that field

[1] "When the District Court proceeded to execute this mandate, the Governor issued orders to General Bright, directing him to call out a portion of the militia in order to protect the persons and property of the representatives of Rittenhouse against any process issued by the District Court of the United States in pursuance of this *mandamus*. At first the marshal was prevented from serving the process by soldiers under the command of Bright, but subsequently, eluding their vigilance, he succeeded in taking into custody one of the defendants. A writ of *habeas corpus*, sued out on behalf of the prisoner, was, however, discharged by Chief Justice Tilghman, and subsequently General Bright with others were indicted in the Circuit Court of the United States for obstructing the process of the District Court. Mr. Justice Washington presided at the trial, which resulted in a verdict of guilty. The prisoners were sentenced to be imprisoned, and to pay a fine; but were immediately pardoned by the President of the United States. *Olmsted's Case*, Brightly, Penn. 1. This appears to have been the first case in which the supremacy of the Constitution was enforced by judicial tribunals against the assertion of State authority." (Mr. Justice Matthew's Address before the Yale Law School, June 26, 1888.)

of inquiry, although the returns which I have received from Philadelphia, through the kindness of the clerk of the District Court of the United States there, show that it is an inviting subject for historical investigation. Some of the opinions below in the Pennsylvania Court of Admiralty will be found in Hopkinson's "Judgments in the Admiralty of Pennsylvania," Philadelphia, 1789, and in the "Miscellaneous Essays and Occasional Writings of Francis Hopkinson, Esq.," vol. 3, Philadelphia, 1792. See also Bee, Appendix 339–440; 1 Dall. 95; and 5 American Museum, 32, etc.

So far as appears by these papers, no written reports in the nature of opinions were made by the committees. The Court of Appeals filed only eight opinions, all of which are reported in 2 Dall. 1–42, under the general title of "Federal Court of Appeals." These opinions were delivered in, (1) *The Resolution*, p. 1; and (2) *S. C.*, on rehearing, p. 19; date of lodgment not known; final decree January 24, 1782: — (3) *The Erstern*, p. 33; lodged January 11, 1781; final decree February 5, 1782: — (4) *The Gloucester*, p. 36; date of lodgment not known; final decree February 5, 1782: — (5) *The Squirrel*, p. 40, see No. 90 *post* in table: — (6) *The Speedwell*, p. 40; lodged June 17, 1783; decided May 24, 1784: — (7) *Luke* v. *Hulbert*, p. 41; no papers on file: — (8) *The Experiment* v. *The Chester*, p. 41; referred by Congress by the resolution of July 24, 1786, already spoken of; decided May 1, 1787. They were properly placed in the volumes which contain the commencement of the series of Reports of the Supreme Court of the United States; for the court from which they proceeded was in its day the highest court in the country, and the only appellate tribunal with jurisdiction over the whole United States.

TABLE OF CASES DECIDED BY THE COMMITTEE OF APPEALS IN THE CONTINENTAL CONGRESS, AND CASES DECIDED BY THE COURT OF APPEALS NOT REPORTED BY DALLAS; ALL ARRANGED, SO FAR AS POSSIBLE, IN THE ORDER IN WHICH THEY WERE PRESENTED.

1. *Roberts, Claimant and Appellant,* v. *The Thistle and McAroy.* Appeal from a decree in the Court of Admiralty for the port of Philadelphia, condemning the vessel. September 9, 1776, referred to a committee. September 19, 1776, reversed.

Courts of Appeal in Prize Cases.

2. *The Elizabeth and Cargo, Wentworth Appellant.* Appeal from a decree in the Court Maritime of New Hampshire, discharging the vessel and cargo. September 12, 1776, libellant's appeal presented to Congress. September 30, 1776, the owners of the goods petitioned Congress to hear the appeal, whereupon it was referred to a committee. October 5, 1776, the petition of one Sheaf respecting it was referred to the same committee, styled Commissioners. October 14, 1776, the committee reported, and on their report the decree was reversed by Congress.

3. *The Peggy and Cargo.* Appeal from the Maritime Court in the Middle District of Massachusetts Bay. October 17, 1776, read and referred to a special committee. Transferred to the Committee on Appeals and then to the Court of Appeals, and dismissed by the latter, May 24, 1784, "neither party appearing." In the Journal of Congress this vessel is called *The Charming Peggy;* but in the papers on file it is called *The Peggy.*

4. *Barry* v. *Sloop Betsey.* Appeal from a decree in the Court of Admiralty in the port of Philadelphia, in Pennsylvania, condemning the vessel. November 7, 1776, referred to a special committee, with power. November 26, 1776, decree below affirmed by the committee.

5. *Joyne* v. *The Sloop Vulcan.* Appeal from a decree in the Court of Admiralty for Virginia. November 27, 1776, referred to a special committee. January 24, 1777, decree below reversed by the committee. In the printed Journal (ed. 1823) *Joyne* is given as *Jones.*

6. *Hopkins* v. *Derby and The Kingston Packet.* Appeal from a judgment in the Court of Justice for the trial of Prize Causes for Rhode Island and Providence Plantations. December 31, 1776, referred to the Committee on Appeals. September 8, 1777, reversed by the Committee on Appeals.

7. *Craig* v. *Brig Richmond.* Appeal from a decree in the Court of Admiralty in the port of Philadelphia in Pennsylvania, condemning the vessel. January 4, 1777, referred to a special committee. January 17, 1777, affirmed by the committee.

8. *Pierce* v. *Brig Phœnix and Cargo.* Appeal from a decree in the Maritime Court for Rhode Island and Providence Plantations, condemning the vessel and cargo. January 12, 1777, referred to

a special committee. January 15, 1777, affirmed by the committee. January 31, 1777, in Congress, the affirmance set aside "because it had been heard and determined by a different committee from that appointed to hear it," and it was "referred to the Standing Committee on Appeals." June 7, 1777, the petition of Green and others for a new hearing referred to the Committee on Appeals. September 3, 1777, decree below reversed by the committee.

9. *The Countess of Eglington, Jones Claimant*, v. *Babcock*. Appeal from a judgment in the Superior Court of Judicature, Court of Assize and General Jail Delivery in Plymouth County, Massachusetts. The proceedings were begun on the 14th January, 1777, and the judgment was reversed September 14, 1783.

10. *Newman* v. *The Sherburne and Cargo*. Appeal from a verdict and judgment of condemnation in the Court of Admiralty in the port of Philadelphia, in Pennsylvania. January 30, 1777, referred to the standing committee for hearing and determination. April 12, 1777, the committee reported that they were divided in opinion, whereupon it was referred to a special committee. May 10, 1777, decree below affirmed. In May, 1777, the Marine Committee, to whom it appears to have been then referred, reported that the case had already received a judicial determination by the Committee on Appeals, and that it was improper for Congress to come to any resolution relative thereto.

11. *Mary Alsop and others* v. *Ruttenburgh*. Appeal from a judgment in the Court of Justice for the trial of prize causes for Rhode Island and Providence Plantations. March 6, 1777, lodged with the Secretary; and April 24, 1777, referred to the Committee on Appeals. May 20, 1777, reversed by the committee.

12. *White* v. *The Sloop Polly and Cargo*. Appeal from a judgment in the Court of Admiralty for Georgia condemning the vessel. March, 12, 1777, referred to the Committee on Appeals. August 6, 1777, J. Green and Peter Knight asked leave to file a further appeal, and the application was referred to the Committee on Appeals, who, on the 15th of August reported that the appeal had been taken too late. Congress then voted to authorize the committee to receive it, and, on the 18th of August, 1777, the decree below was affirmed by the committee.

13. *The Leghorn, Polk Claimant*, v. *Baldwin*. Appeal from a

judgment in the Court of Admiralty for the Port of Philadelphia, in Pennsylvania. April 1, 1777, referred to the Committee on Appeals. May 24, 1777, affirmed by the committee.

14. *The Industry*, *Coffin Master*. Appeal from a judgment in a Maritime Court for the Southern District of Massachusetts Bay held at Plymouth, in Massachusetts, condemning the vessel. April 16, 1777, referred to the Committee on Appeals. September 8, 1777, decree below affirmed by the committee.

15. *The Montgomery* v. *The Minerva*. Appeal from a judgment in the Court of Admiralty of Maryland. April 24, 1777, referred to the Committee on Appeals. June, 2, 1777, decree below affirmed by the committee. June 24, 1777, a petition of Daniel Bucklin, commander of *The Montgomery*, referred to the same committee.

16. *James Coor et al.* v. *The Hanover*. Appeal from a decree of a Court of Admiralty for North Carolina, held at Newbern. May 1, 1777, referred to the Committee on Appeals. August 7, 1778. reversed by the committee.

17. *Palmer* v. *Hussey*. This appeal seems to have been from the same judgment. It was dismissed May 22, 1777.

18. *The Two Brothers*, *Joseph Stanton and Samuel Champlin Claimants*. Appeal from a judgment in the Court of Justice for the trial of Prize Causes for Rhode Island and Providence Plantations, ordering a sale of the vessel for the benefit of the claimants. May 13, 1777, referred to the Committee on Appeals. August 30, 1779, decree below reversed by the committee, and sale ordered for the benefit of Stanton and others. This judgment was set aside, and, on a rehearing in the Court of Appeals, the decree below was affirmed May 28, 1783.

19. *The Greenwich*. Appeal from a decree in the Court of Admiralty for Rhode Island and Providence Plantations. June 7, 1777, referred to the Committee on Appeals, and on their report denied.

20. *Fowkes* v. *The Roseanna*, *Hussey Claimant*. Appeal from a decree in the Court of Admiralty for North Carolina. Date of reference to the Committee on Appeals not known. June 9, 1777, affirmed. Reopened, and on the 25th October, 1777, reversed by the Committee.

Federal Courts before the Constitution.

21. *White* v. *The Ship Anna Maria, Daniel Bucklin Claimant and Appellant.* Appeal from a decree in the Maritime Court for the Middle District of the State of Massachusetts Bay, held at Salem in Massachusetts. June 24, 1777, referred to the Committee on Appeals. August 18, 1780, decree below affirmed by the Court of Appeals.

22. *The Private Sloop of War Retaliation.* Court below not known. August 2, 1777, memorial of Isaac Jones, on behalf of himself and other owners, referred to Committee on Appeals. Nothing further known.

23. *The Polly — Caldwell* v. *Newman.* Appeal from a judgment in the Court of Admiralty for the port of Philadelphia, in Pennsylvania. September 8, 1777, referred to the Committee on Appeals. September 12, 1778, reversed by the committee.

24. *Weyman* v. *Arthur.* Appeal from a decree in the Court of Admiralty for South Carolina. September 12, 1777, referred to the Committee on Appeals. No further record.

25. *Norris* v. *Schooner Polly and Nancy.* Appeal from a decree in the Court of Admiralty for South Carolina. April 20, 1778, referred to the Committee on Appeals. August 14, 1778, affirmed by the committee.

26. *The Peggy.* Court not known. August 14, 1778, petition of John Hart respecting it referred to the Committee on Appeals.

27. *The Hinchinbroke.* Appeal from a decree in a Court of Admiralty in Georgia, condemning the vessel. August 20, 1778, referred to the Committee on Appeals. Nothing further known.

28. *Schooner Hope and Cargo, Lopez Claimant*, v. *Brooks and Griffith.* Appeal from a decree in the County Court for the County of Hartford, in Connecticut. September 7, 1778, referred to the Committee on Appeals. April 10, 1779, decree below reversed by the committee. Motion for a new trial denied February 19, 1780.

29. *Shaler* v. *The Speedwell.* Appeal from a decree in the Court of Admiralty for New Jersey. September 21, 1778, referred to the Committee on Appeals. November 10, 1778, reversed by the committee.

30. *Doane et als.*, *Appellants*, v. *Treadwell and Penhallow, Libel-*

lants, and The Brig Susannah. Appeal from a decree in the Court of Admiralty for New Hampshire. October 9, 1778, referred to the Committee on Appeals. September, 1783, the Court of Appeals reversed the decree as to the appellants. For further proceedings in this case see *Penhallow* v. *Doane*, 3 Dall. 54. See also *Doane* v. *Penhallow*, 1 Dall. 218.

31. *Godwin* v. *Schooner Fortune.* Appeal from a decree in the Court of Admiralty for Delaware. October 12, 1778, lodged with the Committee on Appeals. September 5, 1779, decided by the committee, but in what way does not appear.

32. *Murphy* v. *The Sloop Hawke.* Appeal from a decree in the Court of Admiralty for Delaware. October 13, 1778, lodged with the Committee on Appeals. September 8, 1779, affirmed by the committee.

33. *Taylor* v. *The Sloop Polly.* Appeal from a judgment in the Court of Admiralty for the port of Philadelphia in Pennsylvania. October 20, 1778, referred to the Committee on Appeals. November 22, 1779, affirmed by the committee.

34. *Jencks* v. *Sloop Fancy.* Appeal from a judgment in the Maritime Court for Rhode Island and Providence Plantations. October 20, 1778, referred to the Committee on Appeals. December 3, 1778, reversed by the committee. In the printed Journal of Congress this vessel is called *The Fanny.*

35. *Stevens* v. *Schooner John and Sally.* Appeal from a decree in the Court of Admiralty for New Jersey. October 23, 1778, referred to the Committee on Appeals. March 11, 1779, affirmed by the committee. The plaintiff's name is *Stephen* in the printed journal.

36. *Taylor* v. *Sloop Lark.* Appeal from a decree in the Court of Admiralty for New Jersey. October 26, 1778, referred to Committee on Appeals. January 28, 1780, affirmed by the committee.

37. *Tredwell* v. *Schooner Hawk.* Appeal from a judgment in the Maritime Court for Rhode Island and Providence Plantations. October 26, 1778, referred to the Committee on Appeals. Affirmed March 29, 1779.

38. *Ingersol* v. *Schooner Lovely Nancy.* Appeal from a decree in the Court of Admiralty for New Jersey. October 26, 1778, referred

to the Committee on Appeals. August 22, 1780, affirmed by the Court of Appeals.

39. *Houston* v. *The Sloop Active.* Appeal from a judgment in the Court of Admiralty for the port of Philadelphia in Pennsylvania. November 28, 1778, referred to the Committee on Appeals. December 15, 1778, reversed. The further proceedings in this case have been already stated. — pp. xxix–xxxiv.

40. *Griffin* v. *The Sloop George.* Appeal from a decree in the Court of Admiralty for New Jersey. December 7, 1778, referred to the Committee on Appeals. December 23, 1780, reversed by the Court of Appeals. See *Jennings* v. *Carson*, 4 Cranch, 2.

41. *Pope* v. *Sloop Sally.* Appeal from a decree in the Court of Admiralty for Delaware. January 1, 1779, lodged with the Committee on Appeals. Decided by the committee in 1779. No further particulars.

42. *Gibbs* v. *Sloop Conquerant*, *Pillas Claimant.* Appeal from a decree in the Court of Admiralty for North Carolina. February 6, 1779, lodged with the Committee on Appeals. March 18, 1779, affirmed by the committee.

43. *Davis* v. *Schooner Polly*, *Gibbons Claimant.* Appeal from a decree in the Court of Admiralty for North Carolina. February 6, 1779, lodged with the Committee on Appeals. March 23, 1779, reversed by the committee.

44. *Gurney* v. *Schooner Good Intent*, *Tam Poy Claimant.* Appeal from a judgment in the Court of Admiralty for the port of Philadelphia in Pennsylvania. February 8, 1779, lodged with the committee and affirmed by them November 13, 1779.

45. *Johnson*, *Claimant*, v. *The Fame.* Appeal from a decree in the Maritime Court for New Jersey. February 16, 1779, lodged with the Committee on Appeals. December 23, 1780, affirmed by Court of Appeals.

46. *Elderkin* v. *Edwards.* Appeal from a judgment in the Court of Admiralty in Connecticut. April 29, 1779, lodged with the Committee on Appeals. January 5, 1780, reversed by the committee.

47. *Babcock* v. *Ship Nancy.* Appeal from a judgment in the Maritime Court for the Southern District of Massachusetts Bay.

May 12, 1779, lodged with the Committee on Appeals. August 9, 1779, affirmed by the committee.

48. *Fossett* v. *Sloop Jane.* Appeal from a decree in the Court of Admiralty for Maryland. May 31, 1779, lodged with the Committee on Appeals. January 18, 1780, reversed by the committee.

49. *Scudder* v. *Gray, Claimant.* Appeal from a judgment in the County Court of Fairfield County, Connecticut. May 31, 1779, lodged with the Committee on Appeals. December 23, 1780, reversed by the Court of Appeals.

50. *Cook, Appellant*, v. *Conklin*, in the cases of *The Eagle* and *The Bermudas.* Appeals from judgments in the Maritime Court for New London County, Connecticut. June 7, 1779, lodged with the Committee on Appeals. December 13, 1780, reversed by the Court of Appeals.

51. *Price* v. *The Success.* Appeal from a decree in the Admiralty Court for New Jersey. July 2, 1779, lodged with the Committee on Appeals. July 20, 1779, dismissed on appellee's motion, appellant not objecting.

52. *Barrett* v. *Schooner Packet.* Appeal from a decree in the Court of Admiralty for Delaware. July 21, 1779, lodged with the Committee on Appeals. February 28, 1780, settled by the parties.

53. *Gleason* v. *The Mermaid.* Appeal from a decree in the Court of Admiralty for New Jersey. July 21, 1779, lodged with the Committee on Appeals. In 1780 the decree was reversed by the Court of Appeals.

54. *Bradford* v. *The Viper.* Appeal from a judgment in the Maritime Court for the Middle District of Massachusetts Bay. July 24, 1779, lodged with the Committee on Appeals. November 8, 1779, affirmed by the committee.

55. *Ingersol* v. *Brig Recovery.* Appeal from a decree in the Court of Admiralty for New Jersey. August 17, 1779, dismissed with costs, not having been lodged within the forty days.

56. *Tucker* v. *The Le Vern and Cargo, De Valmais Claimant.* Appeal from a judgment in the Maritime Court for the Middle District of Massachusetts Bay. Referred to the Committee on Appeals. Date of reference not known. The decree below was made Sep-

tember 17, 1779. In 1780 the decree below was reversed by the Court of Appeals. Date of reversal not known.

57. *Cabot* v. *Nuestra Señora de Merced.* Appeal from a judgment in the Maritime Court for the Middle District of Massachusetts Bay. October 9, 1779, lodged with the Committee on Appeals. November 6, 1779, reversed by the committee.

58. *Cleaveland* v. *The Ship Valenciano.* Appeal from a judgment in the Superior Court of Judicature, Court of Assize, and General Jail Delivery at Boston in the Middle District of the State of Massachusetts Bay. October 9, 1779, lodged with the Committee on Appeals. November 1, 1779, reversed by the committee.

59. *Board of War for Massachusetts* v. *Ship Victoria.* Appeal from a judgment in the Maritime Court for the Middle District of Massachusetts Bay. October 9, 1779, lodged with the Committee on Appeals. November 6, 1779, affirmed by the committee.

60. *Tracy* v. *Santos y Martyros.* Appeal from a judgment on a verdict in the Superior Court of Judicature, Court of Assize, and General Jail Delivery at Boston, in the Middle District of Massachusetts Bay. October 9, 1779, lodged with the Committee on Appeals. November 6, 1779, affirmed by the committee.

61. *Decatur* v. *Schooner Barbary.* Appeal from a decree in the Court of Admiralty for the State of New Jersey. November 12, 1779, lodged with the Committee on Appeals. Decided in 1779 by the committee. Date and character of decision not given.

62. *Harridan* v. *Sloop of War Hope.* Appeal from a judgment in the Court of Admiralty, for the port of Philadelphia, in Pennsylvania. 3 Hopkinson's Works, 14; Bee, 385, where it is reported that "the verdict [in the court below] was contrary to the opinion of the judge." November 30, 1779, lodged with the Committee on Appeals. Settled by the parties.

63. *Courter* v. *Brigantine Pitt.* Appeal from a decree in the Court of Admiralty for the State of Maryland. December 30, 1779, lodged with the Committee on Appeals. January 30, 1780, reversed by the committee.

64. *Gardner* v. *The Brig Sea-Horse and Cargo, John Lynch Claimant.* Appeal from a decree in the Court of Admiralty for New Jersey. March 14, 1780, claimant's letter lodged with the

Committee on Appeals. Decided in 1780. Date and judgment not given.

65. *Bragg* v. *Sloop Dove.* Appeal from a decree in the Court of Admiralty for North Carolina. May 9, 1780, lodged with the Court of Appeals. December 23, 1780, reversed by the court.

66. *Nicholson* v. *The Sandwich Packet.* Appeal from a judgment in the Maritime Court for the Middle District of Massachusetts Bay. June 2, 1780, lodged in the office of the Register of the Court of Appeals. August 14, 1780, affirmed.

67. *Rathburn* v. *The Ship Mary.* Appeal from a judgment of the Maritime Court for the Southern District of Massachusetts Bay. Date of lodgment in the office of the Register of the Court of Appeals not given. June 23, 1780, affirmed.

68. *Jencks* v. *The Sloop Industry.* Appeal from a judgment of the Maritime Court for the trial of prize causes in the State of Rhode Island and Providence Plantations. September 14, 1780, lodged in the Register's office of the Court of Appeals. November 24, 1780, reversed.

69. *Deshon* v. *Brig Kitty.* Appeal from a decree of the Court of Admiralty at Beaufort, for North Carolina. October 28, 1780, lodged in the Court of Appeals. April 5, 1781, (probably) affirmed.

70. *McClure* v. *Schooner John. Same* v. *Schooner Hepzabeth.* Appeals from decrees in the Court of Admiralty for North Carolina. October 28, 1780, lodged in the Court of Appeals. April 5, 1781, affirmed.

71. *Old* v. *Sloop Betsy, Bradley Claimant.* Appeal from a judgment in the County Court of the county of New Haven, Connecticut. November 20, 1780, lodged in the Register's office of the Court of Appeals. September 21, 1783, reversed.

72. *Young* v. *Sloop Two Friends.* Appeal from a judgment in the Admiralty Court, for the port of Philadelphia, in Pennsylvania. 3 Hopkinson's Works, 50–54. December 14, 1780, lodged in the office of the Register of the Court of Appeals. December 23, 1780, affirmed.

73. *Smith* v. *Sloop Mary and Cargo.* Appeal from a decree in the Court of Admiralty for North Carolina. July 31, 1781, lodged

in the Register's office of the Court of Appeals. May 6, 1784, dismissed.

74. *Ellis* v. *The Sloop Hannah.* Appeal from a decree in the Admiralty Court for New Jersey. June, 1781, lodged in the Register's office of the Court of Appeals. August 4, 1781, reversed.

75. *Babcock* v. *Brigantine Brunette.* Appeal from a judgment in the Maritime Court for the Middle District of Massachusetts Bay. February 6, 1781, lodged in the Register's office of the Court of Appeals. August 4, 1781, reversed.

76. *Robinson* v. *Schooner Four Sisters and Rogers, Appellee.* Appeal from a judgment in the Court of Admiralty for the county of New Haven, Connecticut. September 24, 1781, lodged in the office of the Register of the Court of Appeals. September 21, 1783, affirmed.

77. *Earle, Appellee,* v. *Schooner Betsey, and Ridgway Appellant.* Appeal from a decree in the Court of Admiralty for Delaware. October 4, 1781, lodged in the Register's office of the Court of Appeals. June 14, 1783, reversed.

78. *Barry* v. *Brig Mars.* Appeal from a judgment in the Maritime Court for the Middle District of the Commonwealth of Massachusetts. October 12, 1781, lodged in the office of the Register of the Court of Appeals. Decided in 1781. Date and decree not given.

79. *Wells* v. *Judson, etc.* Appeal from a judgment in the County Court for Hartford County, Connecticut. January 21, 1782, lodged in the Register's Office of the Court of Appeals. September 21, 1783, reversed.

80. *Haven, Claimant,* v. *The Trumbull, etc.* Appeal from a judgment in the Maritime Court for the county of New London, Connecticut. January 21, 1782, lodged in the Register's office of the Court of Appeals. Decided 1782. Date and decree wanting.

81. *Johnson, Appellee,* v. *Sundry British Goods, Gardiner et al. Claimants and Appellants.* Appeal from a judgment in the County Court for Hartford County, Connecticut. January 21, 1782, lodged in the Register's office of the Court of Appeals. September 21, 1783, reversed.

Courts of Appeal in Prize Cases.

82. *Hart* v. *Foster et als.* Appeal from a judgment in the Maritime Court for New London County, Connecticut. March 13, 1782, lodged in the Register's office of the Court of Appeals. September 21, 1783, reversed.

83. *Lockwood* v. *Bradley, Claimant.* Appeal from a judgment in the Maritime Court for Fairfield County, Connecticut. April 4, 1782, lodged in the Register's office of the Court of Appeals. Dismissed in 1782, neither party appearing.

84. *Spencer, Appellant,* v. *Sloop Sally, and Peters Appellee.* Appeal from a judgment in the Maritime Court for New London County, Connecticut. May 16, 1782, lodged in the office of the Register of the Court of Appeals. June 12, 1783, reversed.

85. *Coakley* v. *Brigantine Hope and John Martin.* Appeal from a decree in the Admiralty Court for Maryland. June 10, 1782, lodged in the Register's office of the Court of Appeals. May 6, 1784, reversed.

86. *Preble* v. *Sloop Lark.* Appeal from a judgment in the Supreme Judicial Court of the Commonwealth of Massachusetts. June 14, 1782, lodged in the Register's office of the Court of Appeals. Ordered to be struck off the docket. Date of order not known.

87. *Allen* v. *The Good Fortune. Howell and Others* v. *The Same.* Appeals from a decree of the Court of Admiralty for North Carolina. August 26, 1782, lodged in the Register's office of the Court of Appeals. June 14, 1783, decree affirmed in Allen's Appeal. May 17, 1787, Howell's appeal dismissed.

88. *Randall* v. *Schooner Neustra Señora, etc., and Cargo, D'O. Claimant.* Appeal from a judgment in the Maritime Court for the Middle District of the Commonwealth of Massachusetts. September 14, 1782, lodged in the Register's office of the Court of Appeals. May 29, 1783, affirmed in part and reversed in part.

89. *Smith* v. *Sundry British Goods.* Appeal from a judgment in the Maritime Court for Fairfield County, Connecticut. September 14, 1782, lodged in the Register's office of the Court of Appeals. May 20, 1787, dismissed, neither party appearing.

90. *Stoddard* v. *Read, Appellee, and the Squirrel.* Appeal from a judgment in the Court of Admiralty for Rhode Island. Novem-

ber 15, 1782, lodged in the Register's office of the Court of Appeals. For interlocutory proceedings in this case see 2 Dall. 40. October 1, 1783, decree below affirmed.

91. *Jackson* v. *The Dolphin*, *Forman Claimant*. Appeal from a decree of the Court of Admiralty for New Jersey. March 16, 1783, lodged in the Register's office of the Court of Appeals. May 21, 1784, affirmed.

92. *Jackson* v. *The Diamond*, *Forman Claimant*. Appeal from a decree of the Court of Admiralty for New Jersey. March 16, 1783, lodged in the Register's office of the Court of Appeals. May 31, 1784, affirmed.

93. *Manly* v. *Ship Bailey*, *and Russell Appellee*. Appeal from a judgment of the Maritime Court for the Middle District of the Commonwealth of Massachusetts. Certified copy of the record below, dated April 25, 1783, lodged in the Register's office of the Court of Appeals, but the date of lodgment not known. May 13, 1783, affirmed.

94. *Garrett*, *Claimant*, v. *Brig Nonsuch and Cathcart*. Appeal from a judgment in the Maritime Court for the Middle District of the Commonwealth of Massachusetts. May 2, 1783, lodged in Register's office of the Court of Appeals. May 13, 1783, affirmed.

95. *Père Debade*, *Appellant*, v. *The San Antonio*, *Hayden et al. Libellants*. Appeal from a judgment in the Maritime Court for the Middle District of the Commonwealth of Massachusetts. May 5, 1783, lodged in the office of the Register of the Court of Appeals. May 28, 1783, reversed.

96. *Derby* v. *Ship Minerva*, *Kohler Appellant*. Appeal from a judgment of the Maritime Court for the Middle District of the Commonwealth of Massachusetts. May 5, 1783, lodged in the Register's office of the Court of Appeals. May 27, 1783, decree below affirmed, but with costs to appellant, which were fixed by agreement of the parties.

97. *Forcan*, *Appellant*, v. *The Brig Maria Theresa*, *and Manly Appellee*. Appeal from a judgment of the Court Maritime for the State of New Hampshire. Date of lodgment unknown. June 12, 1783, reversed.

Courts of Appeal in Prize Cases.

98. *Norton* v. *Perceval and The Schooner Sally.* Appeal from a judgment in the Supreme Judicial Court of the Commonwealth of Massachusetts. June 28, 1783, lodged in the Register's office of the Court of Appeals. Settled by the parties.

99. *Sampson* v. *Schooner Fanny, and Barlow.* Appeal from a judgment in the Supreme Judicial Court of the Commonwealth of Massachusetts. June 28, 1783, lodged in the Register's office of the Court of Appeals. May 28, 1784, affirmed.

100. *Smith* v. *Sloop Polly, and Wickham Appellee.* Appeal from a judgment in the Court of Admiralty for Rhode Island and Providence Plantations. August 9, 1783, lodged in the Register's office of the Court of Appeals. May 26, 1784, reversed for want of jurisdiction. N.B. The date of this decree is May 26, 1782, an evident error.

101. *McClure* v. *Sundry British Goods.* Appeal from a judgment in the Maritime Court for New London County, in Connecticut. No date of lodgment. September 21, 1783, reversed.

102. *Barrell* v. *Sloop Good Intent, Seymour Appellee.* Appeal from a decree of the Court of Admiralty for Virginia. Date of lodgment not known. September 30, 1783, reversed.

103. *The Brigantine Hope.* Appeal from a judgment of the Maritime Court for New London County, Connecticut. This appeal being dismissed because not filed in time, a petition was filed praying the court to take jurisdiction. Citations were ordered, and the petition was dismissed by the court, May 3, 1787.

104. *Barlow* v. *The Sloop Fanny, Coffin Claimant.* Appeal from a judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts. February 19, 1784, lodged in the Register's office of the Court of Appeals. May 6, 1784, settled by the parties.

105. *Harper, etc.*, v. *Schooner Liberty.* Court of Admiralty for North Carolina. Petition for appeal forwarded to the Delegates from Virginia, and presented by them to Congress, August 10, 1779, and referred on that day to the Committee on Appeals. May 6, 1784, dismissed, neither party appearing.

106. *Boitar* v. *Schooner Adventure, Young Claimant.* Appeal

from a decree in the Court of Admiralty for North Carolina. Date of lodgment not known. May 21, 1784, reversed.

107. *Hathaway, Claimant of the Sloop Polly*, v. *Ingersol.* Appeal from a judgment in the Supreme Judicial Court of the Commonwealth of Massachusetts. Libel not on file. May 21, 1784, affirmed.

108. *Elkins* v. *The Sloop Good Intent.* Appeal from a judgment in the Supreme Judicial Court of the Commonwealth of Massachusetts. Date of lodgment not known. May 23, 1784, affirmed.

109. *Cruger* v. *The Captor of the Brig Cumberland.* Original petition to the Court of Appeals, praying an appeal against a judgment in a Court of Admiralty in Connecticut. May 3, 1787, dismissed, neither party appearing.

II. *COURTS FOR DETERMINING DISPUTES AND DIFFERENCES BETWEEN TWO OR MORE STATES CONCERNING BOUNDARY, JURISDICTION, OR ANY OTHER CAUSE WHATEVER.*

The provisions in the Articles of Confederation for the proceedings in the selection of the court in these cases were as follows: "Whenever the legislative or executive authority or lawful agent of any State, in controversy with another, shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause, shall agree in the determination."

The following are all the disputes between States which appear to have been brought before Congress for adjustment, including some in which no court was organized. Only one of them came to trial. There is an abundance of literature, both permanent and ephemeral, on the subject of these disputes; but we are concerned only with the judicial aspect of the controversies, as shown in the Journal of Congress.

New Hampshire *v.* Vermont.
New York *v.* Vermont.
Massachusetts *v.* Vermont.

The controversy for the jurisdiction of the tract of land which became the State of Vermont antedates the Revolution. In 1750 "New York carried its claims to the Connecticut River; France,

which had command of Lake Champlain, extended her pretensions to the crest of the Green Mountains; while Wentworth, the only royal governor in New England, began to convey the soil between the Connecticut and Lake Champlain by grants under the seal of New Hampshire." 2 Bancroft Hist. United States (Last Revision) 361. The latter became known as the New Hampshire grants.

In 1764 the king in council "dismembered New Hampshire, and annexed to New York the country north of Massachusetts and west of Connecticut River. This decision was declaratory of the boundary; and it was therefore held by the royalists that the grants made under the sanction of the royal governor of New Hampshire were annulled." 3 Id. 87. The towns and villages, whose title was thus drawn in question, were settled largely by New Englanders, under the New Hampshire grants. 3 Id. 54.

Early in 1775 "the Court of Common Pleas was to be opened by the royal judges in what was called the New York County of Cumberland, at Westminster, in the New Hampshire grants, on the eastern side of the Green Mountains. To prevent this assertion of the jurisdiction of New York and of the authority of the king, a body of young men from the neighboring farms on the thirteenth of March took possession of the court-house. The royal sheriff, who, against the wish of the judges, had raised sixty men armed with guns and bludgeons, demanded possession of the building; and, after reading the riot act and refusing to concede terms, late in the night ordered his party to fire. . . . The act closed the supremacy of the king and of New York to the east of Lake Champlain." 4 Id. 142.

The settlers adopted the name of Vermont, and, on the 15th January, 1777, in a convention, declared their independence of New York. In the following July a convention assembled at Windsor, which, on the 8th of that month, completed a constitution which was accepted by the legislature and declared to be a part of the laws of the State. 2 Charters and Constitutions, 1857.

Upon this New York appealed to Congress, by a series of resolutions moved by its delegates in that body on the 22d of May, 1779. As a result of this, Congress, on the 24th September, 1779, "*resolved unanimously* that it be, and hereby is, most earnestly recommended to the States of New Hampshire, Massachusetts Bay, and New York forthwith to pass laws expressly authorizing Congress to hear and determine all differences between them relative to their

respective boundaries, in the mode prescribed by the Articles of Confederation, so that Congress may proceed thereon by the first day of February next at the farthest; and further that the said States of New Hampshire, Massachusetts Bay and New York do, by express laws for the purpose, refer to the decision of Congress all differences or disputes relative to jurisdiction which they may respectively have with the people of the district aforesaid, so that Congress may proceed thereon on the first day of February next."

On the 2d October, 1779, it was further recommended to those States "to authorize Congress to proceed to hear and determine all disputes subsisting between the grantees of the several States aforesaid with one another, or with either of the said States, respecting title to lands lying in the said district, to be heard and determined by 'commissioners or judges' to be appointed in the mode prescribed by the 9th article" of the Articles of Confederation.

New York enacted the requisite legislation on the 21st October, 1779, and New Hampshire in the following November. Massachusetts had no real interest in the question. The persons most interested, the settlers on the disputed territory, "proceeded as a separate government to make grants of lands and sales of estates," for which Congress censured them on the 2d of June, 1780. Their evident purpose neither to submit to the jurisdiction of New York, nor to that of New Hampshire undoubtedly prevented a judicial settlement under the Articles of Confederation. No court was ever organized for that purpose; but Congress itself proceeded with the investigation. On the 17th and 20th of September, 1780, the agents of New York laid their case before Congress, claiming that from 1764 to 1777 the people of the territory were represented in the legislature of that State, and submitted to its authority. On the 27th of the same month the agents for New Hampshire presented its case, maintaining that the tract was within the limits of New Hampshire, and that the people inhabiting it had no right to a separate and independent jurisdiction. The case lingered, unsettled, until after the adoption of the Constitution. In fact it could not be settled judicially, as the attitude of the settlers converted it from a judicial into a political question.[1] In 1781 Massachusetts as-

[1] "Those who had an opportunity of seeing the inside of the transactions which attended the progress of the controversy between this State [New York] and the district of Vermont can vouch the opposition we experienced, as well from States not interested, as from those which were inter-

sented to the recognition of the independence of Vermont. New Hampshire followed in 1781, and New York in 1790. The controversy was then closed by the passage of the act of February 18, 1791, 1 Stat. 191, admitting Vermont into the Union on the 4th day of March next ensuing.

PENNSYLVANIA *v.* VIRGINIA.

In the printed Journals of Congress, under date of Monday, December 27, 1779, we find the following entry:

"Whereas, it appears to Congress, from the representation of the delegates of the State of Pennsylvania, that disputes have arisen between the States of Pennsylvania and Virginia, relative to the extent of their boundaries, which may probably be productive of serious evils to both States, and tend to lessen their exertions in the common cause: therefore —

"*Resolved*, That it be recommended to the contending parties not to grant any part of the disputed land, or to disturb the possession of any persons living thereon, and to avoid every appearance of force until the dispute can be amicably settled by both States, or brought to a just decision by the intervention of Congress; that possessions forcibly taken be restored to the original possessors, and things placed in the situation in which they were at the commencement of the present war, without prejudice to the claims of either party."

There is no subsequent entry in the Journals of Congress relating to this subject.

An agreement for settlement was made in Baltimore, August 31, 1779. After some correspondence, the Rev. James Madison, the Rev. Robert Andrews, Mr. John Page and Mr. Thomas Lewis were appointed Commissioners on the part of Virginia, and Mr. John Ewing, Mr. David Rittenhouse, Mr. John Lukins and Mr. Thomas

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ested in the claim; and can attest the danger to which the peace of the confederacy might have been exposed, had this State attempted to assert its rights by force. . . . New Jersey and Rhode Island, upon all occasions, discovered a warm zeal for the independence of Vermont; and Maryland, until alarmed by the appearance of a connection between Canada and that place, entered deeply into the same views." Federalist, No. VII., Alexander Hamilton.

Hutchins, Commissioners on the part of Pennsylvania. "The line commonly called Mason and Dixon's line" was "extended due west five degrees of longitude," "from the river Delaware for the southern boundary of Pennsylvania" and "a meridian line drawn from the western extremity thereof to the northern line of the State" became the western boundary. On the 23d August, 1784, the commission reported that the Ohio River was reached.

Pennsylvania *v.* Connecticut.

The Journal of Saturday, November 3, 1781, contains this entry: "A petition from the Supreme Executive Council of the Commonwealth of Pennsylvania was read, stating a matter of dispute between the said State and the State of Connecticut, respecting sundry lands lying on the east branch of the river Susquehanna, and praying a hearing in the premises, agreeably to the 9th Article of the Confederation."

On the 14th of November, 1781, Congress assigned the fourth Monday in June then next for the appearance of the States by their lawful agents, and ordered notice thereof in the following form:

"By the United States in Congress assembled, in the city of Philadelphia, on the 14th day of November, in the year of our Lord 1781, and in the 6th year of Independence.

"To the legislative authority of the State of Connecticut [Pennsylvania].

"It is hereby made known that pursuant to the 9th Article of the Confederation, the Supreme Executive Council of the State of Pennsylvania have presented a petition to Congress, stating that a controversy has long subsisted between the said State of Pennsylvania and the State of Connecticut, respecting sundry lands lying within the northern boundary of the said State of Pennsylvania, and praying for a hearing in pursuance of the 9th Article of the Confederation; and that the 4th Monday in June next is assigned for the appearance of the said States of Pennsylvania and Connecticut, by their lawful agents, at the place in which Congress shall then sit, to proceed in the premises as by the said Confederation is directed."

Monday, June 24, 1782, being the day assigned for the appearance of the States by their agents, Messrs. William Bradford,

Joseph Reed, James Wilson and Jonathan Dickinson Sargent appeared for Pennsylvania, and their credentials were spread upon the journal. Mr. Eliphalet Dyer appeared for Connecticut, and presented credentials which were also spread upon the journal, from which it appeared that Messrs. Eliphalet Dyer, William Samuel Johnson and Jesse Root were the duly accredited agents of that State.

On the 27th of June, Connecticut moved to postpone the proceedings until "after the termination of the present war;" which motion was denied.

On the 16th of July, 1782, the agents of Pennsylvania presented new credentials, which were objected to by Connecticut. The objection was overruled, and the agents of the two States were directed to "appoint by joint consent, commissioners or judges, to constitute a court for hearing and determining the matter in question, agreeably to the 9th Article of the Confederation."

On Monday, the 12th of August, 1782, Congress was informed, by a paper signed by the agents on both sides, and spread upon the journal, that they had agreed upon the Hon. William Whipple of New Hampshire, Major-General Nathaniel Greene of Rhode Island, Hon. David Brearley and William Churchill Houston, Esq., of New Jersey, Hon. Cyrus Griffin and Joseph Jones, Esq., of Virginia, and Hon. John Rutledge of South Carolina, any five or more of whom they had agreed should constitute the court, and have authority to proceed and determine the matter and difference between the States.

On the 23d of August, 1782, they reported to Congress that General Greene could not attend, and that Mr. Rutledge declined, and that they had agreed upon Mr. Thomas Nelson of Virginia and Mr. Welcome Arnold of Rhode Island in their places: whereupon Congress directed commissions to issue to the judges according to the amended list. It was further agreed between the parties that the court should assemble at Trenton in New Jersey on the 12th day of the next November.

On the 28th of August the form of commission was settled, and it was spread upon the journal.

The court convened, and began its sessions at Trenton, November 12, 1782, with only Mr. Brearley and Mr. Houston present. They adjourned from day to day, up to November 18, when, enough members being present, the court was organized for work, with Mr. Whipple, Mr. Arnold, Mr. Brearley, Mr. Houston and Mr. Griffin as

its members. After some skirmishing the agents on each side, on the 22d of November, put in a written statement, showing the claims set up by their respective States.

Pennsylvania set up the patent of Charles II, of March 4, 1681, to William Penn, which included the disputed tract, "by which letters patent," it was averred, "the jurisdiction and right of government within the limits aforesaid, and also the right of soil, were conveyed, and under which Pennsylvania hath been held, settled and possessed." It was also charged that "sundry persons, pretending to claim, under the late colony, now State of Connecticut, before the Revolution, have violently settled themselves within the limits aforesaid, and the colony of Connecticut, by an act of their legislature, made and passed a short time before the Revolution, have encouraged the said violent settlement, and intrusion, and asserted their claim as a colony to a large part of the lands within the limits aforesaid, as well in point of jurisdiction as territory; and that since the Revolution the said intrusions are continued and daily increased by the said persons pretending to claim under the State of Connecticut."

On the part of Connecticut there was set up: (1) the discovery by Sebastian Cabot, in 1497, from 25° N. to 67° 30′ N.; the designation of a part of the discovery, extending from 40° N. to 48° N. as New England, by James I, by letters patent in 1620, and the incorporation of the Council at Plymouth for governing it; (2) the grant by the Council of Plymouth to Sir Henry Roswell, etc., of the country between the Merrimack and three miles south of the southerly end of Massachusetts Bay from the Atlantic to the Western Sea, in 1628; (3) the grant by the Council of Plymouth, in 1631, to Lord Say and Seal, of that part of New England which extends from Narragansett River forty leagues upon a straight line near the sea shore, towards the southwest, west, and by south or west, as the coast lieth, towards Virginia, and all the lands north and south in latitude and longitude of the breadth aforesaid, throughout the main lands from the Western Ocean to the South Sea — on which grant the Connecticut people settled and established a government, extending their possessions to the Dutch possessions near the Hudson River, and, as early as 1650, to the west side of the Delaware River; (4) that in 1635 the Plymouth Company surrendered its charter, and the Crown granted, in 1662, new letters to John Winthrop and others, of the same tract granted to Lord Say

and Seal, the grantees to form the company and society of the colony of Connecticut, and that thereby the colony became vested with all that land, including the lands in controversy. After setting forth the settlement of New York, and its acquisition by the British Crown, and the letters patent to the Duke of York, and the adjustment of the boundary line between Connecticut and New York, the paper averred that the lands in controversy to the west of New York remained in the colony of Connecticut, and that the grant by Charles II to Penn was taken by him, with a knowledge that the northern limits of his grant interfered with and spread over the lands previously granted to Connecticut. It also set forth that Connecticut had made grants of land within this tract upon the Susquehanna and Delaware rivers to settlers from Connecticut who had acquired the Indian title, and that the legislature had approved of it, and had exercised jurisdiction over them.

The hearing upon the issues thus made up lasted from day to day until the 30th December, 1782, when the court rendered the following judgment:

"We are unanimously of opinion that the State of Connecticut has no right to the lands in controversy.

"We are also unanimously of opinion that the jurisdiction and preëmption of all the territory lying within the charter boundary of Pennsylvania, and now claimed by the State of Connecticut, do of right belong to the State of Pennsylvania."

This judgment settled the question of jurisdiction and preëmption, but the right of soil was still disputed by settlers who were not parties to the proceeding, and who for many years maintained a fierce struggle for their possessions, acquired under Connecticut, almost amounting to a civil war.[1]

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[1] "And even after the feud had been superficially appeased by the adjudication of the court at Trenton, which decided in favor of Pennsylvania, it broke out afresh at a later day in the shape of an armed crusade proclaimed by the Susquehanna Company, which claimed to hold the Wyoming Valley under authority from Connecticut, and which at a later stage of its operations, proceeded to recruit armed emigrants for the forcible occupation of the disputed territory. In Pennsylvania the insurgent leader of the Susquehanna Land Company, John Franklin, had been arrested, and in the latter part of the year 1787 had been deported to Philadelphia, that he might there be put on trial for high treason against the State. In retaliation for this arrest, Timothy Pickering, the Quartermaster General of the Revolutionary Army, and afterward Secretary of State of the United States, was kid-

On the 23d of January, 1784, some of these settlers complained to Congress that they were disturbed in their private right of soil derived from Connecticut by others claiming under the State of Pennsylvania, and prayed that a court might be instituted under the 9th Article of the Confederation, for determining the said right. Congress thereupon resolved that such a court should be instituted "for determining the private right of soil within the said territory, so far as the same is by the said article submitted to the determination of such a court," and assigned the fourth Monday of the next June for the appearance of the parties by their agents. On the 3d of June, Congress adjourned, to meet at Trenton on the 30th of October; so that, when the day for appearance came, there was no Congress. Nothing further was heard of this case; possibly because all parties came to understand that the whole question had been tried and adjudicated.

Finally, in 1799, the legislature of Pennsylvania passed an act of compromise and conciliation, by which compensation was provided for Pennsylvania claimants, and if it appeared that a Connecticut claimant was an actual settler on the land prior to the Trenton decree, in accordance with regulations prevailing among the settlers, he received a patent from the land office by paying two dollars per acre for land of first class, one dollar and twenty cents for land of second class, fifty cents for land of third class, and eight and one-third cents for land of fourth class. Commissioners were appointed to meet at Wyoming to carry out the law, and peace was thus finally restored. Pearce's Annals of Luzerne County, pp. 58–98.

New Jersey *v.* Virginia.

On the 14th September, 1779, George Morgan, agent for the proprietors of a tract of land called Indiana, between the Little Kennawa, the Monongahela and the southern boundary of Pennsylvania, presented a memorial to Congress on their behalf showing that the proprietors had acquired this land from the Six Nations and other Indians for a consideration of £85,916 10*s.* 8*d.*; that

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napped, carried into captivity, and held as a hostage." President James C. Welling, of the Columbian University, before the New York Historical Society, May 1, 1888. See Pickering's own account in 2 Upton's Life of Pickering, pp. 381–390.

after the acquisition it had been separated from the jurisdiction of Virginia by the king in council; and that Virginia had resumed jurisdiction over it and was about to order sales to be made. The memorial prayed that the sales might be stayed until the State and the memorialists could be heard before Congress.

This memorial was referred to a committee. During the deliberations of the committee Virginia, on the 2d January, 1781, ceded to the United States its claims to the territory northwest of the Ohio. New York had already made a similar cession. On the 16th Octotober, 1781, the delegates from Virginia brought the matter before Congress, claiming that if the alleged purchase was within the limits of Virginia as settled by the cession, (which it apparently was,) it was a question to be dealt with by the State; and if it was beyond it, then Congress ought not to receive any claim adverse to the cession. They proposed that before going farther the question should be taken "whether it was the intention of Congress to authorize the committee to receive claims and hear evidence in behalf of said companies, adverse to the claims or cessions of Virginia, New York or Connecticut." An effort was made to amend this so that it should read: "It was not the intention," etc.; but the amendment was lost.

To this committee had been referred the cessions of New York, Virginia and Connecticut, as well as the petitions of the companies. On the 1st May, 1782, they reported recommending that the cession made by New York be accepted; that the cession made by Virginia be not accepted because it was inconsistent with rights vested in the United States, and because Congress could not guarantee to that State the tract claimed by it in its act of cession; and that the petition of the companies be dismissed.

On the 11th September, 1783, Congress, after discussion, voted to accept the cession without the condition proposed by Virginia that the United States should guarantee to that State all the territory between the Atlantic Ocean, the southeast side of the river Ohio, and the Maryland, Pennsylvania and North Carolina boundaries.

Finally, on the 1st March, 1784, the deed of cession was presented to Congress, and accepted by that body, and spread upon the journal: but before that was done the following petition was presented and read:

Courts for determining Disputes between States.

"To the United States of America, in Congress assembled.

"The petition of Colonel George Morgan, agent for the State of New Jersey respectfully sheweth; that a controversy now subsists between the said State and the Commonwealth of Virginia respecting a tract of land called Indiana, lying on the river Ohio, and being within the United States: That your petitioner and others, owners of the said tract of land, labor under grievances from the said Commonwealth of Virginia, whose legislature has set up pretensions thereto: That in consequence of instructions from the legislature of New Jersey to their delegates in Congress, anno 1781, and the petitions of Indiana proprietors, anno 1779, 1780 and 1781, a hearing was obtained before a very respectable committee of Congress, who, after a full and patient examination of the matter, did unanimously report . . . that the purchase of the Indiana Company was made *bona fide* for a valuable consideration, according to the then usage and custom of purchasing lands from the Indians, with the knowledge, consent and approbation of the Crown of Great Britain and the then governments of New York and Virginia: That notwithstanding this report, the State of Virginia still continues to claim the lands in question, to the great injury of your petitioner and others: That your petitioner, on behalf of himself and the other proprietors of the said tract of land, applied to the said State of New Jersey, of which some of them are citizens, for its protection: That the legislature of the said State thereupon nominated and appointed your petitioner the lawful agent of the said State, for the express purpose of preparing and presenting to Congress a memorial or petition on the part and behalf of the said State, representing the matter of the complaint aforesaid, to pray for a hearing, and to prosecute the said hearing to issue, in the mode pointed out by the Articles of Confederation: That the said legislature ordered that a commission should be issued by the executive authority of the said State, to your petitioner, for the purposes aforesaid: That a commission was accordingly issued to your petitioner by the executive authority of the said State, a copy whereof accompanies this petition. . . . Wherefore your petitioner, as lawful agent of the said State of New Jersey, prays for a hearing in the premises, agreeably to the 9th Article of Confederation and Perpetual Union between the United States of America."

A motion was made to commit this petition and it was lost. This was followed by a motion to consider and prepare an answer to it.

This motion, also, was lost; and Congress proceeded at once to accept the deed of cession from Virginia. No court was ever convened, and no other entry on the subject is found in the Journal of Congress.

Massachusetts *v.* New York.

On Thursday, June 3, 1784, Congress received the report of a committee to whom had been "referred a petition from the legislature of the Commonwealth of Massachusetts, praying that a Federal Court may be appointed by Congress to decide a dispute between the said Commonwealth and the State of New York;" and resolved "that the first Monday in December next be assigned for the appearance of the said States of Massachusetts and New York by their lawful agents, at the place in which Congress shall then be sitting." The form of the notice was settled by another resolution. It contained a copy of the petition of the State of Massachusetts, from which it appeared that the subject of the controversy was a claim of Massachusetts to jurisdiction over a tract of land between 42° 2′ N. and 44° 15′ N., extending westwardly to the Southern Ocean, which was denied in part by New York.

On Wednesday, the 8th December, 1784, both parties appeared by their agents, and presented their credentials, which were spread at length upon the journal. Congress directed each to examine the credentials of the other, and report upon the following Friday whether they were objected to. No objection being made on either side, the agents, on the 10th December, 1784, were "directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question, agreeably to the 9th of the Articles of Confederation and perpetual union."

On the 9th June, 1785, Messrs. John Jay, Robert R. Livingston and Walter Livingston, agents for New York, and Messrs. John Lowell, James Sullivan, Theophilus Parsons, Rufus King and S. Holton, agents for Massachusetts, in a paper signed by all, informed Congress that they had agreed upon Thomas Johnson, George Wythe, George Read, James Monroe, Isaac Smith, William Patterson, Samuel Johnson, William Fleming and John Sitgreaves, Esqrs., as judges, and requested that commissions might issue to them, and that they be notified to meet at Williamsburg, in Virginia, on the third Tuesday of November then next, to hear and determine the controversy.

Courts for determining Disputes between States.

Omitting some intermediate entries, it is sufficient to note that on Monday, the 8th October, 1787, Congress resolved as follows:

"Whereas it appears by the Journals of Congress that a Federal Court has been instituted, pursuant to the Articles of Confederation and perpetual union, to hear and determine a controversy respecting territory between the States of Massachusetts and New York; and whereas it appears by the representations of the delegates of the said States in Congress that the said controversy has ceased, and the same has been settled and determined by an agreement entered into on the 16th day of December last, by the agents of the said States, and any further proceedings in or relative to the aforesaid court having become unnecessary:

"*Resolved*, That all further proceedings in and relative to the said Federal Court, as also the commissions of the judges thereof, cease and determine."

The agreement between the two States was then spread at length upon the Journal of Congress.

South Carolina *v.* Georgia.

June 1, 1785, Congress resolved "that the second Monday in May next be assigned for the appearance of the States of South Carolina and Georgia by their lawful agents; and that notice thereof, and of the petition of the legislature of the State of South Carolina, be given by the Secretary of Congress to the legislative authority of the State of Georgia." The prescribed form of the notice contained a copy of the petition of the State of South Carolina, in which the subject of the controversy (after detailing the nature of the colonial claim of title on each side) was stated as follows: "That South Carolina claims the lands lying between the North Carolina line and a line to be run due west from the mouth of Tugoloo River to the Mississippi, because, as the said State contends, the river Savannah loses that name at the confluence of Tugoloo and Keowee rivers, consequently that spot is the head of Savannah River; the State of Georgia, on the other hand, contends, that the source of Keowee River is to be considered as the head of Savannah River. That the State of South Carolina also claims all the lands lying between a line to be drawn from the head of the river St. Mary, the head of Altamaha, the Mississippi and Florida, being,

as the said State contends, within the limits of its charter, and not annexed to Georgia by the said proclamation of 1763 [of the King of Great Britain]; the State of Georgia, on the other hand, contends, that the tract of country last mentioned is a part of that State."

The time for their appearance having been extended, the agents of each State appeared before Congress on Monday, September 4, 1786, and produced their credentials, which were extended at length on the journal. They were then directed "to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question, agreeably to the 9th of the Articles of Confederation and perpetual union."

On the 11th of September the agents for South Carolina reported that they could not agree upon the judges, and prayed Congress to proceed on the following Wednesday "to strike a court agreeable to the Articles of Confederation."

On the following Wednesday (the 13th) the agents of both States attended. On motion of the delegates of Georgia, it was "resolved that Congress proceed to strike a court in the manner pointed out by the Confederation." Three persons were then named from each of the States, and from the list of persons so named each party alternately struck out one until the number was reduced to thirteen. Then, on motion of the delegates from South Carolina, these names were put in a box, and the following nine names were drawn out in the presence of Congress: Alexander Contee Hanson, James Madison, Robert Goldsborough, James Duane, Philemon Dickerson, John Dickinson, Thomas McKean, Egbert Benson and William Pynchon. On the next day, September 14, 1786, the delegates of Georgia moved that this court be held at the city of New York on the first Monday in May then next. The delegates from South Carolina proposed to amend by substituting the third Monday of the next November. This amendment being lost, the original motion was carried.

There is nothing in the published Journals of Congress to show that this court ever sat. The difference was settled by a compact between the two States, the first and second articles of which will be found in 93 U. S. pp. 5, 6, in *South Carolina* v. *Georgia*.

OMITTED CASES IN THE REPORTS OF THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

Our researches have discovered three hundred and fifty-one such unreported cases. Three hundred and ten opinions were given in these cases, the same opinion being sometimes applied to several cases. Many of these opinions were very short, often not more than two or three lines. Some of them were given in announcing the entry of judgment on the stipulation of the parties, or for incompleteness in the record, or for noncompliance with the rules of the court, with neither facts nor law involved. Some were occupied entirely with a discussion of the facts on which the issue turned, with no question of law involved. Some contained neither facts nor law, but ordered judgment to be entered on the authority of some other case or cases referred to; and some were decided partly on the facts and partly on authority. It would be presuming too much upon the good nature of the profession to print such opinions at length. Therefore, after printing the cases which do not come under either of these categories, (one hundred and thirty in all, with one hundred and twelve opinions,) two hundred and twenty-one cases will be grouped together in a tabulated statement, which shows as to each whether it was decided on the facts, or on the stipulation of the parties, or on the authority of another case; and if so, of what case.

I. — *OMITTED CASES NOW REPORTED IN FULL.*

LIST OF CASES SO REPORTED IN FULL.

Cases Omitted in the Reports.

Cases Omitted in the Reports.

WEST *v.* BRASHEAR.

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

No. 93. January Term, 1839. — Decided February 19, 1839.

The court on appellant's motion reinstate a case which had been docketed and dismissed on motion of appellees.

Mr. Sergeant, of counsel for the appellants, having stated to the court that the appellants had lodged the transcript of the record of this cause with the clerk of this court some time in the month of January in the year 1838, more than a twelve-month since, but had not been able to obtain the fee bond to the clerk required by the 37th rule of this court until since this appeal had been at the present term of this court docketed and dismissed, but that the appellant was now prepared to give the usual fee bond, and to have the record filed and docketed, now here moved the court to strike out and rescind the order entered in this case on the 19th January of the present term of this court, and for leave to file the record and docket the cause; which was opposed by *Mr. Crittenden*, of counsel for the appellees, who stated that at the last term of this court he applied to have this appeal docketed and dismissed on the

transcript of the record lodged with the clerk by the appellants, which this court refused until he produced the certificate required by the 30th rule of this court, since when he had obtained the necessary certificate, and whereon the appeal had been regularly docketed and dismissed with costs: whereupon this court, not being now here sufficiently advised of and concerning what judgment to render in the premises, took time to consider.

Per curiam. On consideration of the motion made in this cause on a prior day of the present term of this court, to wit, on Saturday, the 16th instant, and of the arguments of counsel thereupon had, as well in support of as against the motion: It is now here ordered by the court that said motion be and the same is hereby granted, that said order be and the same is hereby rescinded and annulled; and that the appellants have leave to docket this appeal, upon the payment of the costs in this case, and filing the usual fee bond.

So ordered.

Mr. Sergeant for appellants. *Mr. Crittenden* for appellees.[1]

EX PARTE HARMON. IN RE DIXON *v.* MILLER.

ORIGINAL.

No. 2. December Term, 1845. — Decided December 30, 1845.

On application for mandamus on a Circuit Court, that court having made return, this court will not, on the suggestion of a third party, pass any order implying that the return was imperfect or might work injustice to the petitioner.

Rule on judges of the Circuit Court of the United States for the District Court of Columbia to show cause why a writ of mandamus should not issue. Motion of A. D. Harmon to be made a party respondent. The case is stated in the opinion.

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

At the last term of this court a petition was filed by Turner Dixon setting forth that he obtained a judgment in the Circuit Court of the District of Columbia for the county of Alexandria against William Deane, Aaron D. Harmon and Joseph H. Miller, upon which, on the 5th of December, 1843, he sued out a *fieri*

[1] The cause was redocketed February 19, 1839, as No. 93 of January Term, 1839.

facias which was levied upon the goods and chattels of the said Miller; that further proceedings upon the execution were afterwards stayed by injunction; that various other proceedings, particularly set out in his petition, subsequently took place in relation to the said judgment in the Circuit Court sitting either as a court of equity or as a court of law; and that finally on the first of June, 1844, the Circuit Court, sitting as a court of law, made an order that no execution issued or to be issued on the said judgment, should be levied on the person or property of the said Miller; and the petitioner thereupon moved this court for a rule on the judges of the Circuit Court to show cause why a mandamus should not issue commanding them to permit an execution to be issued on the said judgment, and levied on the goods and chattels or body of the said Miller.

Upon this motion a rule returnable to this term was accordingly granted, and the judges have made their return, which is now on the files of the court.

In this state of the proceedings Harmon, one of the defendants against whom judgment was rendered as above mentioned, and against whom the *fi. fa.* issued, has filed his petition stating that an order was passed by the Circuit Court in relation to the execution against him, precisely similar to that in relation to Miller of which the relator complains; that he is equally interested with Miller in the proceeding here, but that his case is not brought up, nor the proceedings of the Circuit Court which show the order in relation to him. And upon this statement he and Miller jointly move the court to allow the judges of the Circuit Court to amend their return by adding thereto a statement of the proceedings in his case; a certified copy of which accompanies the petition.

We do not see any ground on which this motion can be maintained. The judges of the Circuit Court have made no application to this court for leave to alter or add to their return, and we are therefore bound to suppose that they are themselves satisfied with it; and that it contains everything that they deem proper to say or return in answer to the rule. This court ought not therefore to pass an order, upon the suggestion of a third party, which would seem to imply that the return was imperfect, and that it might on that account work injustice to the petitioner.

And as concerns the relator, he has undoubtedly a right to proceed if he thinks proper, against Miller alone, and cannot be

compelled to move against the other parties to the judgment in question unless he desires to do so. Whether he has made proper parties or not, and whether he can obtain the remedy he seeks for without including Harmon, are open questions which may be raised on the motion for the peremptory mandamus. But in this stage of the proceeding we certainly cannot inquire whether the necessary parties have all been brought before the court; nor can we require the relator against his will to add another when he himself elects to proceed against Miller alone.

The motion is therefore overruled.

Mr. Davis and *Mr. Brent* for relator. *Mr. Smith* and *Mr. Coxe* for respondent.

UNITED STATES *v.* LYNDE'S HEIRS. SAME *v.* PINTARD'S WIDOW. SAME *v.* DUPLANTIER. SAME *v.* ELKIN'S HEIRS. SAME *v.* CLARK'S EXECUTORS. SAME *v.* POWER'S HEIRS. SAME *v.* WIKOFF'S ADMINISTRATOR. SAME *v.* JOHNSON'S HEIRS. SAME *v.* FORTIER. SAME *v.* LEONARD'S WIDOW. SAME *v.* CITIZEN'S BANK.

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

Nos. 26, 43, 30, 34, 37, 38, 62, 70, 72, 75, 77. December Term, 1851. — Decided February 19, 1852.

Grants of land made by Spain after the Treaty of St. Ildefonso were void.

The case is stated in the opinion.

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

These cases all depend on the same principle. The several grants were all made after the treaty of St. Ildefonso, by which the territory was ceded to the United States. This court has repeatedly decided that these grants are void. And the decisions of the District Court to the contrary in the within mentioned cases must all be reversed, and a mandate issued directing the several petitions to be dismissed.

Mr. Attorney General for appellant. *Mr. May* and *Mr. R. J. Brent* for appellees in No. 26. *Mr. Taylor* and *Mr. Louis Janin* for appellee in Nos. 43, 38 and 72. *Mr. Taylor*, *Mr. Janin* and *Mr. Coxe* for appellees in No. 37. *Mr. Fendall* for appellee in No. 63. No appearance for appellees in Nos. 30, 34, 70, 75 and 77.

UNITED STATES *v.* CHETIMACHAS INDIANS.

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

No. 21, December Term, 1852. — Decided December 15, 1852.

The Attorney General having stated that the Indians are entitled to the land claimed by them, the case is dismissed.

The case is stated in the opinion.

Mr. Chief Justice Taney said: The Attorney General having appeared in this case, and declined arguing it, on the ground that the Chetimachas Indians are entitled to the land claimed by them in this suit; there appears to be no controversy before this court, and the appeal from the District Court is therefore

Dismissed.

Mr. Attorney General for appellant. *Mr. Taylor* and *Mr. Janin* for appellees.

MAYER *v.* THE VENELIA, HER TACKLE ETC., EDDES MASTER.

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

No. 14, December Term, 1854. — Decided December 18, 1854.

The case is dismissed because neither party is ready for argument at the second term at which it is called.

The case is stated in the opinion.

Mr. Chief Justice Taney announced the following order in this cause:

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and it appearing to the court here that this is the second term at which this case has been called for argument, and that neither party is now prepared to argue the same, it is considered by the court that this appeal should be dismissed at the cost of the appellants pursuant to the 55th rule of this court: whereupon, it is now here ordered and decreed by this court, that this cause be, and the same is hereby dismissed, with costs; and that this cause

be, and the same is hereby remanded to the said Circuit Court, to be proceeded in according to law and justice. *Dismissed.*

Mr. H. M. Phillips for appellants. *Mr. Kane* and *Mr. Fallon* for appellee.

SHANNON *v.* CAVAZOS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF TEXAS.

No. 74. December Term, 1857. — Decided April 19, 1858.

One of several codefendants having appealed from a joint decree against all, without summons and severance, the case is dismissed.

The case is stated in the opinion.

Mr. Justice McLean delivered the following order and opinion:

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Texas, and it appearing to the court here, upon the motion of Messrs. Hale and Robinson, of counsel for the appellees, that the decree of the said District Court in this cause is a joint decree against several codefendants, and that Patrick C. Shannon alone has appealed therefrom, without any summons and severance from the rest of his codefendants, it is the opinion of this court that the case is improperly brought here. On consideration whereof, it is now here ordered, adjudged and decreed by this court, that this appeal be, and the same is hereby

Dismissed, with costs.

Mr. J. P. Benjamin for appellants. *Mr. C. Robinson* and *Mr. Wm. G. Hale* for appellees.

PHELPS *v.* EDGERTON.

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

No. 85. December Term, 1860. — Decided March 5, 1861.

It appearing to the court that this writ of error was sued out merely for delay, the judgment is affirmed with ten per cent damages.

Assumpsit on a promissory note, to which the general counts were joined. The pleas were, a general demurrer to the first count, and non assumpsit. The demurrer was overruled, and a verdict taken for plaintiff, and judgment on the verdict, to which this writ

of error was sued out. On behalf of plaintiff in error it was contended that it was error to overrule the demurrer before joinder by plaintiff, and that by reason of non joinder the action was discontinued. On the part of defendant in error it was claimed that the appeal was taken for delay, and damages were asked for.

Mr. Chief Justice Taney delivered the opinion of the Court.

Upon examining the record in this case, the court is of opinion that the writ of error was sued out merely for delay, and therefore affirm the judgment, with ten per cent damages, according to the second section of the 23d rule of this court. *Affirmed.*

Mr. T. Lyle Dicey and *Mr. J. A. Rockwell* for plaintiffs in error. *Mr. B. C. Cook* and *Mr. L. Trumbull* for defendants in error.

DAVIDSON *v.* LANIER.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

Nos. 264, 265, December Term, 1860. — Announced March 14, 1861.

On a motion to dismiss for want of jurisdiction, the opposing counsel is entitled to a reasonable notice, having regard to the distance of his residence from the court, and to the time necessary to enable him to arrange his business so as to be able to be present at the hearing: and it is within the discretion of the court to determine whether the notice actually given was reasonable.

Motion to dismiss. The case is stated in the opinion.

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

A motion has been made in each of these cases to dismiss it for want of jurisdiction, on account of certain defects, as it is alleged, in the process and proceedings made necessary by the act of Congress, in order to bring it before this court.

It is the practice of this court to receive and hear motions of this kind on the day assigned for business of that description, before the case is reached in the regular call of the docket. And the rule has been adopted, because it would be unjust to the parties to delay the decision until the case is called for trial, if the court are satisfied that they have not jurisdiction, and that the case must be ultimately dismissed without deciding any of the matters in controversy between the parties.

But in order to prevent surprise upon the plaintiff in error, or appellant, the court have always, where the motion is made in

advance of the regular call, directed notice to be given to him or his counsel, and required proof that it was served long enough before the motion is heard to give him an opportunity of contesting the motion if he desires to do so. And the time required must depend upon the distance of the counsel or the party from the place of holding the court, and must be sufficient not only to enable him to make the journey, but to arrange business in which he may be engaged when he receives the notice. For, when a case stands so late on the docket of this court as to give no reasonable hope of reaching it during the term, it cannot be expected that distant counsel will leave their usual place of business, and attend here to guard against the possibility of a motion to dismiss.

The motions in these two cases were made about three weeks before the close of the term, but as soon as it could be conveniently made after they were docketed, and the court directed the usual notice to be given. We are satisfied that the counsel for the defendant in error has used every means in his power to comply with the order. But he has no proof that it was actually served. The counsel and client both reside in Mississippi, and the cases stand so late on the docket that a trial could not be expected at this term. Nor could they anticipate that there would be any reason for their attendance. Under these circumstances the court order that the motion be continued, to be heard on the first Friday in next term, provided notice of the motions and the day of hearing be served on the party or his counsel, thirty days before the commencement of the next term.

So ordered.

Mr. R. J. Brent in support of motions. No one opposing.

MIRAMONTES *v.* UNITED STATES.

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

No. 120. December Term, 1863. — Decided February 15, 1864.

A petition to the Mexican government for a surplus of land which was not granted, is no foundation for an equitable claim against the United States.

The case is stated in the opinion.

Mr. Justice Grier delivered the opinion of the court.

The appellant had a valid grant from Alvarado in January, 1841,

for a square league of land to be surveyed within certain boundaries. Soon after this grant was obtained, he procured judicial possession to be given him by an alcalde, and a survey to be made to his satisfaction at the time.

But the line, as fixed by the alcalde, left a strip of land between it and one of the streams called for in his petition and *diseño*, as a boundary.

This became a subject of dispute between Miramontes and José Antonio Alviso.

In 1844 Miramontes presented a petition to the governor alleging a surplus within the limits of his grant of two thousand *varas* and praying for a grant of the *sabrante*. This petition was referred to the secretary to make report. A report was made, showing that Alviso claimed the land and objected to the grant.

It does not appear that the governor granted the disputed land to either of the contesting parties, although Miramontes continues to complain up to April 1846, of the conduct of Alviso, and pray that he might be "summoned to terminate this question."

The commissioners and District Court very properly confirmed the title of claimant to his square league, as it had been measured to him, and refused to extend his boundaries to cover this *sabrante* or surplus for which he had contended so long with Alviso, and had not succeeded in obtaining a title. The petition for a surplus not granted by the Mexican government, is no foundation for an equitable claim against the United States.

The decree of the District Court is affirmed.

Mr. J. A. McDougall for appellants. *Attorney General*, *Mr. J. S. Black* and *Mr. P. Della Torre* for appellee.

In *Brooks* v. *Martin*, 2 Wall. 70, No. 158, December Term, 1863, there is a statement by the reporter that Mr. Justice Catron dissented, but the dissenting opinion is not reported. It is now on file, and is as follows:

These parties formed a partnership, to speculate on soldiers' claims to land warrants, secured by the act of 1847.

They contracted for more than six hundred claims paying about one half the contract price to the soldier, and taking his bond to assign the warrant, when it was issued and the balance paid; and also a power to assign the warrant after its issue, which power was in blank, and to be filled up of a date subsequent to the issuing of the warrant.

The price paid for the claims was about one half of what the warrant would have sold for if it had then existed. The profit on each warrant was seventy dollars, says the complainant in one of his letters.

Cases Omitted in the Reports.

SMITH *v.* ORTON.

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

No. 80. December Term, 1865. — Decided January 15, 1866.

The grantee in a deed of realty, to whom it is conveyed to protect him against an obligation of the grantor's for which he has become surety, becomes the holder of the legal title in trust for the grantor, when the latter has discharged the obligation and thus released him from the liability.

An assignee of a chose in action takes it subject to the equities of the original debtor or obligor, and is bound to inquire into their existence when the instrument itself puts him upon the track of inquiry.

To bring a defence in a case like this within the rule which affords protection to a *bonâ fide* purchaser without notice, it must be averred in the plea or answer, and proved, that the conveyance was by deed, and that the vendor was seized of the legal title; that all the purchase money was paid, and paid before notice; and there must be a distinct denial of notice, not only before purchase, but also before payment.

The case is stated in the opinion of the court.

Mr. Justice Nelson delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the District of the State of Wisconsin, held by the district judge.

The bill was filed to secure the title in lots Nos. 7 and 8, section No. 9, situate in the City of Milwaukee, to Smith, the complainant, against the defendant Orton. The equitable interest in these lots belonged originally to Otis Hubbard, the legal title being in Cyrus D. Davis. The equitable interest in lots Nos. 5 and 6, in block 43, in said city, also belonged to Hubbard, the legal title being in persons in the States of New York and Massachusetts.

These lots Nos. 5 and 6 were sold by Hubbard, with the assistance of his friend T. D. Butler, to Joseph Schram; but as the legal title was not in him, it was agreed that the purchase money should not be paid until the title was obtained and conveyed to Schram, or satisfactory security given that it would be procured within a given time. Security was accordingly given by David Knab, a responsible person, in which Butler joined, and the purchase money was paid. In order to indemnify Knab, Hubbard procured a conveyance of lots 7 and 8 by Davis to him. The security

to Schram is in the form of a bond under seal, and bears date 22d July, 1848, and is conditioned to procure for him a conveyance of the title to the premises free from incumbrances within three months.

On the same 22d July, Knab gave a bond to Butler, conditioned for the conveyance of lots 7 and 8, which had been conveyed to him by Davis as his indemnity on his (Butler's) fulfilling the conditions of his obligation to Schram.

The conditions of the bond given to Schram to secure a conveyance of the title to lots 5 and 6, were fulfilled by Hubbard. Schram, in his examination, states: "I did receive from Otis Hubbard a deed of the lots described in the bond from Tertullus D. Butler, and David Knab to me. The lots were: twenty-five feet in lot 5, and ten feet in lot 6, in block 43," etc. "The deed," he says, "was executed in part by Hubbard for himself, and in part by him as attorney for others." We may add, these deeds were all found on record, several of them from persons holding the outstanding legal title to Hubbard, and also the deed from Hubbard to Schram, the latter bearing date July 4, 1850.

At this stage of the case, and upon the facts as stated, it is apparent that Hubbard, having satisfied the condition of the bond given by Knab and Butler to Schram, the title to lots 7 and 8 held by Knab, simply as a security against this bond, belonged in equity to him. Knab had no longer any interest in it, and must be regarded as holding in trust for Hubbard.

There is, however, another branch of this case that must be examined, and which calls in question this relation of Hubbard to the title, and asserts the title to be in Orton, the defendant.

On the 22d July, 1851, something more than a year after Hubbard had satisfied the bond to Schram, Butler sold and transferred the bond to him from Knab for the title to these lots 7 and 8 to Orton, for a consideration of $2100, as is alleged, to be paid by the latter; and accompanying the sale and transfer, is a power to Orton to "pursue all legal means to recover the full enjoyment of the same."

The defence in this branch of the case is placed on two grounds:

1. That Orton, the defendant, is a *bonâ fide* purchaser of the title in Knab without notice, and,

2. That Butler owned the title, having purchased it from Hubbard.

As to the first ground; the answer sets up this defence, as fol-

lows: the defendant avers that he purchased said bond so executed by Knab to Butler, for the sum of $2100, which he paid at or about the date of purchase, except a portion thereof which was expended in complying with the conditions of the bond to Schram; and that he caused said bond and assignment to be recorded; that at the time of the purchase, the title of record to said lots was in Knab; that this defendant did not know that said Hubbard had or claimed to have any right or interest therein; that after he purchased said bond, he satisfied some of the incumbrances upon said lots 5 and 6, and indemnified Schram against the remainder and procured from him an assignment of the bond of Butler and Knab, and tendered the same to Knab and demanded a conveyance, &c.

This averment in the answer, if admitted to be true, fails to bring the defence within the principle which affords protection to the title of a *bonâ fide* purchaser without notice; and this upon two grounds:

First. An assignee of a chose in action, to which class the bond in question belongs, takes it subject to all the equities of the original debtor or obligor. Now, Knab, who held a title to these lots at the time of this purchase of his bond by the defendant in trust for Hubbard, had a perfect defence against the claim of Butler, his obligee, for a conveyance. Butler had not complied with any one of the conditions of the bond. They were, in substance, that Butler should perform the conditions of the bond to Schram, and which were, as that instrument was drawn, that B. and K. should procure a conveyance of the title from the persons who held it, and who were named, residing in New York and Massachusetts, to themselves, and that they should convey it to Schram; whereas, no such conveyance had been procured nor any such title made to him. On the contrary, the title had been procured from these persons by Hubbard to himself, and he had made the title to Schram. Both these bonds were before Orton, the defendant, at the time he made the purchase of the one from Knab to Butler, for that refers in terms to the one given to Schram; and, being before him, it was not only his interest, but his duty, to inquire if the bond to Schram had been fulfilled, and to ascertain the truth of the transaction; and, in making that inquiry, he would have found that neither Knab nor Butler had performed the conditions, but Hubbard; and the records of the city would, if examined, have confirmed it. He would have learned, also, that the bond to Schram was given for the benefit of Hubbard, and that his trustee, Davis, had conveyed the title in question to

Knab, to indemnify him and Butler for entering into the obligation to Schram. All this he would have learned from Knab and Schram.

But, secondly, the rule which affords protection to a *bonâ fide* purchaser without notice, has no application to this case. To bring the defence within it, it must be averred in the plea or answer and proved, that the conveyance was by deed, and that the vendor was seised of the legal title: that all the purchase money was paid and paid before notice. There must not only be a distinct denial of notice before the purchase, but a denial of notice before payment. Even if the purchase money has been secured to be paid, yet if it be not, in fact, paid before notice, the plea of purchase for a valuable consideration will be overruled. *Jewett* v. *Palmer*, 7 Johns. Ch. 65; *Vattier* v. *Hinde*, 7 Pet. 252, 271; *Boone* v. *Chiles*, 10 Pet. 177, 211; Story, Eq. Pl. §§ 805, 806.

So utterly defective is the case on this branch of it on the part of the defendant, that it would be a waste of time to examine it.

The remaining question is, whether or not Butler had acquired the interest of Hubbard in these lots, so as to cut off his equitable claim to them.

Butler states, on his examination, that he made the purchase from Hubbard a short time before the conveyance of these lots from Davis to Knab; that it was a purchase by parol, no writing having passed between them; that he paid no money as a consideration for the land; that Hubbard owed him for money and merchandise previously received, to the amount of $800; that he had no vouchers from Hubbard of the advances, as they were generally made on his verbal order. He further states that part of his demand against Hubbard was for board of him at different times during the years from 1844 or 1845, to 1849 or 1850. He says he had regular account books where the items of charge against Hubbard during these years were entered, but that they are lost. He further states that he received a portion of the purchase money paid by Schram, some $200 or more, at the signing of the bond to him, which he held in trust for Hubbard, and afterwards paid it over to him as he wanted it.

The deed from Davis to Knab, the time when Butler claims to have acquired Hubbard's interest in these lots, bears date 20th July, 1848. Butler does not pretend any fixed price was agreed upon between the parties, or that any money was paid at the time or since, to Hubbard. The payment of this indefinite consideration

relied on, is the previous advance of moneys and merchandise resting in a running account and board, all within the years from 1844 or 1845 to 1849 or 1850. No items of money, merchandise, or board are given, for the reason as assigned, that the books are lost. This reason might be satisfactory for the want of fulness and detail in an account, but hardly sufficient for the entire absence of evidence of any of the items.

But the conclusive answer to the whole of this testimony is found in schedule "N" in the record, which embraces eight promissory notes given by Butler to Hubbard, extending from August, 1845, to May, 1850, and covering the period of time within which he claims that his account accrued against Hubbard. These notes amount, in the aggregate, to the sum of $1059. One of these notes for the sum of $300, payable one year from date, with ten per cent interest, was given the 22d July, 1848, the day Schram paid the purchase money for lots 5 and 6 to Hubbard, a part of which, as appears from the testimony of Butler, was received by him and paid to Hubbard soon afterwards, as he wanted it. The last note was given as late as May 11, 1850. These notes, unexplained, furnish conclusive evidence by necessary implication, that Hubbard was not indebted to Butler at the time they were given, and disprove the consideration set up by him for the purchase of Hubbard's interest.

Our conclusion, without further examination, is that Hubbard has not been divested of his equitable title to the premises which he held at the time of the conveyance from Davis to Knab.

This interest he conveyed to Joachim F. Gruenhagen on the 7th of June, 1851, from whom the complainant Smith derives his title. He stands in the place of Hubbard invested with his equitable interest.

It appears in the record that a bill was filed by Orton, the present defendant in the Circuit Court of the county of Milwaukee against Knab to compel him to convey the title held by him to these lots founded upon his bond, to Butler, which has been assigned to Orton; and such proceedings were had in the case, that a decree was rendered directing the conveyance. But as Smith, the present complainant, nor either of the persons from whom he derives title, were parties to that suit, these proceedings are of no importance.

It also appears that Hubbard filed a bill in the same court against Knab, Orton and Butler, to compel a conveyance from Knab, and

to quiet the title; but as this case was afterwards discontinued, it is not material further to refer to it.

Upon the whole, after the best consideration which we have been able to give the case, we are of opinion that the decree of the court below should be

Reversed and the cause remitted, with directions to enter a decree for the complainant Smith, and that Orton release all claim or interest to lots 7 and 8 in controversy, and be enjoined from setting up any right or title to the same.

Mr. James S. Brown for appellant. *Mr. H. S. Orton* and *Mr. E. Mariner* for appellee.

WASHINGTON COUNTY *v.* DURANT.

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

No. 105. December Term, 1865. — Decided February 26, 1866.

An appeal allowed or a writ of error served is essential to the exercise of the appellate jurisdiction of this court.

The case is stated in the opinion.

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

This cause was submitted on a printed argument for the defendant in error. Upon looking into the record, we find that it has been brought into this court by agreement of parties, and without the issuing or service of a writ of error. We think that an appeal allowed or a writ of error served, is essential to the exercise of the appellate jurisdiction of this court.

The appeal in this cause is therefore *Dismissed.*

Mr. Charles Mason for plaintiff in error. *Mr. James Grant* for defendant in error.

DAYTON, CLAIMANT OF THE SCHOONER MONTEREY AND CARGO *v.* UNITED STATES.

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

No. 144. December Term, 1865. — Decided February 26, 1866.

A decree in admiralty for the condemnation of a vessel is not final if the libel claims the condemnation of the cargo as well, and the cargo has been delivered to the respondents at an appraised value, and the money deposited with the register.

Cases Omitted in the Reports.

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

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

We have looked into this record and find no final decree. The libel claims the condemnation of the schooner Monterey and cargo. The answer denies this liability. The cargo was delivered to the respondents at an appraised value, and the money was deposited with the register. The decree condemns the schooner, but makes no mention of the cargo. The decree, therefore, does not dispose of the cause and cannot be final. The appeal must, therefore, be dismissed, and the cause sent to the Circuit Court for the District of Maryland for further proceedings.

Mr. Attorney General and Mr. Assistant Attorney General Ashton for the motion. *Mr. Andrew S. Ridgely* opposing.

MILWAUKEE AND MINNESOTA RAILROAD COMPANY *v.* HOWARD.

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

No. 149. December Term, 1865. — Decided April 3, 1866.

The removal or appointment of a receiver in a suit for the foreclosure of a mortgage on a railroad rests in the sound discretion of the court below, and is not reviewable here.

THE case is stated in the opinion of the court.

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

This is an appeal from an order denying a petition for the dismissal of a receiver.

Sebre Howard filed his bill in the District Court of the United States for the District of Wisconsin, as a judgment creditor of the La Crosse & Milwaukee Railroad Company and Selah Chamberlain, to set aside the contract between the defendants and the confessed judgment, which made the subject of the two suits just decided. The cause was afterwards transferred to the Circuit Court.

Sebre Howard having deceased, Charles Howard was made complainant in his stead; and the La Crosse Company having been obliged to allow their road to be sold under mortgage, the Minnesota Company became the proprietor of an important division of it. Before either of these events, a receiver had been appointed in the suit, and had been for several years in possession and management of the road.

The Minnesota Company, on acquiring title, intervened in the suit by petition, and asked the court to discharge the receiver and put the petitioner in possession of the division of the road purchased by them.

The court being divided in opinion, the petition was denied, and the petitioner appealed.

We think the appeal was premature. The decision upon the petition was not a final decree in the cause. The removal or appointment of a receiver, as we have heretofore said, rests in the sound discretion of the court, and is not reviewable here.

The appeal must, therefore, be dismissed.

Mr. Matthew H. Carpenter for appellant. *Mr. John W. Cary* for appellee.

UNITED STATES *v.* ARMEJO.

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

No. 164. December Term, 1865. — Decided April 3, 1866.

After the lapse of a term a general appearance cannot be changed to a special appearance, so as to affect the rights of parties, without leave of court first obtained.

The case is stated in the opinion.

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

The motion to dismiss the appeal in this case must be denied.

It appears from the record that an appeal was allowed to the appellants from a final decree of the District Court for the Northern District of California, on the 21st December, 1863.

The record was brought here and filed at the next term, but no citation was issued to the appellee.

A general appearance was, however, entered in his behalf, and remained on the docket during the return term, which was the last term of this court.

At this term, the entry was limited to a special appearance by the addition of the necessary words. This addition was made by the clerk without direction from the court, in order, as he states, to make it conform to the original direction given him, which he understood to be not for the entry of a general but of a special appearance, and which direction, through his inadvertence, was not properly performed.

We think it was too late after the lapse of a term to alter a gen-

eral to a special appearance, so as to affect the rights of parties; and no such alteration or any withdrawal of appearance can be allowed in any case, without proper notice, and leave of the court first obtained. We must hold, therefore, that the general appearance supplied the defect of citation, and that the appeal is now regularly before us. *Motion denied.*

Mr. Attorney-General and *Mr. John A. Wills* for plaintiff in error.
Mr. W. W. Cope and *Mr. J. M. Carlisle* for defendant in error.

CRANDALL *v.* NEVADA.

ERROR TO THE SUPREME COURT OF THE STATE OF NEVADA.

No. 85. December Term, 1867. — Decided December 23, 1867.

The order remanding the petitioner became, by the certificate of the clerk, a part of the record in this case.

Motion to dismiss. The case is stated in the opinion. See *Crandall* v. *Nevada*, 6 Wall. 35, for further proceedings in this case.

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

This is a motion to dismiss a writ of error to the Supreme Court of the State of Nevada.

The suit in the state court was by writ of *habeas corpus*, issued out of the Supreme Court, upon return of which the petitioner appears to have been discharged; but on the same day this order seems to have been reconsidered, and the petitioner remanded to custody.

The only question before us is, whether the certificate of the clerk appended to the order remanding the petitioner, made that order a part of the record.

The usual certificate, that the transcript contains all the orders and proceedings in the cause, precedes the certificate just referred to in the record. Then follows the certification of the order to remand.

We think that the order thus certified must be taken as a part of the record, precisely as it would be if it had been certified in obedience to a writ of *certiorari* issued upon a suggestion of diminution.

The motion to dismiss must, therefore, be *Denied.*

Mr. P. Phillips and *Mr. T. J. D. Fuller* for the motion.

No one opposing.

WATERS *v.* BARRILL.

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

No. 90. December Term, 1867. — Decided March 23, 1868.

A citation served on the 1st December, before the return of the writ, is served in time.

The averments of alienage and citizenship in the declaration are sufficient to give the court jurisdiction.

THE case is stated in the opinion of the court.

MR. JUSTICE NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Maryland.

A motion has been made to dismiss the case for want of jurisdiction, on the ground that the citation was not served in time. But this is a mistake. It was served on the first of December, before the return of the writ, and is within the cases of *Villabolos* v. *United States*, 6 How. 81, 89, 90, and *United States* v. *Curry*, 6 How. 106, 112.

Although it was returnable with the writ the first of the term, the defendants had thirty days by the statute to appear. The service on Barrill was good: he was one of the joint defendants, and it would have been good if Murr was dead, of which there is no legal proof, as the suit would survive against Barrill.

Then, as to the merits. The only point made is the want of jurisdiction in the court below, for the defect of the averment as to the alienage of the plaintiff and citizenship of the defendant. There is no foundation for this objection in point of fact, as the declaration plainly sets out that the plaintiffs are aliens, and the defendant a citizen of Maryland. *Covington Drawbridge Co.* v. *Sheppard*, 20 How. 227; *Philadelphia, Wilmington &c. Railroad* v. *Quigley*, 21 How. 202; *Sheppard* v. *Duncan*, 14 How. 504, 508.

Judgment affirmed.

Mr. R. J. Brent for plaintiff in error. *Mr. S. T. Wallis* and *Mr. John H. Thomas* for defendant in error.

Cases Omitted in the Reports.

LE MORE *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

No. 107. December Term, 1867. Motion made in the case at December Term, 1868. — Decided March 22, 1869.

This court will not recall a mandate at the term following the one when it was sent to the inferior court.

THIS was a motion for the recall of a mandate sent down at the last term of court. The case made by the motion is stated in the opinion.

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

This is a petition that the court will cause to be brought before it, the record and proceedings in a cause which was argued and disposed of by decree at the last term, in order to correct an error in the printed transcript of the record.

To make the allowance of the prayer of the petitioners available to them through the correction of the alleged error, it would be necessary to recall the mandate sent to the inferior court, to set aside the decree rendered at the last term, to rehear the cause and make a new decree.

This cannot be done without reversing the settled and uniform practice of the court, and the petition must, of course, be *Denied.*

Mr. Caleb Cushing for the petitioner. No one opposing.

CLARK *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 113. December Term, 1867. — Decided March 30, 1868.

The question of law in this case ought not to have been made, either below or here, and the judgment below is affirmed.

THE case is stated in the opinion.

MR. JUSTICE GRIER delivered the opinion of the court.

The plaintiff's claim in this case is on a contract made with Major Du Barry, an Assistant Commissary of Subsistence, acting in behalf of the United States. The only question of law raised upon the record was, whether the written agreement between the parties

should be received as the correct exponent of the contract, or the correspondence between them which preceded it.

The question of fraud or mistake was one of fact, and was negatived by the finding of the court, which is conclusive here. The question of law ought not to have been made, either in that court or here. Let the judgment of the Court of Claims be *Affirmed.*

Mr. John Jolliffe for appellants. *Mr. Eli P. Norton* and *Mr. John J. Weed* for appellee.

CLARKE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 116. December Term, 1867. — Decided March 16, 1868.

A motion for a *certiorari* to the Court of Claims is denied.

The case is stated in the opinion.

Mr. Justice Nelson delivered the opinion of the court.

This is a motion for a *certiorari* in the case of an appeal from a decree in the Court of Claims on a suggestion of diminution of the record. The diminution as alleged is, that the record does not set out the joinder of issue nor the trial of the same nor the evidence, findings, or judgment of the court; also many orders made in the case.

We have looked into the record and are of opinion that the suggestions are not well founded, in point of fact, with the exception of the one relating to the evidence, which, of itself, is answered by the rules of this court on the subject. *Motion denied.*

Mr. James Hughes and *Mr. John M. McCalla* for appellant. *Mr. John J. Weed* and *Mr. Eli P. Norton* for appellees.

MILWAUKEE AND ST. PAUL RAILROAD COMPANY *v.* SOUTTER. SAME *v.* SAME. SAME *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

Nos. 161, 43, 62. December Term, 1867. — Decided March 16, 1868.

The decrees for the payment of rent by the Milwaukee and St. Paul Railroad Company to the receiver of the La Crosse and Milwaukee Railroad were not final decrees from which appeals could be taken to this court, and this proceeding was irregular, and involved useless litigation.

The case is stated in the opinion of the court.

Milwaukee Railroad Co. *v.* Soutter.

Mr. Justice Nelson delivered the opinion of the court.

These cases are appeals from decretal orders of the Circuit Court for the District of Wisconsin. The first was rendered on the 18th July, 1865, directing the Milwaukee and St. Paul Company to pay to the receiver in the case of *Soutter* v. *The La Crosse and Milwaukee Railroad Company*, $237,338.78, for the use of the rolling stock on the Western Division of the road, from the 12th June, 1863, to 28th February, 1865.

The second is an appeal from a like decree by the same court, ordering the payment of $81,106.08, for the use of the same rolling stock from the 28th February, 1865, to the 9th January, 1866. The third is an appeal from a decree of July 18, 1865, directing the Milwaukee and St. Paul Company to deliver possession of this stock to the Milwaukee and Minnesota Company. These orders were made upon the idea, that the decree in the case of *The Milwaukee and Minnesota Railroad Company* v. *The Milwaukee and St. Paul Railroad Company*, on the demurrer to the supplemental bill, was a final decree, and settled the title to the rolling stock, the subject of controversy, in favor of the claim of the Eastern Division, and hence, that that division was afterwards entitled to compensation for the use of the stock; whereas, leave was given to the defendants to answer, and an answer put in, and proofs taken preparatory to a final hearing on pleadings and proofs, so that the questions involved were left open and undetermined. It was wholly irregular, therefore, in this state of the cause, to institute proceedings and endeavor to recover compensation for the use of the property in controversy, until the right to the same had been finally determined. The proceeding was not only destitute of any legal foundation, but involved an idle and useless litigation, upon an unwarranted assumption, as to the effect of the preliminary decision on the demurrer.

The irregularity, as well as the awkwardness of the result from this inadvertent proceeding, is exemplified by the circumstance that the case has been heard on the pleadings and proofs at the present term, and the court have determined, upon a full consideration, that the right to the use of the stock on the Western Division belonged to the Milwaukee and St. Paul Company, and hence it was not liable to the Eastern Division for the use of the same.

It follows that the decrees in both cases are erroneous, and should be reversed, and the cause remanded to the court below, with directions to enter decrees for the Milwaukee and St. Paul Company.

The third is a decree from the same court, directing the Milwaukee and St. Paul Company to deliver this rolling stock into the possession of the Milwaukee and Minnesota Company, upon the idea, already explained, that the decision on the demurrer to the supplemental bill had determined that the right belonged to the Eastern Division. For the reasons above stated this decree is erroneous, and should be reversed.

Decree reversed. Cause remanded, and decree to be entered for Milwaukee and St. Paul Company.

Decree reversed in each case.

Mr. Justice Miller dissented.

Mr. J. W. Cary for appellant in each case. *Mr. H. A. Cram*, *Mr. Caleb Cushing* and *Mr. M. H. Carpenter* for appellee in Nos. 43 and 62, and *Mr. H. A. Cram* and *Mr. Caleb Cushing* for appellee in No. 161.

PATTERSON *v.* HOA'S EXECUTRIX.

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

No. 326. December Term, 1867. — Decided March 27, 1868.

It appearing, on inspection of the record, that the appeal bond was filed too late to make the writ of error operate as a *supersedeas*, the court vacates an order heretofore made allowing a writ of *supersedeas*.

Motion to vacate a *supersedeas*. The case is stated in the opinion.

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

This is a motion to vacate a *supersedeas*, allowed provisionally in this cause at a former day of this term.

It is made on the coming in of the answer of the District Judge holding the Circuit Court for the District of Louisiana, to a rule to show cause why an absolute *supersedeas* should not issue.

On inspection of the record we find that the judgment of the Circuit Court was rendered on the 13th of May, 1863, and that the bond for prosecution of the writ of error sued out upon it was not filed until the 25th. In order to make a writ of error a *supersedeas*, the law requires that the bond be filed within ten days. In this case, consequently, the bond was filed too late.

It is unnecessary, therefore, to consider the matters stated in the answer of the judge of the court below.

The order heretofore made, allowing a writ of *supersedeas*, will

be vacated, and the order now directed will be certified to the Circuit Court for the District of Louisiana. See 8 Wall. 292.

Mr. P. Phillips for the motion. *Mr. T. J. Durant* opposing.

THE STATE OF VIRGINIA, PETITIONER.

ORIGINAL.

No. 11. Original. December Term, 1868. — Decided February 15, 1869.

The court withholds its decision on this motion for a writ of prohibition, until the certificate of division of opinion on the allowance of the writs of *habeas corpus* complained of can be filed, and a hearing had thereon.

This was a petition for a writ of prohibition. The case is stated in the opinion.

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

The Chief Justice, who holds by allotment the Circuit Court for the District of Virginia, has informed the court that before the pending motion for prohibition was made, he signified to the district judge his dissent from the opinion expressed by him in favor of the allowance of the writs of *habeas corpus* complained of in the petition; and that he has advised the district judge now holding the Circuit Court, to direct that this division of opinion in respect to the motion for the writ now pending in the case of Peter Phillips, be certified to this court.

There is nothing in the provisional order, staying further proceedings by the district judge, which can be properly construed as prohibiting this course; and it is expected that the certificate will be filed at an early day.

On the first Friday thereafter the court will hear argument upon it; and in the meantime the decision of this court on the motion for a writ of prohibition, pending, will be withheld.

The clerk will advise counsel accordingly, and will certify this direction to the district judge for the District of Virginia.

Mr. J. H. Bradley and *Mr. James Lyons* for petitioner.

MARSHALL *v.* LADD.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 78. December Term, 1868. — Decided February 15, 1869.

The legal title must prevail in ejectment; and neither party can set up facts which go to show that equitably the other party is the rightful owner of the property.

Cases Omitted in the Reports.

The rulings of the court of Oregon upon the statutes of that State raise no Federal question in this case.

EJECTMENT. The case is stated in the opinion.

MR. JUSTICE MILLER delivered the opinion of the court.

In this case an action of ejectment was brought, by one of the defendants in the suit just decided (*Silver* v. *Ladd*, 7 Wall. 219), against the plaintiff in that suit and his tenant, Marshall, for a part of the land included in the certificate to Mrs. Thomas, the validity of which we have affirmed.

In this case Ladd, the plaintiff, introduced his patent from the United States, and the defendants introduced the certificate of location to Mrs. Thomas, and relied on that and on the facts which went to show that it was rightfully issued, to defeat the recovery under Ladd's patent.

The court refused several instructions prayed by defendants, based on that defence, and told the jury that the legal title which passed from the United States to the plaintiff, must prevail over the claim to hold possession under the certificate.

In this the court was undoubtedly correct. It is of the essence of the action of ejectment that the legal title must prevail. And neither party can set up in that proceeding facts which go to show that, equitably, the other party is the rightful owner of the property. It is the peculiar province of a court of equity to restrain the assertion of a legal title wrongfully held, or to compel its transfer to the person rightfully entitled to it.

We need not here decide whether certain statutes of Oregon, intended to give to settlements made under the donation law the effect of a legal title, were applicable to a case where a patent had issued, or were properly construed by the Oregon court. Any error of that court in construing the statute of the State, cannot be reviewed here.

The remedy of plaintiff in error is to compel a conveyance of the title from Ladd, and with it a decree for possession, or an action of ejectment founded on the title so acquired.

The judgment of the Supreme Court of Oregon is *Affirmed.*

Mr. J. H. Mitchell, *Mr. J. S. Smith* and *Mr. Rufus Mallory* for plaintiffs in error. *Mr. Edward Lander*, *Mr. T. J. Coffey* and *Mr. J. Hubley Ashton* for defendants in error.

MORRIS *v.* SHRINER.

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

No. 133. December Term, 1868. — Decided April 15, 1869.

Where there is only one exception to a general finding by the court in an action at law tried without the intervention of a jury, and that is not well taken, this court will not examine the record further.

EJECTMENT. The case is stated in the opinion.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an action of ejectment. The plaintiff in error was the plaintiff in the court below. The parties waived the intervention of a jury and submitted the cause to the court.

According to the statute regulating the practice in such cases, the finding of the court upon the facts may be either general or special, and shall have the same effect as the finding of a jury. When the finding is special, the review by this court may extend to the sufficiency of the facts found, to support the judgment. Act of March 3, 1865, § 4, 13 Stat. 501. In this case the finding was general, that the defendants were not guilty, etc., and judgment was rendered in their favor.

We must, therefore, look to the bill of exceptions as if the finding had been by a jury, for the action of the court, and the grounds upon which it is sought to reverse the judgment.

The bill extends over more than fifty printed pages. It contains the testimony, mostly documentary, given by both parties. We have been able to find in it but one exception, that is to the admission of a small part of the evidence offered by the defendants. The court was clearly right in admitting it. The objection is not insisted upon in the agreement of the learned counsel for the plaintiff in error. We need not, therefore, more particularly advert to it. The bill concludes as follows:

"The court thereupon found for the defendants, and found that defendants were not guilty of unlawfully withholding from plaintiff the possession of the premises in controversy. To preserve all which matters and things of record in this cause, defendant prays the court to sign and seal this bill of exceptions on and during the progress of the trial herein, and as the several steps herein were

taken, which upon and during said trial was done accordingly, and this bill of exceptions filed on and during said trial."

There being but the single exception in the bill, we can examine the case no further.

Finding that exception not well taken, we are constrained to affirm the judgment, and it is affirmed accordingly. *Affirmed.*

Mr. J. M. Carlisle for plaintiff in error. *Mr. Jackson Grimshaw* for defendant in error.

AMERICAN WOOD PAPER COMPANY *v.* HEFT.

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

No. 154. December Term, 1868. — Decided March 1, 1869.

In this case the court permits a third party to intervene and file affidavits to show that the suit has been settled between the parties, and that its further prosecution is collusive and fictitious and for the purpose of aiding further proceedings against persons not parties to the record; and, counter affidavits being filed by the appellant, a rule is issued against the appellant to show cause why the suit should not be dismissed.

The case is stated in the opinion of the court. For further proceedings in it, see 8 Wall. 333.

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

This is a motion for leave to intervene and to move to dismiss the appeal upon two grounds, namely:

(1) That the suit of the appellant is merely fictitious, there having been a settlement of the matter in litigation between the parties.

(2) That the suit is now prosecuted, not to determine any real controversy between the parties to the record, but to obtain a decree on which to found an application for an injunction against persons really interested, adversely to the appellants, but not parties to the record, and among them against the person in whose behalf the motion is made.

The affidavits in support of the motion do not show that there was no real controversy in the Circuit Court, but are introduced for the purpose of satisfying us that since the decree in that court the matters there litigated have been settled in such a manner that the appellees have no further interest in the cause.

An affidavit against the motion has been filed by the appellants, in which affiant describes himself as yet of the company, and denies

that the matters in litigation upon the appeal have been settled; but avers, on the contrary, that the appeal is prosecuted in good faith and for the determination of a real controversy.

Taking all the affidavits together, in connection with the circumstance that no appearance has been entered in this court for the appellees, we are of the opinion that enough is shown to warrant a rule against the appellant, to show cause why the appeal should not be dismissed.

In the case of *Lord* v. *Veazie*, 8 How. 251, 254, in this court, an appeal was dismissed upon motion, the court being satisfied, by the affidavit produced, that the suit was fictitious and collusive; and the same course was pursued upon similar showings in *Cleveland* v. *Chamberlain*, 1 Black, 419, 425. *Fletcher* v. *Peck*, 6 Cranch, 87, 147, *per* Johnson, J., dissenting.

In these cases no doubt was left in the judgment of the court, that the suits were in fact what the affidavits in support of the motion to dismiss alleged them to be.

In this case, we do not think it proper to go at present to the extent of dismissal.

We think, indeed, that it would be the better practice in cases similar to this, to move in the first instance upon affidavits for a rule to show cause why the suit should not be dismissed.

That rule will now be awarded returnable the 9th day of April next, and leave is given to both parties to take depositions on sufficient notice before any Commissioner of the United States, in support of the rule and against it. *Rule granted.*

Mr. B. F. Butler for intervenor. *Mr. T. A. Jenckes* for appellant. *Mr. Leonard Myers* for appellees.

CHICAGO *v.* BIGELOW.

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

No. 183. December Term, 1868. — Decided April 12, 1869.

The record showing no allowance of appeal below, and it appearing by affidavits that an appeal was actually allowed of which the clerk omitted to make entry, this court refused a *certiorari* to bring up the record; and the case was passed to enable appellant's counsel to move in the Circuit Court for an entry *nunc pro tunc* of the prayer and allowance.

THE case is stated in the opinion.

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

The record shows no allowance of appeal in the court below, and this is usually a sufficient ground for dismissal.

But it appears from affidavits, that an appeal was in fact prayed and allowed; and that the condition of the record is due to the omission of the clerk below to make the proper entry.

Under these circumstances we think that neither the motion of *Mr. Carpenter* to dismiss, nor the motion of *Mr. Irvin* for a *certiorari*, should be allowed.

We cannot dismiss for the want of an allowance of an appeal, when it is satisfactorily shown by the affidavits that an appeal was actually allowed, without giving the appellant the opportunity to make record proof of the fact. Nor can we allow a *certiorari*, when it appears that nothing is omitted from the record which is of record in the court below.

The cause will be passed until the second Monday of October, that the counsel for the appellant may move upon proper showing for an entry, *nunc pro tunc*, of the prayer and necessary allowance of appeal, in the Circuit Court.

If such an entry shall be made by direction of the Circuit Court, the motion for *certiorari* may be hereafter renewed. *So ordered.*

Mr. B. R. Curtis and *Mr. S. A. Irvin* for appellant. *Mr. M. H. Carpenter, Mr. S. A. Goodwin* and *Mr. E. C. Larned* for appellee.

LYNCH *v.* DE BERNAL.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 305. December Term, 1868. — Decided November 5, 1869.

A motion to dismiss for want of jurisdiction is denied because it involves looking into the merits.

Motion to dismiss. The case is stated in the opinion.

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

The question of jurisdiction in this case cannot be determined without opening the record and looking into the merits of the controversy.

The motion to dismiss for want of jurisdiction will, therefore, be denied; but may be argued upon the hearing of the cause. See 9 Wall. 315. *Denied.*

Mr. E. L. Goold and *Mr. Frederick Billings* for the motion. *Mr. George H. Williams* and *Mr. J. Hubley Ashton* opposing.

TEXAS *v.* WHITE.

ORIGINAL.

No. 4. Orig. December T., 1869. — Decided February 7, 1870, and November 11, 1870.

A defendant in equity is required to pay into court for the benefit of complainant money received by him pending the litigation, before service of process but after knowledge of the complainant's equity.

A rule is granted without affidavits, under the circumstances of this case, (though the practice is irregular,) to show cause why money should not be paid into court for the benefit of complainant.

These were two motions made after the entry of the final decree in *Texas* v. *White*, 7 Wall. 700, 741. The first motion which was for the payment of money into court related to the defendant, Stewart, who is mentioned in the note on page 702 of the report of that case. In the second, (for a rule *nisi* to show cause why money should not be paid into court,) the motion was for a rule upon George W. Paschal. The result of the granting of this rule is reported in *In re Paschal*, 10 Wall. 483.

Mr. Chief Justice Chase delivered the opinion of the court on the first motion, February 7, 1870.

This is a motion in behalf of the complainant for an order upon the defendant, Stewart, to pay the amount of the money received by him pending the litigation into court.

The decree in this cause heretofore rendered, found that the complainant was entitled to recover certain bonds and coupons, and any proceeds thereof which had come into the possession or control of the defendant, with notice of the equity of the complainant; and further that the defendant, Stewart, was accountable to the complainant to make restitution of four of said bonds, numbered 4230, 4231, 4235, and 4236, with the coupons attached, or make good the proceeds thereof.

The decree as to Stewart was rendered *pro confesso*, and a motion was made to set it aside, and for a new hearing, on the ground that the proceeds of the bonds were paid to him before serving of process; but on consideration, the court being satisfied that the payment of the bonds was received by him pending the litigation, and, though before service of process on him, with notice of the equity of the complainant, denied the motion.

Upon the principle of this decision the complainant is entitled to the order for which the motion asks, and it will be allowed.

The clerk is directed to ascertain the amount received by the defendant, Stewart, which amount the defendant is required to pay into court, for the use of the complainant, within thirty days from the date of this order, February 7, 1870. *Motion granted.*

Mr. George W. Paschal for the motion. *Mr. James Hughes* opposing.

Mr. Justice Clifford delivered the opinion and order of the court on the second motion November 11, 1870:

Responsive to the motion submitted by *T. J. Durant* in this case: Ordered, that a rule *nisi* issue to George W. Paschal, returnable on Friday next, to show cause, if any, why the rule prayed in the motion shall not be granted — that he, the said Paschal, pay to the clerk of this court for the benefit of the complainant, the sum of forty-seven thousand three hundred and twenty-five dollars, gold, received by him in behalf of the complainant in said cause, as alleged in the pending motion.

Motions for such a rule ought regularly to be accompanied by an affidavit verifying the facts on which they are grounded, and, when not so supported, they will not in general be entertained by the court for affirmative action; but the docket entries and papers in the case show that due notice was given to the respondent before the hearing, and inasmuch as the respondent appeared by counsel and admitted that he had received the amount alleged in the motion, and expressed through his counsel his readiness to answer the motion upon the merits, the court think it proper to grant the rule *nisi*, giving leave to the parties respectively to file, at the hearing on the rule now ordered, such affidavits, pertinent to the issue involved in the rule, as they shall be advised are necessary to the present inquiry. *Rule granted.*

Mr. T. J. Durant for the motion. *Mr. A. G. Riddle* opposing.

On the 14th day of the same November, Mr. Justice Clifford announced that, Mr. Paschal assenting, a rule would issue to him to show cause why his name should not be stricken from the docket in the case of *Texas* v. *Peabody's Executors* as counsel for the complainant. See *In re Paschal*, 10 Wall. 483.

LATHAM *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 6. December Term, 1869. — Decided December 13, 1869.

An order for allowing an appeal relates back to the date of the prayer for allowance, and is considered as made on that day.

Motion to dismiss. The case is stated in the opinion.

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

This is a motion to dismiss the appeal from the judgment of the Court of Claims, on the ground that it was not allowed within the ninety days fixed by the statute.

And it appears that the order of allowance was not made within the statutory time. But it also appears, on examination, that the prayer for allowance was within the time, and we have heretofore held that the order allowing the appeal must have relation back to the date of the prayer for allowance, and be considered as made on that day.

The motion must therefore be *Denied.*

Mr. Attorney General, *Mr. Assistant Attorney General Talbot*, *Mr. E. P. Norton* and *Mr. J. J. Weed* for the motion. *Mr. J. M. Carlisle*, *Mr. J. D. McPherson* and *Mr. L. S. Chatfield* opposing.

This appeal was subsequently dismissed by the "unanimous judgment of the court." See 9 Wall. 145.

KENOSHA *v.* CAMPBELL.

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

No. 144. December Term, 1869. — Decided April 4, 1870.

Campbell v. *Kenosha*, 5 Wall. 194, affirmed. The court is satisfied that this writ of error was not sued out for delay, and refuses to allow 10 per cent damages.

The case is stated in the opinion.

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

The record in this case was before us at the December Term, 1866. The judgment of the court below had been in favor of the city of Kenosha, and the writ of error was prosecuted by the now defendant in error. The judgment was reversed; and on a new

trial, there was a judgment against the city. And the city is now plaintiff in error, and seeks the reversal of the last judgment.

Counsel have labored with much zeal and ability to satisfy the court that, upon the former hearing, "One important and controlling fact was misapprehended, or did not sufficiently appear in the case at that time." But we are not convinced that there was any such misapprehension, or that any important fact escaped the observation of the court.

The judgment of the Circuit Court, therefore, must be *Affirmed.*

Under the circumstances of the case, however, we cannot say that it was prosecuted merely for delay.

The motion for affirmance with ten per cent damages must, therefore, be denied.

Mr. John W. Cary for plaintiff in error. *Mr. Wm. P. Lynde* for defendant in error.

DOWNING *v.* McCARTNEY.

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

No. 163. December Term, 1869. — Decided April 11, 1870.

An appeal by one of three complainants from a joint decree, without notice to the others and without their refusing to join in it, is dismissed.

The case is stated in the opinion.

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

The decree below was joint against the three complainants. One only has appealed; and there is nothing in the record showing that the other complainants had notice of this appeal, or that they refused to join in it.

The appeal, therefore, must be *Dismissed.*

Mr. W. C. Goudy for appellant. *Mr. James Hughes*, *Mr. J. W. Denver*, *Mr. Charles F. Peck* and *Mr. L. Janin* for appellees.

WOOD *v.* RICHARDS.

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

No. 215. December Term, 1869. — Decided April 30, 1870.

The hearing on a motion for additional security on a writ of error, supported by affidavits but without notice to the opposite party, is postponed in order that notice may be given.

Baltimore Railroad *v.* Marshall County Supervisors.

Motion to give security for costs, etc.

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

This is a motion in behalf of defendant in error for an order that plaintiff in error, who was also plaintiff below, give additional security for costs and damages which may be sustained by the defendant by reason of his wrongful complaint. The motion is founded on affidavits of insolvency of the sureties in the original bond, which certainly are, *prima facie*, sufficient.

But no notice of the motion appears to have been given to the plaintiff in error; and he has had no opportunity to put in counter affidavits.

The hearing of the motion will, therefore, be postponed until the first motion day in November next, in order that proper notice may be given.

Mr. L. P. Poland and *Mr. George S. Boutwell* for the motion. *Mr. P. Phillips* opposing.

THE BALTIMORE & OHIO RAILROAD *v.* MARSHALL COUNTY SUPERVISORS.

CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

No. 267. December Term, 1869. — Decided December 13, 1869.

This court has jurisdiction of a case brought up on a certificate of division of opinion on the question whether the Circuit Court has jurisdiction of it.

A motion to advance is denied, because not coming within the 30th rule.

The case is stated in the opinion.

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

The motion, to dismiss this case for want of jurisdiction, must be denied. It comes here upon a certificate of division of opinion, and the principal point certified is whether the Circuit Court has jurisdiction. It is quite clear that this court has jurisdiction to determine that point.

A motion has also been made to advance the cause upon the docket on the ground that very important interests of the State of West Virginia are involved in the litigation.

The case, however, does not come within any of the exceptions to the 30th rule, which requires that all cases shall be heard when

reached in the regular call of the docket, and in the order in which they are entered.

We are obliged, therefore, to deny the motions.

Both motions denied.

Mr. B. Stanton and *Mr. D. Lamb* for the motions. *Mr. J. H. B. Latrobe* and *Mr. J. R. Tucker* opposing.

COX *v.* UNITED STATES *ex rel.* McGARRAHAN.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 337. December Term, 1869. — Decided January 19, 1870.

The court deny a motion to rescind an order advancing this cause founded upon the fact that the writ of error to the judgment below was allowed November 30, 1869, less than thirty days before the first day of the present term, which began December 6, 1869.

This was a motion to rescind an order, made December 13, 1869, advancing this case for trial. The case is stated in the opinion.

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

We have considered the objection made by *Mr. Phillips* to the hearing, during the present term, of the case of *The Secretary of the Interior* v. *McGarrahan*. It is founded upon the fact that the writ of error to the judgment of the Supreme Court of the District of Columbia, directing the issue of a peremptory *mandamus* to the Secretary was allowed on the 30th November, 1869, less than thirty days before the first day of the present term began, on the sixth of the present month.

The citations and the writ of error were both served on the same day. The 22d section of the Judiciary Act, taken in connection with the act of 1803, provides for the re-examination of cases on writ of error, the adverse party having at least thirty days' notice. This provision does not necessarily require that the thirty days' notice shall be given prior to the first day of the term; but in the case of *Welsh* v. *Mandeville*, 5 Cranch, 321, the court held as a matter of discretion, that they would not compel the hearing of the cause at the first term unless such notice had been given, and this decision was made the rule of the court. This decision was made in accordance with a rule of the court adopted February Term, 1803, 1 Wheat. xvi, Rule XVI, that where the writ of error issued within thirty days before the meeting of the court, the defendant is at liberty

to enter his appearance and proceed to trial; otherwise, the cause must be continued. The above decision seems to have been made in 1809. By the rule adopted February Term 1821, 1 Pet. xxiv, Rule XIX, § 1, it was made the duty of the plaintiff to docket the cause or file the record within the first six days of the term, on failure of which the defendant might docket the cause and file the record; and thereupon the cause was to stand for trial as if the record had been filed within the first six days. The defendant had the option, upon a certificate of the clerk of the court where the judgment was rendered, to have the cause continued or dismissed without hearing. *Motion denied.*

Mr. Attorney General and *Mr. J. Hubley Ashton* for plaintiff in error. *Mr. P. Phillips* and *Mr. A. L. Merriman* for defendants in error.

On the denial of this motion the argument of the cause proceeded. The case is reported in 9 Wall. at page 298.

PEYTON *v.* HEINEKIN.

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

No. 127. December Term, 1871. — Decided April 15, 1872.

There is no merit in any of the defences set up here; and, it being apparent that the appeal was taken for the purpose of delay, the judgment below is affirmed with interest and 10 per cent damages.

In a contract between a commission merchant in New York and a person in another State that the latter shall send merchandise to the former to be sold, and that the former shall make advances on it to be repaid with commissions and interest out of the sales, the rate of interest is to be determined by the laws of New York, the place of performance.

A factor who insures goods consigned to him for the benefit of his principal may recover from him the cost of the insurance.

The case is stated in the opinion.

Mr. Justice Strong delivered the opinion of the court.

There is no merit in any of the exceptions which have been taken to this decree. The contract, which was a deed of trust to secure the repayment of future advances, defined with sufficient certainty the property conveyed, and there could have been no difficulty in identifying it even without reference to the deeds of the grantor. These deeds were, however, referred to as parts of the description, and they may, therefore, be called in aid of the description, if it

could be held defective. But no such defence was set up in the court below. It was not there pretended that the contract was void, either for uncertainty of description, or for any other reason.

Nor is there any validity in the objection that the contract was usurious. The complainants were commission merchants in the city of New York, who agreed to advance money to the defendant, from time to time. To reimburse them for such advances, the defendant undertook to send flour to them in New York, which they agreed to sell and, after deducting commissions and legal interest according to the New York rate, to credit him with the balance. Thus the advances were to be made in New York, and they were to be repaid there. That State was the place of performance, and hence it was legitimate to fix the rate of interest there allowed by law.

There is no error in the decree directing a sale. It is sufficiently specific, and the defendant cannot complain that the sale was ordered to be upon credit when it might have been decreed to be for cash.

The exceptions to the report of the master require only slight notice. They are very trivial. The credit of $40 discount on the draft of August 24 was properly disallowed. The draft was paid by the complainants in full when it fell due, and the defendant is charged with interest only from the time of payment.

The charge of money paid by the complainants for insurance was correct. They were factors, and it was their duty to protect the flour with the same care as that which a prudent man would extend to his own. It is a recognized usage, if not the duty, of factors, to insure their principal's goods. Smith Mer. Law, 124, 125.

The calculation of interest by the master was only too favorable for the defendant.

This disposes of the case. It is very obvious to us that this appeal was taken only for the purpose of delay. It is therefore

Affirmed with interest and ten per cent damages.

Mr. Henry Cooper, Mr. Baylie Peyton in person, and *Mr. Caleb Cushing* for appellant. *Mr. Conway Robinson* for appellees.

GARDNER *v.* GOODYEAR DENTAL VULCANITE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

No. 133. December Term, 1871. — Decided March 3, 1873.

One party to a suit cannot pay the fees of counsel on both sides, both in the court below and on appeal, without being held to have such control over both the preparation and argument of the cause, as to make the suit merely collusive in both courts.

Motion to dismiss. The case is stated in the opinion.

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

The original suit in equity was brought by the Goodyear Dental Vulcanite Company against Gardner, to enjoin him from the use of certain patented subjects, belonging, as alleged, to the company, and for an account. The case was heard upon a bill, answer and testimony, and there was a decree in favor of the company in the Circuit Court for the District of Rhode Island in September, 1870. Upon appeal to this court, the decree below was affirmed on the 6th of May, 1872, but the opinion has not been read.

The defence was conducted by counsel originally employed and paid by Newbrough, under whom Gardner was licensee. On the 1st of July, 1869, before the decree in the Circuit Court, Newbrough and the company compromised all matters of difference between them, with the understanding that this suit should go on to the final hearing and determination, both in the Circuit Court and in this court, on appeal, as if the compromise had not been made.

The company, however, paid the counsel employed for the defence as well as for themselves in the Circuit Court, and subsequently in this court.

These facts appear from the record and from the admissions of the company, in the 9th Article of their answer to the motion to dismiss the appeal. They are the only facts which we think it necessary to notice.

It may be that the company has not become the legal or equitable owners of the opposing interests involved in the suit. There may be, and doubtless are, large opposing interests, of which they are neither the legal nor equitable owners. But it cannot be admitted that one party to a suit can pay the fees of counsel on both sides,

both in the court below and on appeal, without being held to have such control over both the preparation and argument of the cause, as to make the suit merely collusive in both courts. It can make no difference that the counsel fees were charged to the party apparently, though not really, liable to pay them, and payment from the other party procured through him. This, indeed, is a circumstance against the party who pays the fees, rather than in his favor.

The motion to vacate the decree of affirmance, heretofore made, and to dismiss the appeal must, therefore, be granted, and an order made to recall the mandate which has been issued to the Circuit Court. We take occasion, however, to say, that we see nothing in the conduct of the counsel who actually represented the company which merits blame, or which ought to affect in any degree the high esteem in which they have been held. Neither of them appears to have had any knowledge of any arrangements made by their client with the opposing party. *Motion granted.*

Mr. J. S. Black for the motion. *Mr. Causten Browne* submitted an explanatory statement to the court.

WELCH *v.* BARNARD.

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

No. 141. December Term, 1871. — Decided April 22, 1872.

The decree below rightfully denied to the parties their claim for rents and profits, and it is affirmed.

The case is stated in the opinion.

Mr. Justice Field delivered the opinion of the court.

In 1837 one Thomas Barnard, a citizen of the State of Mississippi, filed a bill in the Circuit Court of the United States for the Eastern District of Arkansas, against Chester Ashley, Silas Craig and others, to obtain a decree for the cancellation of certain patents issued to them, and to quiet his title to certain real property in Arkansas, of which he claimed to be the owner and occupant.

In 1853, by a decree of the court rendered in that suit and in a cross-suit commenced by the defendants, the title to the property was adjudged to be in Silas Craig, and the heirs and executrix of Chester Ashley, he having died pending the suits; and the complainants were decreed to surrender possession of the premises, or

such parts thereof as were occupied by them, and to pay the value of the rents and profits of such parts as were possessed and used by Barnwood or his heirs, he also having died pending the suits, after the conveyance of the property by the governor of the Territory to Craig and Ashley, until such parts were sold by them to other persons. And it was ordered that it be referred to a master in chancery, to take and state an account of such rents and profits, and to ascertain what portions, if any, of the property had been sold by Craig and Ashley to other persons; and the master was directed to exclude from the account the rents and profits of the portions thus sold, from the time of their sale.

This decree was affirmed by this court at the December Term, 1855, and the case was remanded for further proceedings to be had respecting the rents and profits.

Upon filing the mandate in the Circuit Court a reference was had to a master to examine and state an account of the rents and profits as directed by the decree. No report was made by him, or if made, was ever acted upon; and in consequence of the death of some of the parties, and proceedings taken to revive the suit, nothing appears to have been done with respect to the account ordered until 1869. The suits being then revived, a new master was appointed to take the account; and in 1868 he made his report, finding that the rents and profits of the property whilst possessed and enjoyed by the complainants, with interest, amounted on the 16th of April of that year to over eighteen thousand dollars.

He also reported that, as appeared by the answer and cross-bill of the defendants, Craig and Ashley, the lands, of which he had taken an account of the rents and profits, had been sold by them long anterior to the decree, and before any rent was proved to have accrued; and that no other evidence of sale was presented to him. As the decree only required an account to be taken of the rents and profits which had accrued previous to a sale by Craig and Ashley, the Circuit Court refused to confirm the report, and denied to the parties their claim for rents and profits; and in so ruling, in our judgment, ruled rightly. *Decree affirmed.*

Mr. Watkins and *Mr. U. M. Rose* for appellants. *Mr. George Taylor* for appellees.

Cases Omitted in the Reports.

BAIRD *v.* UNITED STATES.

UNITED STATES *v.* BAIRD.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 223, 224. December Term, 1871. — Decided November 18, 1872.

Although this court does not apply strict rules of pleading to cases appealed from the Court of Claims, yet the allegations and proofs must so far correspond as to give to the United States the benefit of the principle of *res judicata* in cases where they ought to have the protection which it affords.

When a petition in the Court of Claims is silent upon a subject which forms part of the *res gestæ*, that silence concludes the petitioner.

On the proofs, this court arrives at the conclusion that the judgment of the Court of Claims was right, both in respect of the petitioner, and in respect of the United States.

The case is stated in the opinion.

Mr. Justice Swayne delivered the opinion of the court. These are cross appeals from the judgment of the Court of Claims.

Baird as the surviving member of the firm of M. W. Baldwin & Co. was the petitioner. That court gave him a judgment for $23,750. He appealed and contends that he is entitled to recover a much larger sum. The United States appealed and insist that he is entitled to nothing. The finding of facts presents the case as it is before us for examination.

On the 17th of March, 1864, the United States, by their proper officer, ordered Baldwin & Co. to make for them fifteen locomotive engines, "at the earliest practical period," "to the exclusion of all other interests or contracts whatever, it being understood" that they would be "indemnified from any damage resulting from a compliance with this order." It was added, "In replacing any engines taken from other parties in filling this order, you are authorized to charge the government any advance in the cost of labor and materials over the cost of those on the 9th of November, 1863." On the same day Baldwin & Co. replied that they would furnish the engines. "The whole number to have precedence of all other work whatever, and to be finished with all possible despatch, for which," they said, "we are to receive $18,947.72 for each engine, and government tax."

This correspondence constitutes the contract between the parties.

Baird *v.* United States.

At the date of the order Baldwin & Co. were under a contract to make and deliver to other parties ninety-eight engines. Eighteen of them were finished while the government work was in progress. Of the remaining eighty, thirty-two were contracted for at fixed prices, and the remaining forty-eight at contingent prices to be determined by the cost of labor and materials at the date of delivery. In respect to the forty-eight the rise of prices was calculated, not up to the date of delivery, but up to sixty days before delivery, that is, up to the time at which they would have been delivered, as the petitioner alleged, but for the interposition of the government.

The Court of Claims found that the abatement thus made by Baldwin & Co. was about $1250 upon each engine and that on a settlement with the Galena and Chicago Railroad Co., they sustained a specific loss of $5000 by reason of the delay caused by the execution of the order of the United States.

The government paid the contract price of the engines, amounting in the aggregate to $292,742.25. There was paid subsequently on account of the increase in the cost of labor, materials, interest, etc., in respect to these engines the further sum of $97,507.76, making the whole sum paid by the United States $390,250.01.

The Court of Claims awarded to the petitioner $1250 for the abatement of price on each of fifteen engines, which were, "in fact, pushed out of their place into a period of higher prices than they would otherwise have been built for, by the interposition of the government," and the $5000 lost in the settlement with the Galena and Chicago Railroad Company. The aggregate of these sums is the amount for which the judgment was given. The question presented for our consideration is, whether this judgment is wrong as to either of the parties. The examination of the subject renders it necessary to look carefully into the contract, in connection with the facts developed in the findings by the court.

The government was to pay a stipulated sum for each engine and the tax.

This was done.

It was to pay for any advance in the price of labor and materials beyond the rates which obtained on the 9th of November, 1863.

This also has been done. Upon these subjects the petition is silent, and that silence concludes the petitioner.

This court has never been strict in applying the rules of pleading to this class of cases, and has looked to the substantial justice and

law of the case, rather than to the manner in which the questions to be considered are presented. But the allegations and proofs must so far correspond as that the latter shall not wholly depart from the case made in the petition, and introduce demands which the government had no notice to meet. The rule of correspondence to this extent is vital to the substance of the proceedings, and it is necessary to give to the United States the benefit of the principle of *res judicata* in cases where they ought to have the protection which it affords.

Baldwin & Co. were to be "indemnified from any damage resulting from compliance with the order of the government."

The petition is confined to a claim arising under this clause of the agreement. It was, therefore, the only one open for the examination of the Court of Claims, and it is the only one before us for consideration.

The $5000 lost by Baldwin & Co. in the settlement with the Galena and Chicago Company was clearly within the scope of this clause, and was properly allowed by the court below.

It is equally clear that the fifteen engines constructed for the government displaced and postponed the construction of an equal number under the contracts of Baldwin & Co. with other parties, and subjected them to a loss of $1250 on each engine so postponed. If the indemnity clause has any meaning or effect it must be held to include this charge also. We think it was properly allowed by the Court of Claims, and that there is no ground for complaint on the part of the United States. But the court refused to make the like allowance for the residue of the eighty engines. In this the learned counsel for the petitioner insist that a gross error was committed, and here lies the stress of the case. The difficulty of arriving at a satisfactory conclusion is increased by the finding of the court that the work upon the whole eighty "was delayed about two months." Nevertheless, we think this claim of the petitioner is not well founded. The Court of Claims found that eighteen engines "were finished for private parties while the government work was in progress." In regard to them there was no delay. This shows that the capacity of the establishment was equal to the construction of thirty-three engines at the same time. Baldwin & Co. were to construct eighty for private parties. They agreed to construct for the government fifteen in addition, and to give them the preference in the order of construction. The additional time necessary to con-

tract the eighty would be the time which it required to construct the additional fifteen for the government: no more and no less. Suppose when the government order was completed they had decided not to make the fifteen of the eighty which would have been first put under way if the government order had not been given. Then there could have been no postponement except as to those fifteen. The residue of the eighty would have been unaffected as to the time of their completion: Again; if, when the government order was given it had been determined to construct the fifteen displaced and postponed engines last, instead of next after those of the government, and this purpose had been carried out, then, again, there could have been no delay except as to the fifteen last constructed.

In the light of these considerations, we can come to no other conclusion than that the judgment of the Court of Claims was right in respect to the petitioner, as well as the United States. The allowance of damages was properly limited to fifteen engines, instead of being extended to the eighty in question. The contractors had no right so to conduct their business as unnecessarily to swell their claim for the damages. Their duty was in the other direction. *Wicker* v. *Hoppock*, 6 Wall. 94, 99. Nor can the petitioner be permitted now so to shape his demand as to work out improperly the same result. The theory submitted by his counsel is ingenious, but it does not answer the views we have expressed, and it is unsound. We think it is entirely clear that there could have been no delay, and consequently no loss imputable to the government beyond what relates to fifteen of the engines ordered by other parties.

Neither party in the argument here objected to $1250 as the measure of damages to be applied. We have therefore not deemed it necessary to consider that subject.

The judgment of the Court of Claims is *Affirmed.*

Mr. Attorney General and *Mr. Solicitor General*, for the United States. *Mr. J. M. Carlisle* and *Mr. J. D. McPherson* for Baird.

Cases Omitted in the Reports.

MONGER *v.* SHIRLEY.

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

No. 355. December Term, 1871. — Decided March 25, 1872.

No appeal being asked for below or rendered, no appeal bond given, and there being no citation, the appeal is dismissed on motion.

MOTION to strike the case from the docket. The case is stated in the opinion.

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

The record does not show that an appeal was asked for or rendered. An appeal bond was filed, but there was no approval of it by the court, nor was there any citation. It is unnecessary to say more than that the appeal must be dismissed. *Brockett* v. *Brockett*, 2 How. 238; *Palmer* v. *Donner*, 7 Wall. 541; *Castro* v. *United States*, 3 Wall. 46, 49. *Dismissed.*

Mr. John Baxter for the motion. *Mr. H. Maynard* and *Mr. T. A. R. Nelson*, opposing.

HUNTINGTON *v.* TEXAS.

FIRST NATIONAL BANK OF WASHINGTON *v.* TEXAS.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Nos. 429, 523. December Term, 1871. — Decided February 5, 1872.

After hearing the parties the court advances the causes as causes in which a State is a party under the act of June 30, 1870, 16 Stat. 176, c. 181. Rev. Stat. § 949.

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

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

The motion to advance these cases is made under the act giving priority to certain cases in which a State is a party in the courts of the United States. That act provides that it shall be the duty of the court on sufficient reasons shown, to give causes in which a State is a party preference and priority over all other civil causes pending in such court between private parties. The question presented by these cases relates to the right of the State of Texas to certain bonds of the United States which are said, under the decision of this court in *Texas* v. *White*, 7 Wall. 700, to belong to the State; and it is stated by the governor of the State that the money

represented by the bonds is part of the school fund and is very much wanted for the schools. This seems to us sufficient reason for advancing the causes. They will, therefore, be specially assigned for hearing on Monday, the 4th of March, unless the counsel agree upon a different day. *Motion granted.*

Mr. R. T. Merrick, *Mr. Geo. Taylor* and *Mr. T. J. Durant* for the motion. *Mr. Walter S. Cox* and *Mr. J. Hubley Ashton* opposing. *Mr. Caleb Cushing*, for the Bank of Washington, opposing.

WILLIAMS, Collector, *v.* REYNOLDS, Agent, etc., of the Lafayette and Indianapolis Railroad Company.

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

No. 93. December Term, 1872. — Decided January 20, 1873.

Since the passage of the act of July 13, 1866, c. 184, §§ 67, 68, 14 Stat. 172, and the repeal of § 50 of the act of June 30, 1864, 13 Stat. 241, the Circuit Courts of the United States have no jurisdiction of cases arising under the internal revenue laws, to recover duties illegally assessed, and paid under protest, unless the plaintiff and defendant in such suit are citizens of different States.

The case is stated in the opinion.

Mr. Justice Clifford delivered the opinion of the court.

Internal Revenue taxes were assessed against the aforesaid Railroad Company, or against the plaintiff as their agent and trustee; and the plaintiff, as such agent and trustee, denying the legality of a portion of the tax, brought an action of *assumpsit* in the Circuit Court of the United States for that district against the defendant, the Collector of Internal Revenue, to recover back that amount, as having been unlawfully assessed by the assessor and illegally exacted by the defendant as such collector.

It appeared by the declaration that the net earnings of the Railroad Company for the period therein specified, were duly and correctly reported to the assessor, and that the assessor assessed the same as required by law, and that the plaintiff, as the agent and the trustee of the Company, paid the amount of the tax without complaint.

None of those proceedings are drawn in question; but it also appears that the Company had on hand at that time the sum of one hundred thousand dollars invested in government bonds, the same being a surplus fund which accrued from the net earnings of an

earlier period; and that the assessor also levied an internal revenue tax of five per cent on that fund, to which the defendant, as such agent and trustee, objected and appealed to the commissioner for relief, which was denied by the commissioner; and it appears that he affirmed the action of the assessor.

Payment having subsequently been demanded, the plaintiff submitted and paid the tax, and brought this action to recover back the amount. Service was made and the defendant appeared and demurred to the declaration, but the court, having heard the parties, overruled the demurrer, and the defendant was permitted to plead to the merits.

Subsequently, the defendant filed a special plea in bar of the action in substance and effect as follows: That the fund assessed was a surplus fund of the Company; that the same nor any part thereof had ever been divided among the stockholders, nor paid over to them, or passed to their credit; that it was retained and held by the Company as a corporation; and that the legal title to the same remained vested in the Company; that the fund accrued from earnings of the Company, and was gain, profit and income; and that it was duly assessed as such against the plaintiff for that year; and that the tax was duly collected by the defendant as such collector.

Instead of replying and taking issue upon the matters of fact set forth in the plea, the plaintiff filed a general demurrer to the same, and the defendant joined in demurrer. Hearing was had, and the court sustained the demurrer, and rendered judgment for the plaintiff, and the defendant sued out a writ of error and removed the cause into this court.

Examination to any extent of the merits of the controversy is unnecessary, as the only error assigned by the present plaintiff is, that the Circuit Court had no jurisdiction of the suit, as both parties are citizens of the same State, and it is quite clear that the error assigned is sufficient to dispose of the case, as it appears from the pleadings that the matter of fact alleged to show a want of jurisdiction in the Circuit Court is well founded.

Assumpsit for money had and received is undoubtedly the appropriate remedy to recover back moneys paid under protest for internal revenue taxes illegally exacted, or where an appeal in such a case was duly taken before making the payment to the Commissioner without success; and if commenced in the state court the

action may be removed on petition of the defendant into the Circuit Court for the district where the service was made, and in that state of the case the jurisdiction of the Circuit Court is clear beyond doubt, irrespective of the citizenship of the parties, as it is made so by the express words of an act of Congress.

All cases in law or equity arising under the revenue laws were declared to be cognizable in the Circuit Courts by the act of the 2d of March, 1833, unless where it appeared that other provisions for the trial of the same had previously been made by law. 4 Stat. 632.

Doubts were entertained whether cases arising under laws subsequently passed, to levy and collect internal revenue taxes, would be included in that provision, as no such acts were in force at the time that act was passed; and to remove all such doubts upon the subject, Congress, on the 30th of June, 1864, enacted that the provisions of that act "shall be taken and deemed as extending to and embracing all cases arising under the laws for the collection of internal duties, stamp duties, licenses or taxes, which have been or may be hereafter enacted." 13 Stat. 241.

Beyond doubt, the effect of that enactment was to confer upon the Circuit Courts original jurisdiction in all cases, whether in law or equity, arising under the laws passed to levy and collect internal revenue taxes; but Congress, on the 13th of July, 1866, repealed the section of the act conferring such jurisdiction, and also enacted that the original act conferring such jurisdiction in certain revenue cases, entitled "An Act to provide for the Collection of Duties on Imports," shall not be so construed as to apply to cases arising under an act entitled "An Act to provide Internal Revenue to support the Government," or any act in addition thereto or in amendment thereof, nor to any case in which the validity or interpretation of said act or acts shall be in issue. 4 Stat. 632; 14 Stat. 172, §§ 67, 68; *Hornthall* v. *Collector*, 9 Wall. 560, 565; *Insurance Co.* v. *Ritchie*, 5 Wall. 541.

Since the passage of the last-named act, and the repeal of the 50th section of the prior act, the Circuit Courts have no jurisdiction of cases arising under the internal revenue laws, to recover back duties illegally assessed and paid under protest, unless the plaintiff and defendant in such suit are citizens of different States. Such action, if the parties are citizens of different States, may be commenced in the Circuit Court; but if they are citizens of the same

State, the suit must be commenced in the state court and be prosecuted there, unless it is removed into the Circuit Court for the same district, in pursuance of some one of the acts of Congress passed for that purpose. *Assessor* v. *Osborne*, 9 Wall. 567; *Philadelphia* v. *Collector*, 5 Wall. 720, 728.

Jurisdiction of the Circuit Courts in suits of a civil nature at common law or in equity, as conferred by the 11th section of the Judiciary Act, extended only to cases where the United States are parties or petitioners or where an alien is a party, or where the suit is between the citizen of a State where the suit is brought and a citizen of another State; but the 12th section of the act made provision that the defendant, in certain cases and under certain conditions, might remove the cases from the state court into the Circuit Court "to be held in the district where the suit is pending." 1 Stat. 78.

Amendments have been enacted to the provision giving authority to the defendants to remove such cases from the state courts into the Circuit Courts, extending that right, and even conferring the same right in a limited class of cases upon the plaintiff; but it is unnecessary to enter into any discussion of those provisions, as no one of them has any tendency to support the jurisdiction in this case. 4 Stat. 632; 12 Stat. 756; 14 Stat. 46, 172, 307, 558; 15 Stat. 227, 253, 267; 16 Stat. 261, 440.

Viewed in any light, it is quite clear that the Circuit Court had no jurisdiction of the case.

Judgment reversed, and the cause remanded, with directions to dismiss the suit for want of jurisdiction.

Mr. Attorney General for plaintiff in error. *Mr. J. E. McDonald* and *Mr. A. L. Roache* for defendant in error.

MAYS *v.* FRITTON.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 553. December Term, 1872. — Decided February 10, 1873.

The claim set up in the state court being founded on the Bankruptcy Act, and the decision of the state court being adverse to it, this court has jurisdiction to review it.

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

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

Garratt *v.* Seibert.

This is a motion to dismiss the writ of error for want of jurisdiction.

Upon looking into the record, we find that the only claim set up by the plaintiffs in error was founded upon the act of Congress known as the Bankruptcy Act; and that the decision of the Supreme Court of the State was against the claim.

The case is within the very words of the act of February 5, 1867, giving to this court jurisdiction to review the decisions of the state courts; and the motion must be denied.

Mr. J. H. Parsons and *Mr. P. Phillips* for the motion. *Mr. T. J. Durant* and *Mr. C. W. Hornor* opposing.

GARRATT *v.* SEIBERT.

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

No. 35. October Term, 1873. — Decided March 23, 1874.

If the subject of a patent is a combination of several processes, parts or devices, the use of any portion of the combination less than the whole is not an infringement.

The second claim in the patent granted to Nicholas Seibert for an improvement in lubricators for steam-engine cylinders, does not embrace the heating apparatus and the combination devised for preparing tallow for use in the lubricator, which is covered by the first claim in the patent.

This was an action at law for alleged infringement of letters patent, dated February 14, 1871, granted to Nicholas Seibert for an improvement in lubricators for steam-engine cylinders. The case is stated in the opinion.

Mr. Justice Strong delivered the opinion of the court.

If the true construction of the patent be, as the plaintiffs in error contend, that the patentee's second claim is for a combination of all the devices mentioned in the specification, there was error in the instruction given to the jury by the Circuit Court. It is undoubtedly the law, that if the subject of a patent is a combination of several processes, parts or devices, the use of any portion of the combination less than the whole cannot be an infringement. There may indeed, be a patent for a combination of many parts, and at the same time for an arrangement of some of the parts constituting another combination, but still a part of the larger; yet, if there be no patent for the constituents, they are open to the public for use in

combination, provided all the elements of the patented combination be not employed. It is therefore needful to inquire what are the elements of the combination which is protected by the patent.

The specification describes it as a new and useful improvement in lubricators for steam-engine cylinders, and describes it largely, if not principally, by reference to the accompanying drawings. It consists in the arrangement of several constituents, no single one of which is claimed to be new. These parts are a condensing-pipe connecting the steam-pipe with the lubricator; a reservoir for water, the product of condensed steam; a cup or vessel for oil or other lubricating material, placed vertically and somewhat lower than the water reservoir, but connected with it by a pipe leading from near its lower extremity to the bottom of the reservoir, and having near its upper end a pipe leading to the cylinder and valve chests, with a check-valve at the oil vessel and a stop-cock between it and the cylinder; a waste cock at the bottom of the oil vessel; a screw plug at its top, through which the lubricating material may be supplied; and a regulating valve by which the flow of water from the water reservoir into the oil vessel can be controlled. To these is added a glass tube with a sliding-gauge, arranged so as to stand vertically and parallel with the oil vessel, and connected with it at either extremity, its purpose being to indicate the amount of oil used. The operation of these devices thus arranged is described to be the following: The condensed water in the water reservoir, being higher and heavier than the oil in the oil vessel, forces itself under the oil in both that vessel and the glass tube, and causes it to pass out through the pipe leading to the cylinder and valve-chest into the steam-pipe, thus lubricating the valves and cylinders. These are all the devices necessary for the improved lubricator claimed to have been invented by the patentee, and such is their arrangement. The thing discovered and embodied in a practical combination was that by feeding a column of condensed water under the lubricant contained in a vessel the lubricant might be forced upward and outward, through a discharge pipe, into the cylinder, and upon the bearings of the engine, and that its flow might be controlled by a regulating valve. To embody this principle, nothing more than the devices we have mentioned is needed, and no other device is employed by the patentee. Those mentioned, arranged as they are, constitute a lubricator, and with a fluid lubricant they are sufficient.

But as it might be desired sometimes to use tallow, the patentee

devised another combination, of different devices, by which steam can be conducted from the steam-chest of the engine into an annular space between two concentric vertical tubes located in the vessel containing the oil or tallow, the purpose being to reduce the tallow to a fluid condition, so that it can be forced by the upward pressure of the water through the discharge-pipe into the cylinder and valve-chest. It is for this combination the first claim of the patent is made, and the second claim is for the improved lubricator, consisting of the parts described in the specification, constructed and arranged substantially as specified.

It is upon the construction of this second claim that the parties are at issue, and the question to be decided is, whether the combination for heating tallow is a material part of the combination constituting a lubricator, which is the subject of the second claim. Upon the answer to this question depends the solution of the further question, whether a party not claiming under the patentee can use the lubricator, without the heating arrangement, and be guilty of no infringement.

The Circuit Court was of opinion, and so instructed the jury, that the second claim covers only the combination which makes the lubricator, without the heating apparatus, and does not embrace the combination devised for preparing tallow for use in the lubricator. Was this instruction erroneous? It must be admitted the specification is obscure, and that the second claim has not the precision which it should have. But while it is impossible to determine with entire certainty what the patentee intended to assert in his second claim, we cannot say that a wrong construction was given to it by the court. The combination which primarily and essentially constitutes a lubricator, is independent of any heating or melting arrangement. It can be used by itself and accomplish all the purposes of a lubricator. Every part of it contributes to the embodiment of the principle of the invention. The other combination designated in the first claim is no necessary part of it. Nor is its purpose the same. Though it may be used in connection with the devices, that, combined, constitute a lubricator, its design is only to prepare solid substances for use in the other combination. Its principle is to accommodate the lubricator proper to the use of tallow. And the patentee appears to have considered it as not essential to the successful operation of his lubricator. He begins his description of it by specifying its primary element as a cock to regulate the admis-

sion of steam from the steam-chest into the oil vessel "*when tallow is used.*" Of course, when tallow is not used it has no office. It would seem, therefore, not to be an unreasonable construction of the second claim of the patent to hold that it embraces only the combination which makes up a complete lubricator. And that it does not comprehend the heating arrangement, which may or may not be used in connection with it.

It follows that the exception of the plaintiffs in error to the charge of the circuit judge cannot be sustained. The judgment is

Affirmed.

Mr. M. A. Wheaton and *Mr. Thomas T. Everett*, for plaintiffs in error. *Mr. Edmund L. Goold*, *Mr. A. H. Evans*, *Mr. Charles T. Botts* and *Mr. W. W. Boyce* for defendant in error.

STITT *v.* HUIDEKOPHER.

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

No. 47. October Term, 1873. — Decided October 28, 1873.

Under the circumstances, the court allows an amendment of the record, on the certificate of the court below, without issuing a writ of *certiorari*.

Motion for *certiorari*. The case is stated in the opinion.

Mr. Justice Clifford delivered the opinion of the court.

The motion for *certiorari* is denied. But the court, in view of the circumstances, and on the authority of the case *Woodward* v. *Brown and Wife*, 13 Pet. 1, allow an amendment to be made in the transcript by the entry of the judgment in the following words: "May 18, 1871. Judgment on the verdict." It appearing by the certificate of the clerk of the Circuit Court that the judgment was so entered on that day and before the granting of the writ of error, and that the words aforesaid were inadvertently omitted by the clerk of the Circuit Court in preparing the transcript.

Mr. M. C. Kerr, *Mr. G. W. Guthrie* and *Mr. E. S. Golden* for plaintiff in error. *Mr. Walter D. Davidge* for defendants in error.

After announcing its decision on this motion, the court heard argument on the same day on the merits. The case is reported 17 Wall. 384.

UNDERWOOD *v.* McVEIGH.

ERROR TO THE CORPORATION COURT OF ALEXANDRIA COUNTY, STATE OF VIRGINIA.

No. 504. October Term, 1873. — Decided March 23, 1874.

The writ of error is dismissed, because it should have been directed to the Court of Appeals of the State of Virginia.

Motion to dismiss. The case is stated in the opinion.

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

The writ of error taken in this cause is dismissed, because it should have been directed to the Court of Appeals instead of the judge of the Corporation Court of Alexandria. *Dismissed.*

Mr. Justice Clifford dissenting:

Jurisdiction is vested in the Supreme Court, in certain cases, to re-examine and reverse or affirm upon a writ of error, the final judgment or decree rendered in the highest court of law or equity of a State, in which a decision in the suit could be had in the courts of the State.

Cases of the kind consist of several classes, all of which are plainly described in the 25th section of the Judiciary Act, which also points out, in terms equally plain, the respective conditions annexed to the exercise of the right; as, for example, the decision of the state court, in one class of the cases, must be against the validity of a treaty or statute of, or an authority exercised under, the United States; and in another class the decision of the state court must be in favor of the validity of a statute of, or an authority exercised under, a State in the respect therein specified; and in a third class the decision of the state court must be against the title, right, privilege, or exemption specially set up or claimed, as therein described, by the parties suing out the writ of error.

Congress undoubtedly intended by that provision to give the party aggrieved, in such a case, a right to remove the cause into this court for a re-examination, but whatever the grievance may be, the remedy, if any, must in every case be pursued by a writ of error as the act of Congress gives no other; nor does the power to re-examine and reverse or affirm extend to any proceeding, except a final judgment or decree, of the highest court of law or equity of a State in which a decision of the suit could be had. 1 Stat. 85.

No other process can be employed except that given by the act of Congress, but the act of Congress does not prescribe the tribunal to which the writ of error shall be directed, from which the clear inference is that Congress intended that it should be directed to the tribunal, or, if more than one, to some one of the tribunals, which can execute the commands of the writ, as it would be an idle ceremony to direct it to a tribunal which could not execute its commands.

Common law writers define a writ of error as a commission by which the judges of one court are authorized to examine a record upon which a judgment is given in another court, and on such examination to affirm or reverse the same according to law. "Under the Judiciary Act," says Marshall, C. J., "the effect of a writ of error is simply to bring the record into the appellate court, and submit the judgment of the inferior tribunal to re-examination," as it acts only on the record, and does not, in any manner, act upon the parties. *Cohens* v. *Virginia*, 6 Wheat. 264, 410; *Suydam* v. *Williamson*, 20 How. 437.

Such jurisdiction arises only in the cases specified in the 25th section of the Judiciary Act; but it is a great mistake to suppose that it is limited in its scope to final judgments or decrees rendered in such a case by the highest court of law or equity of the State, as it plainly extends to every final judgment or decree rendered in such a case by the highest court of law or equity of the State, having *jurisdiction* to render the decision, which is the subject of complaint, however subordinate that tribunal may be, as compared with the other judicial tribunals of the State.

Courts of various grades existed in the several States at the time the Judiciary Act was passed, and their power and jurisdiction at that time, as well as at the present time, were and are regulated by statute and, of course, were, as they now are, subject to constant change. Many changes, doubtless, have since been made, but all experience has proved that it would have been unwise to have prescribed to what tribunal the writ of error in such a case should be directed, as that is a matter which can best be determined by the court empowered to issue the writ, the object being that it should be directed to such a tribunal as can execute its commands.

Appellate power, in some form, is exercised by courts in all the States, but the forms and modes of proceeding vary from time to time, and it is not probable that they are at the present time precisely alike in any two States.

Where the appellate court requires the *whole* record to be sent up and executes its own judgments, it may well be held that the writ of error should be directed to that tribunal, as no other can obey the commands of the writ, and send the record, which is the subject of complaint, into the appellate court for re-examination. But where only a part of the record is sent to the appellate court, or where, whatever is sent up, whether the whole or a part, the transcript is immediately returned to the subordinate court, together with the judgment of the appellate court, for record, it is equally plain that the writ of error from this court should be directed to the subordinate court, as the only tribunal which can execute the commands of the writ.

Cases arise also where the law of the State requires a full transcript to be sent up to the appellate court, and makes it the duty of that court, not only to record its own judgment, but also that it shall send down the same to the subordinate court to be there recorded, in which case there is a complete record in both courts, and in such cases the practice is well settled that the writ of error may be directed to either court, as it is clear that either court is competent to execute the commands of the writ of error.

Since the law requires a thing to be done, says Story, J., and gives the writ of error as the means by which it is to be done, without prescribing, in that particular, the manner in which the writ is to be used, it appears to the court to be perfectly clear that the writ must be so used as to effect the object. It may then be directed, as the learned judge said, to either court in which the record and judgment on which it is to act may be found.

Unquestionably the judgment to be examined must be that of the highest court of the State having cognizance of the case; but the record of that judgment may be brought from *any court* in which it may be legally deposited, and in which it may be found by the writ. *Gelston* v. *Hoyt*, 3 Wheat. 246, 304.

In that case it was directed to the Court of Errors, which, having parted with the record by remitting it, could not execute it. Without the direction having been changed, it was then presented to the Supreme Court of the State, but being directed to the Court of Errors, it could not be regularly executed by the Supreme Court.

Beyond doubt a new writ of error would have been required, had not the parties consented to waive all objection and to consider the record as properly here, if, in the opinion of this court, the record

could be properly brought up by writ of error directed to the Supreme Court of the State, which, in that case, was a court subordinate to the Court of Errors; and this court having decided that question in the affirmative, the case was heard here under that arrangement.

Exactly the same rule was promulgated by this court in the case of *Webster* v. *Reid*, 11 How. 457, the unanimous opinion of this court being given by *Mr. Justice McLean*, in which he says, the writ of error in such a case may be directed to any court in which the record and judgment on which it is to act may be found, and if the record has been remitted by the highest court to another court of the State, it may be brought up by the writ of error from the subordinate court.

Examples where the writ of error has been directed to the subordinate court to which the record has been remitted are very numerous, and are sufficient to show that the rule laid down by *Mr. Justice Story* in the leading case of *Gelston* v. *Hoyt*, has always been regarded as the true rule of practice in such cases. *State of New York* v. *Dibble*, 21 How. 366; *Almy* v. *State of California*, 24 How. 169; *Farney* v. *Towle*, 1 Black, 350; *Hoyt* v. *Sheldon*, 1 Black, 518; *Sherman* v. *Smith*, 1 Black, 587; *Cohens* v. *Virginia*, 6 Wheat. 265; *Buell* v. *Van Ness*, 8 Wheat. 312; *Hunt* v. *Palao*, 4 How. 589; *United States* v. *Booth*, 18 How. 476.

Nor is it necessary to rely *merely* upon examples, as the point has been directly adjudicated by this court in a more recent case, where it was decided that a writ of error from this court is properly directed to the court in which the final judgment is rendered, and by whose process it must be executed, and in which the record remains, although such court may not be the highest court of the State, and although such highest court may have exercised a revisory jurisdiction over points in the case, and may have certified its decision to the court below. *McGuire* v. *Commonwealth*, 3 Wall. 382.

Direct adjudication to the same effect was also made by this court in the case of *Green* v. *Van Buskirk*, 3 Wall. 448, 450, in which also, as well as the preceding case, the opinion was given by the late Chief Justice, with the concurrence of all the associate justices of the court. By that case it is expressly determined that, when the highest court of a State renders a final judgment in such a case, and sends the judgment with the record to the court below for execution, the writ of error may be directed to the subordinate court, and the Chief Justice went farther in that case, and decided that a judg-

ment cannot be regarded as final, in the sense of the act of Congress, until it is entered in a court from which execution can issue.

Since those decisions were made and have become known to the legal profession, the examples where the writ of error has been directed to the subordinate court have very much increased in number, as will appear from the following citations, to which many more might be added: *Butler* v. *Horwitz*, 7 Wall. 258; *Aldrich* v. *Ætna Co.*, 8 Wall. 491, 493; *Downham* v. *Alexandria*, 9 Wall. 659; *Downham* v. *Alexandria Council*, 10 Wall. 173; *Insurance Co.* v. *Treasurer*, 11 Wall. 204; *Northern Railroad* v. *The People*, 12 Wall. 384; *Miller* v. *State*, 15 Wall. 478, 491; *Commercial Bank* v. *Rochester*, 15 Wall. 639; *Crapo* v. *Kelly*, 16 Wall. 610; *Miltenberger* v. *Cooke*, 18 Wall. 421; and *Insurance Co.* v. *Dunn*, 19 Wall. 214, both decided at the present Term.

Three grades of courts are established by the laws of Virginia, of which the Court of Appeals is the highest, and from which writs of error may issue to the next highest grade, which are denominated Circuit and Corporation Courts, and from which writs of error may issue to the lower grade, called County Courts. Writs of error may issue from the Court of Appeals to the Corporation Courts, upon the application of an aggrieved party.

Regularly, such a party should apply to the court which rendered the judgment, that the execution of the same may be suspended, as in that event it is the duty of the court to grant such a suspension for a reasonable time, in order that the applicant may apply to the Court of Appeals for a writ of error. He then presents to the latter court a transcript of the record, or of such portion of it as may be necessary to present fully to the appellate court the point or points involved in his complaint, accompanied by a petition for the writ, and an assignment of errors. If the writ of error is allowed, the judgment is suspended until the questions involved are decided in the Court of Appeals. Due hearing is had and the Court of Appeals, if the proceedings are regular, decides the question involved, and affirms or reverses the judgment below, and certifies their decision to the subordinate court, and by the law of the State, the decision of the Court of Appeals is then required to be entered by the subordinate court *as its own*, and the provision is that "execution may issue thereon accordingly." No execution can issue from the Court of Appeals, as their duty is fully performed when they have made their decision and certified the same down to the subordinate court.

Viewed in the light of the authorities cited and of these suggestions, it is quite clear, in my judgment, that the writ of error in this case was properly directed to the subordinate court, as fully appears from the transcript which that court has sent up to this court, and which is in all respects complete. Suppose it be conceded, however, that the full record also exists in the Court of Appeals as well as in the Corporation Court, which is not admitted, still it is clear that the case should not be dismissed, as in that case the law of this court is well settled by repeated decisions, that the writ of error "*may then be directed to either court in which the record and judgment on which it is to act may be found.*" *Gelston* v. *Hoyt*, 3 Wheat. 245, 304; *Webster* v. *Reid*, 11 How. 436, 457; *McGuire* v. *Commonwealth*, 3 Wall. 382; *Green* v. *Van Buskirk*, 3 Wall. 448, 450.

Nothing need be said in respect to the other grounds of the motion, as the order of this court is based entirely upon the ground that the writ of error is directed to the Corporation Court instead of the Court of Appeals. Such a motion, as it seems to me, is entitled to no favor, as the full record is here and has been printed, and is now in the hands of every justice of this court. All doubt upon that subject is foreclosed, as no one suggests any diminution. On the contrary, the principal argument in support of the motion is, that it will enable the defendant in error to get rid of the *supersedeas*, and to get his execution earlier than he will if he has to wait the decision upon the merits. Injury in that behalf will certainly result to the plaintiffs in error, as they will be obliged to pay the expense of another transcript, and the United States will be compelled to pay the public printer for furnishing the justices of this court with copies of the same, though the full record is already in print and in our hands.

Much difficulty, it is apprehended, will result from the rule established in the case, from the fact that the appellate courts of the State have no power to supersede their own judgments in such a case, after the judgment has been remitted to the court below for record and execution; and it is quite clear, that a writ of error from this court to an appellate court of the State will not operate to supersede a judgment recorded in a subordinate court of a State, whose duty it is to issue the final process.

Whether this court can issue a writ of *supersedeas* in such a case to such subordinate court, it is not necessary now to decide, as it is

clear that it cannot be done in this case, more than sixty days having elapsed since the judgment was remitted to and recorded in the Corporation Court.

Doubtless the dismissal of the suit will be satisfactory to the present defendant, as he will be immediately entitled to a writ of *habere facias possessionem*, and the plaintiff will never be able, by any subsequent writ of error or other proceeding, to supersede the judgment pending the litigation.

For these reasons I am of the opinion that the motion to dismiss should be denied.

Mr. S. Ferguson Beach for plaintiffs in error. *Mr. P. Phillips*, *Mr. C. Cushing* and *Mr. C. W. Wattles* for defendant in error.

BOISE COUNTY COMMISSIONERS *v.* GORMAN.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF IDAHO.

No. 717. October Term, 1873. — Decided March 16, 1874.

Supersedeas will not issue without notice to the other party, when the object is to avoid an alleged improper execution of the judgment below.

Motion for *supersedeas*. The case is stated in the opinion.

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

The plaintiffs in error moved in this cause, 1, for the allowance of a *supersedeas;* and 2, for a writ which shall command the marshal of the Territory to restore Ben. T. Davis to the office of assessor and tax-collector of Boise County, from which he has been removed by the execution of the judgment in the court below.

They claim that before the judgment had been enforced by the execution it had been stayed by *supersedeas*. If this claim is supported by the facts, no new *supersedeas* is now necessary. That already obtained will operate to stay any further proceedings which may be had under the judgment.

The real object of this motion is to avoid the effect of the alleged improper execution of the judgment, and restore Davis to his office. Such a motion cannot be entertained, except after reasonable notice to the opposing party. No such notice has been given in this case. This motion is, therefore, overruled, but without prejudice to its renewal after reasonable notice to the defendant in error.

In the event of its renewal, the plaintiffs in error in order to

obtain the relief asked, will be required to show to the satisfaction of the court, that the judgment below was in fact executed after they had become entitled to a stay of proceedings. *Motion denied.*

Mr. Henry E. Prickett for plaintiffs in error. No appearance for defendant in error.

Notice of the motion was given in accordance with the suggestion of the court. The opinion of the court on this motion will be found in 19 Wall. 661.

DANE *v.* CHICAGO MANUFACTURING COMPANY.

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

No. 76. October Term, 1874. — Decided January 11, 1875.

All the combinations and all their separate elements patented to William Westlake, April 6, 1864, for an improvement in lanterns, for which re-issued letters were obtained December 23, 1869, were anticipated by inventions referred to in the opinion of the court.

Bill in equity for the infringement of letters patent. Decree dismissing the bill. Complainants appealed. The case is stated in the opinion.

Mr. Justice Bradley delivered the opinion of the court.

This case comes before us under peculiar circumstances. The appellants were complainants below, and filed a bill as assignees of William Westlake, of certain letters patent granted to him April 26, 1864, for an improvement in lanterns, for which they obtained a re-issued patent November 23, 1869. The bill was dismissed, on what ground does not appear. The defendants have not appeared to contest this appeal. We are left to ascertain as best we can, with such aid as the appellant's counsel have given us, the real merits of the controversy.

The nature and objects of the alleged invention are described by the patentee as follows:

"The nature and objects of my invention consist in the construction of lantern guards without hooks, projections or catches, sticking out and interfering with the safe and convenient use of the lanterns, and so that the same can be readily attached or detached; in the employment of a band or disc to fill or cover the space between the enlarged band or ring at the upper end of the guard and the top of the globe, and in the application of suitable fastenings to

secure the dome to the guard." In other words the improvement claimed is the adaptation to a globe lantern, of a wire guard, removable at pleasure, the top of which is a band or ring sufficiently large for the globe to be passed through it, and which is separated from the top of the globe by a disc to which it is connected by fastenings that allow the said parts (the disc and guard) to be detached at pleasure, so as to permit the removal of the globe. The object of the disc is said to be to cover the space between the top of the guard and the top of the globe, and to hold the latter, which it is important should be contracted at the top. It is stated that the fastenings referred to may be any suitable fastenings to secure the dome or disc to the guard; spring catches being specifically described for the purpose, but any proper fastenings being admissible. The reissued patent originally contained three claims as follows:

"1. The lantern guard *a*, constructed entire, without hinge or joint, so that, as a whole, it can be readily attached to or removed from the lantern, as set forth.

"2. The disc *g*, in combination with the ring or band *b*, of the guard and fastenings *e*, substantially as and for the purposes specified.

"3. The guard *a*, in combination with the disc *g*, fastenings *e*, and removable globe *d*, substantially as specified."

The letters in these claims refer to the drawings, but the parts designated will be readily understood from the foregoing description.

The first claim, which was for the removable guard alone, was afterwards surrendered by a formal disclaimer filed in the Patent Office April 12, 1871.

The other two claims are for combinations; but the disc designated in the drawings by the letter *g*, and being the disc before mentioned, as being used to fill or cover the space between the circular top of the guard and the contracted top of the globe, and to hold the latter in place, is the central and important element in each combination. In the second claim it is combined with the top ring or band of the guard and the fastenings that connect them; in the third, it is combined with the guard, the fastenings and the removable globe. But in both, all these elements are pre-supposed and implied. The idea of the guard is never dissevered from the circular ring or band which forms its top, and the guard and disc are never dissociated from the globe with its contracted top and capacity of removal. It is a globe lantern with the globe removable and con-

tracted at top, to which the improved guard, with its enlarged and circular top and the attendant intervening disc are adapted, and for which they are constructed. This is what the patentee in substance says, and what, indeed, is essential to make his claim to invention even plausible.

From the evidence before us, it appears that when Westlake applied for his patent in March, 1864, all the elements of his improvement were well known. Butterfield's lantern, patented in 1855, and Lamport's, presented to the Patent Office for a patent in 1858, both had removable guards with bands at the top, and contracted topped globes, the guards being so constructed, however, as to open like a jacket, and thus to be removed from the lantern. But the top of the guard, when in place, fitted closely around the top of the globe; and, therefore, there was no place or occasion for a disc between the guard and the globe, as in Westlake's lantern.

In Canning's lantern, and in Max Miller's, both presented for patents, and the latter patented in 1858, there was a nearer approach to Westlake's. They had a guard with an enlarged top, consisting of a circular ring, large enough to allow the globe to be removed through the same, and this top was connected by fastenings, (bayonet fastenings are exhibited,) with the dome, the bottom of which was spread out like a broad flat bell, and might have served the purpose of a disc in Westlake's lantern had it been admissible or required. But in these lanterns, the top of the globe not being contracted, as in Westlake's, it filled the top of the guard, and left no intervening space for a disc between them. With this exception, namely: that the top of the globe was not contracted, the difference between the lanterns of Canning and Max Miller and that of Westlake was very slight. And as globes with contracted tops were not new, it may be deemed somewhat doubtful whether the application of such globe to these lanterns (Westlake's being little more than this) was entitled to the merit of invention, and therefore patentable.

In Water's lantern, patented in 1855, there was a globe with a contracted top, such as is employed by Westlake, and said top was inserted for support in the lower part of the dome, around which a narrow flange spread outwardly, (somewhat like Westlake's disc,) far enough to receive, in small apertures, the wires of the guard, the tops of which, (not being connected by a ring or band,) were inserted therein directly. But although the dome could be detached from the wires by pressing them inwardly, and lifting the dome off

from them, and thus give room for removing the globe, yet, as the parts were arranged, this could not be done conveniently; and, in fact, the globe was not removed from the top of the guard, but the latter was detached at the bottom, and lifted off from the globe, when it was desired to have access to the latter.

In none of the lanterns thus far adverted to, was there fully exhibited and applied the disc described in Westlake's patent, used for the same purpose as in his, although the germ of it was seen in Water's lantern, and an adaptable equivalent for it in Canning's and Max Miller's. But Westlake in his testimony admits that the disc was old at the time he made his invention, when used as a reflector in a conductor's lantern; and two English patents were put into the case, which exhibit it as used substantially in the same manner, and for the same purpose, that it is used in Westlake's lantern. The first was a patent granted to Graham Chappell in 1812, and the other to Isaac Evans in 1861. The use of the disc was somewhat similar in both of the lamps or lanterns described in these patents. That of Evans will be more particularly adverted to.

Evans's lantern had an inner chimney, contracted at the top, an outer globe, and a guard having a circular rim or band at the top. The disc was called in the patent a *crown plate*, and filled and covered the space between the contracted top of the inner chimney and the outer globe, and between the latter and the top rim of the guard. It has some perforations to allow the air to pass upward between the chimney and the globe. The specification says: "Above the top of the outer glass cylinder, *a* (the globe), and inside the upper ring, is placed a crown plate, *l*, provided with a number of projecting flanges, which serve to keep the upper part of the outer and inner glass cylinders, *a* and *b*, in their places." As this lantern was intended to be used in mines, the crown plate was fastened to the top or rim of the guard by a screw, so as to obviate the danger of its being accidentally detached, but when it was detached and removed, the globe and cylinder could also be removed through the top of the guard, or the latter could be removed from the lamp by detaching it from below. This crown plate, therefore, seems to have served the precise office of Westlake's disc. Stetson, the complainant's expert, testifies as follows: "In Evans's patent, Exhibit No. 1, the equivalency of the guard is somewhat doubtful; but I think it is substantially the same as the guard claimed in the first claim (of Westlake's patent). It has a glass chimney, contracted

at the top, within the globe, which is held in place by a disc supporting it at the top, and extending out to the ring at the top of the guard." This is a precise description of Westlake's disc. It is true, the witness adds: "But the disc has holes for the circulation of air; the disc, practically, only fills the space between the small top of the lamp chimney and the globe." But the fact that the disc had holes in it does not deteriorate from its importance as a disc to fill and cover the space between the chimney and the guard, and to hold the former as well as the globe in place. The witness admits that, "If the small holes were made in the defendant's disc, their lanterns would still infringe the second claim of the patent," thus implying that the holes do not destroy the identity of the disc.

Smith, the defendant's expert, says: "This lantern, Exhibit 1, representing Evans's patent, has a guard so made that it may be separated from the top and from the base of the lantern, all in one piece. The parts are screwed together, instead of being held by catches; but it admits the entire removal of the dome from the guard just the same. There is a plate inside the upper band of the guard, which has flanges upon it to maintain the top of the globe and the chimney, and this plate fills the entire space, except so far as it is perforated. The globe can be raised through the top band of the guard. The guard, in this Exhibit 1, is whole, and can be removed, not from the entire lantern, any more than the guard in Exhibit B (Westlake's), but from the other parts of the lantern, the same as the guard of Exhibit B. It cannot be removed from the other parts of the lantern as readily as the guard of Exhibit B, because it is screwed to the other part, and cannot be unscrewed as readily as spring catches can be worked.

"The lantern, Exhibit 1, comes as completely within the first claim of the complainant's patent, No. 3747, marked Complainant's Exhibit A, as the defendant's lanterns do.

"The disc *g* is stated in the patent to be for filling and covering the space between the band and the top of the globe. There is such a disc in Exhibit 1, and it is the equivalent of disc *g*. The fastenings in the lantern, Exhibit 1, for securing the disc to the guard, or the guard to the disc, are not like the fastenings *e*, shown in the patent No. 3747, but they are equivalents for each other, because both specifications say that other fastenings may be used, and they both produce the same result and admit of the complete separation of the guard and discs, and in Evans's Exhibit 1, the globe can be removed.

"The combination claimed in the second claim of the patent No. 3747, Exhibit A, is substantially embodied in the lantern, Exhibit 1, unless the claim embraces the guard *a*, removable, leaving an entire lantern.

"There is a loose globe in Exhibit 1, and it therefore substantially embodies the third claim; but there is a difference in construction between the lantern guards."

This testimony seems to us to be corroborated by the patents and other exhibits; and from this it sufficiently appears that both the second and the third claims of Westlake's patent are exemplified in Evans's lantern. It has the combination of the disc, the band and the fastenings specified in the second claim, and that of the guard, the disc, the fastenings and the globe, specified in the third claim. Whilst, therefore, it may be true that none of the lanterns referred to are equal to Westlake's in beauty of form or convenience of adaptation to the purpose for which it is intended, yet every part has been anticipated and used in some form or other for the very purposes and uses to which it is applied in Westlake's; and in Evans's lantern all the essential parts are brought together and used in the combinations claimed by the patentee. Of course the combination might be new; and if productive of new and useful results, and not a mere aggregation of results, might be the subject of a patent, though all the parts were used before. But here, the combinations patented, as well as their separate elements, had been anticipated. The decree is, therefore, *Affirmed*.

Mr. L. L. Bond for appellants. No appearance at the argument, and no brief, for appellee.

MONGER *v.* SHIRLEY.

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

No. 129. October Term, 1874. — Decided January 18, 1875.

On the facts reviewed in the opinion, *Held*, that the title of the appellant to the premises in dispute whether derived through the sale on execution, or acquired under the confiscation act, is void for fraud.

THE case is stated in the opinion.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an appeal in equity from the Circuit Court of the United States for the Eastern District of Tennessee.

Shirley was the complainant in the court below. His bill alleges that Monger instituted proceedings against him by attachment in the Circuit Court of Hamilton County, Tennessee, upon a promissory note purporting to be executed by Shirley to John W. Westmoreland, for the sum of ten thousand dollars, dated December 15, 1863, payable three months from date, and indorsed by the payee to Monger; that a judgment was rendered against Shirley by default; that a large and valuable farm belonging to him was sold under the judgment and bought in by Monger; that Shirley was then absent from Tennessee and was ignorant of the proceedings; that the note and indorsement were forgeries, and that the whole proceeding culminating in the sale of the farm was a gross fraud upon Shirley perpetrated by Monger. It is further alleged that Monger, in certain proceedings in confiscation in the District Court of the United States for the District of East Tennessee, had fraudulently acquired a title to the life estate of Shirley in the farm. The prayer of the bill is that Monger's titles may be annulled, that he may be compelled to account for the rents and profits of the property, and for general relief.

Monger answered and denied all the material allegations of the bill.

Testimony was taken upon both sides.

The court below sustained the bill and decreed accordingly. Monger thereupon removed the case by appeal to this court.

The power of a court of equity to annul judgments and decrees, and all titles acquired under them, for fraud, where the rights of bona fide purchasers have not intervened, is too well settled to require discussion. Freeman on Judgments, §§ 486, 489, 490, 491; 1 Story Eq. Jur. § 252.

The facts alleged by Monger are as follows: Shirley sympathized with the rebel cause, and early in the war removed to Georgia, within the insurgent lines. While he was there, a man claiming to be John W. Westmoreland came to Tennessee, passed through the lines of the Union Army, and offered to sell the note to Monger for its face in Confederate paper, which was then and there worth ten cents on the dollar. Monger bought the note, under-due, and paid for it accordingly.

The deposition of David Westmoreland was taken in December, 1868. He testified that about three months before that time a man claiming to be John W. Westmoreland came to his house and said

the object of his call was to ascertain whether they were related. He mentioned that he had sold the note of Shirley to Monger. The witness had never seen him before, and never saw him afterwards. The note disappeared from the files of the court and could not be found. There is no proof of any consideration for giving the note, and none of its execution, as to time, place, or circumstances. The testimony of John W. Westmoreland was not taken, and there is no proof that a person of that name was or had been in existence, except the testimony of the David Westmoreland before mentioned, and his further testimony that he had a brother so named who lived and died in Missouri before the war.

According to Monger, the seller of the note came secretly and departed secretly. There is no proof that at that time he saw any one but Monger. There is no trace of his residence or presence anywhere before or afterwards. The deposition of David Westmoreland in nowise identifies the stranger who called on him as the person he assumed to be. The testimony is injurious to Monger. That person, whoever he was, was living in the fall of 1868, while this suit was pending, and more than four years after the alleged transfer of the note to Monger. He was willing to give Monger the benefit of his declarations to David Westmoreland for whatever they were worth. His disappearance and subsequent non-appearance can be accounted for only on the ground that he was afraid to put himself within the reach of the law by appearing as a witness.

Shirley's deposition was taken. He swears positively that he never executed the note and that he never knew any one of the name of the payee.

Richey, a witness in his behalf, testifies that Campbell and Monger conspired together and forged the note. The character of Shirley for truth is shown by a host of witnesses to be very bad. The character and testimony of Richey are destroyed by the witnesses called to impeach and contradict him. There is proof that at the date of the note Shirley was very ill, and if not then unable to execute a note, certainly gave none.

The effect of this evidence is much weakened by the adverse depositions taken by Monger. We have, therefore, laid the testimony of all these witnesses out of view. There is no evidence of the slightest weight that the signature to the note was in Monger's handwriting. The whole superstructure of the case as regards the note rests upon the unsupported declarations of Monger.

It is unnecessary to pursue the subject further. The facts of this branch of the case are as free from doubt and difficulty as the law. They fill the largest measure of conviction in the mind that the note was a forgery, that Westmoreland, if not a myth, was a party to the crime, and that he has wisely shrunk back and since remained in guilty concealment.

But it is insisted that Monger has a valid title to the life estate of Shirley in the farm derived from the confiscation proceedings, and that, therefore, the complainant's case must fail. The life estate was sold in those proceedings, and Monger bought it in for seven hundred dollars. Before the sale was confirmed, Monger intervened and represented that before the libel of information was filed he had attached the premises, and he insisted that his lien thus acquired was paramount as well as prior to that of the government. The court decreed that the money he had paid, less the costs, should be refunded to him, and that the marshal should execute a deed conveying to him the life estate of Shirley. Both were accordingly done. The latter order was an extraordinary feature in the case. The proceedings in behalf of the United States were thus used to pass a title for which they received nothing, and it was conveyed to Monger, who paid nothing for it. If the attention of the court had been called to the error in the entry, it would doubtless have been corrected. *Fay* v. *Wenzel*, 8 Cush. 315.

The same learned judge who made the order, enjoined Monger in this case perpetually from asserting the title.

This shows that he attached no importance to it. But, conceding that the marshal's deed did pass the legal title to the life estate, the answer to the objection is, that under the circumstances, Monger must be held to have taken it, as he took his title under the attachment proceedings, in trust — *ex maleficio* — for Shirley, and subject to all his equities. It would be a reproach upon the administration of justice if such a title thus acquired could avail to defeat the rights of the complainant and give triumph to the iniquity which has been practised upon him.

The decree of the Circuit Court is *Affirmed.*

Mr. Horace Maynard for appellant. *Mr. John Baxter* for appellee.

TREAT *v.* JEMISON.

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

No. 721. October Term, 1874. — Decided April 5, 1875.

When a judgment of affirmance is entered on motion under the rules, it will not be set aside and a rehearing ordered if the court is satisfied that the judgment below would be affirmed on the rehearing, if one were granted.

THIS was a motion to set aside the judgment reported in 20 Wall. 652. The case is stated in the opinion.

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

Before affirming the judgment presented by this record, we carefully examined the arguments submitted by counsel, although not in conformity with Rule 21, and considered the case upon its merits. Being entirely satisfied that the judgment of the court below ought to be affirmed, and not deeming it necessary to discuss in an opinion the several questions presented for our determination, we availed ourselves of the opportunity to call the attention of the bar specially to the new rule as to the form of briefs, which, if adhered to, will, we think, be of great service to counsel as well as the court.

The reason assigned for setting aside the judgment of affirmance and for leave to file a new brief, are such as would certainly have induced us to grant the motion, if it were necessary for a correct decision of the case. The questions involved were all fairly and ably presented by the arguments submitted on both sides. Since this motion we have again examined the case, and are confirmed in our original opinion.

For the reason, therefore, that the judgment must be affirmed if a further hearing is granted, this motion to set aside the order of affirmance already entered, is *Denied.*

Mr. M. Blair for the motion. No one opposing.

FLORIDA *v.* ANDERSON.

ORIGINAL.

No. 3. Original. October Term, 1875. A question in the case made October 7, 1876. — Decided December 11, 1876.

The clerk of this court, when money paid into court is put in his custody, is entitled to a fee of one per cent of the amount.

The court orders the balance of the fund paid to the State of Florida.

Cases Omitted in the Reports.

AFTER the decree in this case, (see *State of Florida* v. *Anderson*, 91 U. S. 667,) a question arose as to the clerk's fee for the custody of the money paid into the court.

MR. JUSTICE BRADLEY delivered the opinion of the court.

A question arises in this case as to the proper allowance to the clerk for the custody of the money paid into court. It is suggested that, by the General Fee Bill, (Rev. Stat. § 828,) the clerks of the Circuit Courts receive one per cent, and that, by analogy, the same allowance would be proper in this case. The fees of the clerk of this court were prescribed by the Process Act of 1792, § 3, 1 Stat. 276, which allowed the clerk $10 per diem for attendance on the court; and for other services, double the fees of the Supreme Court of the State in which the court sat. This section was repeated in the act of Feb. 28, 1799, 1 Stat. 625, when the seat of government was about to be removed to this District, and has never been altered. The bill of fees then adopted was based on those allowed by the laws of Maryland, to the clerk of the Court of Appeals of that State. At that time, 1800, the clerk of that court was allowed ten per cent on fees paid into court, (being a certain number of pounds of tobacco,) which had formerly belonged to the chancellor, but were then directed to be paid into the state treasury. 1 Kelty's Laws, 1779, cxxv, § 23. By the present code of Maryland a commission of five per cent is allowed on taxes and license fees paid into court. 1 Maryland Code, 291. We find, however, no commissions specified for moneys paid into court generally, and presume that none are allowed. But by analogy to the fee bill, for the Circuit and District Courts, we think that one per cent should be allowed in this case. This is the first instance known of moneys being paid into this court.

The allowance is made accordingly.

Sundry persons having made application for the balance of this fund, the court, on the 11th December, 1876, after directing payment in full of one of the claims, ordered the rest paid over to the State of Florida to subserve the liens and trusts to which it was subject in the hands of the State.

OSBORN *v.* UNITED STATES.

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

No. 77. October Term, 1875. — Original motion in the cause made in October Term, 1876. — Decided November 27, 1876.

When the judgment is silent as to costs in this court, neither party recovers his costs here; but each must pay, if not already paid, whatever fees are properly chargeable to him according to law and practice.

When the clerk has no security for fees due to him from a party entitled to a mandate he may withhold the mandate until his fees are paid, or he is otherwise satisfied in that behalf.

The rules relating to taxation of costs amended.

THE judgment in this case was entered at October Term, 1875. The case is reported in 91 U. S. 474. At October Term, 1876, motion was made for an order upon the clerk to issue a mandate. The case is stated in the opinion.

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

At the January Term, 1831, a rule of practice was adopted (No. 37), § 3 of which was as follows:

"In all cases the clerk shall deliver a copy of the printed record to each party; and in cases of dismission (except for want of jurisdiction) or affirmance, one copy of the record shall be taxed against the plaintiff; which charge includes the charge for the copy furnished him. In cases of reversal and dismission for want of jurisdiction, each party shall be charged with one-half the legal fees for a copy." 5 Pet. 724.

In 1858 the rules were changed under the supervision, as we see by the files of the court of Chief Justice Taney.

The following are §§ 3, 4, 5 and 6, of Rule 10, as then adopted:

"3. The clerk shall furnish copies for the printer, shall supervise the printing, and shall take care of and distribute the printed copies to the judges, the reporter, and the parties, from time to time, as required.

"4. In each case the clerk shall charge the parties the legal fees for but the one manuscript copy in that case.

"5. In all cases the clerk shall deliver a copy of the printed record to each party; and in cases of dismissal, reversal, or affirmance with costs, the fees for the said manuscript copy of the record

shall be taxed against the party against whom costs are given, and which charge includes the charge for the copy furnished him.

"6. In cases of dismission for want of jurisdiction, each party shall be charged with one-half the legal fees for a copy." 21 How. viii.

Under this rule the practice has always prevailed for the clerk to charge each party one-half the fees of the manuscript copy furnished the printer. A charge was made against the appellee in this case in accordance with this construction of the rule. In theory, at least, each party pays the clerk his fees for services in his behalf as the service is rendered. If afterwards costs are adjudged to him, he recovers from his adversary what he has thus paid, or is liable for if not paid.

The judgment in this case is silent as to costs in this court, consequently neither party recovers his costs here, but must pay, if he has not already, whatever is properly chargeable to him according to law and the practice. The long practical construction which has been given to this rule, without objection having been made to the court, renders it probable that it has received the construction it was intended to have. One-half the copy of the printer was, therefore, properly charged by the clerk to the appellee. As the clerk has no security for his fees charged to the appellee, we think it not improper in this case for him to withhold the mandate, when asked for by that party, until such fees are paid or he is in some manner satisfied in that behalf.

The motion made by *Edward S. Brown*, therefore, in behalf of the United States, is *Denied.*

Mr. Edward S. Brown for the motion. *Mr. Assistant Attorney General Smith* opposing.

At the last term, after our judgment in this case, we amended § 6 of Rule 10, so as to read as follows:

"In all cases of dismissal for want of jurisdiction the fees for the copy shall be taxed against the party bringing the cause into court, unless the court shall otherwise order."

To make the rule conform as a whole to this amendment, we now amend § 4, so that it will read as follows:

"In each case fees shall be charged in the taxable costs for but one manuscript copy of the record, and that shall be to the party bringing the cause into court, unless the court shall otherwise direct."

PHIPPS *v.* SEDGWICK.

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

No. 100. October Term, 1876. — Original motion in a cause decided at the last term. — Decided May 6, 1878.

Whether this court can recall its mandate, and modify it, after the term is ended in which the judgment was rendered, *quære*.

In this case the mandate of this court, and the decree and mandate of the Circuit Court entered on that mandate, correctly represent what this court decided.

This was a motion for a recall and modification of the mandate in the case of *Phipps* v. *Sedgwick*, reported in 95 U. S. 3. The case is stated in the opinion.

Mr. Justice Miller delivered the opinion of the court.

This case was argued and decided at the last term of the court, and the mandate sent in due time to the Circuit Court. The Circuit Court has also entered its decree in conformity to the mandate, and the case having originated in the District Court, sitting in bankruptcy, has remanded it to that court for further proceedings.

A motion is now made in this court to correct the mandate which was sent to the Circuit Court on the ground that it does not convey correctly to that court the decree which this court intended to make.

A very serious question is raised *in limine* as to the power of this court to recall its mandate and make the modification suggested, after the term has ended in which the judgment of the court was rendered. It is not necessary, however, to decide this question, because we are of opinion that the decree and mandate of this court and the decree of the Circuit Court entered on that mandate do correctly represent what this court decided, and what it intended to decide, and we are quite sure that if the District Court has misapprehended this, and shall, in consequence, in any future action of that court, injure the parties here moving in the matter, it will be corrected by a second appeal to the Circuit Court, or, if necessary, finally, to this court.

The case originates in the bankruptcy of J. K. Place and James Sparkman, and a bill in chancery brought by Sedgwick, assignee of these bankrupts, in the District Court. The main object of that suit was to have certain valuable real estate, conveyed by Place to

his wife some time before the bankruptcy, subjected to the claims of the creditors as being made in fraud of their rights. To this bill Mrs. Place and Place himself, and many others, including Phipps & Co., were made defendants.

Phipps & Co. were creditors holding heavy obligations of the bankrupt firm, for which they had recovered a judgment about the time the proceedings in bankruptcy commenced. Mrs. Place had also given a mortgage to secure this debt, on the real estate mentioned, some time before that, in which her husband had joined. The District Court held that the conveyance of the lots by Place to his wife was but a reasonable provision out of his estate at the time it was made, and dismissed the bill. The Circuit Court, on appeal, held that the conveyance was a fraud upon the creditors of the firm; that it should be set aside and held for naught; and that the proceeds of the property which had been sold by order of the court pending the proceedings, should be paid to the assignee.

In the finding of facts by the Circuit Court embodied in its decree, it is recited that the mortgage to Phipps & Co. was made in fraud of the provisions of the bankrupt law, and with a view to prevent the property from coming to the assignee, and that Phipps & Co. had reasonable cause to believe Place insolvent when it was made.

Phipps & Co. and the executors of Mrs. Place, who had died, appealed to this court.

On final hearing this court made the following decree:

"On consideration whereof it is now here ordered, adjudged and decreed by this court, that so much of the decree of said Circuit Court in these causes as directs the payment of the proceeds of the sale of the Fifth Avenue property, to wit: the sum of $93,161.42 to the assignee, John Sedgwick, is affirmed; but this affirmation is without prejudice to the right of any person now holding the debt growing out of Phipps & Co.'s commercial debt against James K. Place & Co. to present it for the purpose of having it allowed as a claim against the bankrupt estate, and without any determination of that right.

"And so much of said decree as directs that the complainant recover from the executors of Susan A. Place the sum of $22,160 and interest, be and the same is hereby reversed.

"In all other respects the decree is affirmed."

The Circuit Court on receiving the mandate which followed the words of this decree, made its own decree in the same terms by

entering the mandate on its record, and then remanded the case to the District Court for further proceedings. In that court the decree of this court is entered as part of its decree, but there is also added that part of the decree of the Circuit Court which contains the findings that Phipps & Co. had obtained a preference for their claim in fraud of the bankrupt law, and it is the fear of counsel that they will be used as conclusive against that claim, since filed with the assignee for a share in the distribution of the assets, which has caused the present motion.

But this court is unanimously of the opinion that no such defence to that claim is consistent with the decree of this court, and that of the Circuit Court founded on it.

In affirming that part of the decree of the Circuit Court which gave to the assignee the proceeds of the sale of the real estate, from which Phipps & Co. with others had appealed, the decree says in express terms that "their affirmance is without prejudice to the right of any person now holding the debt growing out of Phipps & Co.'s commercial debt against James K. Place & Co. to present it for the purpose of having it allowed as a claim against the bankrupt estate, and without any determination of that right."

For the District Court to hold that this leaves in force the finding of the Circuit Court that Phipps' claim was the subject of fraudulent preference, is to render nugatory the carefully considered words of the decree which we have given *verbatim*. It is as plain as language can make it, that this court intended to declare that while Phipps & Co. had no lien on the land claimed by Mrs. Place, they might present their claim to the assignee, unaffected by the decree of the circuit or of this court; that neither the decree which we were reviewing nor the one we rendered on that review, should establish or defeat, or in any wise affect the action of the assignee or of the court on that claim, when presented for allowance as against the estate. If it did not mean that, it meant nothing; and it is too carefully inserted to justify the latter conclusion.

The opinion of this court, 95 U. S. 5, is in strict conformity to this. In speaking of Phipps & Co.'s claim the court carefully avoids the question of fraudulent preference, but says: "It seems to be clear that the mortgage was taken under such circumstances of notice of the nature of Mrs. Place's title, on the part of Phipps & Co. that their claim under that mortgage is no better than the title of Mrs. Place." As we held that Mrs. Place's title was void,

their mortgage on that property failed, without considering whether they had done anything in fraud of the Bankrupt Law or not. And so that question was left intentionally by the court, as fairly deducible also from the words of the decree, to be an open one if raised by anybody when the claim should be presented for allowance.

We see no occasion to change a word in our decree or mandate, to give effect to the intent of the court, and the motion is, therefore,

Denied.

Mr. J. H. Ashton for the motion. *Mr. F. N. Bangs* opposing.

MEVS *v.* CONOVER.

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

No. 169. October Term, 1876. — Decided March 13, 1877.

Upon a bill in equity by the owner against an infringer of a patent, the plaintiff is entitled to recover the amount of gains and profits that the defendant made by the use of the invention.

The surrender of his patent by a patentee, in order to obtain a reissue, made after obtaining final judgment against an infringer, does not affect his rights which have passed into the judgment.

THE opinion of the court in this case is reported in full in 125 U. S. 144, 145, in the marginal note. *Mr. A. J. Todd* and *Mr. Edward Patterson* for appellant. *Mr. Rodney Mason* for appellee.

FOREE *v.* McVEIGH.

ERROR TO THE SUPREME COURT OF THE STATE OF VIRGINIA.

No. 478. October Term, 1876. — Decided April 16, 1877.

It appearing that the only Federal question involved in this case has been decided in another case at the present term, the court postpones the hearing of a motion to dismiss, in order to allow it to be amended, under the rules, by adding a motion to affirm.

THE case is stated in the opinion.

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

This case comes before us upon a motion to dismiss for want of jurisdiction. A similar motion was made and overruled at the last term, and we are satisfied with that decision.

Rule 6 provides "that there may be united with a motion to dis-

miss a writ of error to a state court a motion to affirm, on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument." So far as we can discover from the record, the only Federal question involved in this case was decided at the present term in *Windsor* v. *McVeigh*, [93 U. S. 274,] and if there had been united with the motion to dismiss a motion to affirm, we should, as at present advised, have been inclined to enter a judgment of affirmance. The only motion made, however, is one to dismiss, and that is the only motion of which the plaintiff in error has had notice. He has never been called upon to meet a motion to affirm.

If a party desires to obtain an affirmance under the operation of this rule, his motion must be to affirm as well as to dismiss. Of this the plaintiff in error must have the requisite notice, so that he may resist if he chooses.

The further hearing of the motion as it now stands is, therefore, postponed, with leave to the defendant in error to amend by adding a motion to affirm because the question involved has been already decided and no further argument is necessary.

So ordered.

Mr. P. Phillips for the motion. *Mr. S. F. Beach* and *Mr. B. F. Butler* opposing.

RUCKMAN *v.* BERGHOLZ.

ERROR TO THE COURT OF ERROR AND APPEALS OF THE STATE OF NEW JERSEY.

No. 704. October Term, 1876. — Decided March 13, 1877.

In an action in a state court by a real estate broker to recover commissions on sales of land, the exclusion of evidence that he had not paid the tax or received the license required by the statutes of the United States, when properly excepted to, raises a Federal question; but in this case the question was frivolous, and manifestly taken for delay.

Motion to dismiss or affirm.

Assumpsit in the Supreme Court of New Jersey by a real estate broker to recover of the defendant commissions on the sales of real estate. Plea *non assumpsit*. Verdict for the plaintiff for $13,903.65, and judgment on the verdict, which was affirmed on appeal. At the trial, the defendant's counsel offered to prove that the plaintiff

had not paid the tax or received the license for carrying on his business which was then required by the statutes of the United States. The court excluded this evidence, and exceptions were duly taken to this ruling. This constituted the only Federal question in the case. The defendant moved to dismiss the writ of error for want of jurisdiction; or to affirm the judgment below on the ground that the writ had been sued out merely for delay.

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

A Federal question is presented by this record, but it is so frivolous as to make it manifest that the writ was taken for delay merely. The motion to dismiss for want of jurisdiction is therefore overruled, but the motion to affirm under Rule 6, as amended May 8, 1876, is granted. *Affirmed.*

Mr. Courtlandt Parker for the motions. *Mr. Jacob Vanatta* and *Mr. Francis Kernan* opposing.

GERMANICA NATIONAL BANK *v.* CASE.

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

No. 784. October Term, 1876. — Decided January 15, 1877.

This court has jurisdiction of an appeal from a decree of a Circuit Court, requiring stockholders in an insolvent national bank to pay a given percentage on their stock which the comptroller of the currency had ordered collected, and such further sums as may be necessary to pay the debts of the bank.

Motion to dismiss. The case is stated in the opinion.

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

If the decree asked and obtained in this cause had been confined to an order for the payment of the seventy per cent upon the amount of the stock held by the appellants respectively, which the comptroller of the currency has already instructed the receiver to collect, the objection taken by the appellee to our jurisdiction might have been good; but the decree as given goes further, and, after providing for the seventy per cent, adjudges that each of the appellants shall be liable to further contribution as stockholders until a sufficient sum is realized to pay the debts of the bank, and that the bill be retained until it shall be certain that no further contribution will be required. This fixes the liability of each of these appellants to contribute in this suit to the extent of the nominal amount of his stock if neces-

sary, and as the bill alleges that at least twenty-five per cent more will be required, it is apparent that the "matter in dispute" is not alone the amount already decreed but a sum in addition that may amount to thirty per cent of the stock, and is now expected to reach twenty-five per cent. Their liability generally as stockholders to make contribution has been finally established. That can never again be contested in this suit except under this appeal. For the purposes of jurisdiction we may consider that as in dispute which would be settled by the decree if it had not been appealed from.

It follows that these motions to dismiss must be *Denied.*

Mr. Charles Carr for the motion. *Mr. R. H. Marr*, *Mr. Thomas J. Durant* and *Mr. C. W. Hornor* opposing.

VAN NORDEN *v.* BENNER.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 794. October Term, 1876. — Decided April 30, 1877.

The case presents no question of Federal law.

The case is stated in the opinion.

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

We find no Federal question in this record. The plaintiffs in error in their answer below claimed no "title, right, privilege, or immunity" under the bankrupt law, but only that the defendant in error availed himself of his rights under that law to force them to execute the note sued upon in order to avoid an adjudication of bankruptcy against a corporation in the existence and prosperity of which they were largely interested. The case as presented by the pleadings seems to be that the defendant in error, owning stock in and having a debt against the corporation, commenced proceedings in bankruptcy to wind up its affairs. This he had the right to do. The plaintiffs in error, fearing that he would be successful in his application and believing that their interests would be injuriously affected if he was, preferred to assume his debt and purchase his stock, in the hope thereby of saving themselves. This they had the right to do, and all that can be said against the transaction is that the defendant in error may have taken advantage of their necessities to secure himself against probable loss. This presents no question of Federal law.

The writ is dismissed for want of jurisdiction.

Cases Omitted in the Reports.

Mr. Charles B. Singleton, *Mr. Samuel Shellabarger* and *Mr. J. M. Wilson* for the motion. *Mr. Thomas J. Durant* and *Mr. C. W. Hornor* opposing.

Van Norden v. *Washburn*, No. 795, at the same Term, with a like state of facts and argued by the same counsel, was dismissed at the same time for the same reasons.

THATCHER *v.* KAUCHER.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF COLORADO.

No. 126. October Term, 1877. — Decided December 17, 1877.

The acts of a person assuming to be an agent in the sale of personal property will not bind the principal, unless he either authorized him to make the sale, or held him out to the public as clothed with the authority of an agent; and there being no evidence in this case either of authority to sell the property in dispute, or of consent to the agent representing himself to have such authority, no basis has been laid for the propositions which the court was asked to give the jury.

There was no error in the rulings of the court admitting evidence to show the market-value of the property converted.

Trover. Verdict for plaintiff and judgment on the verdict. The case is stated in the opinion.

Mr. Justice Strong delivered the opinion of the court.

The several instructions which the defendant below desired to have given to the jury were properly refused. The bill of exceptions exhibits no evidence that justified a demand for any of them. While it is true that if an owner of personal property authorizes an agent to assume the apparent right to sell it, an innocent purchaser may safely buy from the agent, and his purchase will bind the principal, though in fact there was no real authority to sell, yet the principal is not bound unless he has held out the agent to the public as clothed with such authority. There must be some evidence either of permission to sell or of consent to the agent representing himself to have such a license. We can find no such evidence in this case.

It is not claimed that Minch, from whom Thatcher, the defendant, asserts he purchased the whiskey, had in fact any authority to sell the lot. All that is insisted is that the plaintiff allowed him to assume such authority and held him out to the public as so authorized. But certainly there is nothing in the evidence that could warrant a jury thus to find. Minch was not a salesman employed by the plaintiff, and he assumed no appearance of ownership or of

authority to sell, in the presence of the plaintiff, or while the plaintiff was in the Territory. During that time he made no sales. Nothing, therefore, in the conduct of the plaintiff tended to show that Minch was clothed with any right to dispose of the property. And the act of leaving it in Minch's charge in itself had no tendency to show such a right. A bailee for custody has not the *indicia* of an agent to sell. Nor were the small sales made by Minch, while he had the property in charge, and during the absence of the owner, any evidence of his right to sell. An agent's authority cannot be proved by his own acts alone. The sales were made without the knowledge, and, of course, without the consent of the bailor; at least the sales themselves did not show such knowledge or consent. Nothing remains, then, to show the plaintiff's consent to the sale made to the defendant, if any there was, except the fact that Minch was told to sell enough to pay his board during the plaintiff's absence from the Territory. But there is no evidence that even this was made known to the public or that the defendant ever had knowledge of it. All that was known to the public was the fact that the bailee was selling the whiskey in small quantities during the absence of the bailor. And the limited license given was a very different thing from power to dispose of the whole property entrusted to the bailee's care. There was, therefore, no evidence tending to show that Kaucher, the plaintiff, clothed Minch with the *indicia* of ownership of the property, or with powers fitted to induce innocent third persons to believe that he was authorized to make such a sale as the defendant claims was made to him. Much less is there evidence to show that the defendant was misled by any appearances. And it is not a little remarkable that the record exhibits no proof that such a sale was ever made, though the bill of exceptions contains all the evidence introduced at the trial. All that can be found is an unsworn declaration of the defendant that he had made such a purchase, a declaration made in reply to the plaintiff's demand for the property; but that is no proof of the fact asserted. No witness testified that Minch had made a sale to the defendant, and no written evidence of such a sale was adduced. There was no basis, therefore, for the propositions which the court was asked to give as instructions to the jury.

The remarks we have made are sufficient to show there was no error in excluding from the consideration of the jury the evidence given by the defendant relating to Minch's conduct and declara-

tions after the plaintiff had left the Territory. It was all wholly immaterial.

Nor was there error in any of the rulings of the court admitting evidence to show the market value of the property taken and converted.

The judgment is, therefore affirmed, and the record is ordered to be remitted to the Supreme Court of the State of Colorado.

Mr. W. Willoughby and *Mr. J. W. Denver* for plaintiff in error. *Mr. John Q. Charles* for defendant in error.

ELIZABETH *v.* AMERICAN NICHOLSON PAVEMENT COMPANY.

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

No. 203. October Term, 1877. Original motion in the cause made at October Term, 1878. — Decided November 25, 1878.

This court has power at any time to amend a decree which has by inadvertence or mistake been entered in a different form from that in which the court intended it.

When a joint decree is made in the court below against two or more parties, and the decree is found to be correct as to some of the parties, and incorrect as to the others, the ordinary and proper practice is to reverse it as an entirety, and remand the cause for a new decree; but when such a decree does not affect the rights of the different parties in a different manner, as, for instance, when it is found right in all respects, except as to the amount, the court sometimes reverses it in part and affirms it in part, this being always within the discretion of the court.

This was, in substance, a motion to amend the decree of the court, as not being in conformity with its opinion. *Elizabeth* v. *Pavement Co.*, 97 U. S. 126. The case is stated in the opinion.

Mr. Justice Bradley delivered the opinion of the court.

A motion is made in this case to amend the mandate so as to conform to the opinion delivered by the court at the last day of October Term, 1877. The motion cannot be entertained in the form in which it is made, because no mandate has in fact ever been issued in the case. The appellee, however, desires to convert the notice into one for amending the decree on the ground that it does not conform to the opinion. We have examined the decree and find that it does conform precisely to the opinion. The last sentence of the opinion is in these words: "The decree of the Circuit Court,

therefore, must be reversed with costs, and the cause remanded to said court with instructions to enter a decree in conformity with this opinion." The decree of this court exactly follows this announcement; it reverses the decree of the Circuit Court and remands the cause, with instructions to enter a decree in conformity with the opinion. We do not see any mistake at all in the form of entering the decree. We have no doubt of our power at any time to amend a decree which has by inadvertence or mistake been entered in a different form from that in which we intended it. As said by *Mr. Justice Strong*, delivering the opinion of the court in the case of *Insurance Co.* v. *Boon*, 95 U. S. 117, 125: "It is familiar doctrine that courts always have jurisdiction over their records to make them conform to what was actually done at the time." But we see no occasion for exerting any such power in this case.

The learned counsel for the appellee supposes that, in view of the conclusion to which the court came, as expressed in its opinion, it ought to have entered a different decree from that which it saw fit to enter. If it were necessary for the court at this time to enter upon a defence of its action, we should have no difficulty in showing that it was the proper course to take. The conclusion referred to was, that the decree of the Circuit Court, which was a joint decree against three parties, would have been correct if it had been made against one of them and not against the others. The counsel of the appellee contends that, having come to that conclusion, we ought to have affirmed the decree as to the one party against whom such a decree might have been made, and reversed it as to the others. But we do not think so. The decree of the Circuit Court was wrong. All the defendants joined in an appeal for its reversal; and it was the ordinary course to reverse the decree as an entirety and to remand the cause for a new decree. We have in some cases, it is true, affirmed a decree in part, and reversed it in part where such a course did not affect the interest of different parties in a different manner, as might have been the case here had we come to the conclusion that the decree was right in all respects except as to the amount. But even then it would have been in the discretion of the court to have reversed the decree and remanded the cause for correction. This, as before said, is the ordinary course; and if in any case we depart from it, it is in the exercise of that discretion which the court, in view of all the circumstances of the case, has a right to exercise in reference to the particular form of its decree.

The motion, in fact, as now modified, is equivalent to a motion for a rehearing, and cannot be entertained. The decree is in exact conformity to our intention, and must stand as it has been entered.

The motion is denied.

Mr. P. Phillips for the motion. *Mr. W. A. Beach* opposing.

JONES *v.* GROVER AND BAKER SEWING MACHINE COMPANY.

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

No. 231. October Term, 1877. — Decided February 18, 1878.

A bill of exceptions, signed after the term at which the judgment was rendered, without the consent of the parties or an express order of court to that effect made during the term, will not be considered part of the record, except under very extraordinary circumstances.

The court cannot pass upon an exception to the admission of a paper in evidence at the trial, if the record contains no copy of it.

THE case is stated in the opinion.

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

In *Müller* v. *Ehlers*, 91 U. S. 249, after reviewing the earlier cases, we decided that, save under very extraordinary circumstances, a bill of exceptions signed after the term at which the judgment was rendered, without the consent of parties, or an express order of the court to that effect made during the term, could not be considered part of the record in a cause. This rule excludes from this record the bill of exceptions signed October 9, 1875. The judgment was rendered at the June Term of that year, the writ of error sued out July 16, and the citation served the same day. The authentication of the transcript of the record annexed to and returned with the writ, as required by § 997 Rev. Stat., bears date October 7, and the bill of exceptions, signed as it was after that time, is simply appended to what was thus authenticated. There is nothing to show that it was ever even filed in the office of the clerk of the court. Certainly such a paper cannot be considered here.

The note of exception which does appear in the record, and upon which the only error insisted upon in the argument is assigned, contains neither a copy of the rejected agreement nor any statement of its contents. We can only reverse a judgment for error actually

appearing. Every presumption is in favor of the correctness of the ruling below, and until we know from the record what the paper offered in evidence was we cannot say that the court improperly excluded it. *Judgment affirmed.*

Mr. Isaac I. Post and *Mr. J. Hubley Ashton* for plaintiffs in error.
Mr. Enoch Totten for defendant in error.

SAWYER *v.* WEAVER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 239. October Term, 1877. — Decided March 25, 1878.

A deed of trust from the vendee of real estate to the vendor, to secure the payment of part of the purchase-money, recited that there was an indebtedness on the property of eight promissory notes, each for $1000 with interest, as appeared by a deed referred to, which were to be assumed by the vendee as part consideration of the sale, and the vendor saved harmless therefrom. By reference to the deed it appeared that these notes were payable in one, two, three, etc., years respectively, with interest; *Held*, that the interest on each of these notes was payable on its maturity, and, no fraud or mistake being shown, that the obligation of the vendee to protect the vendor extended to the payment of the overdue interest on the specified notes, as well as the principal.

In equity. The case is stated in the opinion.

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

The undertaking on the part of Frederick P. Sawyer, the decedent, in respect to the payment of the indebtedness to North is thus expressed in the deed of trust executed by him, on receipt of the conveyance from Weaver, to secure the payment of the balance of his purchase-money:

"And whereas there is now an indebtedness on said property of eight promissory notes of S. D. Castleman and said Weaver, each for $1000 with interest, as will appear by deed recorded in liber No. 640, folio 474, and part of the consideration of this sale is that the said Sawyer should assume said indebtedness and pay the same, and hold the said Weaver harmless therefrom."

The deed referred to is dated March 24, 1871, and states the indebtedness to be "in the sum of ten thousand dollars, for which amount he (North) holds the ten joint and several promissory notes of the said Castleman and Weaver, bearing date on the 17th day of March, A.D. 1871, each for the sum of one thousand dollars, pay-

able, respectively, in one, two, three, four, five, six, seven, eight, nine and ten years after date, to the order of said Castleman and Weaver, with interest at the rate of seven per cent per annum."

Nothing would seem to be clearer than that this created an obligation on the part of Sawyer to pay the indebtedness of Castleman and Weaver to North upon the property. The assumption is not of eight thousand dollars, but of the indebtedness evidenced by eight of the notes described in the deed referred to, and this was eight thousand dollars with interest from March 17, 1871. The notes were not payable with interest annually, but with interest from date, which implies that the interest accruing from date to maturity was payable at maturity with the principal. Two of the notes described in the deed had matured before the sale to Sawyer, and as eight only were assumed, the presumption is, in the absence of anything to the contrary, that the assumption was of the eight to mature thereafter. As express reference is made in the deed by Sawyer to that by Castleman and Weaver for a description of the indebtedness assumed, the same effect is to be given the contract of Sawyer, embraced in his deed, that would be if the language in the deed referred to had been in terms incorporated into his own.

It is said, however, that the deed from Weaver to Sawyer, executed as it was at the same time with that of Sawyer and as part of the same transaction, must be construed with the deed of Sawyer for the purpose of determining what the contract between the parties actually was. This is undoubtedly so, but we do not think it alters the case. The items of the consideration, as recited in the deed of Weaver, it is true, amount in the aggregate to only twenty thousand dollars, and in the description of the debt to be assumed, special mention of interest is omitted, but the deed of Castleman and Weaver is referred to, and there is nothing to indicate an exclusion of the interest which that deed describes from the debt assumed.

It is conceded on the part of the appellants that the deeds taken together contain the contract of the parties as finally reduced to writing. Parol evidence, therefore, is not admissible to contradict or vary it. An effort is, however, made to have the contract reformed on account of a mutual mistake of the parties as to the amount of the North debt, or the fraud of Weaver in concealing it. The pleadings in the case are not framed with a view to that relief, but if they were, the evidence fails entirely to make out such a case. Reference is given to the deed of Castleman and Weaver for a

description of the indebtedness, and it is there found distinctly stated. There could, therefore, have been no concealment, and there is no pretence whatever of any false statement. If Sawyer had exercised ordinary prudence he need not have been mistaken, and the testimony of the witness who drafted the conveyances, if it is to be relied upon, shows most conclusively that he was not.

The decree is affirmed.

Mr. T. T. Crittenden and *Mr. George W. Paschal* for appellant.

No appearance for appellee.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY *v.* BURNSTINE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 240. October Term, 1877. — Decided March 25, 1878.

A mortgagee who has notice through his agent in the negotiation of the loan, that the discharge of a prior mortgage on the property was fraudulently obtained, cannot acquire the property discharged of the prior incumbrance, by purchase at a sale under decree of foreclosure of his own mortgage.

The question is one of fact; and this court cannot see that the evidence is so clearly against the decision of the court below, that it would be justified in reversing it.

The case is stated in the opinion.

Mr. Justice Hunt delivered the opinion of the court March 25, 1878.

The contention in this case arises upon the priority of the security and the trust deeds held by the respective parties.

The first deed was made by John N. Hubbard to Wm. H. Ward to secure the payment of a note of $3000, payable thirty days after its date, made by Hubbard, payable to and held by James M. Ormes. The papers bear date of January 31, 1872, and within three days after that date the note and the trust deed were transferred and delivered to the plaintiff, Burnstine.

The trust deed under which the insurance company makes claim bears date of November 11, 1872, made by the same Hubbard to trustees, to secure a loan of $12,000 made by the insurance company to Hubbard. The insurance company admits in its answer that at the time of making this loan and receiving its security therefor, the deed to Ward was on record and known to it, and was a

prior encumbrance. It insists, however, that by an agreement with Hubbard it retained and withheld from him a sum sufficient to pay and satisfy the debt of $3000 secured by the said deed, until there was delivered to it as ready for record a release of the debt and security referred to, and the company was notified that the prior lien had been paid off and discharged, and that thereupon, without knowledge or suspicion that the release had not been duly executed, it paid to Hubbard the amount which had been withheld as security in respect to the said prior encumbrance.

This release and discharge of the trust deed was made by Ward, the trustee, and Ormes the original payee of the $3000 note, but it was in disregard and in fraud of the rights of Burnstine, to whom the note had been transferred before maturity, with the accompanying security of the trust deed, and who was the actual holder thereof.

The company claims that under these circumstances it became the first encumbrancer, and having subsequently purchased the property at the sale under the trust in good faith and without notice, it acquired the legal title and holds the same discharged of Burnstine's claim.

Without seriously contesting the soundness of the general principle of law set forth, the counsel of Burnstine contends that John G. Bigelow was the agent of the company in making its loan to Hubbard, and in making the subsequent payment to him, and in receiving the release. That Bigelow knew that Burnstine was the holder and owner of the note secured by the trust deed to Ormes, and knew that the execution of the release by Ward and Ormes was a fraud upon Burnstine.

It is insisted that notice to the agent is notice to the principal, and that a mortgagee with notice of the fraudulent discharge of a prior mortgage is not a *bona fide* purchaser. 2 Leading Cases Equity, 1st ed. 1877, pp. 134, 144, 154, 157, 160, 178; *Williamson* v. *Brown*, 15 N. Y. 354, 359; *Champlin* v. *Layton*, 6 Paige, 189, 203; *Morgan* v. *Chamberlain*, 26 Barb. 163; *Jackson* v. *Post*, 15 Wend. 588, 594. There is but little difficulty as to the principles of law which should control the case.

The question is one of fact: was Bigelow the agent of the company in receiving the release, and had he knowledge of the fraud?

The fraudulent release was executed on the 4th day of February, 1873, and on or about that day was delivered to Mr. Bigelow. It was retained by him without being placed on record until November.

1873, when he delivered it to Mr. Parsons, the president of the insurance company. Mr. Parsons retained it until the 7th day of February following, (for the reasons given by him,) when he placed it on record.

We think that upon the evidence it is too plain for discussion that in February, 1873, and afterwards, Bigelow was the agent of the insurance company in disbursing its moneys to Hubbard and others, and in perfecting its title to the lots covered by the larger trust deed, and in paying out the money reserved for the indemnity of the Ormes or Burnstine security; and that he received the release in question for and on behalf of the company, held it in that capacity, and at a convenient time delivered it to its president as a muniment of title.

Whether Mr. Bigelow had knowledge that Burnstine was the owner of the $3000 note when this release was executed, and that Ward and Ormes had no authority to execute the release they delivered to him, is not free from doubt. Mr. Bigelow testifies positively that he had no such knowledge. Mr. Burnstine testifies positively that he had such knowledge, and that in the presence of his brother (now deceased) and himself, Mr. Bigelow saw him take the note and trust deed from his safe as his property, that they were examined, a calculation made by him of the amount due on the note, and the securities again placed in Burnstine's safe.

Mr. Ormes testifies that he informed Mr. Bigelow that Burnstine was the owner of the note or had an interest in it, and that he went with him to Burnstine's office, leaving him at the door, which Bigelow entered, while he passed on.

Mr. Bigelow admits that he was informed by Mr. Ormes that Burnstine held the note as collateral security, and testifies that he called upon Burnstine for the purpose of paying his claim, but that both Burnstine and his brother denied the ownership or possession of the note, or any knowledge whatsoever of the note or the security.

The court below gave its decision in favor of Burnstine, and we do not see that the evidence is so clearly against that decision that we should be justified in reversing it.

Adding to this the fact that a man who was honest and but reasonably prudent should not have been satisfied with a release without the production of the note secured, when he had information that there was question about its ownership, we feel constrained to affirm the decree. *Affirmed.*

Mr. S. R. Bond for appellant. *Mr. Enoch Totten* for appellee.

Cases Omitted in the Reports.

RISHER *v.* SMITH.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 246. October Term, 1877. — Decided April 22, 1878.

In equity, parol testimony is admissible to show that a conveyance, absolute on its face, was in fact a mortgage.

It is clear from the evidence that the order which was the subject matter of this action, was for the purpose of security only, and that the debt for which it was security was paid before the defendant Taylor received the government drafts.

The case is stated in the opinion.

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

It cannot be considered an open question in this court that in equity parol testimony is admissible to show that a conveyance absolute on its face was in fact a mortgage. *Russell* v. *Southard*, 12 How. 138, 147; *Babcock* v. *Wyman*, 19 How. 289. Upon the evidence in this case it is clear that the order on Taylor given Biddle & Co. by Sawyer, Risher and Hall, and which is the subject matter of the action, was for the purpose of security only. All the parties must have so understood it.

The order was not negotiable commercial paper. Consequently Smith, the plaintiff, took it subject to all equities between the original parties, and there is nothing to show that either the drawers or the acceptor have incurred any obligations to him except such as they were under to the drawees. The case is, therefore, to be considered the same as if Biddle & Co. were now themselves seeking to reach the fund in the hands of Taylor.

After a careful consideration of the evidence we are satisfied that the debt to Biddle & Co. was paid and discharged long before either of the government drafts was received by Taylor. The order was dated June 20, 1867. On the 13th of September in that year Biddle & Co. stated their account, showing a balance in their favor of $25,476.33. Of this amount $12,948.91 was paid the same day, and $1014.53 September 19, leaving a balance at that date of $11,412.89. They then held as collateral, besides the order in question, certain notes of Mace Sawyer, on which $10,000 were afterwards collected. On the 19th October Biddle & Co. accepted two drafts for $6180.50 each, payable in ninety days and six months respectively, to settle a judgment against Sawyer, Risher and Hall

in favor of Lathrop, Luddington & Co. At the same time Risher and Hall, "in consideration of indebtedness and advances made and to be made by Biddle & Co.," gave Biddle an irrevocable power of attorney to collect all moneys that might become due to them from the United States for carrying the mails on certain designated routes for the year ending July 1, 1868. The amount paid by the government for this service after the date of the power of attorney was not far from $19,000, and as the power was filed in the office of the auditor of the treasury for the Post-Office Department on the 12th October, the payments must have been controlled at least by Biddle. On the 24th July, 1868, another power of attorney of like character was executed to Biddle for the year commencing July 1. About $25,000 were paid by the government on this account, and on the 5th of October, 1868, drafts on the department were drawn by Biddle in favor of Theodore Crane, president, amounting in the aggregate to $20,000 of this $25,000. In addition to this Biddle testifies that at one time he borrowed of Risher and Hall ten thousand dollars, upon a draft of his upon one Sampson, a resident of Texas. Under these circumstances certainly the burden is thrown upon Smith to show that the balance due Biddle & Co. was not paid out of the moneys thus received. This he has failed to do.

Taylor received one draft from the government about October 1, 1868, for $4744.19, and another March 22, 1869, for $1332.52. He is entitled to one-fourth of the two amounts for his services. Shortly after the first draft was obtained Taylor drew the money upon it, under an arrangement by which he was to give security for its payment when required. He should, therefore, be charged with interest upon the balance in his hands, after deducting his commissions of twenty-five per cent upon the amount of the two drafts. This balance is conceded to be $3225.01.

The decree is reversed, and the cause remanded with directions to dismiss the original bill at the costs of Smith, the plaintiff, and to enter a decree upon the cross-bill, requiring Taylor to pay Risher the balance in his hands, being $3225.01, with interest from the date of its receipt, and also to deliver to Risher the treasury draft of $1332.52 in his possession. The appellee, Smith, to pay the costs of the appeal.

Mr. T. T. Crittenden and *Mr. George W. Paschal* for appellant. *Mr. F. C. Wood* and *Mr. Thomas Jessup Miller* for appellees.

Cases Omitted in the Reports.

NONCONNAH TURNPIKE *v.* TENNESSEE *ex rel.* TALLEY. SAME *v.* SAME. SAME *v.* SAME.

ERROR TO THE SUPREME COURT OF TENNESSEE.

Nos. 639, 640, 641. October Term, 1877. — Decided November 5, 1877.

No Federal question is presented by the record, in these cases, the question respecting the forfeiture of the charter of the turnpike company being a question of state law only, as to which the judgment of the state court is final.

THE case is stated in the opinion.

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

No Federal question is presented in either of these records. Even if the point urged here in support of our jurisdiction was one involving Federal rights, which we are by no means prepared to admit, it does not appear in the cases as they come to us. Under a statute passed January 8, 1846, (Acts of Tenn., 1845–6, 107,) authorizing judicial enquiry "to ascertain whether any corporation by non-user or abuse of its franchises has incurred a forfeiture of its charter or has been disabled by a surrender of its franchises," it seems to have been held by the courts of Tennessee, that to justify a decree of forfeiture there must have been wilful abuse or improper neglect in the exercise of the powers conferred. *State* v. *Merchants' Ins. and Trust Co.*, 8 Humphreys, 235, 284; *State* v. *Columbia and Hampshire Turnpike Co.*, 2 Sneed. (Tenn.), 254. But in 1857–8, by the code then adopted, provision was made for a like proceeding against corporations that "do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation," and for a decree of forfeiture "if it be adjudged that a defendant corporation has by neglect, non-user, abuse, or surrender, forfeited its corporate rights." Tenn. Code, 1857–8, §§ 3409, 3425. This law was in force when the charter of the Nonconnah Turnpike Company was granted, and the Supreme Court in these cases decided that under its provisions the failure of the company to complete its road within the time limited was such a substantial non-compliance with the requirements and conditions of the charter as to subject the company to a decree of forfeiture. This is a question of state law alone, as to which the judgment of the state court is final.

The cases are dismissed for want of jurisdiction.

Mr. Albert Pike, *Mr. L. H. Pike* and *Mr. Robert W. Johnson* for the motion. *Mr. Samuel Shellabarger*, *Mr. J. M. Wilson* and *Mr. D. K. McRae* opposing.

UNITED STATES *v.* DRISCOLL.

APPEAL FROM THE COURT OF CLAIMS. ORIGINAL MOTION IN THE CASE.

No. 1053. October Term, 1877. — Decided April 8, 1878.

A request for an order upon the Court of Claims for an additional finding is refused, because that court had not been requested to make the findings, in accordance with rules 4 and 5 regulating appeals therefrom.

THE case is stated in the opinion.

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

This motion is denied. At the same term with the order for additional findings in *United States* v. *Adams*, 9 Wall. 661, and to avoid the difficulty experienced in that case, rules 4 and 5, regulating appeals from the Court of Claims, were promulgated. 9 Wall. 7. The fourth requires that court to file its findings of facts at or before the time of entering the judgment, and the fifth permits either party to call for a finding upon a special question deemed material to the judgment in the case, and, if refused, to ask this court to pass upon the materiality of the fact alleged, and, should it be considered material, to send down for the finding. Such is the construction given the rules in *Mahan* v. *United States*, 14 Wall. 109, 112. The object is to present the question here as upon an exception to the ruling of the court below in respect to the materiality of the fact. For that purpose it must have been submitted to the court in a written request, as provided in the rule. Nothing of the kind appears here. While other requests were made, this was not, and the record upon its face does not show that the court has omitted to pass upon any fact necessary to the decision of the cause. No foundation has, therefore, been laid for this application. *Motion denied.*

Mr. Thomas J. Durant for the motion. No one opposing.

See *United States* v. *Driscoll*, 96 U. S. 421.

Cases Omitted in the Reports.

DUMONT *v.* DES MOINES VALLEY RAILROAD COMPANY.

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

No. 87. October Term, 1878. — Decided May 5, 1879.

A petition to file a bill of review on the ground of newly discovered evidence will not be granted if the bill, when filed, ought not to be sustained by reason of the laches of the petitioner in neglecting to discover the evidence earlier.

PETITION for leave to file a bill of review. The application was denied in the Circuit Court, and the petitioner appealed. The case is stated in the opinion.

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

This application is denied. The petitioners have not shown such diligence as will entitle them to reopen a litigation that has been carried on with so much pertinacity for a great number of years. The new matter relied upon consists principally of record evidence drawn from the archives of the government, which might as easily have been found at the time the controversy arose as now. The treaty was a part of the law of the land, and the maps and official reports have been on file in the proper government office, where they were discovered, for a quarter of a century. We are all of the opinion that if a bill of review should be filed containing all the averments that are in the present petition, it ought not to be sustained. Clearly, then, leave ought not to be granted for a continuance of the litigation. *Affirmed.*

Mr. Charles A. Clark and *Mr. James Grant* for appellant. *Mr. C. C. Nourse* and *Mr. A. M. Hubbard* for appellees.

CARSON *v.* OBER.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 123. October Term, 1878. — Decided January 13, 1879.

The question raised and decided in a state court, whether there could be a sale of cotton so as to pass title to the vendee before the payment of the government tax, is not a Federal question.

THE case is stated in the opinion.

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

We find no Federal question in this record. The court below decided that as between vendor and vendee there could be a sale and delivery of cotton, so as to pass title to the vendee before the payment of the government tax assessed upon the cotton, under the act of July 1, 1862, 12 Stat. 465. This was a question of general law only. The plaintiff in error claimed no right or title under the tax laws or treasury regulations. The court was not called upon to determine whether the lien of the tax was valid or invalid, but only whether so long as the lien existed the ownership of the property subject to the lien could be transferred. The case is clearly within the rule considered in *Long* v. *Converse*, 91 U. S. 105, 112.

Dismissed for want of jurisdiction.

Mr. J. S. Black and *Mr. H. W. Garnett* for plaintiff in error.
Mr. S. T. Glover and *Mr. J. R. Shepley* for defendants in error.

FLOURNOY *v.* LASTRAPES.

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

No. 186. October Term, 1878. — Decided April 7, 1879.

A sheriff's deed executed by a deputy sheriff in his own name is good in Louisiana.

An objection not made below cannot be assigned as error and considered here.

A general verdict "for the defendant" is equivalent to a special verdict on each and all the issues tried.

The judgment followed the pleadings.

The case is stated in the opinion.

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

The first error assigned in this case is to the effect that the court admitted in evidence to prove the title of the defendant, a sheriff's deed executed by a deputy sheriff in his own name, and not in the name of the sheriff. In some States this would be a good objection, but in Louisiana the rule appears to be otherwise. The precise question was raised and directly decided in *Kellar* v. *Blanchard*, 21 La. Ann. 38, 41, and we are not advised that the authority of this case has ever been questioned.

The second assignment is that the sale and adjudication of the

property by the deputy sheriff was null and void, on account of the insufficiency of the bid. No such objection was made below, and it cannot be considered here.

The third assignment is that the verdict of the jury was too vague and indefinite. The verdict was "for the defendant." This is equivalent to a special finding in favor of the defendant upon each and every one of the issues tried, and authorizes any judgment that could be entered on such a finding.

The only remaining assignment is that the court gave judgment in favor of the defendant for the property in controversy. It is claimed that this could not be done under the pleadings. The prayer of the petition was that the petitioner might be decreed to be the true and lawful owner of the property; that if the defendant set up color of title, he might be required to produce the same; and if it should appear insufficient, that he might be prohibited from claiming ownership. The defendant answered, setting out his title, and asking that it be recognized and acknowledged, and that the plaintiff be condemned to surrender and deliver to the defendant full possession. The judgment followed this prayer in the answer.

Affirmed.

Mr. Thomas Hunton for plaintiff in error. *Mr. W. Hallett Phillips* for defendant in error.

METROPOLITAN BANK *v.* CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

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

No. 229. October Term, 1878. — Decided November 4, 1878.

Brine v. *Insurance Co.*, 96 U. S. 627, followed, in regard to the right of redemption from a sale under foreclosure of a mortgage in Illinois.

The case is stated in the opinion.

Mr. Chief Justice Waite announced the judgment of the court.

This was a bill in equity filed by the Connecticut Mutual Life Insurance Company in the Circuit Court of the United States for the Northern District of Illinois, to foreclose a mortgage executed to that company by the Marine Company upon certain lands in the city of Chicago. The Metropolitan National Bank of New York, a subsequent lien holder, was made a party defendant, and while

not contesting the right of the complainant to a decree of sale, insisted in its answer, that if such a decree was rendered it should provide "for the redemption therefrom required and secured by the statute of Illinois in that behalf." The court, however, February 17th, 1875, directed that the sale be made "in accordance with the course of practice that prevailed therein," which did not allow redemption. A sale having been made and reported by the master under this decree, the bank objected to its confirmation, on the ground that it was absolute, when it should have allowed redemption in accordance with the state statutes, and that a certificate of sale should be given by the master instead of a deed, and redemption allowed. These objections were overruled and a decree entered August 14, 1875, confirming the sale and directing the master to convey the premises to the purchaser and the defendants to deliver the possession. The bank has taken this appeal, and in its assignment of errors returned with the record alleges for error that the court directed the sale without redemption and confirmed the sale of the master as an absolute sale and without redemption.

The insurance company, appellee, seeing that the case is governed by our decision at the last term in *Brine* v. *Insurance Co.*, 96 U. S. 627, now comes and, confessing the errors assigned, asks that the decree may be reversed and the cause remanded, and that the mandate issue immediately. Accordingly the decree of August 14, 1875, confirming the sale, is

Reversed, and also so much of the decree of February 17, 1875, *as directs that the sale be made in accordance with the practice of the court, but in all other respects the decree of February* 17 *is affirmed. The cause is remanded, with instructions to set aside the sale and modify the decree of February* 17 *by providing for a redemption from the sale in accordance with the statutes of Illinois. The costs of this appeal must be paid by the appellee, and a mandate may issue immediately.*

Mr. Melville W. Fuller for appellant. *Mr. Edward S. Isham* and *Mr. Robert T. Lincoln* for appellee.

Cases Omitted in the Reports.

UNITED STATES *v.* MORGAN.

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

No. 258. October Term, 1878. — Decided May 5, 1879.

An adjusted account of an Internal Revenue Collector at the Treasury, showing the exact amount finally allowed him as extra compensation, is conclusive evidence on that question.

The Secretary of the Treasury may fix the amount of an extra allowance to a Collector of Internal Revenue in advance of the service rendered.

THE case is stated in the opinion.

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

We find no error in this record. The objection to the admissibility of the testimony of Curtis and the defendant Morgan was not because it was insufficient to prove an arrangement between the Secretary of the Treasury and Morgan, by which Morgan was to be allowed his extra compensation, but because the Secretary of the Treasury might make the allowance at any time, and as the adjusted account showed the exact amount finally allowed, this account was conclusive evidence on that question. As the case stands upon the record it is to be presumed there was evidence tending to prove that the letter of the Commissioner of Internal Revenue was authorized by the Secretary of the Treasury. Upon the objection as made we think the ruling of the court was right. There is nothing in the act of Congress which precludes the Secretary of the Treasury from fixing the rate of extra compensation to be allowed in advance of the service rendered, and if he does, it becomes binding on the government and may be enforced in the settlement of accounts thereafter.

The allowance of a commission upon the sum of $13,619.85, as part of the compensation of the collector for the year ending June 30, 1864, was also right. The money was all collected before the expiration of that year, and ten thousand dollars was actually paid into the treasury. As to the allowance of commissions for this there can be no doubt. It is a matter of no consequence that advices of the payment did not reach the accounting officers of the Treasury Department, so as to be entered on the books there, until after the year expired. No unnecessary delay occurred in paying over the remainder. It was actually collected in a distant part of

the collection district, and did not in the ordinary course of transmission reach the collector so that it could be paid into the treasury before June 30. The collector was accountable for it when it was collected, and since he paid it over as soon as he could, we think he was entitled to his compensation as for services rendered during the year.

The objection to the claim for express charges paid was not made below and cannot be considered by us. We hear the case upon the rulings contained in the bill of exceptions and not upon the evidence.

The same is true as to the claim now made that compensation has been given by the jury in their verdict in excess of the maximum limit fixed by the statute for the year. It does not appear from the bill of exceptions that this point was taken below.

No error is assigned upon that part of the charge of the court which related to the payment of the bills of the assistant assessors.

The judgment is *Affirmed.*

Mr. Attorney General for plaintiff in error. *Mr. W. W. Morrow* for defendants in error.

HUNT *v.* HUNT.

ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

No. 705. October Term, 1878. — Decided January 6, 1879.

The contract of marriage is not a contract within the meaning of the provision in the Constitution prohibiting States from impairing the obligation of contracts.

Motion to dismiss. The case is stated in the opinion.

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

In the *Dartmouth College Case*, 4 Wheat. 629, it was expressly said by Chief Justice Marshall, in delivering the opinion of the court, that the provision of the Constitution prohibiting States from passing laws impairing the obligation of contracts "had never been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate upon the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has

been broken by the other." This disposes of the first ground upon which our jurisdiction is invoked in this case. The law complained of simply provides for divorces in certain cases after hearing by a court of competent jurisdiction.

The suit in Louisiana was one affecting the personal status of the defendant in error, a citizen of that State. The contract of marriage from which he sought to be liberated had been entered into in that State when both parties were citizens of the State. The question presented for decision below, and decided, was not what would be the rights of the plaintiff in error if she had been a citizen of the State of New York when the suit was commenced against her in Louisiana, but whether she was a citizen of New York. The court decided she was not. Such a decision of the state court does not present a question of which we have jurisdiction.

The motion to dismiss is granted.

Mr. Thomas J. Durant and *Mr. C. W. Hornor* for the motion. *Mr. D. D. Lord* opposing.

KNOX COUNTY *v.* UNITED STATES *ex rel.* HARSHMAN.

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

No. 712. October Term, 1878. — Decided January 29, 1879.

A defective *supersedeas* bond is vacated and a proper one ordered to be filed.

This was a motion to vacate a *supersedeas*. The case is stated in the opinion.

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

The *supersedeas* bond in this case is clearly defective. It recites a judgment rendered, at the March Term, 1878, of the Circuit Court, against the defendant, "in a suit depending in said court between George W. Harshman, plaintiff, and Knox County, in the State of Missouri, defendant." That is not a true description of the judgment awarding the mandamus upon which the writ of error was sued out, or of either of the judgments for the collection of which the mandamus was awarded.

We think the case a proper one for the allowance of an amendment of the bond, *O'Reilly* v. *Edrington*, 96 U. S. 726, and it is accordingly ordered that the *supersedeas* be vacated, unless the plaintiffs in error shall, on or before the first Monday in January

next, file with the clerk of this court a new bond in the penal sum of twenty thousand dollars, with good and sufficient security, conditioned according to law. *So ordered.*

Mr. T. K. Skinker for the motion. *Mr. David P. Dyer* opposing.

PHILLIPS, PETITIONER.

ORIGINAL.

No. 11. Original. October Term, 1879. — Decided November 10, 1879.

The court declines to hear an argument whether mandamus shall issue to the Circuit Court directing it to order stipulators for value and sureties on an appeal bond in an admiralty suit to appear for examination concerning their property: whether it has the power to issue the writ in such case *quære.*

This was a motion for a writ of mandamus. The case is stated in the opinion.

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

The petitioner shows that, having recovered a summary judgment in an admiralty suit against the stipulators for value and the sureties on an appeal bond, he moved the Circuit Court for an order on such stipulators and sureties to appear "for examination concerning their property, according to the laws and practice of the State of New York;" and also for an order that they "disclose all information concerning their property, with a view to the sequestration thereof, and that they be directed to convey all their said property to a sequestrator to be appointed by the court," and also that they "be punished for their contempt in not performing their stipulations and failing to comply with the provisions of the decrees." These motions were overruled by the court, and we are now asked for an order on that court to show cause why a mandamus should not issue commanding it to exercise the power and grant the remedy sought.

Even if we have the power to grant a mandamus in a case like this, the reasons assigned by the circuit judge in his opinion for refusing the motion are so satisfactory and show so clearly that he was right in what he did, that we think it quite unnecessary to hear an argument, and, therefore, deny the application for the rule.

Rule denied.

Mr. H. J. Scudder and *Mr. Frank W. Hackett* for the petitioner. No one opposing.

Cases Omitted in the Reports.

CRANE *v.* KANSAS PACIFIC RAILWAY COMPANY.

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

No. 2. October Term, 1879. — Decided November 17, 1879.

The performance of a contract for the construction of a railroad, made by a deceased person with the railroad company, cannot be enforced by his heirs, even if the profits are partly in lands.

THE case is stated in the opinion.

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

This decree is affirmed. The suit was in equity by the children and heirs of Samuel Hallett, deceased, to enforce a contract he made in his lifetime with the railroad company, defendant, then known by another name, for the construction of its line of railway and telegraph. By the terms of the contract he was to be paid for his work in money, United States subsidy bonds, construction bonds, land-grant bonds, and capital stock of the company, and city and county bonds. He was not to become interested in any lands except indirectly as a stockholder in a corporation owning lands, and a holder of bonds secured by mortgage. When he died, the contract formed part of his personal estate, and belonged to his personal representative and not to his heirs, except upon distribution after all debts were paid. Had the personal representative performed the contract, he, like the intestate, would be entitled to money, stocks, and bonds for what he did. In this way he might have added to the assets of the estate for distribution, but he would get nothing which could pass directly to the heirs by inheritance. It matters not that since the death of Hallett others may have taken possession of the contract and made themselves in law trustees of the profits they have realized by its performance. As such trustees they must account to the personal representative of the estate and not to the heirs. If the profits for which they account are partly in lands, these lands do not pass to the heirs of Hallett by inheritance. They go to the personal representative as part of the personal estate, and through him on distribution to the heirs.

It follows that the heirs could not bring this suit and that the demurrer to their bill was properly sustained.

Affirmed.

Mr. Matthew H. Carpenter and *Mr. J. B. Stewart* for appellant.
Mr. J. P. Usher and *Mr. C. E. Bretherton* for appellees.

UNITED STATES *ex rel.* PHILLIPS *v.* GAINES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 109. October Term, 1879. — Decided March 15, 1880.

A court has no power to award costs in criminal proceedings unless some statute has conferred it.

In Tennessee the costs of a criminal prosecution are made by statute a debt of the State, for which the comptroller may be compelled to draw a warrant upon the state treasurer when the proper foundation has been laid for such an order by the court; but in this case the steps required by law to be taken in order to charge such costs upon the State as a debt had not been taken.

THE case is stated in the opinion.

MR. JUSTICE STRONG delivered the opinion of the court.

This case comes before us by writ of error, in a case where there was a certificate of division between the judges of the Circuit Court for the Middle District of Tennessee.

It is a petition for a *mandamus* to the comptroller of the State, commanding him to issue his warrant to the state treasurer for the payment of a bill of costs of an indictment against Phillips, one of the relators, and others not named.

The petition represents that on the 10th of October, 1870, the petitioner Phillips and others were indicted in the county of Putnam for the murder of one Stephen Ford; that after his arrest, the said Phillips presented his petition to the state court, praying for a removal of the indictment into the Circuit Court of the United States, under and by virtue of the acts of Congress of March 3, 1863, May 11, 1866, and February 5, 1867; that the state court ordered and adjudged that the cause should be thus transferred and that copies of the record and all proceedings in that court were made out and duly filed in the said United States Circuit Court. The petition further represents that the Circuit Court took cognizance of the case until 1874, when the State of Tennessee, by her attorney, appeared and dismissed the case, agreeing that the costs should be adjudged against the State; that the court accordingly rendered such a judgment, and that a warrant for the payment of the costs had been demanded from the comptroller and refused.

A portion of the record of the indictment and of the proceedings

thereon including what purports to be a bill of costs and the judgment of the court certified by the clerk and made an exhibit is appended to the petition. It is evidently incomplete. It does not contain the petition filed in the state court for the removal of the cause. The brief of the plaintiff in error, however, states that the killing, for which Phillips was indicted, was an act of war and in battle; that the petitioner adhered to the cause of the government, and that Ford, the person killed, was a belligerent and soldier of the army of the rebellion. These averments are not denied, and if they were made in the petition it may be assumed that the indictment was removable and properly removed under the act of Congress, and that the Circuit Court obtained jurisdiction of it.

The record made, as we have stated, an exhibit of the petition for a *mandamus*, shows that in the Circuit Court the State of Tennessee entered a *nolle prosequi* to the indictment; and that thereupon the court considered that the defendant, Phillips, be dismissed and go without day; that the State pay the costs of prosecution; and that the same be certified to the comptroller for payment. It also shows that a bill of costs including not merely the costs of prosecution but the defendant's costs was presented to the comptroller, and that a warrant upon the treasurer therefor was demanded, but was refused.

To this petition for a *mandamus*, the defence set up by the comptroller was twofold; first, that the Circuit Court of the United States had no power to render the judgment for costs against the State of Tennessee; second, that the court had no power to enforce the collection of the judgment for costs by *mandamus* by reason of the facts averred in the petition, the defendant being an officer of the State and the court having no power to control his action. For these reasons the court refused to grant the writ, and that refusal is now assigned for error. We are not, however, called upon to consider them, in view of the facts of the case as they are made to appear.

Costs in criminal proceedings are a creature of statute, and a court has no power to award them unless some statute has conferred it. By the common law, the public pays no costs. In England, the king does not, and the State stands in place of the king. This is the rule in the State of Tennessee. *Mooneys* v. *State*, 2 Yerger, 578. But in that State, statutes have changed the rule. The act of 1827, c. 36, Hay and Cobb, 54, enacted as follows:

"In all criminal cases, above the grade of petit larceny, originating in the Circuit Courts, where the defendant may be acquitted, and in all cases where the defendant may be convicted and shall prove insolvent and unable to pay the costs, the same shall be paid out of the treasury of the State." Before that act, in cases of acquittal by the verdict of a jury, costs were to be adjudged against the county. Act 1813, c. 136, § 3.

The act of 1827 had no application to costs in cases ended by a *nolle prosequi*. But an act passed in 1832, c. 8, § 2, enacted that in all prosecutions for offences subjecting the offender to confinement in the jail and penitentiary house of the State in which a *nolle prosequi* shall be entered, or the defendant or defendants in such prosecution shall be otherwise discharged, the costs of such prosecution shall be paid by the State in the same manner and under the same provisions as in cases where the defendant or defendants may be acquitted by the verdict of a jury. The indictment against Phillips was such a case. Conceding, then, that the costs of the prosecution in that case were chargeable to the State, was the comptroller bound to issue his warrant for the bill presented to him? It is made his duty by the law of the State, to examine and adjust all accounts and claims against the State, which are by law to be paid out of the treasury, and to draw warrants upon the treasury for the sums which upon such examination and adjustment, may be found due from the State. Civil Code, § 207. But the statutes of the State make some special provisions respecting costs. Before the comptroller can issue a warrant for their payment, a bill of fees and costs must be presented to him in legal form, and it must be shown that all the preliminary requisites of the law have been complied with. *State* v. *Delap*, Peck, 91. An examination of the state statutes will reveal what these preliminary requisites are. Section 5569, (Thompson and Steger's Compilation,) declares that the costs chargeable upon the State or county in criminal cases shall be made out so as to show the specific items, and be examined and entered of record and certified to be correct, by the court or judge before whom the cause was tried or disposed of, and also by the district attorney. Section 5579 directs that a copy of the judgment and bill of costs, certified by the clerk of the court and by the Attorney-General and judge shall be presented to the comptroller, etc., . . . by the clerk or some person authorized by him, in writing, to receive

the same, whereupon a warrant shall issue for the amount. Provisions somewhat similar are found in §§ 5571 and 5572.

In the present case it does not appear that these prerequisites to a comptroller's warrant had been complied with. The bill of costs had not been taxed, nor had it been examined and certified by the Circuit Court, nor by the Attorney General or district attorney, and it contained the costs of the defendant, for which the State is not liable.

Though, therefore, the costs of the prosecution are undoubtedly a debt of the State, for which the comptroller may be compelled to draw a warrant upon the state treasurer, the demand made upon him by the relators was unauthorized by law; and, consequently the *mandamus* was properly refused.

The judgment of the Circuit Court is *Affirmed.*

Mr. John P. Murray and *Mr. Benton McMillan* for plaintiffs in error. No appearance for defendant in error.

KNICKERBOCKER LIFE INSURANCE COMPANY *v.* SCHNEIDER.

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

No. 163. October Term, 1879. — Decided March 2, 1880.

When the plaintiff in an action at law on a life insurance policy against the insurer avers in his declaration that the company had been notified of the death of the person whose life was insured in the policy, and that the necessary preliminary proofs required by it had been made, and the answer is a general denial of all and singular the allegations of the petition so far as the same may have a tendency to give to said plaintiffs any right or cause of action against the respondent, and, not specially traversing the allegations as to notice and proof, sets up specific defences, on which alone the defendant relies, it is not necessary to prove the notification, nor that the necessary preliminary proofs were made.

The case is stated in the opinion.

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

This was a suit on a policy of insurance for $20,000 issued by the plaintiff in error on the life of Gustav Osterman in favor of Schneider & Zuberbier, his creditors. The policy provided for payment within three months after due and satisfactory proof of the

death of Osterman. The petition set forth his death on the 15th of September, 1876, and averred that the company was immediately notified thereof, and that due proof of the death, "made under the forms and directions of said insurance company, were duly forwarded and their receipt acknowledged by said company." The company answered the petition, denying "all and singular the facts and allegations therein contained, so far as the same may have a tendency to give said plaintiff any right or cause of action against respondent," and then averring that Osterman, at the date of the application for insurance and of the policy, "was, and continued up to the time of his death to be, so far intemperate as to impair his health and shatter his constitution; . . . that he was addicted to gambling, a duellist, a debaucher of women, . . . and an idle and roaming character; leading such a dissolute, profligate, and wandering life, as not only materially affected his health, but also considerably shortened the period of his life." There were other averments sufficient to make this a good defence to the action if the allegations were true. It was also averred that the debt of Osterman to the plaintiffs was barred by the statute of limitations; that certain warranties contained in the application for the policy had been broken, and that false answers were made to certain interrogatories propounded by the company's medical examiner. The issues being made up by the pleadings, a trial was had before a jury. On the trial, the plaintiffs after proving the policy and the debt of Osterman, rested. The company then offered evidence tending to prove that the habits of Osterman at the time of the application were so far intemperate as to impair his health and shorten his life. Evidence in rebuttal was given, and both parties rested. The company then asked the court to charge the jury, "that plaintiffs having failed to produce any evidence to show that previous to the institution of this suit they had given notice of the death of said Osterman, in conformity with the provisions printed on the back of the policy, and in fact as the plaintiffs had failed to adduce any evidence tending to show that plaintiffs had furnished, prior to the institution of this suit, any proof whatever of the death of Osterman, said plaintiffs could not recover." This request was refused and the jury, in substance, told that if they found for the plaintiffs on the other issues, their verdict must be in favor of the plaintiffs for the full amount of the policy and interest from the commencement of the suit, because the pleadings, in effect, admitted the death of Osterman and placed the defence on the

ground that, under the facts of the case, his death was not covered by the policy. A judgment having been rendered against the company, this writ of error was brought.

The only question presented by the assignment of errors is whether, under the issues made by the pleadings, it was necessary for the plaintiffs, before they could recover, to show by evidence that they had notified the company of the death of Osterman, and made the necessary preliminary proofs required by the policy before the suit was begun. We think it was not. It is directly averred in the petition that such notice was given and proof made. The answer is to be construed as a whole. There has been no attempt to set up separate defences, such as is allowed in common-law pleadings. No direct issue is made upon the fact of notice and proof, but the whole effort is to show that, notwithstanding such notice and proof, the plaintiffs cannot recover. It is true there is a general denial of all and singular the allegations of the petition, "so far as the same may have a tendency to give said plaintiffs any right or cause of action against the respondent;" but this we understand to be no more than a denial of such averments as are inconsistent with the specific defences set out in the other parts of the answer. Taken as a whole the answer in legal effect admits that the plaintiffs must recover unless the specific defences relied on are sustained. This evidently was the understanding of all parties at the time of the trial, for the objection now insisted upon was not made until the case on both sides had been closed, and the court was about to charge the jury.

The judgment is affirmed, and as it is apparent to our minds that this writ was sued out for delay, damages to the amount of one thousand dollars are awarded in addition to interest.

Mr. Thomas J. Semmes for plaintiff in error. *Mr. J. P. Hornor* and *Mr. W. S. Benedict* for defendant in error.

McINTYRE *v.* GIBLIN.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 173. October Term, 1879. — Decided December 1, 1879.

In an action to recover damages for carelessly and negligently shooting and wounding the plaintiff, it is no error to charge the jury that in computing the damages they may take into consideration a fair compensation for the physical and also for the mental suffering caused by the injury.

Rice *v.* Edwards.

The case is stated in the opinion.

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

This was a suit to recover damages for the careless and negligent shooting and wounding of Giblin, the plaintiff below, by McIntyre, the defendant. On the trial the court charged the jury that in computing the damages they might take into consideration "a fair compensation for the physical and mental suffering caused by the injury," and the only question submitted to us now is whether this charge was erroneous because the words "and mental" were included.

We think, with the court below, that the effect of this instruction was no more than to allow the jury to give compensation for the personal suffering of the plaintiff caused by the injury, and that in this there was no error.

Judgment affirmed.

Mr. Benjamin Sheeke and *Mr. S. A. Merritt* for plaintiff in error.
Mr. E. D. Hoge for defendant in error.

RICE *v.* EDWARDS.

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

No. 222. October Term, 1879. — Decided April 5, 1880.

A decree in equity will not be reversed for an immaterial departure from technical rules when no harm has been done.

If a bond contains a provision that on default of the payment of interest the principal shall become due at the election of the holder, and such default takes place, the commencement of suit to collect the principal and interest and the production of the bond at the trial are sufficient proof of such election.

The case is stated in the opinion.

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

This case shows that on the first day of May, 1874, Henry M. Rice applied to the Equitable Trust Company, of New London, Conn., for a loan of twenty-five thousand dollars for five years, with interest at the rate of ten per cent per annum. His application resulted in his executing to the company twenty-five bonds of one thousand dollars each, payable five years after date, with interest semiannually at the rate of seven per cent per annum. The difference between seven and ten per cent interest was taken in advance,

the company deducting fifteen per cent from the face of the loan when paying over the money.

The bonds contained a provision to the effect that if default should be made in the payment of any one of the instalments of interest as they fell due, and the default should continue for ten days, the principal of the bonds should become due, at the election of the holders, without notice. Payment was secured by a deed of trust from Rice and his wife to Edwards, the trustee.

Default was made in the payment of an instalment of interest falling due November 1, 1875, and in another due May 1, 1876. Thereupon Edwards, the trustee, on the 9th of September, 1876, filed a bill in equity to foreclose the trust, alleging an election by the holders of the bonds to consider the principal sum due, as well as the interest. Rice and wife appeared and filed what is termed a plea to so much of the bill as avers that election was duly made that the principal should be due and payable, in which they denied all the allegations of the bill in that behalf. An issue was made on the averments in this plea, and on the 16th of July, 1877, the court below decided that the commencement of the suit, and the production of the bonds at the hearing, was sufficient evidence of the election in the absence of any proof that the owners of the bonds did not sustain the trustee in the course he had pursued. The cause was then at once referred to a master to ascertain the amount due. On the 6th of August a report was made, finding due at that date $\$29{,}210\frac{22}{100}$ principal and interest, and on the same day the court entered the usual decree of foreclosure and sale for that amount. On the 20th of August Rice appeared, by his solicitors, and moved the court to open the decree in respect to the amount due, and to refer the cause again to a master to state the account on the basis of deducting a proper sum for the interest taken in advance. Upon this petition an order was made on the master to compute, ascertain and report the amount which should be deducted for this cause. The master heard the parties and reported that a deduction of $1120.60 should be made for unearned interest paid in advance, but the court on consideration, refused to modify the decree as originally entered. Rice and his wife thereupon took this appeal.

The errors assigned are: 1, That, upon overruling the plea, a decree was entered without assigning the defendant to answer the bill, as provided in equity rule 34; 2, that there was no proof that any election had been made, before the suit was brought, to con-

sider the principal due; and, 3, that the decree was not modified by deducting therefrom $1120.60.

As to the first error assigned, it is sufficient to say that no application was made for time to answer, and it nowhere appears that the failure to conform to the rule has resulted in harm to the appellants. In *Allis* v. *Insurance Co.*, 97 U. S. 144, we said we would not reverse a decree for an immaterial departure from technical rules when we could see that no harm had been done. Here it is not pretended that the appellants have any other defence to the action than such as they set up in their plea, or presented to the court in their application for a modification of the decree. Upon both these defences they were fully heard, and the case is now here for review, with a sufficient record to enable us to pass upon all the questions presented. Under such circumstances it would be clearly wrong to reverse the decree because time was not given to file a formal answer, setting up what already appeared in the case.

We agree with the court below that the election by the bondholders to consider the principal sum due was sufficiently proven by the bringing of the suit by the trustee and the production of the bonds at the hearing.

The laws of Minnesota put no limit on the rate or amount of interest for which the parties may contract in writing. The contract in this case was to pay the fifteen per cent in advance, and the continuance of the loan for the five years was made dependent on the prompt payment of the semiannual interest at the rate of seven per cent. *Decree affirmed.*

Mr. M. Lamphrey and *Mr. C. K. Davis* for appellants. *Mr. H. R. Bigelow* for appellee.

O'REILLY *v.* EDRINGTON.

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

No. 246. October Term, 1879. — Decided April 19, 1880.

The agreement of compromise between the parties which is referred to in the opinion was competent evidence and properly received as such, although not set forth and relied upon in the pleadings.

The case is stated in the opinion.

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

O'Reilly, as assignee in bankruptcy of Edrington, Jr., and Steele,

filed a bill in equity in the District Court for the Southern District of Mississippi, to foreclose a lien in the nature of a mortgage in favor of Edrington, Jr., on an undivided two-thirds of what was known as the Shipland plantation. In his bill he alleged it was important that the taxes on the property be paid from year to year, as the same should accrue; "that taxes in arrears be also paid; and that all clouds upon the title be removed; and that the said lands be redeemed from any tax sales." It was then alleged "that William H. Edrington, Jr., and Henry C. Edrington, as administrators of Eliza M. Edrington, deceased, and Charles S. Jeffords claim to have some equitable claims upon the lands aforesaid for money advanced by them for the payment of taxes, the exact nature and extent of whose claims are unknown to your orator." The prayer was, among other things, "that the rights of the defendants, Charles S. Jeffords, and William H. Edrington, Jr., and Henry C. Edrington, as administrators of Eliza M. Edrington, deceased, if any they have, be ascertained, declared, and settled." The administrators, defendants, appeared the day the suit was begun and filed an answer and cross-bill. The cross-bill set forth, in substance, that the lands had been sold for taxes, and conveyed to one Richardson, April 10, 1872; that Richardson had also paid the taxes on the lands for 1870; that the payments by Richardson were, for 1870, $1244.08, and at the tax sale, $1754.87; that on the 29th of May, 1872, Mrs. Edrington, the deceased, paid Richardson for a deed of the lands to her $3142.89, being the amount advanced by him, and interest thereon $143.94, and that she afterwards paid the taxes of 1872, amounting to $1907.11. The prayer was that the administrators might be decreed to have a lien on the lands, and that O'Reilly, the assignee, be required to pay to them the several amounts so advanced.

O'Reilly answered the cross-bill, admitting all the allegations except as to the amounts paid. As to these proof was demanded, but for such amount as should be found due it was admitted that the administrators were entitled to the relief they asked. On the 28th of May, 1875, a decree was entered finding the amount due on the mortgage debt and ordering a sale of the property. As to the cross-bill and tax claims all questions were reserved for future adjudication, and the decree in the principal suit was "without prejudice to said parties in asserting their claims either against the proceeds of said lands, when paid into the court, or against the

lands themselves, in case the assignee shall become the purchaser thereof." On the 2d of December, the cause was referred to a master to ascertain and report the facts as to the tax claims, and he reported that payments had been made precisely as stated in the cross-bill, but that the taxes so paid covered the whole of the lands, and not two-thirds only. The whole amount paid was $5050.01. He also reported that O'Reilly objected to refunding the taxes of 1870, which had been paid by Richardson before sale, and that he claimed he was not, under any circumstances, chargeable with more than two-thirds of the whole amount, as his lien covered only that part of the land. He also reported that the administrators offered in evidence before him an agreement, of the date of April 30, 1874, between O'Reilly, as assignee, and the counsel of the Edringtons, but objection being made by O'Reilly it was not considered by him. By this agreement, "to avoid further expensive litigation," a compromise of all matters in controversy between the parties was effected, by which among other things, O'Reilly, as assignee, was to pay the administrators "such sums of money as were paid by said Eliza M. Edrington, in purchasing the tax-title to said plantation, and such further sums as have been paid by her or her heirs and administrators in the payment of taxes for and on account of such plantation," and the administrators were to release all claims. This agreement was made subject to the approval and confirmation of the District Court in Bankruptcy. On the coming in of the report the agreement was approved by the court, and a decree entered to the effect that whenever the administrators should tender the assignee "deeds of quit-claim of all their interest in the lands described in the pleadings, including the one-third interest in said lands not sold under the decree rendered herein," the said assignee should pay to them, from the proceeds of the sale then in his hands, the sum of $5050.01.

From this decree O'Reilly appealed.

The principal objection to the decree below is that it was made on the basis of an agreement of compromise entered into before the suit was begun, when that agreement was not set forth and relied on in the pleadings. The case brought up by the appeal is that made by the cross-bill, where all the several items of tax claim are set out, showing what were for taxes paid and what for purchases at tax sales. In the answer no objection was made because the claim included the taxes on the whole property, or because those

for 1870 were paid before a sale. All O'Reilly required was proof of amounts, and that being made the right to the relief asked was conceded. No exception was taken to the amount as reported by the master. The questions as to liability for the taxes of 1870, and for the full amounts paid, rather than two-thirds, were first raised at the hearing on the reference. When those questions came to be considered by the court, the agreement of compromise, after having been examined and approved, was received as evidence that the full amount should be allowed. While the agreement was not directly sued on, the amount it called for was claimed in the cross-bill. No defence was set up in the answer inconsistent with what had been agreed to, and, as the agreement has been perfected by the approval of the court, we see no reason why it may not be used in evidence to show that, for a valuable consideration, the assignee has waived the objections he now makes to the amount of the recovery. The decree, as rendered, is not for the specific performance of the agreement, but is one in which the rights of the administrators are "ascertained, declared and settled," in accordance with the prayer of the original bill, and establishing a lien on the lands for the taxes paid, and requiring the assignee to refund the amount expended, as asked for in the cross-bill. *Affirmed.*

Mr. W. K. Ingersoll, *Mr. A. P. Morse* and *Mr. A. B. Pitman* for appellant. *Mr. G. Gordon Adam*, *Mr. Thomas J. Durant* and *Mr. C. W. Hornor* for appellees.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, PETITIONER.

ORIGINAL.

No. 8. Original. October Term, 1880. — Decided May 2, 1881.

Mandamus will not lie when there is an ample remedy by appeal if the case is put in a condition for it.

THIS was an application for a writ of mandamus. The case is stated in the opinion.

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

This is a petition for a writ of mandamus to compel the Circuit Court of the United States for the Northern District of Illinois to hear and determine whether a master of the court shall execute to the relator a deed for certain lands bought under a sale ordered

by that court. It nowhere appears from the relator's own showing that the court has expressly refused such an order. The court has refused leave to file a certain petition in the suit, and it has refused an order on the master to show cause why he should not make such a deed. From the whole case as presented by the parties we infer that the court below, as constituted when the application was made, thought the deed ought not to be executed, and it is possible the order now complained of may be the equivalent of a final decree in the cause to that effect, from which an appeal to this court may be taken. But whether that be so or not, we will presume the court below will not hesitate, on a proper application, to put the record in a shape to enable us to pass on that question in the ordinary course of proceeding to obtain our review. Mandamus can only be resorted to when other remedies fail. It is an extraordinary writ, and should only be used on extraordinary occasions. Here the parties have ample remedy by appeal, if they put their case in a condition for such a form of proceeding. As the relator presents his case on this application, he must avail himself of that remedy. We cannot, under the facts he states, expedite the determination of his cause by mandamus. *The application is consequently denied.*

Mr. E. S. Isham, *Mr. Robert T. Lincoln* and *Mr. C. Beckwith* for petitioner. *Mr. George F. Edmunds*, *Mr. Henry S. Monroe*, *Mr. William R. Page* and *Mr. W. C. Goudy* opposing.

HAND *v.* HAGOOD.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 2. October Term, 1880. — Decided October 25, 1880.

On the facts set forth in the opinion, it is held that the judgment below, to which the writ of error was directed, was not a final judgment, and that this court was therefore without jurisdiction.

The case is stated in the opinion.

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

The judgment from which this writ of error was taken is not a final judgment in the cause. Hand, a creditor of the Savannah and Charleston Railroad Company, sued that company in the Court of Common Pleas of Charleston County, South Carolina, and obtained the appointment of a receiver to hold and operate the railroad of the company and apply the net profits to the payment of its

debts. In this condition of things the comptroller-general of the State applied to the court, by petition in that cause, to permit him to take possession of the road under the provisions of the act of 1869, and, if for any purpose it should be deemed advisable to continue the receivership, that he might be permitted to perform that duty in addition to those imposed on him by the law. The Supreme Court of the State, on appeal, adjudged that the comptroller-general was authorized to take possession of the road with its appurtenances, "and hold and administer the same according to the power conferred by said act." Then followed these words: "The assets of the road to be subject to the direction of the court, and the order now made to be in no wise regarded as affecting the lien obtained by any creditor of the said road established in the principal cause, or in any way affecting the rights of creditors. The petition is remanded to the Circuit Court for such orders as may be necessary to give effect to the judgment of this court." It nowhere appears that the Circuit Court has acted on this mandate. In effect the judgment, as it now stands, is nothing more than a direction to transfer the possession of the road to the comptroller-general, subject to such orders as the Circuit Court shall deem necessary for the protection of the rights of the parties in the principal suit. There is nothing to prevent the Circuit Court from following the suggestion of the comptroller-general in his petition and making him receiver. In fact, as the assets were to be kept subject to the direction of the court, that would seem to be what was expected. As receiver he would be bound to obey the orders of the court for all the purposes of the principal suit, and the practical result of the application of the comptroller-general would be nothing more than a change of receivers. Under these circumstances it seems to us clear that the rights of the comptroller-general, as against the parties to the suit, have not been finally settled, and that the writ of error was prematurely sued out. The suit is, therefore,

Dismissed for want of jurisdiction.

Mr. P. Phillips, *Mr. John L. Cadwalader* and *Mr. James B. Campbell* for plaintiff in error. *Mr. Leroy F. Youmans*, *Mr. John Conner*, *Mr. D. T. Corbin*, *Mr. James Lowndes*, and *Mr. T. J. D. Fuller* for defendant in error.

ANDREWS *v.* CONGAR.

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

No. 38. October Term, 1880. — Decided November 8, 1880.

If a person, not a party to a promissory note, writes his name on the back of it when the note is made, the law in Illinois regards him as a guarantor, unless the contrary is shown; but the law in Missouri regards him as *prima facie* a joint maker.

In a suit against a joint maker of a promissory note a charge to the jury that he was only a guarantor works no injury to him.

Under the practice in Illinois if one is sued as guarantor of a note, and he verifies his plea of the general issue by affidavit, the plaintiff need not prove the execution of the note itself as well as the guaranty.

When a contract is within the scope of the business of a partnership, each partner is presumed to be the agent of all, and it is immaterial what the secret understanding of the parties may have been as to the powers of each.

There was no error in the ruling that if the maker of the note which forms the basis of the controversy in this case could not use an account on its books as a set-off against the note, the defendants as guarantors could not.

THE case is stated in the opinion.

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

There are nineteen errors assigned on this record, but those relied on in the argument present in reality but four questions. These are:

1. Whether the court erred in charging the jury that "if a person not a party to a note, that is to say, not the payee or maker, writes his name on the back of the note at the time the note is made, the presumption is that he has assumed the liabilities and responsibilities of a guarantor; this presumption, however, is liable to be rebutted by the proof."

2. Whether, under the practice in Illinois, which is regulated by statute, if one is sued as a guarantor of a note, and he verifies his plea of the general issue by affidavit, the plaintiff must prove the execution of the note itself as well as the guaranty.

3. Whether the defendants should have been permitted to prove that there was an agreement between themselves as partners, that neither of them should assume any liability on behalf of the firm out of the line of its regular business without the consent of the others,

and that one of the defendants did not know that the liability sued on was incurred until long after the notes were made and indorsed, and that since he learned it he has always repudiated it.

4. Whether it was wrong for the court to instruct the jury that if, as between the plaintiff and the maker of the note, the maker could not use an account on its books as a set-off against the note, the defendants as guarantors could not.

As to the first question. The charge as given states correctly the law of Illinois, as settled by the highest court of the State in a long series of decisions. *Cushman* v. *Dement*, 3 Scammon, 497; *Stowell* v. *Raymond*, 83 Illinois, 120. The contract, however, was made in Missouri, and was to be performed there. In that State the rule is that he who writes his name on the back of a note, of which he is neither the maker nor the payee, is *prima facie* liable as a joint maker. *Powell* v. *Thomas*, 7 Missouri, 440; *Schneider* v. *Seiffman*, 20 Missouri, 571; *Otto* v. *Bent*, 48 Missouri, 26; *Baker* v. *Block*, 30 Missouri, 225. For this reason it is insisted that the contract is governed by the laws of Missouri, and that the jury should have been so instructed. Admitting this to be true, it is difficult to see how the plaintiffs in error have been harmed by the charge of which they complain. They claim to have been presumptively joint makers of the note, while the court told the jury they were guarantors only. Clearly the charge as given was more favorable than the one contended for. A recovery could have been had against them as joint makers under the common counts.

The court, however, after stating what the presumption from such an indorsement was, went on to say, "the law authorizes the holder of a note to write over the name thus written across the back of the note any agreement consistent with that made between the parties at the time the name was placed there; that is to say, if the party did actually, at the time he put his name on the back of the note, stipulate for any liability short of a guaranty, or different from that of guarantor, then the holder of the note had no right to write a false guaranty over the name." Then, after calling attention to the facts which had been shown in evidence, and the claims of the respective parties, it was said: "If you are satisfied that the defendants in this case put their names upon the note at the time it was made, with the express understanding that they were to be liable as indorsers, that is, liable after the plaintiff had used due diligence to fix their liability as indorsers, then the defendants are not liable in this

action: but if, on the contrary, you are satisfied from all the evidence in the case that the defendants intended to become liable to pay the debt if the maker did not, that is, that they would stand in the relation of sureties and guarantors, substantially as the contract is now written over their names, then the defendants are liable." And again, after referring to a condition which it was proved the plaintiffs in error had incorporated into the obligation they assumed, and which it was insisted should have been expressed in the guaranty as written over their signature, the court said: "If you are satisfied that the positive performance of this part of the agreement was thus waived or abrogated by mutual consent of the plaintiff and defendants before the guaranty was written, then no mention need be made of it." In this way, as it seems to us, the case upon this point was fairly put to the jury, and the plaintiffs in error were given the benefit of every circumstance they relied on to establish their defence. If the presumption arising from their indorsement had been overcome by the evidence, the jury were told in express terms to find accordingly.

As to the second question. A statute of Illinois provides that "no person shall be permitted to deny on trial the execution or assignment of any instrument in writing . . . upon which any action may have been brought . . . or is admissible in evidence under the pleadings, when a copy is filed, unless the person so denying the same shall, if defendant, verify his plea by affidavit." Ill. Rev. Stat. (Hurd, 1883), c. 110, § 34.

This action was brought on a guaranty, a copy of which was filed. The affidavit only made it necessary to prove the execution of that instrument. That was done, and that of itself was equivalent to proof of an admission by the guarantors of the due execution of the note. Whether this admission was one that could be contradicted, need not now be determined. It was certainly sufficient until overcome.

As to the third question. There is nothing in the case to show, or tending to show, that the execution of the guaranty was not in the line of the regular business of the partnership. On the contrary, it does appear that the partners were the owners of a majority of the stock in the corporation that made the note, and that the note and guaranty were given with a view to the protection and improvement in value of that stock. The transaction was one which appears to have been entered into for the common benefit of all the partners.

Under such circumstances, it was of no consequence what the secret understanding of the partners may have been as to the powers of each. The contract being within the scope of the partnership business, each partner is presumed to be the authorized agent of all.

As to the fourth question. A simple statement of the facts is all that is necessary to dispose of this question. The plaintiff was the president of the corporation, maker of the note guaranteed. On the books he was charged with moneys paid to him from time to time and credited with a salary and interest on his investment in stock. After he went out of office his successor settled with him and paid the balance found to be his due. The books were thereupon balanced. The plaintiffs in error sought to set off against their liability as guarantors of the note, the items which appeared on the debit side of the account, without any regard to the credits. As to this, the court instructed the jury that they "must be satisfied that the company itself could use the same set-off against the note before the defendants could avail themselves of it, and that if they were satisfied from the evidence that the plaintiff's account stood balanced on the books of the company as kept, then the defendants could not set up the account as a set-off to the note without showing fraud or mistake in striking such balance." There can be no doubt as to the correctness of this ruling.

This covers substantially all there is in the case. The other errors assigned are unimportant and need not be considered specially.

The judgment is affirmed.

Mr. George Herbert for plaintiffs in error. *Mr. Charles Hitchcock* for defendant in error.

GIBBS *v.* DIEKMA.

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

No. 88. October Term, 1880. — Decided December 13, 1880.

An objection on the ground of the non-joinder of parties who are proper but not indispensable parties cannot be made for the first time in this court.

This court has power to adjudge damages for delay on appeals as well as writs of error, and this power is not confined to money judgments.

The case is stated in the opinion.

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

The contract with Risdon embraced the lands specifically described

and no more. The last clause in the contract was evidently added by way of limitation, so as to exclude from the sale any of the parcels specifically described which should be found to have been previously contracted to other parties. The order on the Commissioner of the Land Office in favor of Gibbs was for patents for the lands sold Risdon, as described in his contract. No other reasonable interpretation can be put on the language of that instrument. It follows that Gibbs took the title to all lands patented to him, and not included in the Risdon contract, in trust for the complainants.

If either Risdon or the other vendees of the complainants were proper parties to the suit, they certainly were not indispensable parties. The objection that they have not been joined in the suit comes, therefore, too late in this court. The claim that the complainants are not entitled to a decree because in some cases title was left in the State to avoid the payment of taxes, is frivolous.

The decree is affirmed, and it is so apparent the appeal was vexatious and for delay only, that we adjudge to the appellees five hundred dollars as just damages for their delay. While § 1010 of the Revised Statutes includes, in express terms, writs of error only, § 1012 provides that appeals from the Circuit and District Courts shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error. This gives us authority to adjudge damages for delay on appeals as well as writs of error, and our power is not confined to money judgments only. *Affirmed.*

Mr. Alfred Russell and *Mr. Nathaniel Wilson* for appellant. *Mr. J. W. Stone* for appellees.

KAISER *v.* STICKNEY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 90. October Term, 1880. — Decided December 13, 1880.

In the District of Columbia a valid note of the husband may be secured by a deed of trust of the general property of the wife, executed by husband and wife in the manner required by law.

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

It is very clear that the property in question was not, under the provisions of § 727 of the Revised Statutes of the District of Columbia, the sole and separate property of Mrs. Kaiser. She could

not, therefore, convey it, or contract with reference to it, "in the same manner and with the same effect as if she were unmarried," (§§ 728 and 729,) but it was her general property which she could convey by uniting with her husband in a deed executed in the form required by §§ 450, 451 and 452 of the same statutes. In this way she could charge her property with the payment of a debt, although she might not be able to bind herself individually. Her husband did unite with her in the execution of the deed under which the appellees claim, and the requirements of the law as to the form of execution were in all respects complied with. The note secured was valid as the note of the husband, and the deed was, therefore, binding. We have not overlooked the fact that Mrs. Kaiser, both in her original bill and in her answer to the cross-bill, has averred that her husband signed the deed only as a witness to her signature; but the fact was clearly otherwise. His signature is affixed both to the note and deed as maker, and his due execution of the deed was properly acknowledged before a competent officer. An attempt was made to prove that he was mentally incapable of entering into a contract, but the evidence falls short of establishing this fact, notwithstanding the wife in her testimony said he only did what she told him to do. We have no hesitation in deciding that the deed was well executed and that it binds the property for the payment of the debt it was intended to secure. It is not claimed, either in the original bill or in the answer to the cross-bill, that the Trust Company did not in fact loan on the faith of the security all the money the note calls for. Consequently, upon the case as made, the decree was properly rendered for the full amount of the note and interest, deducting only what was shown to have been paid.

It is insisted, however, that there is a variance between the proof and the allegations in the cross-bill, and that on that account there can be no recovery by the Trust Company in this suit. The objection is that in the cross-bill the property is proceeded against as the separate property of the wife, whereas the proof shows it to have been her general property. We do not so understand the effect of the pleadings. In the original bill the appellants sought to set aside the trust deed because it was executed by the wife alone for the conveyance of her general property, and, therefore, not binding. The appellees, on the contrary, in their cross-bill sought to enforce the deed because it was executed by both the husband and wife. The single point put in issue is the validity of the deed as a

conveyance in trust of the property owned by the wife to secure the debt which was described, and inasmuch as the wife insists that the property was her general property, the cross-bill ought not to be dismissed because of a single alternative averment that it was her separate property. *The decree is affirmed.*

Mr. Michael L. Woods and *Mrs. Belva A. Lockwood* for appellants. *Mr. Enoch Totten* for appellee.

RELFE *v.* WILSON.

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

No. 92. October Term, 1880. — Decided December 20, 1880.

In Missouri, in an action against an insurer to recover on a policy, evidence of an offer by the insurer to settle for less than the policy, and of an intimation by the same to the insured that the policy was obtained by misrepresentation, is admissible to show "vexatious delay."

When competent evidence becomes immaterial under a charge favorable to the party offering it, its exclusion is not error.

It is no error to refuse to give special instructions asked for when the general charge has stated them in language equally favorable to the party asking.

If a series of proportions are embodied in instructions, and the instructions are excepted to in a mass, the exception will be overruled if any one proposition is correct.

The act of Missouri giving damages for vexatious refusal by insurance companies to pay policies is not repealed.

A verdict, the amount of which can be ascertained by a simple arithmetical calculation, and which includes every material fact at issue, will be sustained.

The case is stated in the opinion.

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

The testimony of Mrs. Wilson and Huff was admitted only on account of its bearing on the question of vexatious delay. The matter testified to had none of the characteristics of "confidential overtures of pacification," and there is nothing from which to infer "that the parties agreed together that evidence of it should not be given." But even if technically inadmissible, it is difficult to see what harm was done the insurance company. An agent of the company went to Mrs. Wilson and in substance told her he wanted to settle by paying less than the face of her policy. She told him if she was entitled to anything she was to the whole, and refused

to entertain any proposition. He intimated that the policy was obtained by a misrepresentation of facts. This offended her and he apologized. Certainly we ought not to reverse the judgment for the admission of such testimony.

The exclusion of the testimony of Hoover could do no harm under the charge of the court upon that branch of the case. The jury were told in substance they must find for the company on the issue to which this testimony related, unless the person who took the application of Wilson and made it out was at the time the agent of this company and knew that the previous application, about which Hoover was called to testify, had been made and rejected. In this view of the case the excluded testimony was immaterial.

The general charge included all that the insurance company in its special requests asked. The language was not the same, but, if anything, the charge as given was more favorable to the company than that requested.

The exception to the charge as given is general. The charge embraced several distinct matters, most of which are not now objected to. This exception, therefore, was not well taken. Our decisions are uniform and numerous to the effect that "if a series of propositions are embodied in instructions and the instructions are excepted to in a mass, if any one of the propositions is correct, the exception must be overruled." *Johnston* v. *Jones*, 1 Black, 209, 220; *Beaver* v. *Taylor*, 93 U. S. 46, 54. Rule 4 of this court, promulgated more than twenty years ago, 21 How. vi., was intended to give substantial effect to this line of decisions, and requires of parties in excepting to the charge of the court to state distinctly the several matters to which they except.

Section 1, c. 90, of the General Statutes of Missouri, revised in 1865, which gives damages in actions against insurance companies for a vexatious refusal to pay policies, was not repealed by the acts of March 10, 1869, for the incorporation and regulation of insurance companies. Acts of 1869, pp. 26, 45. That section is not inconsistent with any of the provisions of the later acts, and repeals by implication are not favored. There is nothing in the new acts which relates to the same subject matter, and the presumption is, therefore, that it was intended this section should stand. Such was evidently the understanding of the legislature when it revised and promulgated the statutes of the State in 1879

under the provisions of the constitution, for the section is brought into the revision, not as a new enactment, but as an existing law. Rev. Stat. Missouri, § 6026.

The verdict is sufficiently certain to authorize the judgment. It is for the full amount of the policy, with six per cent interest, and ten per cent damages for vexatious delay. The amount of the policy and the date from which interest is to be calculated is stated in the petition and admitted in the answer. The amount of the judgment to be entered on the verdict can, therefore, be ascertained by simple arithmetical calculation, which may as well be done by the court as the jury. Every material fact at issue was found by the jury, and all the elements of the calculation to be made were indicated with sufficient certainty.

Judgment affirmed.

Mr. James Carr, *Mr. George D. Reynolds*, *and Mr. John R. Shepley* for plaintiff in error. *Mr. E. T. Farish* for defendant in error.

HAUENSTEIN *v.* LYNHAM.

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

No. 133 of October Term, 1879. — Motion made in the case at October Term, 1880.— Decided November 22, 1880.

An officer of a State, sued in his official capacity, and charged with no official delinquency, is not liable for costs.

This was a motion to correct the judgment in *Hauenstein* v. *Lynham*, 100 U. S. 483. The case is stated in the opinion.

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

This motion is denied. The defendant in error was sued in his official character, as escheator for the Commonwealth of Virginia. He was a public officer of the state, and he held the funds sued for in that capacity. He was charged with no official delinquency. Under such circumstances he cannot be made liable personally for the costs of the plaintiffs. The court below was right, therefore, in confining the judgment for costs to the funds in his hands as escheator.

Denied.

Mr. W. L. Royall for the motion.

Cases Omitted in the Reports.

UNION PACIFIC RAILROAD COMPANY *v.* CLOPPER.

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

No. 139. October Term, 1880. — Decided January 17, 1881.

In an action to recover of the defendant the profits which the plaintiff would have gained in supplying articles to him under a contract, which articles the plaintiff was ready and willing to furnish and the defendant refused to receive, the burden of proof is on the plaintiff to show clearly that the articles refused came within the contract.

In the trial of such an action brought to recover profits on stone contracted to be supplied to a railroad company for the construction of a bridge and its approaches, and which the company refused to receive, the testimony of experts is admissible to show what constitutes the bridge and its approaches, and whether a dyke is a necessary part of them; and the jury should be told to consider what was the condition of things at the time the contract was made, and not the condition as developed subsequently by the operation of nature.

THE case is stated in the opinion.

MR. JUSTICE MILLER delivered the opinion of the court.

The Union Pacific Railroad Company having undertaken to build a railroad bridge across the Missouri River at Omaha, entered into the following written contract, by its chief engineer and superintendent:

"OMAHA, *June 13th*, '71.

"We hereby propose to furnish at Missouri River bridge stone enough to complete said bridge and approaches, excepting the three thousand yards now under contract to W. B. Clark, ag't, at the following rates, viz.:

"Column stone, containing not less than three cubic feet each, and not less than six inches in thickness, at three dollars and fifty cents per cubic y'd.

"Riprap stone, containing not less than six cubic feet, each stone, at four dollars per cubic y'd.

"Dimension stone, containing not less than nine cubic feet each, and rectangular in shape, at four dollars and fifty cents per cubic y'd.

"All stone to be clear, sound and durable, and subject to inspection of the engineer of the bridge, and in quantities as may be required.

"It being understood that forty-four hundred and twenty pounds be a cubic yard. "CLOPPER AND GISE.
"CHAS. FLEURY.

"Approved.
"[STAMP.] "T. E. SICKLES,
"*Ch. Eng'r. and Sup't.*"

The defendants in error having furnished a large amount of stone for which they received payment under this contract, and being ready and willing to furnish other stone, which they allege was needed by the company to complete the bridge and its approaches, bring this suit to recover damages for the refusal of the company to receive it, alleging that it had bought the same from other persons.

The case was submitted to a jury, who found a verdict for the plaintiffs in the sum of $22,085.50, on which judgment was rendered; to reverse which this writ of error is brought.

The assignments of error necessary to be considered here arise in the refusal of the court to grant certain prayers for instruction by the defendant, and the exception to the charge which the court did give to the jury.

So far as these are material to be considered, they all relate to the mode of ascertaining what work, in which stone was used, was necessary to complete the bridge and its approaches, within the meaning of the contract.

It will be seen at once that the language of the contract on this point is very vague. There is no description of the bridge, no statement of its length, or the number of its piers, or their height; no indication of the length of the approaches to it, nor any estimate of quantity. Nor does the testimony reveal any statement of this kind referred to by either party at the time the contract was made, or during its negotiation, nor any estimate made by the company itself.

The principal object of this action being the recovery of profits for stone not actually delivered, but which the plaintiffs would have made if delivered and paid for according to the terms of the contract, it would seem eminently proper that plaintiffs should make out clearly that the stone which was bought by the company from others was within the terms of their contract, and used to complete the bridge or its approaches.

Cases Omitted in the Reports.

The main controversy before the jury had relation to what constituted the eastern approach to the bridge. To understand this it is essential to understand the topography of the land adjacent to the eastern end of the bridge. The ground there at the river bank is higher than it is for several thousand feet back toward the eastern bluffs. In fact, from the bank of the river a low bottom extends for about four miles to the city of Council Bluffs, which in many places is lower than the level of the immediate bank of the river. The current of the river, at the time the bridge was built and for many years before, ran close to this eastern bank, and in very high water the whole bottom was overflowed, and on occasions when it was not so high, a part of the water would break through the eastern bank at different points, and run in currents or channels through this wide bottom. The bottom of the bridge on which the rails were laid was considerably higher than the level of this bank, and of course the eastern approach to it had to be projected a corresponding distance on this bottom to obtain the grade necessary to enable the train to ascend to the level of the rails of the bridge.

After the bridge was completed, it was found necessary to protect this eastern approach against the overflow of the river by a riprap wall of stone. It also became expedient for the company to prolong or continue its track for more than a thousand feet, at a considerable elevation above the natural surface of the ground, as a means of checking the currents of these overflows, which would otherwise cut through their track and do it immense damage. This also aided in turning the current or channel to the western or Omaha side of the river. It does not seem to be yet decided how far eastwardly this elevation of the railroad may be profitably projected for these purposes, without reference to its use as an approach to the bridge; nor how much of it will require a riprap of stone for its protection; nor how much of this may be profitably done, though not absolutely necessary.

Under these circumstances, it was important that the principles which should guide the jury in deciding what part of this track was the approach to the bridge, within the meaning of the contract, and what was mere elevated track to get above high water, and dyke to repel the currents of the overflow, should be stated to them with as much precision as possible. We are of opinion that this was not done, but that prayers of the defendant were refused which conveyed the true rule on that subject, and others granted, at the request of the plaintiffs, which were erroneous.

Union Pacific Railroad Co. *v.* Clopper.

The following instructions, each of which was specifically refused by the court, were, in our opinion, entirely correct and should have been applied by the jury to the ascertainment of what was the eastern approach to the bridge, intended by the use of that language in the contract:

7.

"In determining what was intended to be embraced in the contract the jury should consider what was the condition of things at the time it was made, and not the condition as developed by the operations of nature years afterwards, and which was not and could not have been in the minds of the parties at the time the contract was made.

"(Refused by the court.)

8.

"The contract must be construed and interpreted as it was made and understood at the time of entering into it, unless it has been satisfactorily shown that it was subsequently changed or modified.

"(Refused by the court.)

9.

"The testimony of experts who are shown to have had experience in the science of bridge-building and as civil engineers has been admitted, and is entitled to due weight as to whether or not the work spoken of as a dyke is a part of the bridge or approach.

"(Refused by the court.)"

That the opinion of a practical civil engineer of experience in bridge building is entitled to weight with the jury in deciding whether part of this track through the bottom, which had been protected by stone, was so constructed as a dyke against the current of water, or as the approach to the bridge, is, we think, too clear for argument. Such a witness would know what is usually meant by the term approach to a bridge, much better than the average juror, and would have, perhaps, little difficulty in forming a just opinion, when the ordinary juror would have been wholly at a loss. So, also, no reason can be seen for rejecting the seventh and eighth instructions, which were only intended to assert the ordinary rule, that a contract must be construed in the light of surrounding circumstances, as the parties understood it at the time it was made.

The reason for rejecting these prayers is found in the following instruction granted at the request of the plaintiffs:

"If the jury are satisfied from the evidence, that at the time the contract sued on was executed, no plan or specifications for the building of the bridge or its approaches existed, but that the building and completion of the bridge and its approaches were left entirely by the defendant to Mr. Sickles, the chief engineer, who had not, at the time of executing said contract, any definite or fixed plan as to construction and completion of piers or columns and approaches, other than to put in said piers or columns and approaches and riprap the same with stone to protect the same, as it might subsequently be ascertained to be necessary, and it was subsequently ascertained, while work under said contract was in progress, that it would be necessary for such protection to riprap any or all of said piers or approaches, by putting in stone about said piers or columns, or by extending the east approach by building a heavy wall, extending back in a northeast direction, as far as circumstances might develop a necessity for, then the plaintiffs would be entitled to recover such damage as the proof under instruction may show them entitled to, for all stone necessary to be used for such purposes; and this right of plaintiffs to so recover would exist and apply to stone yet undelivered, if necessary for such purposes, as well as to stone already delivered."

Under this last instruction the jury was left fairly to infer that if, after the bridge itself was completed and in use, the company should find it expedient, with a view to arrest the overflow of the river bottom, to extend its track across the entire four miles to Council Bluffs, and protect it by an exterior covering of stone, this dyke or wall might be the approach to the bridge within the meaning of the contract and the stone used in the dyke covered by its terms.

Taking the prayers refused and the instructions given, and we are satisfied that the jury were left with a very improper view of what was the approach to the bridge, and with unlimited discretion as to time of completion and extent of track that might be called an approach.

We cannot, of course, lay down any precise description of how much of this track was approach and how much was dyke and how much ordinary railroad track. We think the three prayers asked by defendant and refused by the court contain the true elements of the problem, and that much weight ought to be given to the views of scientific and practical engineers and builders of bridges.

The main charge delivered by the court is very full and apparently

very fair, but it nowhere removes or cures the errors we have pointed out, and for these the judgment of the court is

Reversed and the case remanded, with instructions to set aside the verdict and grant a new trial.

Mr. Samuel Shellabarger, *Mr. J. M. Wilson* and *Mr. A. J. Poppleton* for plaintiff in error. *Mr. J. L. Webster* and *Mr. W. J. Connell* for defendants in error.

WHITNEY *v.* COOK.

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

No. 285. October Term, 1880. — Decided May 2, 1881.

Damages are awarded in a case where the appeal was taken for delay, and was frivolous.

The case is stated in the opinion.

Mr. Chief Justice Waite announced the judgment of the court.

There has been no appearance for the plaintiffs in error in this case. The writ of error has operated to delay proceedings on the judgment against Klein, the garnishee. There is nothing whatever in the record to justify him in staying execution. The security by Whitney, the judgment debtor, was for costs only. The cause has been permitted to remain on the docket for two years, notwithstanding what was said by us at the October Term, 1878, 99 U. S. 607, when we felt compelled to deny a motion to affirm because it could not be brought under the operation of rule 6, there being no color of right to a dismissal.

We, therefore, affirm the judgments, with interest and costs, and award two hundred and fifty dollars damages against Klein on account of the delay. *So ordered.*

Mr. P. Phillips and *Mr. G. Gordon Adam* for defendants in error.

FLETCHER *v.* BLAKE.

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

No. 685. October Term, 1880. — Decided December 6, 1880.

The internal revenue stamps used by the defendant in error are no infringement of the letters patent issued to the plaintiff in error, June 8, 1869, for an improvement in stamps used for revenue and other purposes.

Cases Omitted in the Reports.

The case is stated in the opinion.

Mr. Justice Harlan delivered the opinion of the court.

This is an appeal from a decree in the Circuit Court of the United States for the Southern District of New York, dismissing a bill in equity, based upon an alleged infringement of letters patent issued to the plaintiff in error on the 8th of June, 1869, for an improvement in stamps used for revenue and other purposes.

At the time of such alleged infringement the defendant was a collector of internal revenue. The revenue stamps, the sale and use of which by him constitutes the basis of the claim herein for damages, were sold and used in pursuance of directions by the Commissioner of Internal Revenue, and in discharge of defendant's duties as such collector, and for no other purpose. The action is further defended upon the ground that the stamps so sold and used by the defendant, known as tax-paid special stamps, rectified spirit stamps, and wholesale liquor dealer's stamps, were not constructed in accordance with the specifications, claims and drawings of the letters patent; that there has been no infringement upon any right or privilege secured to plaintiff by his letters patent; and, lastly, that the alleged improvement was neither useful nor valuable.

The solicitor general, in both his oral and printed arguments, claims, that, although the grant to the patentee, his heirs and assigns, was of an exclusive right for a prescribed term to make, use and vend his invention or discovery, the United States are at liberty to use the thing protected without making compensation to the patentee. This, upon the ground that the government is not named in the patent law as being excluded from using the invention or discovery which may be patented. To support that position reference is made to several adjudged cases in the English courts. *Feather* v. *The Queen*, 6 B. & S. 257; *Walker* v. *Congreve*, 1 Carpmael Pat. Cas. 356; and *Dixon* v. *Small-Arms Co.*, L. R. 10 Q. B. 130. In view of those decisions, we are invited, notwithstanding what was said in *United States* v. *Burns*, 12 Wall. 246, repeated in *Cammeyer* v. *Newton*, 94 U. S. 225, to re-examine the question as to the right of the United States, without the consent of the patentee, and without making compensation, to use in the public business any invention or discovery for which letters patent may have been issued.

It has also been suggested that since the collector, in using the stamps in question, acted in accordance with orders of his superior

officers, he can, in no event, be held individually liable to the plaintiff, and that the claim of the latter, if any he has, should be asserted directly against the United States.

We deem it unnecessary to pass upon either of the foregoing propositions, because we are all of opinion, passing by all other questions in the case, that the stamps used by the collector are not included in the patent of the plaintiff.

That which plaintiff claimed and desired to be secured was described in the schedule, referred to in the letters patent, as "a postage or revenue stamp having a portion of its *surface* composed of thin or fragile paper, or other suitable material, *loosely attached* and *on which* a portion of the design or other matter is printed, substantially as and for the purposes set forth." Referring to the descriptive portion of the schedule, the invention is declared to consist "in providing the stamp with a flap or flaps covering a portion of its face, and arranging the requisite design or printed matter on such stamp *to extend over the flap or flaps* and remaining or uncovered portion of said face or body of the stamp. By this application of my invention as applied to an adhesive stamp, whether for internal or other purposes, said stamp may be cancelled by tearing off the flap or flaps which, if necessary, may be preserved as evidence of the cancellation; or where not required to be preserved, the flap or flaps may be torn off and thrown away or be so mutilated by the act of cancelling as heretofore practised on postage stamps (which and other adhesive stamps, my invention is equally applicable to) as that it will be impossible to use the same stamp over again without detection of the fraud."

Upon comparing the stamp, as thus described, with the stamp used by the defendant, we are satisfied that the latter is not covered by the plaintiff's patent. It is a different article altogether from that described in the specifications and claim of the plaintiff. The stamp used by the government is composed of one continuous piece of paper, of uniform thickness, upon the face of which is certain printed or engraved matter, with blanks in which are inserted, at the appropriate time, certain figures and names required by law to appear on revenue stamps. No separate paper is attached, loosely or otherwise, to the face of that stamp. Upon the back of the body of the government stamp, attached to its outside edges, is a slip of red, blank paper, of less width than the stamp. When the stamp is pasted upon the barrel, that portion of it immediately over

the red slip does not adhere to the barrel. It is protected from the paste on the barrel by the intervening red slip, so that when the portion, thus protected, is cut or torn out for preservation or for any other purpose, the slip, underneath, with the remaining portion of the stamp, adheres to the barrel. An essential characteristic of plaintiff's stamp is a flap, originally a distinct piece of paper, but, when used, to be loosely attached to the *face* of the body of the stamp. A further characteristic is that upon the piece, thus loosely attached, must appear a portion of the vignette, design, or printed matter required to be engraved or printed on the face of revenue stamps. The government stamp has no such characteristics. It is, as we have said, one continuous paper, containing upon it the required printed matter, with no flap loosely attached to its face, which may be subsequently torn off. Neither the red slip of unprinted paper across the back of the government stamp, and which adheres to the barrel, nor that portion of the stamp which does not adhere to the barrel, answers the same purposes as the flap of plaintiff's stamp. The present claim by the plaintiff is manifestly broader than his claim and specifications, as set out in the schedule to his letters patent. We concur with the court below in the opinion that the whiskey stamp is a modification of the inventor's idea that had not occurred to him when he drew his specifications, which were so limited in their terms as not to include the stamps used by the government. It is, clearly, not a mere colorable contrivance or imitation for evading that which had been done before.

Decree affirmed.

Mr. Treadwell Cleveland and *Mr. Joseph H. Choate* for appellant. *Mr. Solicitor General* for appellee.

HILL *v.* HARDING.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 735. October Term, 1880. — Decided December 6, 1880.

A bankrupt may prosecute in his own name a writ of error to a judgment rendered after the adjudication of bankruptcy; but the assignee will be heard on questions which he thinks involve the estate of the bankrupt.

THESE were motions by the defendants in error to dismiss, and by the assignee in bankruptcy to be substituted as plaintiff. The case is stated in the opinion.

Louisiana *v.* New Orleans.

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

As the judgment in this case was rendered after Hill's adjudication in bankruptcy, we think he may prosecute a writ of error in his own name. We will not undertake to decide on a motion to dismiss, whether his discharge operates to release him from all liability growing out of the judgment. The motions are, therefore, overruled; but if the assignee shall be of the opinion that any of the questions involved are such as may affect the estate of the bankrupt, he will be heard on such questions by his counsel in connection with the plaintiff in error when the case comes up for argument, if he desires. *Denied.*

Mr. Adolph Moses for the motion to dismiss. *Mr. George W. Brandt* opposing.

FARLOW *v.* KELLEY.

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

No. 795. October Term, 1880. — Decided March 14, 1881.

An allowance by a Circuit Court of an appeal taken by a receiver, is equivalent to leave by the court to the receiver to take an appeal.

Motion to dismiss. The case is stated in the opinion.

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

This motion is denied. The allowance of the appeal by the circuit justice is equivalent to leave by the court to the receiver to take an appeal. The order appealed from finally disposed of the suit, which was instituted against the receiver by permission of the court under date of November 13, 1878. It was the final judgment or decree in that matter. To what extent it may be reviewable here, in this form of proceeding, will be for determination when the case is heard on its merits.

Mr. R. P. Buckland and *Mr. J. W. Keifer* for the motion. *Mr. S. A. Bowman* opposing.

LOUISIANA *ex rel.* FOLSOM *v.* NEW ORLEANS.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 810. October Term, 1880. — Decided March 14, 1881.

The judges of the court differing in opinion, the submission is set aside, and an argument ordered.

Cases Omitted in the Reports.

THE case is stated in the opinion.

MR. JUSTICE FIELD announced the order of the court.

The relators are the holders of two judgments against the city of New Orleans, one for $26,850, the other for $2000. Both were recovered in the courts of Louisiana; the first in June, 1877, by the relators; the second in June, 1874, by parties who assigned it to them. Both judgments were for damages caused to the property of the plaintiffs therein by a mob or riotous assemblage of people, in the year 1873. A statute of the State made municipal corporations liable for damages thus caused within their limits. Revised Statutes of Louisiana, 1870, § 2453.

The judgments were duly registered in the office of the controller of the city, pursuant to the provisions of the act known as No. 5, of the extra session of 1870, and the present proceeding was taken by the relators to compel the authorities of the city to provide for their payment.

At the time the injuries complained of were committed, and one of the judgments was recovered, the city of New Orleans was authorized to levy and collect a tax upon property within its limits, of one dollar and seventy-five cents upon every one hundred dollars of its assessed value. At the time the other judgment was recovered this limit of taxation had been reduced to one dollar and fifty cents on every one hundred dollars of the assessed value of the property. By the constitution of the State adopted in 1879, the power of the city to impose taxes on property in its limits was further restricted to ten mills on the dollar of its valuation.

The effect of this last limitation is to prevent the relators, they not being allowed to issue executions against the city, from collecting their judgments, as the funds receivable from the tax thus authorized to be levied are exhausted by the current expenses of the city, which are to be first met.

The question is therefore raised by the relators whether the limitation of the taxing power of the city by the state constitution of 1879, does not conflict, so far as it applies to their judgments, with the clause of the 14th Amendment of the Constitution of the United States which forbids the State to deprive any person of property, without due process of law, their contention being that the judgments are property, and the restriction of the power of taxation of the city of New Orleans to its present limit, since they were recovered, renders it impossible to collect them and thus they are practically destroyed.

Upon the question thus presented the judges differ in opinion. The court, therefore, orders an oral argument upon it.

The submission on briefs is accordingly set aside and the cause restored to its place on the calendar.

Mr. Robert Mott, Mr. Thomas J. Semmes and *Mr. Henry B. Kelly* for plaintiffs in error. *Mr. E. Howard McCaleb* and *Mr. Henry C. Miller* for defendants in error.

This case was argued and decided at October Term, 1883. See 109 U. S. 285.

NATIONAL LIFE INSURANCE COMPANY *v.* SCHEFFER.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 273. October Term, 1881. — Decided April 24, 1882.

A record in a state court which shows a verdict and motion for new trial overruled, but no judgment on the verdict, shows no final judgment to which a writ of error may be directed.

The case is stated in the opinion.

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

A majority of the court is of opinion that there has been no final judgment below in this case. Upon the trial in the District Court of Ramsey County, a verdict was rendered in favor of the plaintiff. Before any judgment was entered on this verdict, a motion was made for a new trial. This motion was overruled and thereupon an appeal was taken to the Supreme Court of the State from "the order . . . denying the application for a new trial." The judgment on this appeal is as follows: "Pursuant to an order of court duly made and entered in this cause on the 21st of March, 1879, it is here and hereby determined and adjudged that the order herein appealed from, to wit, of the District Court of the second judicial district, sitting within and for the county of Ramsey, be and the same hereby is in all things affirmed." Then follows a judgment for costs in the Supreme Court. No further proceedings appear to have been had in either court, and the record consequently shows a verdict and motion for new trial overruled, but no judgment on the verdict. It follows that the writ of error must be

Dismissed.

Mr. Isaac N. Arnold, Mr. Van H. Higgins and *Mr. Leonard Swett* for plaintiffs in error. *Mr. E. C. Palmer* for defendants in error.

Cases Omitted in the Reports.

SCRUGGS *v.* MEMPHIS AND CHARLESTON RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

No. 391. October Term, 1881. — Decided December 12, 1881.

Service of notice of citation on the attorney of a party is sufficient.

An appeal bond for costs need not be signed by all the appellants. Being approved by the court it stands as security for all the appellees.

This was a motion to dismiss. The case is stated in the opinion. The final disposition of the case will be found in 108 U. S. 368.

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

This motion is denied. There is sufficient evidence of the service of the citation on the attorney of Viser, and that is enough. *United States* v. *Curry*, 6 How. 111; *Bacon* v. *Hart*, 1 Black, 39. The bond for the appeal is sufficient. The appeal does not operate as a *supersedeas*. The security is for costs only. The bond need not be signed by all the appellants. *Brockett* v. *Brockett*, 2 How. 240. Having been approved by the judge, it stands as security for all the appellees.

The controversy in the suit is as to the account between Mrs. Scruggs and the railroad company, growing out of the purchase by the company of the hotel in Corinth. The amount in dispute, as shown by the exceptions to the master's report, is more than five thousand dollars. Viser seeks payment of a debt due him from Mrs. Scruggs out of the proceeds of the litigation between Mrs. Scruggs and the railroad company, and if it should appear that she was not bound to return the company any of the money which was paid to her, he can have no decree against her personally. The relief which he asks is a mere incident to the accounting between Mrs. Scruggs and the railroad company.

In addition to this, it appears that the original claim of Viser exceeded $5000. Mrs. Scruggs resisted the payment of the whole. It has all been allowed in the progress of the cause. The final decree in his favor was less than $5000, because the remainder of the claim had, by an order of the court, been paid before from the proceeds of the litigation.

Mr. J. H. Viser for the motion.

MARSHALL *v.* KNOTT.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 209. December Term, 1867. — Decided February 24, 1868.

This court has not jurisdiction in error over the judgment of a state court brought here under the 25th section of the Judiciary Act of 1789, unless the record discloses that one of the questions described in that section arose in the state court, or was decided by its judgment.

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

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

By the motion made in this case we are asked to dismiss the writ of error. The case is brought here under the 25th section of the Judiciary Act, but it does not appear from the record that any of the questions described in that section arose in the cause in the state court, or were decided by its judgment. We have, therefore, no jurisdiction to revise the judgment of the Supreme Court of Oregon upon writ of error, and the writ must be *Dismissed*.

Mr. Edward Lander for the motion. No one opposing.

STARK *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 259. December Term, 1871. — Decided February 12, 1872.

The court refuses a rule on the Court of Claims to certify up evidence used in that court on the trial of a cause which has been brought here by appeal from that court.

THE case is stated in the opinion.

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

The motion for rule on the Court of Claims to certify, whether certain depositions were used in evidence on the trial of this cause, and also to transmit a copy of the evidence used, and also to transmit certified copies of depositions used on the trial of the cause in *this* court is *Denied*.

Mr. Wm. Penn Clarke for the motion. No one opposing.

UNITED STATES *v.* SMOOT.

SMOOT *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 264, 265. December Term, 1871. — Decided February 19, 1872.

This court will not direct the Court of Claims to send up the evidence on which that court bases its findings.

The case is stated in the opinion.

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

The court is of opinion that the motion in this case asks in effect to remand this case to the Court of Claims with directions to send the evidence upon which their findings of fact were made to this court for revision. It alleges that the court omitted to find particular facts and asks that it may be required to certify what they shall find to support the omissions in said finding. We have repeatedly decided that this cannot be done under the rules governing appeals from the Court of Claims. The motion must, therefore, be

Denied.

Mr. Benjamin F. Butler for the motion. *Mr. Assistant Attorney General Hill* opposing.

AMBLER *v.* WHIPPLE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 610. December Term, 1871. — Decided February 19, March 22, 1872.

A cause is docketed and dismissed upon motion of the appellee, and subsequently redocketed on motion of the appellant.

Motion to docket and dismiss. The case is stated in the opinion.

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

The judgment was rendered and the appeal allowed on the 2d of December, 1871. The ninth rule provides that where an appeal shall be brought to this court in less than thirty days before the commencement of the term, if the appellant shall fail to docket the appeal within the first thirty days after the judgment was rendered, the appellee may have the case docketed and dismissed upon producing a certificate from the clerk of the court wherein the decree was rendered, stating the cause and certifying that the appeal had been duly sued out and allowed; this returnable to the next term after it was allowed, which was December Term, 1871, commencing

on the 4th day of December. The motion is therefore within the rule and it must be docketed and dismissed.

On the 1st of March, 1872, *Mr. B. F. Butler* moved to strike out order of 19th February and for leave to docket the appeal. This being argued on the 22d March, it was ordered that decree of February 19 be rescinded and annulled, and leave was granted appellant to docket cause.

Mr. James Hughes for the first motion. No one opposing.

Mr. B. F. Butler for the second motion. *Mr. James Hughes* opposing.

EX PARTE LANGE.

ORIGINAL.

No. 9. Original. October Term, 1873. — Decided January 12, 1874.

A writ of *habeas corpus* is ordered to issue, and also a writ of *certiorari* to bring up a petition by this petitioner to the judge of a Circuit Court of the United States for a writ of *habeas corpus*, and the denial thereof made in chambers; inasmuch as the petition in this court showed that the papers had been filed in the Circuit Court and remained there of record.

Petition for writs of *habeas corpus* and *certiorari*. The case is stated in the opinion.

Mr. Justice Clifford delivered the opinion of the court.

Representation is made by the petitioner that he is, and since the eighth of November last has been a prisoner confined in the Ludlow-Street jail in the city of New York, in the custody of Oliver Fiske, United States marshal for the Southern District of New York, under an illegal sentence pronounced on him on the said eighth of November, and that he is restrained of his liberty in violation of the Constitution of the United States, and of the law in such case made and provided. Wherefore he prays that a writ of *habeas corpus* issue directed to the said Oliver Fiske, as such marshal, commanding him to produce the petitioner before this court here, at such time as this court shall direct, and that he, the marshal, show at the same time the cause of the petitioner's detention, to the end that he, the petitioner, may be discharged from custody.

Superadded is also the further prayer that a writ of *certiorari* may issue to Kenneth G. White, clerk of the Circuit Court of the United States for the same district, commanding him to certify to

this court the petition for *habeas corpus* which the petitioner on or about the seventeenth of December last presented "to the Hon. Lewis B. Woodruff, Circuit Judge of the United States for the Second Circuit, with the return thereto, and all the record of said court respecting the same, and the adjudication thereon, to the end that the errors therein may be corrected by this court, as more fully set forth in the petition."

Petitions of the kind when presented here are heard in the first place *ex parte*, and in view of that fact it is proper to remark that it has not escaped the attention of the court that the adjudication sought to be reviewed was made on a petition presented to the said circuit judge at chambers, but inasmuch as the petition here appears to warrant the inference that the first named petition and the proceedings thereon were subsequently filed in the Circuit Court, and that the same remain there of record, the court is of opinion that the special circumstance mentioned is no bar to the present application; and due consideration having been given to the petition, the court directs that the writ of *habeas corpus* issue to the person named and to the end as prayed.

Also that the writ of *certiorari* issue and that it be directed as prayed, and that it be made returnable forthwith.

Mr. Stewart L. Woodford for the petitioner.

For further proceedings in this case see *Ex parte Lange*, 18 Wall. 163.

BERGNER *v.* PALETHORP.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 926. October Term, 1875. — Decided March 27, 1876.

A Federal question not raised at the trial of a cause in the state court below will not be considered here.

Motion to dismiss for want of jurisdiction. The case is stated in the opinion.

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

The motion to dismiss this cause for want of jurisdiction is granted. No Federal question is presented by the record. It is argued here that a certain paper writing given in evidence upon the trial in the Court of Common Pleas was not good and valid as a lease, because not stamped as such, but the record does not show that any such question was presented to the Supreme Court for de-

termination, or that it was decided, or that its decision was in any manner necessary to the judgment as rendered.

Mr. Robert Palethorp for the motion. *Mr. Samuel Gormley* and *Mr. W. S. Price* opposing.

MEYER *v.* PRITCHARD.

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

No. 171. October Term, 1876. — Decided January 15, 1877.

The surrender of letters patent for an invention extinguishes them; and if made after appeal to this court, no substantial controversy remains.

Motion to dismiss. The case is stated in the opinion.

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

In *Moffitt* v. *Garr*, 1 Black, 273, we held that a surrender of a patent "means an act which, in the judgment of law, extinguishes the patent. It is a legal cancellation of it, and hence can no more be the foundation for the assertion of a right, after the surrender, than could an act of Congress which has been repealed. . . . The reissue of the patent has no connection with or bearing upon antecedent suits; it has as to subsequent suits. The antecedent suits depend upon the patent existing at the time they were commenced, and unless it exists and is in force at the time of trial and judgment the suits fail." To the same effect is *Reedy* v. *Scott*, 23 Wall. 352. We are satisfied with this ruling.

Since the appeal in this case, the appellants, who represent the original patentees, have surrendered the patent upon which the suit was brought and obtained a reissue. This fact is conceded. If we should hear the case and reverse the decree below, we could not decree affirmative relief to the appellants, who were the complainants below, because the patent upon which their rights depend has been cancelled. There is no longer any "real or substantial controversy between those who appear as parties to the suit" upon the issues which have been joined, and for that reason the appeal is dismissed, upon the authority of *Cleveland* v. *Chamberlain*, 1 Black, 419, and *Lord* v. *Veazie*, 8 How. 250.

The cause is remanded to the Circuit Court to be dealt with as law and justice may require.

Mr. George Harding and *Mr. J. Hervey Ackerman* for the motion. *Mr. B. F. Thurston* and *Mr. S. D. Law* opposing.

WILSON v. HOSS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 243. October Term, 1876. — Decided May 7, 1877.

Upon the pleadings and proof, the plaintiff was entitled to recover, whether the deposition objected to was admitted or excluded, and therefore its admission worked no injury to the defendant.

THE case is stated in the opinion.

MR. JUSTICE HUNT delivered the opinion of the court.

The burden of the appellant's cause of complaint in this appeal is the admission in evidence of the deposition of the plaintiff below. This complaint is not well founded.

Upon the pleadings in the case, whether the deposition be considered as in the case, or whether it is excluded, the plaintiff was entitled to recover. No proofs were taken, except this deposition.

The bill alleged the making of an agreement between the plaintiff and the defendants' firm, (who are practising lawyers,) to the effect that the plaintiff should use his exertions to secure to the defendants certain professional business described, and that after deducting expenses the plaintiff should have one third of the fees received for prosecuting such business; that as to certain other claims mentioned, one half of the fees should in like manner be paid to the plaintiff; that various claims mentioned were prosecuted under the agreement, and judgments recovered and collected, the fees in which, amounting to over $4000, were received by the defendant; that $500 only had been paid to the plaintiff; that the defendants refuse to pay him the balance due to him; and demands an account and decree for the amount due, after deducting expenses. A copy of the agreement is made an exhibit to the bill. This agreement states that as to the cases of Cogan, Calleton and Moran, now in defendants' hands, the fees shall be equally divided between the parties.

The answer of the defendant Wilson admits the making of the agreement, alleges that the same was entered into upon plaintiff's representation that he was the agent for a number of persons having claims to a large amount against the United States, and that plaintiff should use his exertions that defendants should be employed as attorneys in such cases; that plaintiff failed to deliver

any such claims, or cause them to be delivered to defendants, or cause them to be employed, and that since the signing of the agreement no such claims have come into his hands through plaintiff's exertions; avers a belief that plaintiff was not agent for such claims, and that his representation was fraudulent; admits that the claims of Cogan and Moran were prosecuted successfully, and that he received between $3000 and $4000 as fees in those cases.

The answer thus admits the receipt of between $3000 and $4000, which the agreement expressly provided should be divided equally between the parties. It is not pretended that any larger sum than $500 has been paid to the plaintiff. The pleadings show an amount of about $1500 due to the plaintiff, subject to an account for expenses, and upon these pleadings a decree was necessarily ordered for the plaintiff.

If there is a claim of fraud it must be proved, which is not here attempted.

Excluding as irregular the deposition in which the plaintiff establishes his case, it is not a subject of reasonable doubt that upon the hearing on bill and answer, and on the motion for a rehearing, in which both parties appeared, the decree given was properly rendered. The decree expressly states that it is made upon the bill and answer, without regard to the deposition, which was irregularly taken. *Decree affirmed.*

Mr. Enoch Totten and *Mr. Thomas Wilson* for appellant. *Mr. J. M. Carlisle* and *Mr. J. D. McPherson* for appellee.

STATEN ISLAND RAILWAY COMPANY *v.* LAMBERT.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 772. October Term, 1877. — Decided January 7, 1878.

If in an action in a state court to recover damages under a state statute for a death caused by a collision on navigable waters within the State, no Federal question is raised during the trial, this court cannot take jurisdiction in error.

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

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

The steamboat Middletown, owned by the plaintiff in error, (defendant below,) on her passage from Staten Island to New York ran into and sank a small sail-boat lying at anchor, thereby causing

the death of Charles Lambert. This action was brought by the administratrix of Lambert, under a statute of the State, to recover damages for his death, upon the ground that it resulted from the carelessness and negligence of those engaged in navigating the steamboat. In its answer the plaintiff in error denied the negligence complained of, and insisted that the accident happened through the fault of the decedent, but did not set up any claim of right, privilege or immunity under the navigation laws of the United States. The case as tried presented questions of fact alone, and, upon the motion to dismiss the complaint after the testimony was closed, the court was not asked to rule the law upon conceded facts, but to decide upon the effect of conflicting evidence. Certainly there was no such failure of proof on the part of the plaintiff below as to make it error in the court to refuse to take the case from the jury, and in the assignment of error which has been returned with the writ, in accordance with the requirements of sec. 997, Rev. Stat., no complaint is made of the instructions as given to the jury, or of the refusal to give any that were requested. It does not appear, therefore, that any Federal question was necessarily involved in the decision of the court below, or that any was in fact decided.

The motion to dismiss for want of jurisdiction is granted.

Mr. W. W. Goodrich for the motion. *Mr. Julian A. Davies* opposing.

SOUTHERN *v.* HAGOOD.

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

No. 27. October Term, 1878. — Decided November 4, 1878.

This bill is dismissed because the evidence sent here fails to support the finding on which the bill was dismissed; and as grave constitutional questions were involved, it is remanded to the Circuit Court with power to allow amendments to the pleadings and take further proof.

The case is stated in the opinion.

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

This record shows clearly that the case was heard and decided below upon testimony which is not before us. The decree of dismissal is based entirely upon a finding, that the complainants were concluded by some judgment in a state court "to which Mr. Wesley

was a party." There is nothing here to support such a finding. In fact, no testimony whatever has been sent up.

Neither is the case in a condition to be heard understandingly upon the important constitutional questions which have been argued. It comes upon bill, answer and replication alone. There is nothing to show the form of the "revenue-bond scrip," which is the subject matter of the controversy, and we have not a description of it even. Under these circumstances it is apparent that the case has not been prepared by either party with a view to the presentation of these questions, and we are, therefore, unwilling to enter upon their consideration on this appeal.

The decree of the Circuit Court is reversed with costs, upon the sole ground that the evidence which has been sent here fails to support the finding upon which the bill was dismissed, and the cause is remanded for a further hearing, with power in the Circuit Court to allow such amendments to the pleadings and such further proof as it shall be advised may be necessary for the proper presentation of the questions to be decided.

Mr. Dennis McMahon for appellants. *Mr. Leroy F. Youmans* for appellees.

For further proceedings in this case, see *Hagood* v. *Southern*, 117 U. S. 52.

MARSH *v.* CITIZENS INSURANCE COMPANY.

ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

No. 70. October Term, 1878. — Decided December 9, 1878.

At the trial in a state court upon a policy of insurance of a steamboat, the question whether if the steamboat was burned while carrying turpentine as freight, the owner must show affirmatively his license to carry the turpentine, or whether the law would presume a license until the contrary was shown, is not a Federal question.

THE case is stated in the opinion.

This case presents no question of Federal jurisdiction. Marsh, the plaintiff in error, claimed below no "title, right, privilege, or immunity" under the Constitution, laws, or treaties of the United States, and no such title, right, privilege, or immunity has been denied him. He sued upon a policy of insurance to recover for the loss of his steamboat by fire, and the defence was that the fire was caused by his gross carelessness in the use of turpentine, on board as freight, to increase steam while racing with another boat.

De Liano *v.* Gaines.

An act of Congress (Stat. 63, c. 106, § 7) prohibits the transportation of turpentine, as freight, on steamboats carrying passengers, "except in cases of special license for that purpose." No complaint was made of the carriage of the turpentine, but of its use while being carried. The court in effect told the jury that, under the existing laws, there could be no recovery if the loss was occasioned by the misconduct of the insured in taking a barrel of turpentine from the hold of the boat, placing it in front of the furnace, knocking out the head, and pouring two thirds of a bucket full of turpentine on the coal and wood near by, so that when the furnace-door was opened and the fire stirred up, during a race with another boat, the burning coals fell on the fuel thus saturated and set fire to the boat. No complaint is made here, by the assignment of errors, of the charge as given. The errors assigned relate only to the refusal of the requests to charge made by Marsh, and these presented only questions as to the effect of evidence and the burden of proof; that is to say, whether if a steamboat was burned while carrying turpentine as freight, the owner, in an action on a policy of insurance, must show affirmatively his license to carry the turpentine, or whether the law would presume a license until the contrary was shown. The determination of such questions by the court below, even if necessary to the decision of the case, is final and cannot be re-examined here.

The suit is consequently dismissed for want of jurisdiction.

Mr. Edward Lander, *Mr. J. W. Moore*, and *Mr. E. A. Newman* for plaintiff in error. *Mr. Andrew McCallum* for defendant in error.

DE LIANO *v.* GAINES.

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

No. 192. October Term, 1879. — Decided March 15, 1880.

The overruling of a motion that the cause proceed no farther by reason of an alleged compromise of the suit is not a final judgment or decree.

The case is stated in the opinion.

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

A decree having been entered referring this cause to a master to state an account of rents and profits, De Liano, the appellant, appeared in court and moved that the master be directed to proceed no further with his accounting, by reason of an alleged compromise

and settlement that had been made by the parties in respect to the matters in dispute. The court, after a hearing, denied the motion and directed that "the cause proceed." From this order De Liano took this appeal.

It needs only a statement of the facts to show that we have no jurisdiction. The decree appealed from is not a final decree.

The appeal is dismissed.

Mr. H. B. Kelly, *Mr. G. L. Bright* and *Mr. H. L. Lazarus* for appellant. *Mr. Samuel Shellabarger*, *Mr. J. M. Wilson*, and *Mr. C. E. Fenner*, for appellee.

WEATHERBY *v.* BOWIE.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 790. October Term, 1879. — Decided January 5, 1880.

A statement in the opinion of the highest court of a State that the only Federal question in the case was probably abandoned as "it is manifest that the Circuit Court could not have taken jurisdiction" is not such a decision of the question as to give this court jurisdiction.

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

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

We may look into the opinions of the Supreme Court of Louisiana for the purpose of determining whether a Federal question was raised and decided in a case coming up from that court. *Armstrong* v. *Treas. Athens Co.*, 16 Pet. 281; *Cousin* v. *Blanc*, 19 How. 202. To give us jurisdiction in a writ of error to a state court a Federal question must not only exist in the record, but it must have been decided against the party who sues out the writ. *Murdock* v. *Memphis*, 20 Wall. 590. "Only such questions as either have been or ought to have been passed upon by that court in the regular course of its proceedings can be considered by us upon error." *Fashnacht* v. *Frank*, 23 Wall. 416.

On looking into the opinion in this case we find that the only Federal question there is in the record was not presented to the Supreme Court "either in brief or oral argument." The court also say they presume the question was abandoned, and as one of their reasons for that presumption they say "it is manifest that the Circuit Court could not have taken jurisdiction." We think this is not such a decision of the question as will give us jurisdiction.

Dismissed.

Mr. John H. Kennard for the motion. *Mr. A. J. Semmes* opposing.

BACON *v.* INTERNATIONAL BANK OF CHICAGO.

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

No. 237. October Term, 1880. — Decided March 21, 1881.

The rights of an assignee in bankruptcy over collateral lodged by the bankrupt with the bank more than two months prior to the bankruptcy, as security for indebtedness which then existed or might thereafter be created, are only such as the bankrupt had when the proceedings in bankruptcy were commenced.

THE case is stated in the opinion.

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

The facts of this case briefly stated are these:

In 1876, the firm of Brunswick Brothers, Stephani & Hart Company was engaged in the business of making and selling billiard tables at Chicago and St. Louis. In August or September of that year this firm agreed to sell the J. M. Brunswick & Balke Company the stock and branch of the business at St. Louis, for which the purchasing company was to give, when the stock was transferred, its notes of one thousand dollars each payable three months from date, and the balance of the invoice when taken was to be divided into monthly notes of one thousand dollars each, the first to fall due four months from date, and one each month thereafter until the whole price was paid. The three notes due three months after date were to be delivered the selling firm when the transfer of the stock was made, but the others were to be deposited with the International Bank of Chicago, with instructions that they be delivered one month before their maturity.

The invoice when taken amounted to twelve thousand dollars. The stock was transferred and notes executed according to the agreement, September 9, 1876. The three first to fall due were at once handed over to the selling firm and the others deposited in bank as agreed. The firm of Brunswick Brothers, Stephani & Hart Company was dissolved in September, 1876, and all its assets passed on the dissolution to the firm of Brunswick, Stephani & Hart, which was its successor in the business.

On the 16th of September the new firm agreed that the bank might hold the nine notes then in its possession as collateral security for the indebtedness of the firm to the bank, which then existed or which might thereafter be created. The firm was at the time

owing the full amount of the notes, a part, at least, of which was for a debt incurred under a promise to give the notes as collateral when they were obtained.

Proceedings in bankruptcy were instituted against Brunswick, Stephani & Hart, on the 29th of November, 1876, and they were adjudicated bankrupts on the 16th of the following December. On the 3d of February, 1877, the other members of the firm of the Brunswick Brothers, Stephani & Hart Company filed their petition in bankruptcy, and on the same day they were adjudicated bankrupts and made parties to the former proceeding.

The J. M. Brunswick & Balke Company paid the notes to the bank as they fell due, and the payments as made were applied to the liquidation of the debt for which they were held as collateral. On the 25th of June, 1877, the assignee in bankruptcy of the bankrupt firms commenced this suit in trover against the bank to recover damages for the unlawful conversion of the notes and the moneys collected thereon.

This statement, which is not disputed, shows clearly, as we think, that the court below committed no error in directing a verdict in favor of the bank. The makers of the notes do not complain of what was done between the bank and the payees. They owed the debt represented by the notes and have paid it to the bank as it fell due. As the payments were made they got up their notes. The rights of the assignee against the bank are only such as the bankrupts themselves had when the proceedings in bankruptcy were commenced. That the St. Louis firm owed the debt to the Chicago firm, whether the notes were ever delivered by the bank or not under the terms of the deposit, is conceded. That debt was assigned to the bank as collateral. Such is the legal effect of the agreement between the bank and the firm. That gave the bank the right to collect the notes as they fell due, and apply the proceeds to the discharge of the debt to secure which the transfer was made. This was done more than two months before the proceedings in bankruptcy were begun, and there is no allegation or suspicion of bad faith. This made the title of the bank good as against the creditors of the bankrupts. Certainly the bankrupts cannot call on the bank to return the notes until the debt for which the security was given is paid. No more can the assignee.

The judgment is *Affirmed.*

Mr. J. W. Jackson and *Mr. Thomas Dent* for plaintiff in error.

Mr. A. M. Pence for defendant in error.

LEARY *v.* LONG.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 50. October Term, 1880. — Decided November 8, 1880.

When it appears in the pleadings that a former bill for the same cause of action was dismissed for the reason that a plea that had been filed and not denied presented a good defence, an averment that there has been no adjudication upon the merits is not enough; but it must be averred in the pleadings and shown that the nature of the defence did not present a bar to the action.

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

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

Upon the case made by the bill, the appellant is not entitled to recover. Paragraphs 9 and 10 of the bill are as follows:

"9. Complainant further states that he filed his bill of complaint in said court against said defendant and said Kappell, on or about the 19th day of July, 1870, praying that said sale should be set aside, and for other matters, which will more fully appear by reference to said bill, which bill was afterwards dismissed for want of prosecution upon the part of the attorney for complainant.

"10. Complainant further states that on or about the 16th day of October, 1871, he filed his second bill in said court, praying for the same relief, and that the defendant plead thereto, which bill was also dismissed for the reason of the default of a replication to said plea, the attorney of the complainant having died during the pendency of said last-mentioned bill."

Here is an express admission of record that a bill for the same identical cause of action now sued on was dismissed for the reason that a plea which had been filed and not denied presented a good defence. What the plea was, does not appear, but as the bill was dismissed absolutely, the presumption is it went to the merits. A mere averment that there has been no adjudication upon the merits, is not enough. To overcome the effect of the other allegations, the nature of the defence set up in the plea should have been stated, so that it could be seen that it did not present a bar to the action.

Affirmed.

Mr. L. G. Hine and *Mr. S. T. Thomas* for the motion. *Mr. A. L. Merriman* opposing.

LANE *v.* WALLACE.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 1016. October Term, 1881. — Decided November 21, 1881.

When the highest court of a State dismisses a suit brought up from the trial court for want of jurisdiction, the Federal question, if there be one in it, was decided by the trial court, and the writ of error should be directed to that court.

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

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

The judgment of the Supreme Court of Louisiana in this case was one dismissing the suit for want of jurisdiction. Consequently that court could not have decided the Federal question presented to and passed upon by the District Court. All it did was to determine that the District Court was the highest court of the State in which a decision in the suit could be had. The writ of error should, therefore, have been directed to that court instead of the Supreme Court. Such a writ can now issue if applied for and allowed in time.

The motion to dismiss is granted.

Mr. W. W. Handlin for the motion. *Mr. Joseph P. Hornor* opposing.

II. TABLE OF OMITTED CASES; (1) *IN WHICH THE OPINION STATES FACTS UPON WHICH THE JUDGMENT IS RENDERED, INVOLVING NO QUESTION OF LAW:* (2) *IN WHICH A BRIEF OPINION ORDERS JUDGMENT ENTERED ON AUTHORITY OF SOME OTHER CASE REFERRED TO, WITHOUT FURTHER DISCUSSION:* (3) *IN WHICH JUDGMENT IS ENTERED PARTLY ON FACTS, AND PARTLY ON AUTHORITY: OR* (4) *IN WHICH THE OPINION ORDERS A JUDGMENT ENTERED ON THE STIPULATION OF THE PARTIES, OR FOR INCOMPLETENESS OF THE RECORD, OR FOR NON-COMPLIANCE WITH THE RULES OF COURT.*

Dec. T. 1851. 1. United States *v.* Harrison. No. 126. (Authority of *United States* v. *Philadelphia*, 11 How. 609.)

Dec. T. 1852. 2. United States *v.* Carrère. No. 18. } (Same

" 3. United States *v.* Grafton. No. 80. } authority.)

Dec. T. 1854. 4. The Steamboat Niagara *et al.* v. Van Pelt *et al.* No. 69. (Stipulation.)

Dec. T. 1856. 5. Coggeshall *et als. v.* Hartshorne *et al.* No. 60. (Stipulation.)

Dec. T. 1857. 6. Hudgins *et al. v.* Kemp. No. 22. (Authority of *Same* v. *Same*, 18 How. 530.)

" 7. Watterson *v.* Payne. No. 56. (Facts.)

Dec. T. 1859. 8. United States *v.* Osio. No. 74. (Facts. Identical with *Same* v. *Same*, 23 How. 273.)

Dec. T. 1863. 9. Richardson *v.* Lawrence County. No. 100. (Authority of *Woods* v. *Lawrence County*, 1 Black, 386.)

" 10. United States *v.* Hallock. No. 113. (Authority of *The Prize Cases*, 2 Black, 635.)

" 11. United States *v.* Olvera. No. 149. (Facts.)

" 12. Milwaukee and Minnesota Railroad Co. *v.* Soutter. No. 267. (Authority of a case previously decided, which is probably *Bronson* v. *La Crosse Railroad*, 1 Wall. 405.)

" 13. Same *v.* Same. No. 268. (On the same authority.)

Omitted Cases.

Dec. T. 1864. 14. Merriam *v.* Haas. No. 77. (Facts.)
Dec. T. 1865. 15. United States *v.* De Haro. No. 81. (Facts.)
" 16. Mahoney (Intervenor) *v.* United States. No. 146. (Facts.)
" 17. Rogers *v.* Keokuk. No. 94. (Authority of *Gelpcke* v. *Dubuque*, 1 Wall. 202, in part; facts in part.)
" 18. Rogers *v.* Lee County. No. 95. (Authority of *Rogers* v. *Keokuk*, *ante*, No. 94.)
" 19. Duvall *v.* United States. No. 145. (Authority of *The Reform*, 3 Wall. 617.)
" 20. Horback *v.* Potter. No. 189. } (Facts.)
" 21. Horback *v.* Brown. No. 190. }
" 22. Hammond *v.* Massachusetts. No. 240. } (Authority of *McGuire* v. *Massachusetts*, 3 Wall. 387.)
" 23. McNeal *v.* Same. No. 241. }
" 24. Clark *v.* Same. No. 242. }
" 25. Churchill *v.* Utica. No. 286. } (Authority of *Van Allen* v. *Assessors*, 3 Wall. 387.)
" 26. Williams *v.* Nolan. No. 288. }
Dec. T. 1866. 27. Brown *v.* Johnson. No. 47. (Authority of *Brown* v. *Bass*, 4 Wall. 262.)
" 28. Mineral Point *v.* Lee. No. 164. (Authority of "several cases of similar character.")
" 29. United States *v.* Mayrand. No. 187. (Authority of *United States* v. *Holliday*, 3 Wall. 407.)
" 30. Tillinghast *v.* Van Buskirk. No. 313. (Authority of *Green* v. *Van Buskirk*, 5 Wall. 307.)
" 31. Southern Pennsylvania Railroad *v.* Baltimore. No. 43. (Facts.)
Dec. T. 1867. 32. *Ex parte* Milwaukee and Minnesota Railroad Co. No. 8. Original. (Authority of a case referred to but not named in the opinion, but which is probably *Minnesota Co.* v. *St. Paul*, 6 Wall. 742.)
" 33. Mississippi *v.* Stanton and Grant. No. 14. Original. (Authority of *Georgia* v. *Stanton*, 6 Wall. 50; and *Georgia* v. *Grant*, 6 Wall. 241.

Omitted Cases.

Dec. T. 1867. 34. Gaines *v.* Lizardi. No. 83. (Authority of *Gaines* v. *New Orleans*, 6 Wall. 642.)

" 35. United States *v.* Cook. No. 102. (Partly on facts; partly on authority of *United States* v. *Hartwell*, 6 Wall. 385.)

" 36. Hunt *v.* Bender. No. 103. (Authority of *Seaver* v. *Bigelows*, 5 Wall. 208.)

" 37. United States *v.* Bales of Cotton marked J. H. B. No. 146. (Authority of *Union Ins. Co.* v. *United States*, 6 Wall. 759.)

" 38. Williamson *v.* Moore. No. 421. (Authority of *Williamson* v. *Suydam*, 6 Wall. 723.)

Dec. T. 1868. 39. Tillinghast *v.* Van Buskirk. No. 32. (Authority of *Green* v. *Van Buskirk*, 7 Wall. 139.)

" 40. Burbank *v.* Bigelow. No. 36. (Authority of *Breedlove* v. *Nicolet*, 7 Pet. 413.)

" 41. Smith *v.* Washington Gas Light Co. No. 86. (Facts.)

" 42. Finley *v.* Isett. No. 150. (Facts.)

" 43. Dutton *v.* Palairet. No. 184. (Authority of *Bronson* v. *Rodes*, 7 Wall. 229.)

" 44. United States *v.* Mowry. No. 186. (Authority of *United States* v. *Adams*, 7 Wall. 463.)

" 45. United States *v.* Morgan. No. 191.
" 46. United States *v.* Burton. No. 192.
" 47. United States *v.* Geffroy. No. 193.
" 48. United States *v.* Higdon. No. 197.
(Same authority.)

" 49. Davidson *v.* Starcher. No. 329.
" 50. Same *v.* King. No. 330.
" 51. Same *v.* McMahon. No. 331.
(Facts.)

" 52. Moulder *v.* Forrest. No. 371. (Authority of *Insurance Co.* v. *Mordecai*, 21 How. 195, and *Porter* v. *Foley*, 21 How. 393.)

Dec. T. 1869. 53. *Ex parte* Pargoud. No. 9. Original. (Authority of *Ex parte Zellner*, 9 Wall. 244.)

" 54. Burlington and Missouri River Railroad Co. *v.* Mills County. No. 39. (Authority of *Railroad Co.* v. *Fremont County*, 9 Wall. 89.)

" 55. Willard *v.* Willard. No. 90. (Authority of *Willard* v. *Presbury*, 14 Wall. 676.)

Omitted Cases.

Dec. T. 1869. 56. United States *ex rel.* Amy *v.* Burlington. No. 94.

" 57. Same *ex rel.* Learned *v.* Same. No. 95. (Authority of *Butz* v. *Muscatine*, 8 Wall. 575.)

" 58. Flanders *v.* Tweed. No. 108. (Authority of *Same* v. *Same*, 9 Wall. 425.)

" 59. Weed *v.* Crane. No. 123. (Facts.)

" 60. Supervisors *v.* Durant. No. 134. (Authority of *Supervisors* v. *Durant*, 9 Wall. 415.)

" 61. Washington County *v.* United States *ex rel.* Mortimer. No. 137. (Authority of *Supervisors* v. *Durant*, 9 Wall. 415.)

" 62. Northern Belle *v.* Robson. No. 141. (Facts.)

" 63. Kenosha *v.* Lamson. No. 143. (Authority of *Knox County* v. *Aspinwall*, 21 How. 539; and *The City* v. *Lamson*, 9 Wall. 477.)

" 64. Long *v.* Patton. No. 196. (Authority of *Little* v. *Herndon*, 10 Wall. 26, in part, and on facts as to the remainder.)

" 65. Underhill *v.* Herndon. No. 197. (Same authority.)

" 66. Sturtevant *v.* Herndon. No. 198. (Authority of *Little* v. *Herndon*, 10 Wall. 26.)

" 67. Underhill *v.* Patton. No. 199. (Same authority.)

" 68. Supervisors *v.* United States *ex rel.* Durant. No. 202. (Facts.)

" 69. Godbe *v.* Tootle. No. 258. (Authority of *Mussina* v. *Cavazos*, 6 Wall. 355.)

" 70. McCollum *v.* Howard. No. 344. (Facts. The decree below was interlocutory.)

" 71. United States *v.* Pollard. No. 391.

" 72. United States *v.* Kohn. No. 359.

" 73. United States *v.* Stanton. No. 390. (Authority of *United States* v. *Anderson*, 9 Wall. 56.)

" 74. Riley *v.* Welles. No. 397. (Authority of *Wolcott* v. *Des Moines Co.*, 5 Wall. 681.)

Dec. T. 1870. 75. *Ex parte* Waples. No. 10. Original. (Authority of *Ex parte Graham*, 10 Wall. 541.)

Omitted Cases.

Dec. T. 1870. 76. Garnett *v.* United States. No. 15. (Authority of *Same* v. *Same*, 11 Wall. 256.)

" 77. Stevens *v.* De Aubrie. No. 45.

" 78. Stevens *v.* Bellemarde. No. 46.

(Authority of *Smith* v. *Stevens*, 10 Wall. 321.)

" 79. United States *v.* Hodson. No. 52. (Authority of *Same* v. *Same*, 10 Wall. 395.)

" 80. United States *v.* Mynderse. No. 237. (Authority of *United States* v. *Hodson*, 10 Wall. 395.)

" 81. Van Slyke *v.* Wisconsin. No. 261.

" 82. Bagnall *v.* Same. No. 262.

(Authority of *National Bank* v. *Commonwealth*, 9 Wall. 353, and *Lionberger* v. *Rouse*, 9 Wall. 468.)

" 83. Cousin *v.* Generes. No. 286. (Authority of *Bethell* v. *Demaret*, 10 Wall. 537.)

Dec. T. 1871. 84. *Ex parte* Loud. No. 8. Original. (Authority of *Ex parte McNiel*, 13 Wall. 236.)

" 85. Holmes *v.* Sevier, Adm'r. No. 31. (Authority of *Osborn* v. *Nicholson*, 13 Wall. 654.)

" 86. Jackoway *v.* Denton. No. 47. (Authority of *Sevier* v. *Haskell*, 14 Wall. 12.)

" 87. Plant *v.* Stovall. No. 82. (Facts. No error in the record.)

" 88. Conrad *v.* Hazlett. No. 108. (Facts.)

" 89. St. John (The) *v.* Hasbrouck. No. 131. (Facts.)

" 90. Germain *v.* Mason. No. 290. (Authority of *Wells* v. *McGregor*, 13 Wall. 188.)

" 91. Northwestern Union Packet Co. *v.* Home Insurance Co. No. 467. (Authority of *Callan* v. *May*, 2 Black, 541, and other cases cited.)

" 92. Gray *v.* Coon. No. 481. (Facts.)

" 93. Davidson *v.* Connelly. No. 510. (Facts.)

Dec. T. 1872. 94. Jones *v.* Fritshle. No. 59. (Facts.)

" 95. Diaz *v.* United States. No. 97. (Authority of *Pico* v. *United States*, 2 Wall. 279; *Peralto* v. *United States*, 3 Wall. 434.)

Omitted Cases.

Dec. T. 1872. 96. United States *v.* Stafford. No. 105. (Facts. The court says the question has ceased to be of any importance.)

" 97. Norton *v.* Jamison. No. 192. (Authority of *Bartemeyer* v. *Iowa*, 18 Wall. 129.)

" 98. Oulton *v.* San Francisco Savings Union. No. 206. (Authority of *Oulton* v. *Savings Institution*, 17 Wall. 109.)

" 99. Humbird *v.* Jackson County. No. 209. (Authority of *Olcott* v. *Supervisors*, 16 Wall. 678.)

" 100. Charleston *v.* Jessup. No. 234. (Authority of *Tomlinson* v. *Jessup*, 15 Wall. 454.)

" 101. Bank of New Orleans *v.* Caldwell. No. 255. (No bill of exceptions in record.)

Oct. T. 1873. 102. South Carolina *ex rel.* Robb *v.* Gurney. No. 22. (Authority of *State* v. *Stoll*, 17 Wall. 425.)

" 103. Adelia (The) *v.* Jackson. No. 65. (Facts.)

" 104. Chicago and Northwestern Railway Co. *v.* Fuller. No. 89. (Authority of *Railroad Co.* v. *Fuller*, 17 Wall. 561.)

" 105. Kenner *v.* United States. No. 202. (Authority of *The Confiscation Cases*, 20 Wall. 92.)

" 106. Allen *v.* Tarelton. No. 251. (Facts.)

" 107. United States *v.* Six Lots, Hatch, claimant. No. 225. (Authority of *The Confiscation Cases*, 20 Wall. 92.)

" 108. United States *v.* Ten Lots, Conrad, claimant. No. 283. (Same authority.)

" 109. Priest *v.* Folger. No. 298.
" 110. Thwing *v.* Folger. No. 299. (Authority of *Habich* v. *Folger*, 20 Wall. 1.)

" 111. Woodman Pebbling Machine Co. *v.* Guild. No. 311. (Stipulation.)

" 112. Heath *v.* Slidell. No. 532.
" 113. Brugere *v.* Slidell. No. 479. (Authority of *Bigelow* v. *Forrest*, 9 Wall. 339, and *Day* v. *Micou*, 18 Wall. 156.)

Oct. T. 1874. 114. Hardy *v.* Harbin. No. 14. (Facts.)

Omitted Cases.

Oct. T. 1874. 115. Northwestern Union Packet Co. *v.* Viles. No. 70. (Authority of *Same* v. *Clough*, 20 Wall. 528.)

" 116. Lee County *v.* Clews. No. 79. (Authority of *Chambers County* v. *Clews*, 21 Wall. 317.)

" 117. Schow *v.* Harriman. No. 101. (Authority of *Schulenberg* v. *Harriman*, 21 Wall. 44.)

" 118. Basse *v.* Brownsville. No. 109. (Authority of *McKinney* v. *Saviego*, 18 How. 235.)

" 119. Rogers Locomotive and Machine Works *v.* Helm. No. 134. (Facts.)

" 120. Oulton *v.* Savings and Loan Society. No. 169.

" 121. Cary *v.* Same. No. 172.

" 122. Same *v.* German Savings and Loan Society. No. 173.

(Authority of *Cary* v. *San Francisco Savings Union*, 22 Wall. 38.)

" 123. Oulton *v.* California Insurance Co. No. 170. (Authority of *Barnes* v. *Railroad Co.*, 17 Wall. 294, and *Stockdale* v. *Atlantic Ins. Co.*, 20 Wall. 323.)

" 124. Lane *v.* United States. No. 176. (Authority of *Haycraft* v. *United States*, 22 Wall. 81.)

" 125. Bailey *v.* Work. No. 540. (Authority of *Bailey* v. *Clark*, 21 Wall. 284.)

" 126. Blake *v.* Fourth National Bank. No. 554.

" 127. Blake *v.* Park Bank. No. 555.

" 128. Kenny *v.* Philadelphia &c. Railroad. No. 318.

(Authority of *Blake* v. *National Banks*, 23 Wall. 307.)

" 129. Windsor *v.* McVeigh. No. 583. (Motion. Authority of *Gregory* v. *McVeigh*, 23 Wall. 294.)

" 130. Commercial Bank of Cleveland *v.* Iola. No. 741. (Authority of *Loan Association* v. *Topeka*, 20 Wall. 655.)

Oct. T. 1875. 131. Eliza Hancox (The) *v.* Langdon. No. 36. (Facts.)

Omitted Cases.

Oct. T. 1875. 132. Turner *v.* Ward. No. 129. (Facts.)

" 133. Crary *v.* Devlin. No. 527. (Authority of *Mining Co.* v. *Boggs*, 3 Wall. 304.)

" 134. Atherton *v.* Fowler. No. 648. (Authority of *Same* v. *Same*, 91 U. S. 143.)

" 135. Mead *v.* Pinyard. No. 754. (Facts.)

Oct. T. 1876. 136. Berreysea *v.* United States. No. 83. (Authority of *United States* v. *Cambuston*, 20 How. 59; *United States* v. *Knight*, 1 Black, 227; *Peralta* v. *United States*, 3 Wall. 434, and other cases.)

" 137. Herhold *v.* Upton. No. 125. (Authority of *Upton* v. *Tribilcock*, 91 U. S. 45; *Sanger* v. *Upton*, 91 U. S. 56; and *Webster* v. *Upton*, 91 U. S. 65.)

" 138. Mackall *v.* Richards. No. 184. (Facts.)

" 139. Johansson *v.* Stephenson. No. 194. (Facts.)

" 140. Davies *v.* Slidell. No. 417.

" 141. Huppenbaur *v.* Slidell. No. 435.

" 142. Ames *v.* Slidell's Heirs. Nos. 668 and 669.

(Authority of *Bigelow* v. *Forrest*, 9 Wall. 339; *Day* v. *Micou*, 18 Wall. 156; and *Wallach* v. *Van Riswick*, 92 U. S. 202.)

" 143. Morrill *v.* Wisconsin. No. 685. (Authority of *Welton* v. *Missouri*, 91 U. S. 275.)

" 144. Pittsburgh Locomotive & Car Works *v.* National Bank of Keokuk. No. 718. (Facts.)

" 145. Van Norden *v.* Washburn. No. 795. (Authority of *Van Norden* v. *Benner*, *ante*, clxi.)

" 146. Haynes *v.* Pickett. No. 837. (Authority of *Ray* v. *Norseworthy*, 23 Wall. 128.)

" 147. McCready *v.* Virginia. No. 992. (Authority of *Same* v. *Same*, 94 U. S. 391.)

Oct. T. 1877. 148. First National Bank of Cincinnati *v.* Cook, No. 182. (Authority of *Merchants' Bank* v. *Cook*, 95 U. S. 342; and *West Philadelphia Bank* v. *Dickson*, 95 U. S. 180.)

" 149. Corry *v.* Campbell. No. 187. (Authority of *Davidson* v. *New Orleans*, 96 U. S. 97.)

" 150. Hutchinson *v.* The Northfield. No. 213. (Facts.)

Omitted Cases.

Oct. T. 1877. 151. Clark *v.* Beecher. No. 214. (On one branch on the facts; on the other on authority of *Phipps* v. *Sedgwick*, 95 U. S. 3; and *Trust Co.* v. *Sedgwick*, 97 U. S. 304.)

" 152. Strong *v.* United States. No. 537. (Facts.)

" 153. Goodenough Horse-Shoe Manufacturing Co. *v.* Rhode Island Horse-Shoe Co. No. 665. (Facts.)

" 154. United States *v.* Atchison, Topeka &c. Railroad Co. No. 875. (Facts.)

" 155. Indianapolis & St. Louis Railroad Co. *v.* Vance. No. 897. (Authority of *Railroad Co.* v. *Vance*, 96 U. S. 450.)

" 156. Hagar *v.* California. No. 898. (Authority of *Crowell* v. *Randall*, 10 Pet. 367; and *Edwards* v. *Elliott*, 21 Wall. 532.)

" 157. Keogh *v.* Orient Fire Ins. Co. No. 917. (Facts.)

" 158. Northwestern Life Insurance Co. *v.* Martin. No. 1009.

" 159. Same *v.* Wellborn. No. 1008.

(Authority of *Thompson* v. *Butler*, 95 U. S. 694.)

Oct. T. 1878. 160. Wilson *v.* Goodrich. No. 100. (Authority of *Claflin* v. *Houseman*, 93 U. S. 130.)

" 161. Jaeger *v.* Moore. No. 232. (Facts.)

" 162. Burke *v.* Tregre. No. 253. (Facts.)

" 163. Leavenworth *v.* Kinney. No. 744. (Authority of *Commissioners* v. *Sellew*, 99 U. S. 624.)

" 164. Case *v.* Marchand. No. 804. (Facts.)

" 165. Faxon *v.* Russell. No. 846. (Authority of *Arthur* v. *Davies*, 96 U. S. 135.)

" 166. Betts *v.* Mugridge. No. 870. (Authority of *Norris* v. *Jackson*, 9 Wall. 125, and *Insurance Co.* v. *Sea*, 21 Wall. 158.)

" 167. Ingersoll *v.* Bowen. No. 949. (Authority of *Wiswall* v. *Campbell*, 93 U. S. 347.)

" 168. Dold *v.* United States. No. 955. (Facts.)

" 169. Williams *v.* United States. No. 1058. (Facts.)

Oct. T. 1879. 170. North *v.* McDonald. No. 41. (Facts.)

" 171. Lammers *v.* Nissen. No. 72. (Facts.)

Omitted Cases.

Oct. T. 1879. 172. Woolfolk *v.* Nisbet. No. 73. (Facts.)
" 173. Follansbee *v.* Ballard Paving Co. No. 102. (Facts.)
" 174. Ponder *v.* Delauney. No. 204. (Facts.)
" 175. Fountaine *v.* McNab. No. 205. (Facts.)
" 176. United States *v.* Williams. No. 216. (Facts.)
" 177. Grand Trunk Railway Co. *v.* Walker. No. 219. (Facts.)
" 178. Burr *v.* Myers. No. 223. (Facts.)
" 179. Dallas County *v.* Huidekoper. No. 224. }
" 180. Same *v.* Davol. No. 226. }
(Authority of *Dallas County* v. *Huidekoper*, below.)
" 181. Dallas County *v.* Huidekoper. No. 225. (Authority of *Smith* v. *Clark County*, 59 Missouri, 59; and *Macon County* v. *Shores*, 97 U. S. 272.)
" 182. Bank of the Republic *v.* Millard. No. 240. (Authority of *Railroad Co.* v. *Grant*, 98 U. S. 398.)
" 183. Gage *v.* Carraher. No. 243. (Authority of *Removal Cases*, 100 U. S. 457.)
" 184. Louisville (The) Gibson, Claimant *v.* Halliday. No. 278. (On point 1, authority of *The Abbotsford*, 98 U. S. 440; on point 2, authority of *The Lucille*, 19 Wall. 73; *Montgomery* v. *Anderson*, 21 How. 386; *Yeaton* v. *United States*, 5 Cranch, 281.)
" 185. Jouan *v.* Divoll. No. 485. (Facts.)
" 186. Woodfolk *v.* Seddons. No. 943. (Facts.)
" 187. Gurnee *v.* Blair. No. 988. (Authority of *Railroad Co.* v. *Blair*, 100 U. S. 661.)
" 188. Sea *v.* Connecticut Mutual Life Insurance Co. No. 1066. (Authority of *Carroll* v. *Dorsey*, 20 How. 204.)
" 189. Cowdrey *v.* Vandenburgh. No. 1076. (Authority of *Same* v. *Same*, 101 U. S. 572.)
Oct. T. 1880. 190. Groat *v.* O'Hare. No. 35. (Facts.)
" 191. Bank of Montreal *v.* White. No. 61. (Facts.)

Omitted Cases.

Oct. T. 1880. 192. White *v.* United States. No. 82. (On the 1st point on the facts; on the 2d on the authority of *Silliman* v. *United States*, 101 U. S. 465.)

" 193. McLaughlin *v.* Fowler. No. 94.

" 194. Same *v.* Thorpe. No. 95.

(Authority of *Newhall* v. *Sanger*, 92 U. S. 761.)

" 195. Richmond Mining Co. *v.* Eureka Mining Co. Nos. 116, 117. (Authority of *Same* v. *Same*, 103 U. S. 839.)

" 196. Whitney *v.* First Nat. Bank of Brattleboro. No. 125. (Authority of *National Bank* v. *Graham*, 100 U. S. 699.)

" 197. Benton County *v.* Rollens. No. 147. (Authority of *Scotland County* v. *Thomas*, 94 U. S. 682, and *Schuyler County* v. *Thomas*, 98 U. S. 169.)

" 198. Seward *v.* Corneau. No. 240. (Facts. See *Seward* v. *Corneau*, 102 U. S. 161.)

" 199. Wight *v.* Condict. No. 280. (Facts.)

" 200. France *v.* Missouri. No. 915. (Facts.)

" 201. Green *v.* Fisk. No. 965. (Authority of *Green* v. *Fisk*, 103 U. S. 518.)

Oct. T. 1881. 202. Hearst *v.* Halligan. No. 6. (Facts.)

" 203. Price *v.* Kelley. No. 13. (Facts.)

" 204. Roberts *v.* Bolles. No. 48. (Authority of *Same* v. *Same*, 101 U. S. 119.)

" 205. Glover *v.* Love. No. 62. (Facts.)

" 206. Levy *v.* Bangel. No. 72. (Authority of *Railroad Co.* v. *Heck*, 102 U. S. 120.)

" 207. Continental Bank Note Co. *v.* United States. No. 216. (Facts.)

" 208. Bonnifield *v.* Price. No. 230. (Authority of *Hecht* v. *Boughton*, 105 U. S. 235.)

" 209. Mellon *v.* Delaware, Lackawanna and Western Railroad Co. No. 244. (Facts.)

" 210. United States *v.* Canda. No. 257. (Authority of *United States* v. *Rosenburgh*, 7 Wall. 580; and *United States* v. *Avery*, 13 Wall. 251.)

Omitted Cases.

Oct. T. 1881. 211. Upton *v.* Mason. No. 262. (Authority of *Hecht* v. *Boughton*, 105 U. S. 235.)

" 212. Upton *v.* Steele. No. 263. (Same authority.)

" 213. Ralls County Court *v.* United States *ex rel.* George. No. 278. (Authority of *Ralls County Court* v. *United States*, 105 U. S. 733.)

" 214. United States *v.* Barnett. No. 901. (Authority of *United States* v. *Kaufman*, 96 U. S. 567.)

" 215. Grame *v.* Mutual Assurance Society of Virginia. No. 1049.

" 216. Goddin *v.* Same. No. 1050.

(Motion. Authority of *Steines* v. *Franklin County*, 14 Wall. 15.)

Oct. T. 1882. 217. Thompson *v.* Perrine. No. 75. (Authority of *Same* v. *Same*, 106 U. S. 589.)

" 218. Kahn *v.* Hamilton. No. 149. (Authority of *Hecht* v. *Boughton*, 105 U. S. 235.)

" 219. Badger *v.* Ranlett. No. 587. (Authority of *Same* v. *Same*, 106 U. S. 255.)

" 220. Chicago and Alton Railroad *v.* Wiggins Ferry Co. No. 839. (Authority of *Same* v. *Same*, 108 U. S. 18.)

Oct. T. 1883. 221. Steever *v.* Rickman. No. 67. (Facts.)

TABLE OF THE SAME CASES, ALPHABETICALLY ARRANGED.

TABLE OF CASES IN WHICH STATUTES OR ORDINANCES HAVE BEEN HELD TO BE REPUGNANT TO THE CONSTITUTION OR LAWS OF THE UNITED STATES, IN WHOLE OR IN PART, BY THE SUPREME COURT OF THE UNITED STATES FROM THE ORGANIZATION OF THE COURT TO THE END OF OCTOBER TERM, 1888.

A. — Statutes of the United States.

1. *Hayburn's Case*, August T. 1792, 2 Dall. 409. Whether the act of March 23, 1792, 1 Stat. 243, conferring upon the United States courts jurisdiction to pass upon claims for pensions, was unconstitutional, was not decided by the court; but the judges were individually of that opinion, as appears by a note to the case reporting decisions in circuit made by every justice except Mr. Justice Johnson. See *United States* v. *Todd*, No. 2, *post*.

2. *United States* v. *Yale Todd*, February T. 1794, 13 How. 52, *n*. In this case the court held the act of March 23, 1792 (considered in *Hayburn's Case*, No. 1, *ante*), to be unconstitutional, as attempting to confer upon the court power which was not judicial.

3. *Marbury* v. *Madison*, February T. 1803, 1 Cranch, 137. The provision in the Judiciary Act of 1789, c. 20, § 13, 1 Stat. 80, 81, conferring upon the Supreme Court original jurisdiction to issue writs of mandamus directed to "persons holding office," is not warranted by the Constitution.

4. *United States* v. *Ferreira*, December T. 1851, 13 How. 40. The acts of March 3, 1823, 3 Stat. 768, c. 35; June 26, 1834, 6 Stat. 569, c. 87; and March 3, 1849, 9 Stat. 788, c. 181, confer upon the District Court powers which are not judicial, and they are therefore void.

5. *Gordon* v. *United States*, December T. 1864, 2 Wall. 561. Sections 5, 7, of the act of March 3, 1863, 12 Stat. 765, conferring jurisdiction of appeals from the Court of Claims, are void. No reasons are given. But see 117 U. S. 697; and *United States* v. *Jones*, 119 U. S. 477.

6. *Ex parte Garland*, December T. 1866, 4 Wall. 333. The act of January 24, 1865, c. 20, 13 Stat. 424, respecting the oath to be administered to attorneys and counsellors in courts of the United

States, was *ex post facto*, and in the nature of a bill of pains and penalties.

7. *Hepburn* v. *Griswold*, December T. 1864, 8 Wall. 603. The legal tender act of February 25, 1862, c. 33, 12 Stat. 345; the joint resolution of January 17, 1863, 12 Stat. 822; and the act of March 3, 1863, 12 Stat. 709, so far as they made the notes of the United States a legal tender for debts contracted before their respective enactments, were unconstitutional. This ruling was reversed in *Knox* v. *Lee*, 12 Wall. 457; *Dooley* v. *Smith*, 13 Wall. 604; *Railroad Co.* v. *Johnson*, 15 Wall. 195; *Maryland* v. *Railroad Co.*, 22 Wall. 105; and *The Legal Tender Case*, 110 U. S. 421.

8. *United States* v. *DeWitt*, December T. 1869, 9 Wall. 41. Section 29, c. 169, act of March 2, 1867, 14 Stat. 484, so far as it applies to the offence described by it when committed within a State, is in excess of the powers conferred upon Congress.

9. *The Justices* v. *Murray*, December T. 1869, 9 Wall. 274. So much of § 5, c. 80, 12 Stat. 756, "act relating to *habeas corpus*," as provided for the removal of a judgment in a state court in which the cause was tried by a jury to a Circuit Court of the United States for retrial on the facts and law, is in conflict with the 7th Amendment to the Constitution, relating to the reëxamination of facts tried by a jury.

10. *Collector* v. *Day*, December T. 1870, 11 Wall. 113. The income-tax laws of the United States, 13 Stat. 281, 479; 14 Stat. 137, 477, so far as they imposed a tax upon the salary of a judicial officer of a State, were unconstitutional.

11. *United States* v. *Klein*, December T. 1871, 13 Wall. 128. The proviso respecting pardons attached to the appropriation act of July 12, 1870, c. 251, 16 Stat. 235, were *ex post facto*, and in the nature of a bill of pains and penalties.

12. *United States* v. *Railroad Co.*, December T. 1872, 17 Wall. 322. Section 122, Internal Revenue Act of 1864, 13 Stat. 284, taxing interest paid by railroads on their bonds is unconstitutional, in so far as it taxes the revenues of a municipal corporation in a State.

13. *United States* v. *Reese*, October T. 1875, 92 U. S. 214. The provisions of §§ 3 and 4 of the act of May 31, 1870, 16 Stat. c. 114, 140, 141, to enforce the rights of citizens of the United States to vote, are beyond the limit of the 15th Amendment of the Constitution.

14. *United States* v. *Fox*, October T. 1877, 95 U. S. 670. Rev. Stat. § 5132, concerning goods obtained by a bankrupt under false

pretences, so far as it relates to offences which are subjects of state legislation, and are not within the jurisdiction of the United States, is in excess of the powers conferred upon Congress.

15. *Trade-Mark Cases*, October T. 1879, 100 U. S. 82. Sections 4 and 5 of the act of August 14, 1876, c. 274, 19 Stat. 141, and Rev. Stat. § 4937, relating to trade-marks, are void because they apply to a species of commerce which is not placed under the control of Congress.

16. *Kilbourn* v. *Thompson*, October T. 1880, 103 U. S. 168. The resolution of the House of Representatives, January 24, 1876, for an inquiry into the nature and business of a real estate pool in the District of Columbia which was in bankruptcy and indebted to the United States, related to a judicial subject, and conferred no power to compel a witness to testify.

17. *United States* v. *Harris*, October T. 1882, 106 U. S. 629. Rev. Stat. § 5519, relating to conspiracies to deprive persons of the equal protection of the laws, is a broader exercise of power to punish criminal offence than is warranted by the Constitution.

18. *Civil Rights Cases*, October T. 1883, 109 U. S. 3. Sections 1 and 2 of the act of March 1, 1875, c. 114, "to protect all citizens in their civil and legal rights," 18 Stat. 335, 336, are not authorized, either by the 13th or by the 14th Amendment to the Constitution.

19. *Boyd* v. *United States*, October T. 1885, 116 U. S. 616. Section 5 of c. 391, 18 Stat. 187, "to amend the customs-revenue laws, and to repeal moieties," as applied to suits for penalties or to establish a forfeiture, is repugnant to the 4th and 5th Amendments to the Constitution.

20. *Callan* v. *Wilson*, October T. 1887, 127 U. S. 540. The Revised Statutes for the District of Columbia, § 1064, when applied to a person accused of a conspiracy to prevent one from pursuing a lawful avocation, deprives him of the right of trial by jury, and is repugnant to the Constitution.

B. — Statutes of the States and Territories.

Alabama.

1. *Sinnot* v. *Davenport*, December T. 1859, 22 How. 227. The act of February 15, 1854, to provide for the registration of the names of the owners of steamboats navigating the waters of the State, is in conflict with the provisions of the act of February 18, 1793, 1 Stat. 305.

2. Affirmed in *Foster* v. *Davenport*, December T. 1859, 22 How.

3. *Howard* v. *Bugbee*, December T. 1860, 24 How. 461. The act of January, 1842, authorizing redemption from mortgage sales by judgment creditors of the mortgagor, so far as it affects mortgages made before its enactment, impairs the obligations of the contracts, and is unconstitutional.

4. *The Belfast*, December T. 1868, 7 Wall. 624. The Alabama Code, §§ 2692, 2708, and the statute of October 7, 1864, concerning maritime liens, are in conflict with § 9 of the Judiciary Act of 1789, 1 Stat. 76.

5. *State Tonnage Tax Cases*, December T. 1870, 12 Wall. 204. Section 2, pl. 12, of the act of February 22, 1866, imposing a tax per ton on vessels owned within the State, conflicts with the provision of the Constitution that no State shall, without the consent of Congress, lay any duty on tonnage.

6. *Morgan* v. *Parham*, December T. 1872, 16 Wall. 471. The laws of Alabama taxing vessels temporarily in the State are in conflict with the commerce clause of the Constitution.

7. *Horn* v. *Lockhart*, October T. 1873, 17 Wall. 570. The acts of November 9, 1861, and November 23, 1863, authorizing executors to invest in Confederate bonds, were unconstitutional.

8. *Leloup* v. *Port of Mobile*, October T. 1887, 127 U. S. 640. An ordinance of the Port of Mobile, 1883, imposing license taxes for that year, when applied to a telegraph company engaged in interstate commerce, is in conflict with the commerce clause of the Constitution.

Arizona.

None.

Arkansas.

1. *Woodruff* v. *Tapnall*, December T. 1850, 10 How. 190. The act of January 10, 1845, requiring taxes to be paid in "par funds," so far as it applied to notes of the Bank of the State of Arkansas issued prior to that date, impairs the obligation of the contract in its charter that the notes of the bank shall be received for debts due the State.

2. *Curran* v. *Arkansas*, December T. 1853, 15 How. 304. Statutes enacted in 1843, 1845, 1846 and 1849, withdrawing the assets of the Bank of the State from creditors when it was insolvent, impaired its contracts with its creditors.

3. *McGee* v. *Mathis*, December T. 1866, 4 Wall. 143. The acts of January 11, 1855, and January 13, 1857, authorizing the taxation of swamp lands, known as the "Levee Act," impaired the

obligation of the contract with holders of state scrip, redeemable in these lands, that they should be exempt from taxation.

4. *Osborn* v. *Nicholson*, December T. 1871, 13 Wall. 654. The provision in the constitution of Arkansas of 1868, annulling contracts for the purchase of slaves, so far as it operated on preëxisting contracts, impaired the obligation of those contracts.

California.

1. *Hays* v. *Pacific Mail Steamship Co.*, December T. 1854, 17 How. 596. Taxing laws imposing taxes on vessels owned and registered in New York, employed in commerce between New York and California, conflict with the act of December 31, 1792, § 3, 1 Stat. 287, "concerning the registering and recording of ships."

2. *Almy* v. *California*, December T. 1860, 24 How. 169. The act imposing a stamp duty on bills of lading of gold and silver is a tax on exports and as such is unconstitutional.

3. *Low* v. *Austin*, December T. 1871, 13 Wall. 29. California taxing laws of 1868, when enforced against imported goods in original packages, conflict with Art. 1, Sec. 10, of the Constitution.

4. *Chy Lung* v. *Freeman*, October T. 1875, 92 U. S. 275. The Political Code of California and the statutes of 1873, 1874, requiring bonds from passengers coming into the State, conflict with the commerce clause of the Constitution.

5. *Yick Wo* v. *Hopkins*, October T. 1885, 118 U. S. 356. The municipal ordinances of San Francisco of 1880, respecting laundries, which conferred power to make unjust discriminations, founded on difference of race, conflict with the 14th Amendment.

6. *California* v. *Central Pacific Railroad Co.*, October T. 1887, 127 U. S. 1. General taxing laws, so far as they attempt to reach franchises conferred upon railroad corporations by the United States, conflict with the interstate commerce clause of the Constitution.

Colorado.

None.

Connecticut.

None.

Dakota.

None.

Delaware.

Neal v. *Delaware*, October T. 1880, 103 U. S. 370. The provision in the Constitution limiting the right of suffrage to the white race, conflicts with the 15th Amendment to the Constitution.

District of Columbia.

Stoutenburgh v. *Hennick*, October T. 1888, 129 U. S. 141. Clause 3 of § 21 of the District Act of June 20, 1872, requiring commercial agents selling by sample to take out a license, is a regulation of interstate commerce, when applied to agents soliciting purchases on behalf of principals outside of the District.

Florida.

Pensacola Telegraph Co. v. *Western Union Telegraph Co.*, October T. 1877, 96 U. S. 1. The act of December 11, 1866, granting exclusive privileges to the Pensacola Telegraph Co., is in conflict with the act of July 24, 1866, 14 Stat. 221, c. 230, "to aid in the construction of telegraph lines." Rev. Stat. §§ 5263–5268.

Georgia.

1. *Fletcher* v. *Peck*, February T. 1810, 6 Cranch, 87. The act of February 13, 1796, declaring void the act of January 7, 1795, which made a grant of public land, impairs the obligation of the contract of the State in making the grant.

2. *Worcester* v. *Georgia*, January T. 1832, 6 Pet. 515. The acts of December 19, 1829, (extending the laws of Georgia over the Cherokee country,) and of December 22, 1830, "to prevent the exercise of assumed and arbitrary power by all persons under pretext of authority from the Cherokee Indians," conflicts with treaties with those Indians and statutes passed to give them effect.

3. *White* v. *Hart*, December T. 1871, 13 Wall. 646. The provision in the Constitution of 1868, concerning enforcement of debts contracted for the purchase of slaves, so far as it applies to prior contracts, impairs their obligation.

4. *Gunn* v. *Barry*, December T. 1872, 15 Wall. 610. The provision in the Constitution of 1868, exempting property from execution, so far as it affects judgments obtained before the passage of the act, impairs the obligation of the judgment contract.

5. *Walker* v. *Whitehead*, December T. 1872, 16 Wall. 314. The act of October 13, 1870, imposing conditions upon obtaining a judgment, so far as it affected prior contracts, impaired their obligation.

6. *Central Railroad Banking Co.* v. *Georgia*, October T. 1875, 92 U. S. 665. The tax-law of February 26, 1874, conflicts with the obligation of the contract in the charter of the companies consolidated into the plaintiff corporation.

7. *Southwestern Railroad Co.* v. *Georgia*, October T. 1875, 92 U. S. 676. Affirming *Central Railroad Banking Co.* v. *Georgia*, *ante*, No. 6.

8. *Savannah* v. *Jesup*, October T. 1882, 106 U. S. 563. The ordinance of the city of Savannah taxing the property of the Atlantic and Gulf Railroad Co. in excess of the limit fixed by their charter, impairs the obligation of that contract.

9. *Spraigue* v. *Thompson*, October T. 1885, 118 U. S. 90. Section 1512 of the Code, respecting pilots, conflicts with Rev. Stat. § 4237.

Idaho.

None.

Illinois.

1. *Bronson* v. *Kinzie*, January T. 1843, 1 How. 311. The acts of February 19 and February 27, 1841, concerning sales under execution and under decrees of foreclosure, and concerning redemptions from such sales, so far as applied to prior mortgages, impaired the obligation of the contracts with the mortgage creditors contained in them.

2. *McCracken* v. *Hayward*, January T. 1844, 2 How. 608. The act of February 27, 1841, concerning sales under execution, impaired the obligation of prior judgment contracts.

3. *Bradley* v. *People*, December T. 1866, 4 Wall. 459. Applying *Van Allen* v. *Assessors*, 3 Wall. 573, (No. 8, New York, *infra*,) to the taxing laws of Illinois.

4. *Von Hoffman* v. *Quincy*, December T. 1866, 4 Wall. 535. The act of February 14, 1863, affecting the provisions of law concerning taxation in the city of Quincy which were in force when the legislature authorized the issue of the bonds in suit, and also when they were issued, impaired the obligation of the contract with the holders of the city's bonds.

5. *University* v. *People*, October T. 1878, 99 U. S. 309. The revenue law of Illinois of 1872, so far as it was attempted to be applied to the Northwestern University, impaired the obligation of its charter contract for the exemption of its property from taxation.

6. *Wabash, St. Louis & Pacific Railway Co.* v. *Illinois*, October T. 1886, 118 U. S. 557. The provision in c. 114, § 126, Rev. Stats. Ill., against discriminations by railways in the transportation of passengers or freight in interstate commerce, infringes upon the powers confided to Congress by the Constitution.

Indiana.

1. *Gantley's Lessee* v. *Ewing*, January T. 1845, 3 How. 707. The act of February 13, 1841, imposing restrictions on mortgage

sales, thereby impairing the obligation of the mortgage contracts, is unconstitutional. *Bronson* v. *Kinzie*, (No. 1, Illinois, *supra*,) affirmed and applied to this statute.

2. *Evansville Bank* v. *Britton*, October T. 1881, 105 U. S. 322, *Hills* v. *Exchange Bank*, 105 U. S. 319, (No. 16, New York, *post*,) and *Supervisors* v. *Stanley*, 105 U. S. 305, (No. 15, New York, *post*,) affirmed and applied to the tax laws of Indiana.

3. *Western Union Telegraph Co.* v. *Pendleton*, October T. 1886, 122 U. S. 347. Sections 4176, 4178, Rev. Stats. Ind. 1881, concerning the delivery of telegrams, so far as they relate to such deliveries in other States, are a regulation of interstate commerce.

Iowa.

1. *Webster* v. *Reid*, December T. 1850, 11 How. 437. The Territorial Act of June 25, 1839, providing that the trial of certain land suits should "be before the court, and not a jury" is in conflict with the 7th Amendment to the Constitution.

2. *Barron* v. *Burnside*, October T. 1886, 121 U. S. 186. The act of April 6, 1886, c. 76, Laws of 21st Gen. Assembly, so far as it makes the right of a foreign corporation to do business within the State dependent upon its surrender of a right secured to it by the Constitution and laws of the United States, is unconstitutional.

3. *Bowman* v. *Chicago & Northwestern Railway Co.*, October T. 1887, 125 U. S. 465. Section 1553 of the Code, as amended by c. 143, Acts of 20th Gen. Assembly, 1886, forbidding common carriers to bring intoxicating liquors into the State except in certain specified cases, is a regulation of commerce, in conflict with the commerce clause of the Constitution.

Kansas.

1. *The Kansas Indians*, December T. 1866, 5 Wall. 737. The Kansas tax laws, so far as they impose taxes on lands belonging to certain tribes of Indians, conflict with treaties and laws of the United States, and with their general policy towards the Indians.

2. *Railway Company* v. *Prescott*, December T. 1872, 16 Wall. 603. Kansas tax laws, when applied to lands to which the Kansas Pacific Railway has a contingent right of preëmption, conflict with the laws of the United States. But see *Railway Co.* v. *McShane*, 22 Wall. 445; and *Hunnewell* v. *Cass County*, 22 Wall. 464, overruling this.

3. *Loan Association* v. *Topeka*, October T. 1874, 20 Wall. 655. The act of February 29, 1872, authorizing municipal corporations to issue bonds in support of private enterprises, is unconstitutional.

Kentucky.

1. *Green* v. *Biddle*, February T. 1823, 8 Wheat. 1. The act of February 27, 1797, and the substituted act of January 31, 1812, respecting occupying claimants of land, impaired the obligation of the compact between Virginia and Kentucky.

2. *Bush* v. *Kentucky*, October T. 1882, 107 U. S. 110. The General Statutes of Kentucky of 1873, in force in May, 1880, excluding colored citizens from juries, conflict with the 15th Amendment to the Constitution.

3. *Louisville Gas Co.* v. *Citizens' Gas Co.*, October T. 1885, 115 U. S. 683. The act of March 21, 1872, incorporating the Citizens' Gas Light Company, and authorizing it to lay pipes and furnish gas in Louisville, impairs the obligation of the contract in the charter of the Louisville Gas Company.

Louisiana.

1. *McMillan* v. *McNeill*, February T. 1819, 4 Wheat. 209. The insolvent law of March 25, 1808, so far as it attempted to discharge the contract sued on, impaired its obligation, and was unconstitutional.

2. *Steamship Co.* v. *Portwardens*, December T. 1867, 6 Wall. 31. The act of March 15, 1855, concerning the fees of portwardens, is a regulation of commerce.

3. *White* v. *Cannon*, December T. 1867, 6 Wall. 443. The ordinance of secession of Louisiana, passed January 26, 1861, was a nullity.

4. *Cannon* v. *New Orleans*, October T. 1874, 20 Wall. 577. The New Orleans ordinance of 1852, imposing a tonnage tax from January 1, 1853, for levee dues, conflicts with the provision in the Constitution that no State shall, without the consent of Congress, lay any duty of tonnage.

5. *Commissioners* v. *North German Lloyd*, October T. 1875, 92 U. S. 259. The law imposing taxes on immigrants is a regulation of commerce.

6. *Board of Liquidation* v. *McComb*, October T. 1875, 92 U. S. 531. The act of March 2, 1875, authorizing bonds issued under the Funding Act of 1874 to be delivered to the Louisiana Levee Company, impairs the obligation of the contract made with holders of consolidated bonds.

7. *Foster* v. *Master and Wardens of the Port of New Orleans*, October T. 1876, 94 U. S. 246. The act of March 6, 1869, con-

cerning the survey of vessels by masters and portwardens, is a regulation of commerce.

8. *Hall* v. *DeCuir*, October T. 1877, 95 U. S. 485. The act of February 23, 1869, to enforce the 13th Article of the state constitution, and to regulate the licenses therein mentioned, is a regulation of interstate commerce.

9. *Wolff* v. *New Orleans*, October T. 1880, 103 U. S. 358. The act of March 6, 1876, adjusting the debt and limiting taxation in New Orleans, so far as it applies to debts contracted before its passage, impairs the obligation of those contracts.

10. *Louisiana* v. *Pilsbury*, October T. 1881, 105 U. S. 278. The act of March 6, 1876, limiting taxation so far as it relates to the consolidated debt, impairs the obligation of that contract.

11. *Asylum* v. *New Orleans*, October T. 1881, 105 U. S. 362. The general taxing laws for New Orleans when applied to the property of the asylum, impair the obligation of the contract in its charter to exempt it from taxation.

12. *Louisiana* v. *Jumel*, October T. 1882, 107 U. S. 711. The Constitution of 1879, so far as it impairs the obligation of the contract made by the State by the act of 1874, No. 3, is unconstitutional.

13. *Nelson* v. *St. Martin's Parish*, October T. 1883, 111 U. S. 716. The act, No. 56, April 10, 1877, of the extra session, repealing Rev. Stat. La. §§ 2628, 2630, so far as it affected prior judgments, impairs their obligation.

14. *Moran* v. *New Orleans*, October T. 1884, 112 U. S. 69. The license ordinance of New Orleans of 1880, so far as it imposed a license tax upon persons owning and running towboats to and from the Gulf of Mexico, was a regulation of commerce.

15. *New Orleans Gas Light Co.* v. *Louisiana Light Co.*, October T. 1885, 115 U. S. 650. The New Orleans ordinance of January 25, 1881, authorizing the Louisiana Light and Heat Producing and Manufacturing Company to supply New Orleans with gas, impaired the obligation of the contract made with the New Orleans Gas Company in the amendments to its charter.

16. *New Orleans Water Works Co.* v. *Rivers*, October T. 1885, 115 U. S. 674. The New Orleans ordinance of November 15, 1882, granting to Rivers the right to lay water pipes through the streets to the Mississippi, and to take water therefrom for use in the St. Charles Hotel, impaired the obligation of the contract contained in the charter of the New Orleans Water Works Company.

17. *Fisk* v. *Jefferson Police Jury*, October T. 1885, 116 U. S.

131. The Louisiana constitution of 1880, so far as it impaired the obligation of the contract with Fisk for his salary, made under authority derived from § 7 of the act of 1871 (Acts of 1871, 109), was to that extent unconstitutional.

18. *New Orleans* v. *Houston*, October T. 1886, 119 U. S. 265. The act of 1880, No. 77, so far as it imposes a tax upon the capital stock of the Louisiana State Lottery Company, impairs the obligation of the contract in its charter.

19. *St. Tammany Water Works* v. *New Orleans Water Works*, October T. 1886, 120 U. S. 64. Affirming *New Orleans Water Works* v. *Rivers*, No. 16, *ante*.

Maine.

Hawthorne v. *Calef*, December T. 1864, 2 Wall. 10. The act repealing the clause in the act of April 1, 1836, making shareholders in a corporation individually liable for the debts of the company, so far as concerns debts before its passage, impaired the obligation of their contracts.

Maryland.

1. *McCulloch* v. *Maryland*, February T. 1819, 4 Wheat. 316. The bank-tax act of February 11, 1818, so far as it applies to the Bank of the United States, taxes the means employed by Congress to carry into execution the powers entrusted to it, and is unconstitutional.

2. *Brown* v. *Maryland*, January T. 1827, 12 Wheat. 419. Section 2 of the act of December, 1821, c. 246, entitled "An act supplementary to the act laying duties on licenses to retailers of dry goods, and for other purposes," is repugnant to the clause in the Constitution giving Congress the power to impose duties; and also to the commerce clause.

3. *Boyle* v. *Zacharie*, January T. 1832, 6 Pet. 348. Applying *Ogden* v. *Saunders*, 12 Wheat. 213, (see New York, No. 3, *post*,) to the insolvent laws of Maryland.

4. *Gordon* v. *Appeal Tax Court*, January T. 1845, 3 How. 133. The act of April 1, 1841, c. 23, imposing a tax upon holders of stock in banks, so far as it applied to stockholders in banks organized under the act of 1821, impaired the obligation of the contract in their charters.

5. *Cook* v. *Moffat*, January T. 1847, 5 How. 295. Insolvent laws of Maryland, so far as they affect debts due to citizens of other States, are unconstitutional. See *Ogden* v. *Saunders*, No. 3, New York, *post*.

6. *Achison* v. *Huddleson*, December T. 1851, 12 How. 293. The act of March 10, 1843, c. 282, imposing tolls for passing over the Cumberland road, is inconsistent with the compact between Maryland and the United States.

7. *Ward* v. *Maryland*, December T. 1870, 12 Wall. 418. The Code of Public Law, Art. 56, Title License, so far as it discriminates against non-resident traders, is repugnant to Art. 4, § 20, of the Constitution. Mr. Justice Bradley also thought it repugnant to the commerce clause.

8. *Guy* v. *Baltimore*, October T. 1879, 100 U. S. 434. Ordinances of Baltimore, imposing on vessels laden with products of other States taxes not imposed upon vessels laden with products of Maryland, conflict with the commerce clause of the Constitution.

9. *Corson* v. *Maryland*, October T. 1886, 120 U. S. 502. Art. 12, §§ 41–56, of the Code relating to licenses to salesmen, as applied to a citizen of New York offering in Maryland to sell his goods in New York by sample, is in conflict with the commerce clause of the Constitution.

Massachusetts.

1. *Norris* v. *Boston*, January T. 1849, 7 How. 283. The act of April 20, 1837, c. 238, imposing a tax upon alien passengers, is a regulation of commerce.

2. *Western Union Telegraph Co.* v. *Massachusetts*, October T. 1887, 125 U. S. 530. Pub. Stats. Mass. c. 13, § 54, so far as it assumes to confer power to restrain a telegraph company which has accepted the provisions of Rev. Stat. § 5263, is in conflict with that act.

Michigan.

1. *Walling* v. *Michigan*, October T. 1885, 116 U. S. 446. Act, No. 226, of the Session Laws of 1875, imposing a tax upon the business of selling intoxicating liquors in Michigan to be shipped from without the State, so far as it discriminates against manufacturers in other States, is a regulation of commerce, and conflicts with the commerce clause of the Constitution.

2. *Fargo* v. *Michigan*, October T. 1886, 121 U. S. 230. The act of June 5, 1883, No. 152, taxing the gross receipts of companies and corporations engaged in interstate commerce, is a regulation of commerce and conflicts with the commerce clause of the Constitution.

Minnesota.

Irvine v. *Marshall*, December T. 1857, 20 How. 558. The territorial statutes of Minnesota, concerning resulting trusts, in so far as they assumed to affect the disposition of public land by the Federal government, were in excess of the power conferred upon the legislature by Congress.

Mississippi.

Planters' Bank v. *Sharp*, January T. 1848, 6 How. 301. Section 7 of the act of February 21, 1840, c. 1, making it unlawful for banks to transfer evidences of debt, so far as it applied to the Planters' Bank, impaired the obligation of the contract in its charter.

Missouri.

1. *Craig* v. *Missouri*, January T. 1830, 4 Pet. 410. The act of June 27, 1821, c. 1, "for the establishment of loan offices," authorized the issue of bills of credit by the State, and was repugnant to Art. 1, § 10, paragraph 1 of the Constitution.

2. Affirmed in *Byrne* v. *Missouri*, January T. 1834, 8 Pet. 40.

3. *Bagnell* v. *Broderick*, January T. 1839, 13 Pet. 436. Missouri statutes of 1825 and 1835, relating to the effect of a New Madrid location as evidence in an action of ejectment, are void so far as they affect the force of a patent of the United States as evidence.

4. *Cummings* v. *Missouri*, December T. 1866, 4 Wall. 277. Sections 3, 6, 7, 9 and 14 of Art. 2 of the Constitution of 1865, are *ex post facto*, and in the nature of bills of attainder and repugnant to the Constitution.

5. *Home of the Friendless* v. *Rouse*, December T. 1869, 8 Wall. 430. The general taxing law of Missouri of 1865, as applied to the property of the Home, impairs the obligation of the contract in its charter.

6. Affirmed in *Washington University* v. *Rouse*, December T. 1869, 8 Wall. 439, as to that institution.

7. *St. Louis* v. *Ferry Co.*, December T. 1870, 11 Wall. 423. The St. Louis ordinance taxing ferry-boats owned by an Illinois corporation, having their home in that State, but plying between its shores and St. Louis, is void.

8. *Pacific Railroad Co.* v. *Maguire*, October T. 1873, 20 Wall. 36. The Railroad ordinance of the state constitution of July 4, 1865, when applied to the Pacific Railroad Company, impairs the obligation of the contract in its charter.

9. *Welton* v. *Missouri*, October T. 1875, 91 U. S. 275. The

act forbidding persons to peddle goods, wares or merchandise not the product of the State, Gen. Stats. Missouri 1866, c. 96, § 1, is a regulation of commerce.

10. *Railroad Co.* v. *Husen*, October T. 1877, 95 U. S. 465. The act of January 23, 1872, regulating the bringing of Texas, Mexican or Indian cattle into the State is a regulation of commerce.

11. *Kring* v. *Missouri*, October T. 1882, 107 U. S. 221. A provision in the Missouri constitution of 1875, changing the criminal law of the State, is *ex post facto* and void, so far as it affects the accused in this case, the crime complained of being committed before its adoption.

12. *Cole* v. *La Grange*, October T. 1884, 113 U. S. 1. The act of March 9, 1871, authorizing the issue of municipal bonds in aid of a manufacturing corporation, is in excess of the grant of legislative power by the state constitution.

13. *Seibert* v. *Lewis*, October T. 1886, 122 U. S. 284. The act of March 8, 1879, Rev. Stats. Mo. §§ 6798, 6799, 6800, repealing the tax law of March 10, 1871, so far as it applies to preëxisting debts, impairs the obligation of their contracts.

14. Affirmed in *Seibert* v. *United States, ex rel.* Harshman, October T. 1888, 129 U. S. 192.

Montana.

Dunphy v. *Kleinsmith*, December T. 1870, 11 Wall. 610. The statutes of 1867, 1869, abolishing the distinction between equitable and legal remedies, is in excess of the power conferred upon the legislature. Reconsidered in *Hornbuckle* v. *Toombs,* 18 Wall. 648.

Nebraska.

None.

Nevada.

Crandall v. *Nevada*, December T. 1867, 6 Wall. 35. Section 90 of c. 85 of the acts of 1865, imposing on passengers leaving the State by stage coach and railroad a *per capita* tax, is an exercise of the taxing power upon the right to travel from State to State, and as such is unconstitutional. The Chief Justice and Mr. Justice Clifford held it to be a regulation of commerce.

New Hampshire.

Trustees of Dartmouth College v. *Woodward,* February T. 1819, 4 Wheat. 518. The act of June 27, 1816, "to amend the charter and enlarge and improve the corporation of Dartmouth College," impairs the obligation of the contract in the charter of the college.

New Jersey.

1. *New Jersey* v. *Wilson*, February T. 1812, 7 Cranch, 164. The act of October, 1804, repealing the act of August 12, 1758, which exempted certain Indian lands from taxation, impairs the obligation of the contract of 1758.

2. *New Jersey* v. *Yard*, October T. 1877, 95 U. S. 104. The taxing act of April 2, 1873, when applied to the Morris and Essex Railroad, impairs the obligation of the contract in its charter.

New Mexico.

None.

New York.

1. *Sturges* v. *Crowninshield*, February T. 1819, 4 Wheat. 122. The insolvent act of April 3, 1811, so far as it attempts to discharge the defendant from the debt in the declaration mentioned, is a law impairing the obligation of contracts. But see *Ogden* v. *Saunders*, No. 3, *post*, and cases there referred to.

2. *Gibbons* v. *Ogden*, February T. 1824, 9 Wheat. 1. The acts of March 27, 1798, April 5, 1803, April 11, 1808, and April 9, 1811, conferring upon Livingston and Fulton the sole and exclusive right of navigating, with vessels impelled by steam, the creeks, rivers, bays and waters within the jurisdiction of New York, are regulations of commerce.

3. *Ogden* v. *Saunders*, January T. 1827, 12 Wheat. 213. The insolvent laws of New York of April 3, 1801, April 3, 1811, and April 12, 1813, discharging an insolvent from his debts, when applied to debts due to citizens of other States are unconstitutional. Affirmed in *Boyle* v. *Zacharie*, 6 Pet. 348; *Cook* v. *Moffat*, 5 How. 295. See Maryland, *ante*, Nos. 3 and 5.

4. *Smith* v. *Turner*, (The Passenger Cases,) January T. 1849, 7 How. 283. The provision in Rev. Stat. N. Y., part 1, c. 14, tit. 4, § 7, concerning immigrants, imposing a fee for the health commissioner, is a regulation of commerce.

5. *Bank of Commerce* v. *New York City*, December T. 1862, 2 Black, 620. The taxing laws of the State, so far as they impose a tax upon the capital of a bank invested in securities of the United States, are an unconstitutional exercise of the taxing power.

6. *Bank Tax Case*, December T. 1864, 2 Wall. 200. The New York statute of April 29, 1863, c. 240, in so far as it taxes stocks of the Federal government, is an unconstitutional exercise of the

taxing power. Affirming *Bank of Commerce* v. *New York City*, 2 Black, 620.

7. *The Binghamton Bridge*, December T. 1865, 3 Wall. 51. The act of April 5, 1855, c. 164, authorizing the Binghamton Bridge Company to construct a bridge within the limits covered by the charter of the Chenango Bridge Company, impairs the obligation of the contract in that charter.

8. *Van Allen* v. *The Assessors*, December T. 1865, 3 Wall. 573. The New York act of March 9, 1865, c. 97, § 10, taxing shares in national banks, so far as it authorizes a greater tax than is imposed upon shares in state banks, is in conflict with the provisions of the act of June 3, 1864, c. 106, § 41, 13 Stat. 111.

9. *New York Indians*, December T. 1866, 5 Wall. 761. The New York tax laws, so far as they impose taxes on certain tribes of Indians, conflict with a treaty.

10. *The Banks* v. *The Mayor*, December T. 1868, 7 Wall. 16. New York laws taxing certificates of indebtedness of the Federal government are beyond the taxing power of that State.

11. Affirmed in *Bank* v. *Supervisors*, December T, 1868, 7 Wall. 26, and applied to notes issued as money.

12. *Henderson* v. *New York*, October T. 1875, 92 U. S. 259. The act of April 11, 1849, c. 350, imposing severe conditions upon the landing of immigrants, is a regulation of commerce.

13. *Inman Steamship Co.* v. *Tinker*, October T. 1876, 94 U. S. 238. The immigrant act of May 22, 1862, c. 487, as amended April 27, 1865, c. 586, imposing a tonnage tax, imposes a tonnage duty in violation of Art. 1, § 10, par. 3, of the Constitution.

14. *People* v. *Weaver*, October T. 1879, 100 U. S. 539. The taxing laws of New York tax shares in national banks at a higher rate than other moneyed capital, and are in conflict with Rev. Stat. § 5219.

15. *Supervisors* v. *Stanley*, October T. 1881, 105 U. S. 305. The act of April 23, 1866, c. 761, for the taxation of banks, conflicts with Rev. Stat. § 5219, in so far as it allows taxation of national banks in excess of state banks.

16. *Hills* v. *Exchange Bank*, October T. 1881, 105 U. S. 319, affirming *Supervisors* v. *Stanley*, No. 15, *ante*.

17. *People* v. *Compagnie Générale Transatlantique*, October T. 1882, 107 U. S. 59. The alien passenger act of May 31, 1881, c. 432, is a regulation of commerce.

North Carolina.

1. *Wilmington Railroad* v. *Reid*, December T. 1871, 13 Wall. 264. The general tax laws of North Carolina, as applied to a railroad whose property and franchises are exempt from taxation by its charter, impairs the obligation of the contract in the charter.

2. *Edwards* v. *Kearzey*, October T. 1877, 96 U. S. 595. The provision in the Constitution of 1868, exempting property of a debtor from levy, when applied to contracts made prior to its adoption impairs their obligation.

Ohio.

1. *Osborn* v. *Bank of the United States*, February T. 1824, 9 Wheat. 738. The Ohio tax act of February 8, 1819, c. 83, so far as attempted to be applied to the Bank of the United States, taxes an agent of the United States necessary and proper for carrying into effect the powers vested in the government of the United States, and exceeds the taxing power of the State.

2. *Neil* v. *Ohio*, January T. 1845, 3 How. 720. The acts of 1831, of February 6, 1837, and of March 19, 1838, imposing tolls for transportation over the Cumberland road, impair the obligation of the contract between the United States and the State.

3. *State Bank of Ohio* v. *Knoop*, December T. 1853, 16 How. 369. The act of March 21, 1851, taxing the bank, impairs the obligation of the contract in its charter. Followed, as to the act of April 13, 1852, (4) in *Dodge* v. *Woolsey*, 18 How. 331; (5) in *Mechanics and Traders' Bank* v. *Debolt*, 18 How. 380; and (6) in *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; (7) as to the act of April 15, 1853, in *Franklin Branch Bank* v. *State of Ohio*, 1 Black, 474; and (8) as to the act of April 5, 1859, in *Wright* v. *Sill*, 2 Black, 544.

9. *Pelton* v. *National Bank*, October T. 1879, 101 U. S. 143. The act of April 12, 1877, Vol. 74, p. 88, "for the equalization of bank shares for taxation conflicts with Rev. Stat. § 5219.

10. *Whitbeck* v. *Mercantile Bank*, October T. 1887, 127 U. S. 193. The Revised Statutes of Ohio, §§ 2804, 2808, 2809, impose an unequal tax on shares of national banks, and are in conflict with Rev. Stat. § 5219.

11. *Ratterman* v. *Western Union Telegraph Co.*, October T. 1887, 127 U. S. 411. The taxing laws of the State, as applied to interstate telegraphic messages, conveyed by a company which has accepted the benefit of the act of July 24, 1866, 14 Stat. 221, c. 230 (Rev. Stat. §§ 5266, 5267, 5268), conflict with those acts.

Oregon.

None.

Pennsylvania.

1. *United States* v. *Peters*, February T. 1809, 5 Cranch, 115. The Pennsylvania act of April 2, 1803, c. 2379, requiring the executors of David Rittenhouse to pay into the state treasury the funds arising from the sale of the Active and her cargo, is an unconstitutional attempt to resist the lawful process of a court of the United States.

2. *Farmers and Mechanics' Bank* v. *Smith*, February T. 1821, 6 Wheat. 131. The insolvent act of March 13, 1812, c. 3486, so far as it attempted to discharge the contract, impaired its obligation. See *Ogden* v. *Saunders*, No. 3, New York, *ante*.

3. *Dobbins* v. *Erie County*, January T. 1842, 16 Pet. 435. The act of April 15, 1834, No. 232, imposing a tax upon salaries of officers of the United States, conflicts with the execution of powers delegated to the United States.

4. *Prigg* v. *Pennsylvania*, January T. 1842, 16 Pet. 539. The statutes on which the indictment was found are repugnant to the provisions of the Constitution respecting the surrender of fugitive slaves.

5. *Searight* v. *Stokes*, January T. 1845, 3 How. 151. The act of June 13, 1836, No. 69, relating to tolls on the Cumberland road, impairs the obligation of the contract between the State and the United States.

6. *Railroad Company* v. *Jackson*, December T. 1868, 7 Wall. 262. The Pennsylvania acts requiring a railroad company, in paying interest on bonds secured by mortgage of its whole road, part of which is in another State, to withhold a tax upon the capital of the bond imposed by the State, operate upon property and interests beyond its jurisdiction, and are in excess of its taxing power.

7. *State Freight Tax*, December T. 1872, 15 Wall. 232. The act of August 25, 1864, No. 870, taxing freight transported in the State, so far as it affects interstate commerce, is a regulation of commerce.

8. *State Tax on Foreign-Held Bonds*, December T. 1872, 15 Wall. 300. The tax law of May 1, 1868, No. 69, taxing the bonded debt of corporations of the State, so far as it affects holders of railroad bonds without the State, is in excess of the taxing power of the State.

9. *Cook* v. *Pennsylvania*, October T. 1878, 97 U. S. 566. The act of May 20, 1853, No. 380, § 18, (modified by the act of April

29, 1859, No. 426,) taxing auction sales, when applied to sales of imported goods in the original packages, lays a duty upon imports and is a regulation of commerce.

10. *Boyer* v. *Boyer*, October T. 1884, 113 U. S. 689. The provisions of the law of March 31, 1870, No. 22, as to local taxation, were held, on the case presented by the demurrer, to impose an unequal tax upon national banks, and thus to conflict with Rev. Stat. § 5219.

11. *Gloucester Ferry Co.* v. *Pennsylvania*, October T. 1884, 114 U. S. 196. The taxing laws of the State, when attempted to be applied to the capital stock of a New Jersey corporation, running a ferry on the Delaware between New Jersey and Pennsylvania, carrying on no business in the State except the landing and receiving of passengers and freight, is a tax on interstate commerce.

12. *Philadelphia and Southern Steamship Co.* v. *Pennsylvania*, October T. 1886, 122 U. S. 326. The tax laws of March 20, 1877, No. 5, and June 7, 1879, No. 122, in so far as they attempt to tax gross receipts of a corporation incorporated under the laws of the State which are derived from the transportation of persons and property on the high seas, between different States, or to and from foreign countries, is a regulation of interstate and foreign commerce.

Rhode Island.

None.

South Carolina.

1. *Weston* v. *Charleston*, January T. 1829, 2 Pet. 449. The ordinance of Charleston, passed February 20, 1823, authorizing the taxation of stock issued for loans to the United States, is in excess of the taxing power of the State.

2. *Humphrey* v. *Pegues*, December T. 1872, 16 Wall. 244. The tax laws of the State, when applied to a railroad whose charter exempts it from taxation, impair the obligation of the contract in the charter.

3. *Barings* v. *Dabney*, October T. 1873, 19 Wall. 1. Section 11 of the act of December 21, 1865, "to raise supplies," impairs the obligation of a contract between the Bank of South Carolina and its creditors.

4. *Murray* v. *Charleston*, October T. 1877, 96 U. S. 432. The taxing ordinances of Charleston of March, 1870, and March, 1871, withholding a tax to the city in paying the interest on its bonds, impair the obligation of the contract in the bonds.

Tennessee.

1. *Furman* v. *Nichol*, December T. 1868, 8 Wall. 44. The laws of 1865, c. 28, § 37, and 1866, providing that notes of the Bank of Tennessee should not be received in payment of taxes so far as it applied to notes issued before the rebellion, impaired the obligation of the contract in the charter of the bank.

2. *Farrington* v. *Tennessee*, October T. 1877, 95 U. S. 679. The tax law of February 12, 1869, when applied to the Union and Planters' Bank, impaired the obligation of the contract in its charter.

3. *Memphis* v. *United States*, October T. 1877, 97 U. S. 293. The act of March 23, 1875, repealing the act of March 18, 1873, when applied to a judgment recovered before the repeal, impaired the obligation of that contract.

4. *Keith* v. *Clark*, October T. 1878, 97 U. S. 454. The provision in the Constitution of 1865, forbidding the receipt for taxes of bills of the Bank of Tennessee, when applied to notes issued during the rebellion, impaired the obligation of the contract in the charter of the bank.

5. *Stevens* v. *Griffith*, October T. 1883, 111 U. S. 48. The confiscation act of the Confederate States, when enforced as a law of Tennessee, was unconstitutional.

6. *Pickard* v. *Pullman Southern Car Co.*, October T. 1885, 117 U. S. 34. The tax act of March 16, 1877, imposing a tax upon sleeping cars when applied to such cars engaged in interstate commerce, is a tax upon interstate commerce.

7. Affirmed in *Tennessee* v. *Pullman Southern Car Company*, October T. 1885, 117 U. S. 51.

8. *Van Brocklin* v. *Tennessee*, October T. 1885, 117 U. S. 151. The tax laws of the State cannot be enforced against property of the United States.

9. *Robbins* v. *Shelby County Taxing District*, October T. 1886, 120 U. S. 489. Ch. 96, § 16, Stats. 1881, imposing a tax on drummers, when applied to a person soliciting the sale of goods on behalf of persons doing business in another State, is a regulation of commerce.

Texas.

1. *Texas* v. *White*, December T. 1868, 7 Wall. 700. The act of secession, and the act of January 11, 1862, "to provide funds for military purposes," are unconstitutional.

2. *Peete* v. *Morgan*, October T. 1873, 19 Wall. 581. The act of

August 13, 1870, imposing a tonnage tax on vessels at quarantine, is a duty of tonnage and conflicts with Art. 1, § 10, par. 3, of the Constitution.

3. *Tierman* v. *Rinker*, 102 U. S. 123. The tax act of June 3, 1873, so far as it discriminates against wines and beer not manufactured in the State, is unconstitutional.

4. *Telegraph Co.* v. *Texas*, October T. 1881, 105 U. S. 460. The laws taxing telegraphic messages sent out of the State, as applied to a telegraph company which has accepted the provisions of Rev. Stat. title 65, §§ 5263–5269, conflicts with those acts.

5. *Asher* v. *Texas*, October T. 1888, 128 U. S. 129. The act of May 4, 1882, imposing a tax upon drummers, is a regulation of commerce.

Utah.

Ferris v. *Higley*, October T. 1874, 20 Wall. 375. The act of January 19, 1855, conferring on probate courts jurisdiction in civil and criminal cases, and in common law and chancery causes, is in conflict with the act organizing the Territory.

Vermont.

Society for the Propagation of the Gospel v. *New Haven*, February T. 1823, 8 Wheat. 464. The act of October 30, 1794, granting the lands belonging to the society to the respective towns in which they were situated, impaired the contract of the grant of the same lands to the society.

Virginia.

1. *Terrett* v. *Taylor*, February T. 1815, 9 Cranch, 43. The acts of 1798, c. 9, and 1801, c. 5, so far as they operated to divest the Episcopal Church of property acquired before the Revolution, are void.

2. *Pennsylvania* v. *Wheeling Bridge Co.*, December T. 1851, 13 How. 518. The Virginia act of March 19, 1847, c. 160, authorizing the construction of a bridge over the Ohio River, is unconstitutional.

3. *Thomas* v. *City of Richmond*, December T. 1870, 12 Wall. 349. The ordinance of the city of Richmond, of April, 1861, for the issue of city notes, and the act of Virginia, March 19, 1862, validating the same, were passed in aid of the rebellion and are void.

4. *Williams* v. *Bruffy*, October T. 1877, 96 U. S. 176. The confiscation act of the Confederate States, when enforced as a statute of Virginia, is void.

5. *Hauenstein v. Lynham,* October T. 1879, 100 U. S. 483. The laws of escheat of Virginia, so far as they interfered with treaty obligations of the United States, are void.

6. *Hartman* v. *Greenhow*, October T. 1880, 102 U. S. 672. The act of 1876, c. 161, § 117, concerning deduction of taxes from coupons on its bonds presented for payment, when applied to coupons separated from bonds issued under the Funding Act of March 30, 1871, and held by different owners, impairs the obligation of the contract of the State with the bondholders.

7. *Webber* v. *Virginia*, October T. 1880, 103 U. S. 344. The license acts of 1875, 1876, which require a license for sales of goods made without the State, but none for sales of goods made within it, are regulations of commerce.

8. *Antoni* v. *Greenhow*, October T. 1882, 107 U. S. 769. The acts of March 7, 1872, c. 148, and January 14, 1882, c. 7, both relating to the funds in which taxes shall be paid, impair the obligation of the contract made by the State in the Funding Act of March 30, 1871.

9. *Virginia Coupon Cases*, October T. 1884, 114 U. S. 269. The acts of January 26, 1882, c. 41, and March 13, 1884, c. 421, impair the obligation of the contract made by the State in the Funding Act of March 30, 1871.

10. *Effinger* v. *Kenney*, October T. 1885, 115 U. S. 566. The act of February 28, 1867, c. 270, relating to the adjustment of liabilities arising under contracts or wills made between January 1, 1862, and April 10, 1865, impairs the obligation of those contracts.

11. *Royall* v. *Virginia*, October T. 1885, 116 U. S. 572. Affirming *Antoni* v. *Greenhow*, and *The Virginia Coupon Cases*, and applying them to the Code of 1873, title 12, c. 34, § 60, and the acts of February 7, 1884, and March 15, 1884.

Washington.

None.

West Virginia.

1. *Pierce* v. *Carskadon*, December T. 1872, 16 Wall. 234. The Act of February 11, 1865, amending § 27 of the Process Act of September 25, 1863, is an *ex post facto* law, and partakes of the nature of a bill of pains and penalties when applied to judgments recovered before the passage of the Amending Act.

2. *Strauder* v. *West Virginia*, October T. 1879, 100 U. S. 303. The Juror Act of March 12, 1873, so far as it discriminates against negroes on account of race, is in conflict with the 14th Amendment.

3. *Parkersburg* v. *Brown*, October T. 1882, 106 U. S. 487. The act of December 15, 1868, authorizing the city of Parkersburg to issue its bonds in aid of manufacturers carrying on business near the city, exceeds the power of taxation conferred upon a legislative body.

Wisconsin.

1. *Insurance Co.* v. *Morse*, October T. 1874, 20 Wall. 445. The clause in the act of 1867, c. 179, authorizing foreign insurance companies to transact business within the State, by which they were required, as a condition, to agree that they would not remove causes to the Federal court if sued in a state court, is repugnant to the Constitution and laws of the United States.

2. *Doyle* v. *Continental Ins. Co.*, October T. 1876, 94 U. S. 535. Affirming *Insurance Co.* v. *Morse*, 20 Wall. 445 (No. 1, *ante*).

3. *Koshkonong* v. *Burton*, October T. 1881, 104 U. S. 668. The act of March 9, 1872, relating to the recovery of interest upon interest, when applied to prior contracts, impairs their obligation.

Wyoming.

None.

THE SAME CASES CHRONOLOGICALLY ARRANGED.

INDEX TO THE OMITTED CASES.

[*For the Index to the Other Cases reported in this Volume, see post,* page cclxxxi.]

ADMIRALTY.

1. A decree in admiralty for the condemnation of a vessel is not final if the libel claims the condemnation of the cargo as well, and the cargo has been delivered to the respondents at an appraised value, and the money deposited with the register. *Dayton, Claimant, etc.*, v. *United States*, lxxx.
2. The court declines to hear argument whether mandamus shall issue to the Circuit Court directing it to order stipulators for value and sureties on an appeal bond in an admiralty suit to appear for examination concerning their property: whether it has the power to issue the writ in such case *quære*. *Phillips, Petitioner*, clxvii.

APPEAL.

1. An order for allowing an appeal relates back to the date of the prayer for allowance, and is considered as made on that day. *Latham* v. *United States*, xcvii.
2. An appeal by one of three complainants from a joint decree, without notice to the others and without their refusing to join in it, is dismissed. *Downing* v. *McCartney*, xcviii.
3. An allowance by a Circuit Court of an appeal taken by a receiver, is equivalent to leave by the court to the receiver to take an appeal. *Farlow* v. *Kelley*, cci.
4. An appeal bond for costs need not be signed by all the appellants. Being approved by the court it stands as security for all the appellees. *Scruggs* v. *Memphis &c. Railroad*, cciv.

See PRACTICE, 3, 11.

APPEAL BOND.

See APPEAL, 4;
PRACTICE, 14.

APPEARANCE.

See PRACTICE, 6.

BANKRUPTCY.

1. A bankrupt may prosecute in his own name a writ of error to a judgment rendered after the adjudication of bankruptcy; but the assignee

COLLUSION.

See PRACTICE, 10, 16.

CONSTITUTIONAL LAW.

The contract of marriage is not a contract within the meaning of the provision in the Constitution prohibiting States from impairing the obligation of contracts. *Hunt* v. *Hunt*, clxv.

CONTRACT.

The performance of a contract for the construction of a railroad, made by a deceased person with the railroad company, cannot be enforced by his heirs, even if the profits are partly in lands. *Crane* v. *Kansas Pacific Railway*, clxviii.

See EVIDENCE, 5, 6;
PRINCIPAL AND AGENT, 1.

COSTS.

1. When the judgment is silent as to costs in this court, neither party recovers his costs here; but each must pay, if not already paid, whatever fees are properly chargeable to him according to law and practice. *Osborn* v. *United States*, cxxxvii.
2. When the clerk has no security for fees due to him from a party entitled to a mandate he may withhold the mandate until his fees are paid, or he is otherwise satisfied in that behalf. *Ib.*
3. The rules relating to taxation of costs amended. *Ib.*
4. A court has no power to award costs in criminal proceedings unless some statute has conferred it. *United States ex rel. Phillips* v. *Gaines*, clxix.
5. In Tennessee the costs of a criminal prosecution are made by statute a debt of the State, for which the comptroller may be compelled to draw a warrant upon the state treasurer when the proper foundation has been laid for such an order by the court; but in this case the steps required by law to be taken in order to charge such costs upon the State as a debt had not been taken. *Ib.*
6. An officer of a State, sued in his official capacity, and charged with no official delinquency, is not liable for costs. *Hauenstein* v. *Lynham*, cxci.

COURT OF CLAIMS.

1. Although this court does not apply strict rules of pleading to cases appealed from the Court of Claims, yet the allegations and proofs must so far correspond as to give to the United States the benefit of the principal of *res judicata* in cases where they ought to have the protection which it affords. *Baird* v. *United States*, cvi.
2. When a petition in the Court of Claims is silent upon a subject which forms part of the *res gestæ*, that silence concludes the petitioner. *Ib.*
3. On the proofs, this court arrives at the conclusion that the judgment of

of the overdue interest on the specified notes, as well as the principal. *Sawyer* v. *Weaver*, cli.

EJECTMENT.

The legal title must prevail in ejectment; and neither party can set up facts which go to show that equitably the other party is the rightful owner of the property. *Marshall* v. *Ladd*, lxxxix.

EQUITY.

1. In equity, parol testimony is admissible to show that a conveyance, absolute on its face, was in fact a mortgage. *Risher* v. *Smith*, clvi.
2. It is clear from the evidence that the order which was the subject matter of this action, was for the purpose of security only, and that the debt for which it was security was paid before the defendant Taylor received the government drafts. *Ib.*
3. A decree in equity will not be reversed for an immaterial departure from technical rules when no harm has been done. *Rice* v. *Edwards*, clxxv.

See CHOSE IN ACTION;
PLEADING.

ESTOPPEL.

See PLEADING, 2.

EVIDENCE.

1. There was no error in the rulings of the court admitting evidence to show the market-value of the property converted. *Thatcher* v. *Kautcher*, cxlvi.
2. An adjusted account of an Internal Revenue Collector at the Treasury, showing the exact amount finally allowed him as extra compensation, is conclusive evidence on that question. *United States* v. *Morgan*, clxiv.
3. The agreement of compromise between the parties which is referred to in the opinion was competent evidence and properly received as such, although not set forth and relied upon in the pleadings. *O'Reilly* v. *Edrington*, clxxvii.
4. When competent evidence becomes immaterial under a charge favorable to the party offering it, its exclusion is not error. *Relfe* v. *Wilson*, clxxxix.
5. In an action to recover of the defendant the profits which the plaintiff would have gained in supplying articles to him under a contract, which articles the plaintiff was ready and willing to furnish and the defendant refused to receive, the burden of proof is on the plaintiff to show clearly that the articles refused came within the contract. *Union Pacific Railroad* v. *Clopper*, excii.
6. In the trial of such an action brought to recover profits on stone contracted to be supplied to a railroad company for the construction of a

of the United States for a writ of *habeas corpus*, and the denial thereof made in chambers; inasmuch as the petition in this court showed that the papers had been filed in the Circuit Court and remained there of record. *Ex parte Lange*, ccvii.

ILLINOIS.

See PROMISSORY NOTE, 1, 3.

INSURANCE.

When the plaintiff in an action at law on a life insurance policy against the insurer avers in his declaration that the company had been notified of the death of the person whose life was insured in the policy, and that the necessary preliminary proofs required by it had been made, and the answer is a general denial of all and singular the allegations of the petition so far as the same may have a tendency to give to said plaintiffs any right or cause of action against the respondent, and, not specially traversing the allegations as to notice and proof, sets up specific defences, on which alone the defendant relies, it is not necessary to prove the notification, nor that the necessary preliminary proofs were made. *Knickerbocker Life Ins. Co.* v. *Schneider*, clxxii.

See PRINCIPAL AND AGENT, 2.

INTEREST.

See DEED, 2;
PRINCIPAL AND AGENT, 1.

INTERNAL REVENUE COLLECTOR.

See EVIDENCE, 2;
SECRETARY OF THE TREASURY.

JURISDICTION.

1. An appeal allowed or a writ of error served is essential to the exercise of the appellate jurisdiction of this court. *Washington County* v. *Durant*, lxxx.
2. The removal or appointment of a receiver in a suit for the foreclosure of a mortgage on a railroad rests in the sound discretion of the court below, and is not reviewable here. *Milwaukee and Minnesota Railroad* v. *Howard*, lxxxi.
3. The averments of alienage and citizenship in the declaration are sufficient to give the court jurisdiction. *Waters* v. *Barrill*, lxxxiv,
4. The decrees for the payment of rent by the Milwaukee and St. Paul Railroad Company to the receiver of the La Crosse and Milwaukee Railroad were not final decrees from which appeals could be taken to this court, and this proceeding was irregular, and involved useless litigation. *Milwaukee and St. Paul Railroad* v. *Soutter*, lxxxvi.
5. This court has jurisdiction of a case brought up on a certificate of division of opinion on the question whether the Circuit Court has

17. This court has power to adjudge damages for delay on appeals as well as writs of error, and this power is not confined to money judgments. *Gibbs* v. *Diekma*, clxxxvi.
18. A record in a state court which shows a verdict and motion for a new trial overruled, but no judgment on the verdict, shows no final judgment to which a writ of error may be directed. *National Life Ins. Co.* v. *Scheffer*, cciii.
19. This court has not jurisdiction in error over the judgment of a state court brought here under the 25th section of the Judiciary Act of 1879, unless the record discloses that one of the questions described in that section arose in the state court, or was decided by its judgment. *Marshall* v. *Knott*, ccv.
20. A Federal question not raised at the trial of a cause in the state court below will not be considered here. *Bergner* v. *Palethorp*, ccviii.
21. If in an action in a state court to recover damages under a state statute for death caused by a collision on navigable waters within the State, no Federal question is raised during the trial, this court cannot take jurisdiction in error. *Staten Island Railway* v. *Lambert*, ccxi.
22. At a trial in a state court upon a policy of insurance of a steamboat, the question whether, if the steamboat was burned while carrying turpentine as freight the owner must show affirmatively his license to carry the turpentine, or whether the law would presume a license until the contrary was shown, is not a Federal question. *Marsh* v. *Citizens Ins. Co.*, ccxiii.
23. The overruling of a motion that the cause proceed no farther by reason of an alleged compromise of the suit is not a final judgment or decree. *De Liano* v. *Gaines*, ccxiv.
24. A statement in the opinion of the highest court of a state that the only Federal question in the case was probably abandoned as "it is manifest that the Circuit Court could not have taken jurisdiction" is not such a decision of the question as to give this court jurisdiction. *Weatherby* v. *Bowie*, ccxv.

See ADMIRALTY, 1, 2;
EXCEPTION;
PRACTICE, 3.

LOCAL LAW.

1. A sheriff's deed executed by a deputy sheriff in his own name is good in Louisiana. *Flournoy* v. *Lastrapes*, clxi.
2. In the District of Columbia a valid note of the husband may be secured by a deed of trust of the general property of the wife, executed by husband and wife in the manner required by law. *Kaiser* v. *Stickney*, clxxxvii.
3. In Missouri, in an action brought against an insurer to recover on a policy, evidence of an offer by the insurer to settle for less than the policy, and of an intimation by the same to the insured that the policy

MOTION TO DISMISS.

A motion to dismiss for want of jurisdiction is denied because it involves looking into the merits. *Lynch* v. *De Bernal*, xciv.

See PRACTICE, 5.

NATIONAL BANK.

See JURISDICTION, 10.

NON-JOINDER OF PARTIES.

An objection on the ground of the non-joinder of parties who are proper but not indispensable parties cannot be made for the first time in this court. *Gibbs* v. *Diekma*, clxxxvi.

PARTIES.

See NON-JOINDER OF PARTIES.

PARTNERSHIP.

When a contract is within the scope of the business of a partnership, each partner is presumed to be the agent of all, and it is immaterial what the secret understanding of the parties may have been as to the powers of each. *Andrews* v. *Congar*, clxxxiii.

PATENT FOR INVENTION.

1. The decree below rightfully denied to the parties their claim for rents and profits, and it is affirmed. *Welch* v. *Barnard*, civ.
2. If the subject of a patent is a combination of several processes, parts or devices, the use of any portion of the combination less than the whole is not an infringement. *Garratt* v. *Seibert*, cxv.
3. The second claim in the patent granted to Nicholas Seibert for an improvement in lubricators for steam-engine cylinders, does not embrace the heating apparatus and the combination devised for preparing tallow for use in the lubricator, which is covered by the first claim in the patent. *Ib.*
4. All the combinations and all their separate elements patented to William Westlake, April 6, 1864, for an improvement in lanterns, for which reissued letters were obtained December 23, 1869, were anticipated by inventions referred to in the opinion of the court. *Dane* v. *Chicago Manufacturing Co.*, cxxvi.
5. Upon a bill in equity by the owner against an infringer of a patent the plaintiff is entitled to recover the amount of gains and profits that the defendant made by the use of the invention. *Mevs* v. *Conover*, cxlii.
6. The surrender of his patent by a patentee, in order to obtain a reissue made after obtaining final judgment against an infringer, does not affect his rights which have passed into the judgment. *Ib.*
7. The internal revenue stamps used by the defendant in error are no infringement of the letters patent issued to the plaintiff in error, June

9. The court withholds its decision on this motion for a writ of prohibition, until the certificate of division of opinion on the allowance of the writs of *habeas corpus* complained of can be filed, and a hearing had thereon. *Virginia, Petitioner*, lxxxix.
10. In this case the court permits a third party to intervene and file affidavits to show that the suit has been settled between the parties, and that its further prosecution is collusive and fictitious and for the purpose of aiding further proceedings against persons not parties to the record; and, counter affidavits being filed by the appellant, a rule is issued against the appellant to show cause why the suit should not be dismissed. *American Wood Paper Co.* v. *Heft*, xcii.
11. The record showing no allowance of appeal below, and it appearing by affidavits that an appeal was actually allowed of which the clerk omitted to make entry, this court refused a *certiorari* to bring up the record; and the case was passed to enable appellant's counsel to move in the Circuit Court for an entry *nunc pro tunc* of the prayer and allowance. *Chicago* v. *Bigelow*, xciii.
12. A defendant in equity is required to pay into court for the benefit of complainant money received by him pending the litigation, before service of process but after knowledge of the complainant's equity. *Texas* v. *White*, xcv.
13. A rule is granted without affidavits, under the circumstances of this case, (though the practice is irregular,) to show cause why money should not be paid into court for the benefit of complainant. *Ib.*
14. The hearing on a motion for additional security on a writ of error, supported by affidavits but without notice to the opposite party, is postponed in order that notice may be given. *Wood* v. *Richards*, xcviii.
15. There is no merit in any of the defences set up here; and, it being apparent that the appeal was taken for the purpose of delay, the judgment below is affirmed with interest and ten per cent damages. *Peyton* v. *Heinekin*, ci.
16. One party to a suit cannot pay the fees of counsel on both sides, both in the court below and on appeal, without being held to have such control over both the preparation and argument of the cause, as to make the suit merely collusive in both courts. *Gardner* v. *Goodyear Dental Vulcanite Co.*, ciii.
17. No appeal being asked for below or rendered, no appeal bond given, and there being no citation, the appeal is dismissed on motion. *Monger* v. *Shirley*, cx.
18. After hearing the parties the court advances the causes as causes in which a State is a party under the act of June 30, 1870, 16 Stat. 176, c. 181. Rev. Stat. § 949. *Huntington* v. *Texas*, cx.
19. Under the circumstances, the court allows an amendment of the record, on the certificate of the court below, without issuing a writ of *certiorari*. *Stitt* v. *Huidekopher*, cxviii.
20. The writ of error is dismissed, because it should have been directed to the Court of Appeals of the State of Virginia. *Underwood* v. *McVeigh*, cxix.

See APPEAL;
CERTIORARI;
CITATION;
CLERK OF THE SUPREME COURT;
COURT OF CLAIMS, 4;
DAMAGES;
EXCEPTION;
MANDAMUS;
MANDATE;
MOTION TO ADVANCE;
MOTION TO DISMISS;
SUPERSEDEAS;
WRIT OF ERROR.

PRINCIPAL AND AGENT.

1. In a contract between a commission merchant in New York and a person in another State that the latter shall send merchandise to the former to be sold, and that the former shall make advances on it to be repaid with commissions and interest out of the sales, the rate of interest is to be determined by the laws of New York, the place of performance. *Peyton* v. *Heinekin*, ci.
2. A factor who insures goods consigned to him for the benefit of his principal may recover from him the cost of the insurance. *Ib.*
3. The acts of a person assuming to be an agent in the sale of personal property will not bind the principal, unless he either authorized him to make the sale or held him out to the public as clothed with the authority of an agent; and there being no evidence in this case either of authority to sell the property in dispute, or of consent to the agent representing himself to have such authority, no basis has been laid for the propositions which the court was asked to give the jury. *Thatcher* v. *Kautcher*, cxlvi.

PROMISSORY NOTE.

1. If a person, not a party to a promissory note, writes his name on the back of it when the note is made, the law in Illinois regards him as a guarantor, unless the contrary is shown; but the law in Missouri regards him as *prima facie* a joint maker. *Andrews* v. *Congar*, clxxxiii.
2. In a suit against a joint maker of a promissory note a charge to the jury that he was only a guarantor works no injury to him. *Ib.*
3. Under the practice in Illinois if one is sued as guarantor of a note, and he verifies his plea of the general issue by affidavit, the plaintiff need not prove the execution of the note itself as well as the guaranty. *Ib.*
4. There was no error in the ruling that if the maker of the note which forms the basis of the controversy in this case could not use an account on its books as a set-off against the note, the defendant as guarantor could not. *Ib.*

PUBLIC LAND.

1. Grants of land made by Spain after the Treaty of St. Ildefonso were void. *United States* v. *Lynde*, lxix.
2. The Attorney General having stated that the Indians are entitled to the land claimed by them, the case is dismissed. *United States* v. *Chetimachas Indians*, lxx.
3. A petition to the Mexican government for a surplus of land which was not granted, is no foundation for an equitable claim against the United States. *Miramontes* v. *United States*, lxxiii.

RAILROAD.

See JURISDICTION, 2, 4.

metical calculation, and which includes every material fact at issue, will be sustained. *Relfe* v. *Wilson*, clxxxix.

WRIT OF ERROR.

1. The court deny a motion to rescind an order advancing this cause founded upon the fact that the writ of error to the judgment below was allowed November 30, 1869, less than thirty days before the first day of the present term, which began December 6, 1869. *Cox* v. *United States ex rel. Garrahan*, c.
2. When the highest court of a State dismisses a suit brought up from the trial court for want of jurisdiction, the Federal question, if there be one in it, was decided by the trial court, and the writ of error should be directed to that court. *Lane* v. *Wallace*, ccxix.

See SUPERSEDEAS, 1.

GENERAL INDEX.

[For Index to Omitted Cases, see *ante*, cclxiv.]

CONSTITUTIONAL LAW.

CONTEMPT.

ing machines which the defendant has sold, he must show what profit he made on his own machines. *Ib.*

POSTMASTER GENERAL.

See JURISDICTION, A, 2;
MAIL TRANSPORTATION.

PRACTICE.

1. Under the circumstances set forth in the motion papers below, the court, as to so much of the record as was printed by order of the court below, dispenses with the filing of ten of the twenty-five copies required by Rule 10 to be printed for the use of the court and counsel, and remits the clerk's fees for supervision of printing. *Dent* v. *Ferguson*, 397.
2. M. filed a bill in equity against S. for the infringement of letters patent. S. answered and filed a cross-bill. The decree dismissed the original bill from which M. appealed. Thereupon S. took an appeal in the cross-suit from rulings excluding evidence. In this court the clerk required S. to pay one half the cost of printing the record. This court, after argument, affirmed the decree dismissing the original bill, and dismissed the cross-appeal. 128 U. S. 605. *Held*, that S. was entitled to recover of M. the amount so paid. *Nichols* v. *Marsh*, 401.
3. The counsel for appellees having undertaken to appear for the heirs and representatives of the original appellee, deceased, and having filed in the office of the clerk of this court a waiver of publication, and having failed to appear, and the cause having been heard and having proceeded to final hearing, (128 U. S. 464;) *Held*, that the decree be made absolute against the heirs and representatives of the deceased appellee. *Hunt* v. *Blackburn*, 403.

See APPEAL;
CRIMINAL LAW;
DAMAGES;
JURISDICTION, A, 1, 6, 7, 8, 11;
MANDATE;
MOTION FOR REHEARING;
WASHINGTON TERRITORY.

PROMISSORY NOTE.

The original payee cannot maintain an action upon a note, the consideration of which is money advanced by him upon or in execution of a contract of wager, he being a party to such contract, or having directly participated in the making of it in the name, or on behalf of one of the parties. *Embrey* v. *Jemison*, 336.

PUBLIC LAND.

See OATH, 2, 3.

RAILROAD.

1. A contract made by the president of a railroad corporation, in its behalf, and within the scope of its chartered powers, to pay certain sums to the proprietors of a railway bridge for the use thereof, and made