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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1889

J. C. BANCROFT DAVIS

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.

SAMUEL FREEMAN MILLER, Associate Justice.

STEPHEN JOHNSON FIELD, Associate Justice.

JOSEPH P. BRADLEY, Associate Justice.

JOHN MARSHALL HARLAN, Associate Justice.

HORACE GRAY, Associate Justice.

SAMUEL BLATCHFORD, Associate Justice.

LUCIUS QUINTUS CINCINNATUS LAMAR, Associate Justice.

DAVID JOSIAH BREWER, Associate Justice.

WILLIAM HENRY HARRISON MILLER, Attorney General.

WILLIAM HOWARD TAFT, Solicitor General.[1]

JAMES HALL McKENNEY, Clerk.

JOHN MONTGOMERY WRIGHT, Marshal.

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[1] Mr. Chapman having deceased, Mr. Taft was commissioned on the 4th day of February, 1890, and qualified on the 15th day of that month.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1889.

UNITED STATES *v.* STOWELL.

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

No. 167. Submitted December 2, 1889. — Decided January 20, 1890.

Statutes to prevent frauds upon the revenue, although they impose penalties or forfeitures, are not to be construed, like penal laws generally, strictly in favor of the defendant; but they are to be fairly and reasonably construed, so as to carry out the intention of the legislature.

The forfeiture imposed by the act of February 8, 1875, c. 36, § 16, for carrying on the business of a distiller without having given bond, or with intent to defraud the United States of the tax on the spirits distilled, includes all personal property owned by other persons, knowingly and voluntarily permitted by them to remain on any part of the premises, and actually used, either in the unlawful business, or in any other business openly carried on there; but in the lot of land on which the distillery is situated, only the right, title and interest of the distiller, and of persons who have consented to the carrying on of the business of a distiller thereon, is forfeited. And there is a like forfeiture of personal property under Rev. Stat. § 3258, for setting up an unregistered still; and of personal property and interests in real estate under § 3305, for omitting to keep books as required by law.

The forfeiture imposed by the act of February 8, 1875, c. 36, § 16, and by Rev. Stat. §§ 3258, 3305, takes effect from the time of the commission of the offence, both as to the right, title and interest in the land, and as to personal property then upon the land.

When the owner of land, upon which an illicit distillery has been set up and carried on with his consent, has previously made a mortgage thereof to

one who does not permit or connive at the illicit distilling, and the mortgagor, upon a subsequent breach of condition of the mortgage, makes a quitclaim deed to the mortgagee, the forfeiture of the land, as well as of trade fixtures annexed to it for a lawful purpose before the setting up of the still, is of the equity of redemption only.

This was an information, filed November 18, 1884, under §§ 3258 and 3305 of the Revised Statutes, and § 16 of the act of February 8, 1875, c. 36, (the material parts of which are printed in the margin,[1]) for the forfeiture of property particularly described in the information, and seized by the collector of internal revenue on November 14, 1884, and including: 1st. All the right, title and interest of Thomas Dixon, Eli B. Bellows

[1] By Rev. Stat. § 3258, "every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is." "Stills and distilling apparatus shall be registered immediately upon their being set up. Every still or distilling apparatus not so registered, together with all personal property in the possession or custody or under the control of such person, and found in the building, or in any yard or inclosure connected with the building in which the same may be set up, shall be forfeited," and he shall be punished by fine and imprisonment.

By the act of February 8, 1875, c. 36, § 16, (substantially reënacting Rev. Stat. § 3281,) any person "who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof," shall be fined and imprisoned. "And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found; and all distilled spirits or wines and personal property, found in the distillery or rectifying establishment, or in any building, room, yard or inclosure connected therewith, and used with or constituting a part of the premises; and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated; and all right, title, and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same;" shall be forfeited to the United States. 18 Stat. 310.

By Rev. Stat. § 3305, every distiller who omits to keep books in the form prescribed by the Commissioner of Internal Revenue shall be punished by fine and imprisonment, and "the distillery, distilling apparatus, and the lot or tract of land on which it stands, and all personal property on said premises used in the business there carried on, shall be forfeited to the United States."

Statement of the Case.

and William Stone in a lot of land in the city of Lawrence, with the buildings thereon. 2d. A copper still, a boiler and engine, a pump, vats and tanks, and other machinery and fixtures. 3d. A number of butts, a quantity of malt and hops, two horses and wagons and harnesses, and other personal property.

Joseph Stowell filed a claim for the real estate, the machinery and fixtures, (except the still,) the butts, and the malt and hops; and Thomas Bevington filed a claim for the horses, wagons and harnesses.

A decree was entered against the property not claimed; and upon a trial in the District Court between the United States and the claimants the only evidence introduced was an agreement in writing, signed by the counsel of all the parties, that certain facts were true, which was, in substance, as follows:

For some time before and until the seizure, Dixon carried on the business of a brewer on the premises, which consisted of a three-story frame building and adjoining sheds with doors between, and a yard connected therewith. The requirements of the internal revenue laws concerning breweries were complied with. In the latter part of September, 1884, Stone and Bellows, with Dixon's knowledge and consent, set up in the third story of the principal building (which story was not used in the brewing business, except as the large tanks used in brewing reached up into it) a copper still, which remained in position and in proper condition for use until November 9, 1884, and with which, during that time, two hogsheads and one barrel of rum were made from molasses. The still was not registered as required by law; no bond therefor was given; no government book was kept; the still was run with intent to defraud the United States of the tax on the spirits distilled, and the United States were defrauded of that tax. It did not appear that the sheds were in any way used in connection with the distillery. Dixon continued to carry on his business as a brewer while the still was being used, and on November 10 and 11 took down and removed the still.

There were on the premises a large boiler set in brick, a

small engine, a small pump, and large vats and tanks, which the claimants alleged to be real estate, but which the United States asserted to be fixtures. It was admitted that a part or all of them would be trade fixtures as between landlord and tenant; that part or all of them were apparatus used in the brewery, and such as might properly be in the brewery; and that part or all of them were used as apparatus for the illicit distilling, and were fit to be used in connection with the still.

At the times of the illicit distilling and of the seizure, all these fixtures and the still, as well as all the personal property seized, were in Dixon's possession and custody and under his control, and they were found in the brewery, sheds and yard. Neither of the claimants knew until after the seizure that a still had been set up on the premises.

On June 11, 1883, Dixon conveyed the real estate to Stowell by a mortgage deed, duly recorded, subject to a prior mortgage of $1500, to secure a debt of $2500. On October 13, 1884, upon a breach of condition of this mortgage, Stowell, instead of foreclosing it, took from Dixon a quitclaim deed of the premises, the consideration named in which was $8000.

On June 5, 1884, Stowell took a bill of sale from Dixon of the butts, as security for endorsing a note for $350, which went to protest, and was paid by him on November 10, 1884. At the time of that bill of sale, the butts were pointed out by Dixon to Stowell as those which he was to have, but they remained in Dixon's possession.

On November 8, 1884, Stowell took a bill of sale of part of the malt and hops, as security for endorsing a note for $100 payable in ten days, and paid that note also after it had been duly protested. No delivery was ever made of the malt and hops. Neither of those bills of sale was ever recorded.

On November 11, 1884, a bill of sale of the horses, wagons and harness was executed and delivered by Dixon to Bevington, as security for a loan of $700, which was never paid. This bill of sale was recorded in the city clerk's office on November 18, 1884. The property so conveyed to Bevington was kept on a farm of Dixon's at North Andover, and was used in the business of the brewery, and seized at the brewery.

Argument for Defendants in Error.

At the time of the sale, Dixon pointed it out to Bevington, and said that he delivered it, and Bevington appointed Dixon's son as nominal keeper, but never otherwise took possession of it, and it remained under the control of Dixon, and was used by him.

Upon these facts the District Court ruled that the information could not be maintained against the property claimed by Stowell and Bevington, and adjudged that it be dismissed as to that property. The United States alleged exceptions, and, upon the affirmance by the Circuit Court of the judgment of the District Court, sued out this writ of error.

Mr. Solicitor General and *Mr. Alphonso Hart*, Solicitor of Internal Revenue, for the plaintiffs in error, cited: *Dobbins's Distillery* v. *United States*, 96 U. S. 395, 399; *United States* v. *1960 Bags of Coffee*, 8 Cranch, 398, 405; *United States* v. *Brigantine Mars*, 8 Cranch, 417; *Gelston* v. *Hoyt*, 3 Wheat. 246, 311; *Wood* v. *United States*, 16 Pet. 342, 362; *Caldwell* v. *United States*, 8 How. 366; *Thatcher's Distilled Spirits*, 103 U. S. 679; 16 Opinions Attys. Gen. 41; *United States* v. *7 Barrels Distilled Oil*, 6 Blatchford, 174; *United States* v. *56 Barrels Whiskey*, 1 Abbott (U. S.) 93; *S. C.* 4 Int. Rev. Rec. 106; *United States* v. *Whiskey*, 11 Int. Rev. Rec. 109; *United States* v. *100 Barrels Spirits*, 1 Dillon, 49, 57; *S. C.* 12 Int. Rev. Rec. 153; *S. C.* (*sub nom. Henderson's Distilled Spirits*) 14 Wall. 44; *United States* v. *Distillery at Spring Valley*, 11 Blatchford, 255; *United States* v. *76,125 Cigars*, 18 Fed. Rep. 147; *Taylor* v. *United States*, 3 How. 197; *Cliquot's Champagne*, 3 Wall. 114; *United States* v. *All the Distilled Spirits*, 2 Ben. 486.

Mr. Edgar J. Sherman and *Mr. Charles U. Bell* for defendants in error.

The only material part of the record is the agreed facts, by which it appears that neither of the claimants knew that an illicit business was carried on in the premises, and that a legal business was ostensibly and actually carried on there.

The court must find that these claimants were innocent, not only of any wrongful intent, but even of negligence or blame of any kind. The question then to be argued is whether the property of a person innocent of any charge or suspicion of crime or negligence is to be forfeited, and he thereby punished, because a third person has committed an offence. To the consideration of this question we invite the attention of the court.

I. Penal laws are to be construed strictly. 1 Bl. Com. 91; *Margate Pier Co.* v. *Hannam*, 3 B. & Ald. 266; *Edwards* v. *Dick*, 4 B. & Ald. 212; *Green* v. *Kemp*, 13 Mass. 515; *S. C.* 7 Am. Dec. 169; *Reed* v. *Davis*, 8 Pick. 513; *Caledonian Railway* v. *North British Railway*, 6 App. Cas. 114, 122; *Walton*, *Ex parte*, 17 Ch. D. 746; *Jackson* v. *Collins*, 3 Cowen, 89, 96; *People* v. *Utica Ins. Co.*, 15 Johns. 358, 380; *S. C.* 8 Am. Dec. 243. Especially forfeitures are not favored. *Hubbard* v. *Johnstone*, 3 Taunton, 177; *Adams* v. *Bancroft*, 3 Sumner, 384.

II. Forfeiture is a punishment, and therefore, if a man who is wholly innocent can ever be punished for the crime of another, it must require language absolutely unequivocal before the court will so construe a statute. The cases we have cited show how strong the language must be. The language of the law and the intent of the law must clearly coincide in requiring such a construction. All the cases assume that in order to subject property to a forfeiture, the owner must himself have violated the law or must knowingly have suffered the property to go into possession of and control of some other person engaged in the regulated business. That is, if he either himself violates the law or knowing that another is violating the law permits him to have the use of his property in the unlawful business, or even permits him to have the use of his property in a business which is lawful, only if it be lawfully conducted, he may forfeit the property. There must be some degree of blame on the owner of the property; for property has no guilty character except as connected with persons who are chargeable with responsibility or blame. If the owner is absolutely innocent the property cannot be forfeited. The mere accident of its situation cannot give it a

criminal character independent of its owner's fault. *United States* v. *Barrels of Spirits*, 1 Lowell, 239; *Dobbins's Distilled Spirits* v. *United States*, 96 U. S. 395.

III. The general object of the statute is to enforce the payment of a tax on all liquor manufactured. It proposes to accomplish this object by inflicting punishments of fine, imprisonment and forfeiture on all actually guilty of attempting to defraud the government of the tax and by requiring vigilance on the part of all who are in any way concerned in the business and property to prevent and disclose any illegal acts under a penalty of a forfeiture of their goods. The legislature thought that the watchfulness of a man whose property was in danger would be greater than that of any government officer. Therefore every one concerned with an open distillery is bound to see that the law is not violated. If he chooses to leave his property in such a distillery, he does so knowing the risk and ought first to satisfy himself that there is no violation of law.

But if the distillery is a secret one and the owner is in ignorance of its existence and in no fault, what conceivable purpose is served by punishing him by a forfeiture of his property?

IV. If then the construction of the statute claimed by the government is, first, unjust, and, second, in no way within the object or intent of the law, the next question would seem to be whether the words of the statute are so imperative that we are driven to say that Congress intended this unjust and unreasonable thing when they passed the law. We claim on the contrary that it clearly appears that the intention was just and reasonable and that Congress does not deserve the imputation which the government would cast upon them.

V. Examining the whole chapter, Rev. Stat. Title 35, c. 4, in the light of these principles we find the law contemplates (1) open lawful distilleries which are stringently regulated with numerous penalties and forfeitures. §§ 3259, 3260, 3262, 3263, 3264, 3267, 3269, 3271, 3275, 3277, 3279, 3280, 3283, 3284, 3286, 3288, 3303, 3304, 3305.

In all cases arising under these sections knowledge of the

nature of the business at least is either expressly required or is assumed from the very nature of the thing. Thus every such open distillery must have a conspicuous sign stating that it is a distillery. § 3279.

For instance, the elaborate provisions of § 3269 are absurd if applied to an illicit distillery. Of what consequence is it whether the pipes are painted black or red so long as the whole is concealed and secret.

The spirit of the law is farther well indicated by § 3262 which contains elaborate provisions, the sole object of which appears to be to protect the government on one side and on the other to secure all innocent parties from loss. The spirit of that section is that no person is to be subjected to the forfeiture unless he has consented to assume that liability. *United States* v. *Distillery at Spring Valley*, 11 Blatchford, 255, 271.

It is clear then that the statute both by its express provisions and by necessary implication, in the case of open distilleries, imposes no forfeiture except on those who have expressly consented or knowingly exposed their property to the risk of forfeiture.

But there is another class of distilleries against which the law is also aimed; which are illicit distilleries. This falls under §§ 3257 and 3281, which latter section has been superseded by Stat. 1875, c. 36, § 16, 18 Stat. 310. In this latter case the owner of the property may be wholly innocent of any knowledge of the existence of the distillery. The proposition which we desire to maintain is that if he is ignorant of the existence of the distillery, his property cannot be forfeited.

As we have seen in case of lawful distilleries no person's goods are forfeited unless he has knowingly exposed them to forfeiture. There is no reason why any harsher rule should be applied in case of illicit distilleries. *Gregory* v. *United States*, 17 Blatchford, 328.

It is undoubtedly true that the presumption is against any one whose property is found in the illicit distillery, especially if such property is in its nature adapted to use in the illegal business. But it is equally clear that the owner may rebut

this presumption and prove that he was wholly innocent. *United States* v. *One Still*, 5 Blatchford, 403; *S. C.* 5 Int. Rev. Rec. 189. Take the case for instance of stolen property. It is clear that it would be unjust, unreasonable and preposterous that the real owner should forfeit such property by its being found in an illicit distillery. Suppose that a person drives his horse upon premises secretly used as a distillery for some innocent and legitimate purpose and while there the distillery and the horse are seized, cannot he claim it?

These illustrations and others of the like class which will suggest themselves prove two points: first, that innocence may be proved, and second, that there are exceptions to the literal meaning of the law. The moment it is admitted that there are such exceptions the matter is settled, for if there is any exception, no one will dispute that our case will fall within it. 2. Opinions Attys. Gen. 428; *The Bello Corrunes*, 6 Wheat. 152; *Peisch* v. *Ware*, 4 Cranch, 347, 362.

VI. It ought to be enough simply to state our position. If a man leaves his property and parts with the control of it for a legal and proper purpose, no act of the tenant, unknown to him, and without his consent, can deprive him of his property.

VII. We understand that the decision in *United States* v. *33 Barrels of Spirits*, 1 Lowell, 239, covers this case; and we cite the words of Judge Lowell: "It is impossible to believe that any such sweeping condemnation is intended to be passed founded upon mere proximity in place upon the goods of all persons, innocent or guilty." It is a rule of law as well as of natural justice that statutes will not be understood to forfeit property except for the fault of the owner, general or special, unless such a construction is unavoidable.

VIII. As the statute has absolutely required the assent of the landlord or lessor to the business of licensed distilling, it would certainly have reserved to him some power to control the property and restrain violations of the law, if it had intended to hold him responsible. If the law is as is claimed by the government the case would stand like this: A man lets his estate for a legal and legitimate business. After a time he learns that the tenant has set up an illicit still. He has no

power to enter the premises and stop him. He can only inform the government officers that they may come and seize the premises; that is, may come and seize his own property. The government construction of this statute says to the landlord: "If you give us any information of the illegal acts of your tenant, you shall be punished by a heavy fine." Our construction says to the landlord: "If you do not as soon as you learn of the crime of your tenant inform the government, you shall be punished." Which construction will carry out the end of the law? Which construction is it probable the legislature had in view?

IX. We claim that any such construction would be unconstitutional. And we cite the dictum of the court in *United States* v. *Distillery at Spring Valley*, 11 Blatch. 255, 271.

X. But it may be asked why Congress did not more explicitly guard against such a construction as that claimed? The answer is that no Congress for one moment supposed that the government would ever attempt to rob a citizen of his property, when it knew and admitted that he was guilty of no crime. The suggestion made in one case that the remedy for an innocent person is to ask favor of some government officer, is unworthy of the court. If a man has rights a court of justice is the place to maintain them. If he has no rights except by the favor of government officers, it is oppression. But if a person humbled himself to beg, what encouragement has he, when the government with full knowledge of his innocence has instituted and pressed the prosecution. The place for discretion, if any, is in refusing to institute unjust suits.

XI. In the very late case of *United States* v. *16 Barrels Distilled Spirits*, 10 Ben. 484, the court although criticising the case in Lowell admit that the statute must be limited in some way and suggest another plan of escaping from its literal terms by limiting the forfeiture to goods found in the very room where the illegal acts were. This seems to us a very illogical way of avoiding the difficulty. It amounts to this. The court says the forfeiture is too unjust to be allowed in a case of magnitude, but if it is only a small amount of property which is affected, we will overlook the injustice. But even if

this construction was adopted, there would be too small an amount of goods left here to make it worth the government's while to continue this controversy.

XII. There can be no question that the real estate is not liable to forfeiture. A farther question arises as to what is part of the real estate. It is not a question of fixtures but of the division line between real and personal estate. If an article is personal estate, it is not a fixture. If it is a part of the real estate and is severable by a tenant, it is a fixture; but this is allowed only in favor of trade and not in favor of forfeitures and penalties. In a case like that before the court the rule in its utmost strictness as between heir and executor is applicable and all machinery and other articles which are annexed to the realty or which go to make it the manufactory for which it is intended are part of the realty.

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

The property sought to be forfeited consisted of real estate, and of machinery and fixtures and personal property found thereon.

The real estate was a single lot of land, part of which was covered by a building and sheds opening by doors into one another, and the rest of which was a yard connected with the buildings. Dixon owned the premises, and used them for a lawful brewery. Stone and Bellows, with Dixon's knowledge and consent, set up and used a still in the principal building, and there carried on the business of distillers, without the still having been registered, and without giving bond, or keeping books, as required by the internal revenue laws, and with intent to defraud the United States of the tax on the spirits which they distilled.

The omission to register the still was a cause of forfeiture under § 3258 of the Revised Statutes; the carrying on of the business of a distiller, without having given bond, or with intent to defraud the United States of the tax on the spirits distilled, was a cause of forfeiture under § 3281, as reënacted

in § 16 of the act of February 8, 1875, c. 36; and the omission to keep books was a cause of forfeiture under § 3305 of the Revised Statutes. The questions presented are of the extent of the forfeiture.

By the now settled doctrine of this court, (notwithstanding the opposing dictum of Mr. Justice McLean in *United States* v. *Sugar*, 7 Pet. 453, 462, 463,) statutes to prevent frauds upon the revenue are considered as enacted for the public good and to suppress a public wrong, and therefore, although they impose penalties or forfeitures, not to be construed, like penal laws generally, strictly in favor of the defendant; but they are to be fairly and reasonably construed, so as to carry out the intention of the legislature. *Taylor* v. *United States*, 3 How. 197, 210; *Cliquot's Champagne*, 3 Wall. 114, 145; *United States* v. *Hodson*, 10 Wall. 395, 406; *Smythe* v. *Fiske*, 23 Wall. 374, 380.

It will be convenient, in the first place, to ascertain the construction and effect of the provisions of § 16 of the act of 1875, by which, if any person carries on the business of a distiller, without having given bond, or with intent to defraud the United States of the tax on the spirits distilled by him, he shall be punished by fine and imprisonment, and there shall be forfeited to the United States: 1st. "All distilled spirits or wines, and all stills or other apparatus fit or intended to be used for the distillation of spirits, owned by such person, wherever found." 2d. "All distilled spirits or wines and personal property, found in the distillery, or in any building, room, yard or inclosure connected therewith, and used with or constituting a part of the premises." 3d. "All the right, title and interest of such person in the lot or tract of land on which such distillery is situated." 4th. "All right, title and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same." 18 Stat. 310.

By the first of these provisions, all distilled spirits or wines, and all stills or other apparatus fit or intended to be used for the distillation of spirits, owned by the illicit distiller, and found on the premises or elsewhere, are forfeited, without

regard to the question whether the apparatus, by reason of the manner in which and the purpose for which it is placed on or affixed to the land, is technically personal property or real estate. But this provision does not extend to property owned by any other person than the distiller.

The second provision forfeits "all distilled spirits or wines and personal property, found in the distillery, or in any building, room, yard or inclosure connected therewith, and used with or constituting part of the premises." The last words, "and used with or constituting part of the premises," like the words next preceding, "connected therewith," aptly designate real estate, and naturally and grammatically relate to and qualify "any building, room, yard or inclosure," and not "all distilled spirits or wines and personal property." The provision is clearly not limited to personal property owned by the illicit distiller. To hold it to be so limited would give no effect to that part of this provision which forfeits distilled spirits or wines; for all distilled spirits or wines owned by the distiller, wherever found, have been already forfeited by the first provision. The first provision is restricted in point of ownership, and not in point of place. The second provision is restricted in point of place, and not in point of ownership. Nor can the second provision be restricted to property fit or intended to be used for the distillation of spirits; for, while the first provision contains such a restriction as regards apparatus, the second provision omits all requirement of fitness or intention for the unlawful use. Each of the two provisions clearly defines its own restrictions, and the restrictions inserted in the one cannot be imported into the other. The second provision must therefore extend to some property not owned by the distiller, and to some property not fit or intended to be used in distilling spirits. In order to give it such effect as will show any reason for its insertion in the statute, it must be construed to intend, at least, that all personal property which is knowingly and voluntarily permitted by its owner to remain on any part of the premises, and which is actually used, either in the unlawful business, or in any other business openly carried on upon the premises, shall be forfeited, even if he has no participation in or knowl-

edge of the unlawful acts or intentions of the person carrying on business there; and that persons who entrust their personal property to the custody and control of another at his place of business shall take the risk of its being subject to forfeiture if he conducts, or consents to the conducting of, any business there in violation of the revenue laws, without regard to the question whether the owner of any particular article of such property is proved to have participated in or connived at any violation of those laws. The present case does not require us to go beyond this; or to consider whether the sweeping words "all personal property" must be restricted by implication in any other respect, for instance, as to personal effects having no connection with any business, or as to property stolen or otherwise brought upon the premises without the consent of its owner.

The significance of the omission of all restrictions in point of ownership, and in point of fitness or intention for the unlawful use, in the second provision concerning personal property, is clearly brought out by contrasting that provision with the provisions immediately following it, concerning real estate.

The third provision forfeits only "all the right, title or interest of" the distiller "in the lot or tract of land on which the distillery is situated." And the fourth provision forfeits only "all right, title and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same."

Congress has thus clearly manifested its intention that the forfeiture of land and buildings shall not reach beyond the right, title and interest of the distiller, or of such other persons as have consented to the carrying on of the business of a distiller upon the premises.

In the case, on which the attorney for the United States much relied, of *Dobbins's Distillery* v. *United States*, 96 U. S. 395, the jury, under the instructions given them at the trial, had found that the owner of the distillery, whose title was held to be included in the forfeiture for unlawful acts of his lessee, had leased the property for the purpose of a distillery, which brought the case within the provision of the act under

which the condemnation was sought, corresponding to the fourth provision now under consideration. Act of July 20, 1868, c. 186, § 44; 15 Stat. 143.

The intention of Congress, that no interest in land and buildings shall be forfeited, which does not belong to some one who has participated in or consented to the carrying on of the business of distilling therein, is further manifested in the provision of § 3262 of the Revised Statutes, which directs that "no bond of a distiller shall be approved, unless he is the owner in fee, unincumbered by any mortgage, judgment or other lien, of the lot or tract of land on which the distillery is situated, or, unless he files with the collector, in connection with his notice, the written consent of the owner of the fee, and of any mortgagee, judgment creditor, or other person having a lien thereon, duly acknowledged, that the premises may be used for the purpose of distilling spirits, subject to the provisions of law, and expressly stipulating that the lien of the United States for taxes and penalties shall have priority of such mortgage, judgment or other incumbrance, and that in case of the forfeiture of the distillery premises, or of any part thereof, the title of the same shall vest in the United States, discharged from such mortgage, judgment or other incumbrance."

That section clearly indicates that the interest of an innocent mortgagee or other person having a lien on the lot or tract of land on which the distillery is situated would not otherwise be included in a forfeiture for acts of the owner only.

The provisions of the other sections of the Revised Statutes, relied on to support this information, may be more briefly treated.

Section 3258 does not forfeit any land or buildings. But it does forfeit every still or distilling apparatus not registered by the person having it in his possession or custody, or under his control; as well as "all personal property in the possession or custody or under the control of such person, and found in the building, or in any yard or inclosure connected with the building in which the same may be set up." Personal prop-

erty, by whomsoever owned, is thus included in the forfeiture, provided that it is in the possession, custody or control of the distiller, as well as found upon the premises. There is no reason for giving a narrower construction to this enactment than to the second provision of § 16 of the act of 1875, above considered.

Section 3305 provides that in case of omission to keep the books required by law, "the distillery, distilling apparatus, and the lot or tract of land on which it stands, and all personal property on said premises used in the business there carried on," shall be forfeited. This description, taken by itself and literally construed, would include not only the distillery and distilling apparatus, but "the lot or tract of land on which it stands," by whomsoever owned, as well as all personal property on the premises and used in the business there carried on. But it is hard to believe that Congress intended that a forfeiture of real estate, under this section, for not keeping books, should be more comprehensive than the like forfeiture, under the leading section already considered, for the graver offence of carrying on the business of a distiller without having given bond, or with intent to defraud the United States of the tax upon the spirits distilled. The more reasonable construction is that the brief summary of § 3305 was intended to conform substantially, in scope and effect, to the fuller definitions in § 3281, (reënacted in § 16 of the act of 1875,) and to forfeit, without regard to the question of ownership, the distillery and distilling apparatus, and all personal property found on the premises and used in the business there carried on; but, as to the real estate, to forfeit only the right, title and interest of the distiller, and of any persons who participate in or consent to the carrying on of the distillery.

The next question to be determined is from what time the forfeiture takes effect.

By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States,

although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offence is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.

The rule was early applied under statutes enacting that whenever goods, the importation of which was prohibited, should be imported, they should be forfeited; and that if any ship should leave port without clearance or giving bond as required by law, the ship and the cargo should be forfeited. *United States* v. *Coffee*, 8 Cranch, 398; *The Mars*, 8 Cranch, 417. It has been recognized and acted on in cases of goods imported in fraud of the customs laws. *Gelston* v. *Hoyt*, 3 Wheat. 246, 311; *Wood* v. *United States*, 16 Pet. 342, 362; *Caldwell* v. *United States*, 8 How. 366. And it has been steadfastly upheld under the internal revenue laws; in one case, under an enactment punishing by fine and imprisonment any person removing distilled spirits from the distillery contrary to law, with intent to evade the payment of the tax thereon, and providing that spirits so removed should be forfeited; and in another case under an enactment that any person fraudulently executing an instrument required by the internal revenue laws should be punished by fine and imprisonment, and the property to which the instrument related should be forfeited. *Henderson's Distilled Spirits*, 14 Wall. 44; *Thacher's Distilled Spirits*, 103 U. S. 679.

The rule is equally applicable to the statutes now in question. In the act of February 8, 1875, c. 36, § 16, the four provisions, before quoted, relating to forfeiture, follow immediately after the clause prescribing the punishment by fine and imprisonment of the offender, and contain nothing to imply that the forfeiture of all the kinds of property mentioned is not to take effect at one and the same time. The forfeiture, under the first of those provisions, of spirits and wines, stills and apparatus, owned by the offender, is evidently intended to take effect immediately upon the commission of the offence, so as to prevent any subsequent alienation by him before seiz-

ure and condemnation; and the words "wherever found" merely preclude all limit of place, and have no tendency to postpone the time when the forfeiture shall take effect. In the second provision, the restriction to personal property "found in the distillery," or upon the premises of which it is part, is a limit of place only, and does not postpone the forfeiture of such property which is on the premises when the offence is committed; and from what date a forfeiture of personal property not on the premises at the time of the commission of the offence, but brought there afterwards, should take effect, this case does not require us to consider. That the forfeiture of real estate, under the third and fourth provisions, must take effect as soon as the offence is committed, is yet clearer; for those provisions contain nothing which by any possible construction could be supposed to postpone the forfeiture; and by the common law of England, even in the case of the forfeiture of all the real and personal estate of an offender, while the forfeiture of his goods and chattels was only upon conviction and had no relation backwards, the forfeiture of his lands had relation to the time of the offence committed, so as to avoid all subsequent sales and incumbrances. 4 Bl. Com. 387. The forfeitures under §§ 3258 and 3305 of the Revised Statutes are governed by the same considerations.

It remains to apply the provisions of the statutes to the admitted facts of this case.

Stowell claims the real estate and certain machinery and fixtures, as well as a number of butts and a quantity of malt and hops.

The butts were personal property, used in the business of the brewery. Assuming them to have been sold and delivered by Dixon to Stowell before any offence was committed by which a forfeiture was incurred, yet they were suffered by Stowell to remain in Dixon's possession, custody and control, and were upon the premises at the time of the commission of the offence, and found there at the time of the seizure. They were therefore forfeited under each of the sections relied on.

As to the malt and hops, the case is even clearer in favor of the United States; for not only were they intended to be

used in the brewery, and were in the possession, custody and control of Dixon, and upon the premises, both at the time of the commission of the criminal acts and of the seizure, but Stowell acquired no right whatever in them until after such acts had been committed.

Of the real estate, Stowell, more than a year before the unlawful acts began to be committed by which a forfeiture was incurred, took a mortgage from Dixon, subject to a prior mortgage for $1500, and to secure a debt of $2500. This mortgage conveyed a distinct interest in the real estate to the mortgagee; and, by the law of Massachusetts, as between the mortgagor and the mortgagee, vested the fee in the latter, but, subject to the mortgage, and as regarded third persons, left the legal title in the mortgagor. *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386, 441; *Ewer* v. *Hobbs*, 5 Met. 1, 3; *Howard* v. *Robinson*, 5 Cush. 119, 123. As soon as a still was set up on the land, with the mortgagor's knowledge and consent, in violation of the internal revenue laws, the forfeiture under those laws took effect, and (though needing judicial condemnation to perfect it) operated from that time as a statutory conveyance to the United States of all the right, title and interest then remaining in the mortgagor; and was as valid and effectual, against all the world, as a recorded deed. The right so vested in the United States could not be defeated or impaired by any subsequent dealings of the mortgagee with the mortgagor. *Upton* v. *South Reading National Bank*, 120 Mass. 153, 156. The mortgagor's subsequent conveyance of the land by quitclaim deed to the mortgagee, therefore, passed no title as against the intervening right of the United States. But this deed did not have the effect of merging or uniting the mortgage and the equity of redemption in one estate, because, by reason of that intervening right, it was for the interest of the mortgagee that the mortgage should be kept on foot. The quitclaim deed, being void or voidable, left the mortgaged estate exactly where it found it. *Factors' & Traders' Ins. Co.* v. *Murphy*, 111 U. S. 738, 744; *Dexter* v. *Harris*, 2 Mason, 531, 539; *New England Jewelry Co.* v. *Merriam*, 2 Allen, 390; *Stantons* v. *Thompson*, 49 N. H. 272.

It being admitted that the business of a distiller was not carried on with the mortgagee's permission or connivance, and that he did not even know, until after the seizure, that a still had been set up on the premises, it follows, for the reasons already stated in discussing the construction and effect of the statutes in question, that the mortgage is valid as against the United States, and that, so far as concerns the real estate, the judgment of condemnation must be against the equity of redemption only.

As to the boiler, engine, pump, vats and tanks, the forfeiture must be equally limited. As we understand the somewhat ambiguous statement of the facts regarding them, they were upon the premises before the still was set up, and were owned by Dixon, and not by the distillers; and it is not shown that any of them were used or fit to be used in connection with the distillery, which were not already in lawful use in the brewery. In that view, even if they, or some of them, would be trade fixtures as between landlord and tenant, yet, while annexed to the land, they were real estate, and covered by the mortgage. *Kutter* v. *Smith*, 2 Wall. 491; *Freeman* v. *Dawson*, 110 U. S. 264, 270; *Winslow* v. *Merchants' Ins. Co.*, 4 Met. 306; *Bliss* v. *Whitney*, 9 Allen, 114.

The horses, wagons and harnesses claimed by Bevington were personal property, used in the business of the brewery, and were sold and a formal delivery of them made to Bevington by Dixon after the acts had been committed by which a forfeiture was incurred; they were afterwards suffered by Bevington to remain under Dixon's control and in his use, and they were found upon the premises at the time of the seizure. They were, therefore, forfeited under each of the sections relied on by the United States.

Judgment reversed, and case remanded for further proceedings in conformity with this opinion.

CASE *v.* KELLY.

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

No. 2. Argued January 26, 1888. — Decided January 6, 1890.

In the absence of an enabling statute, either general or special, a railroad or other corporation cannot purchase and hold real estate indefinitely, without regard to the uses to be made of it.

A provision in an act of a state legislature that the courts of the State shall be bound to take judicial notice of it after its passage and publication is binding upon the courts of the State, and also in proceedings in the federal courts in the same State.

The rule that the limitation of the power of a corporation in a State to receive and hold real estate concerns the State alone does not apply when the corporation, as plaintiff, seeks to acquire real estate which it is not authorized by law to acquire.

Under the circumstances of this case the trustee is entitled to receive the value of the improvements made by him in good faith upon the real estate in controversy, before being required to convey it.

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

The Green Bay and Minnesota Railroad Company being in the hands of a receiver, namely, Timothy Case, in the Circuit Court of the United States for the Eastern District of Wisconsin, in a suit by the Farmers' Loan and Trust Company, to foreclose a mortgage on said railroad, said receiver was directed by the court to take possession of all the property, real and personal, of said company, namely, its road-bed, lands, right of way and all its other property and rights whatsoever, with authority to bring suits in the name of the railroad company as he should be advised by counsel to be necessary. Under this order Mr. Case, as receiver, brought the present suit, stating that he sues in behalf of said railroad company, and as receiver, the defendants David M. Kelly, Henry Ketchum and George Hiles and the Arcadia Mineral Spring Company, a corporation created by the laws of the State of Wisconsin.

The allegations of the bill are, that the defendants Kelly,

Ketchum and Hiles, who were officers of the railroad company during its period of construction, had procured numerous donations of land from citizens who were interested in the construction of the road, along its line, intended to be for the use and benefit of the railroad company, and to assist it in such construction. The fundamental allegation of the bill is, that these defendants, representing to the persons who made the donations that they were officers of the road, and soliciting these grants for the benefit of the road, took the conveyances to themselves individually; that they did this in a fraudulent manner, by making the grantors in the conveyances believe that they, as the officers of the company, could receive the conveyances for the benefit of the road; and that either the grantors did not really know to whom the conveyances were made, or were induced to believe that when made the grantees held the lands as a trust for the benefit of the road. These defendants not recognizing this trust, and the conveyances on their faces being merely conveyances to the individuals, either separately or collectively, to wit: to Ketchum, Kelly and Hiles, who now refuse to convey to the company or to admit its right to the lands, this suit is brought to have a declaration of the trust made by the court and a decree ordering conveyances by the defendants of the land to the corporation.

It is further alleged that the mortgage in process of foreclosure in the court under which Case is acting as receiver covered all the lands of the corporation, and would cover these lands if the title of the corporation in them was established.

The defendants Kelly, Ketchum and Hiles filed answers, in which they denied all fraud or deception, denied that they held the lands in trust for the railroad company, and denied the right of plaintiff to any relief. A decree for want of an answer was taken *pro confesso* against the Arcadia Mineral Spring Company; replications were filed to the answers, the case was put at issue as regards the three principal defendants, and an immense mass of testimony, documentary and otherwise, was taken.

Statement of the Case.

The Circuit Court on the hearing was of opinion that the conveyances made by various persons to Kelly and Ketchum and Hiles of the lands described in the bill were made by the grantors and received by the defendants as contributions to the railroad company to aid in the construction of its road; and that if the railroad company had authority by law to receive such grants and to hold such real estate, it would be entitled to the relief sought in the bill in this case. But being also of opinion that, by the laws of Wisconsin, and under its charter, it could only receive and hold lands for the defined purposes of the road, it held that only such lands as were necessary and proper for the immediate use of the road could be recovered in this suit. *Case* v. *Kelly*, 13 Am. and Eng. Railroad Cas., 70. It therefore entered the following interlocutory decree:

"This day came the parties, by their counsel, and, on consideration of the pleadings and proofs in this cause and the arguments of counsel thereon, it is ordered, adjudged and decreed by the court that the complainant is entitled to recover from the defendants the title and possession of all such lands mentioned in the bill of complaint as are required by the railroad company for right of way, depot buildings and other necessary railroad purposes, as described and limited in the charter of the company, and that the bill of complaint as to all other portions of the lands described therein be dismissed.

"For the purpose of ascertaining what lands are required for right of way, depot grounds and other railroad purposes, as above stated, and also the extent and value of any improvements made by defendants, this cause is referred to Hon. James H. Howe, as special master of this court, who will take such additional proof as either party may offer upon reasonable notice, the evidence to close by the first day of October next, and the report of the master to be filed herein by the 20th day of October next. The master will accompany his report with such reasons as he may deem proper in support of the conclusions reached by him. For that purpose he may visit the premises and report the result of his personal examination."

The master made his report, accompanied by the testimony,

to which exceptions were taken both by Case, the receiver, and by the defendants Hiles and Kelly, which exceptions were overruled by the court, and a final decree entered. From this the present appeal is taken.

That decree, after specifying certain pieces of land which the court considered as necessary and proper to the road for its use in the way of track, right of way, depots and other similar, proper and necessary uses, ordered the conveyance of these pieces of land by Kelly and by Ketchum and by Hiles and by the Arcadia Mineral Spring Company to the railroad company. It also directed a master to ascertain and report the value of certain improvements made by Hiles upon a portion of this property, and report the same to the court, for which Hiles was to be paid in case complainant should elect to take such improvements.

Mr. Walter C. Larned (with whom was *Mr. Herbert M. Turner* on the brief) for appellant.

I. The act of incorporation of the Green Bay and Minnesota Railroad Company being a private act, the court cannot take judicial notice of it. *Atchison & Topeka Railroad* v. *Blackshire*, 10 Kansas, 477; *Horn* v. *Chicago &c. Railroad*, 38 Wisconsin, 463; *Perry* v. *New Orleans &c. Railroad*, 55 Alabama, 413; *Mandére* v. *Bonsignore*, 28 La. Ann. 415; *Broad Street Hotel Co.* v. *Weaver*, 57 Alabama, 26; *Chapman* v. *Coleby*, 47 Michigan, 46; *Workingmen's Bank* v. *Converse*, 33 La. Ann. 963; *Hailes* v. *State*, 9 Texas App. 170; *Leland* v. *Wilkinson*, 6 Pet. 317.

II. The State alone, by a proceeding *quo warranto*, has the right to inquire whether the corporation was exceeding its powers in the acquisition of real estate. *National Bank* v. *Matthews*, 98 U. S. 621; *Leazure* v. *Hillegas*, 7 S. & R. 313; *Cowell* v. *Springs Co.*, 100 U. S. 55; *Goundie* v. *Northampton Water Co.*, 7 Penn. St. 233; *Runyan* v. *Coster*, 14 Pet. 122; *The Banks* v. *Poitiaux*, 3 Randolph, 136; *S. C.* 15 Am. Dec. 706; *McIndoe* v. *St. Louis*, 10 Missouri, 575; *Gold Mining Co.* v. *National Bank*, 96 U. S. 640.

Citations for Appellee.

III. The trustee was not entitled to improvements. *Thompson* v. *Thompson*, 16 Wisconsin, 91; *Waterman* v. *Dutton*, 6 Wisconsin, 265.

Mr. George H. Noyes, for Hiles, appellee, cited: *People* v. *Ottawa Hydraulic Co.*, 115 Illinois, 281; *Covington Draw Bridge Co.* v. *Shepherd*, 20 How. 227, 232; *Junction Railroad Co.* v. *Bank of Ashland*, 12 Wall. 226; *People* v. *River Raison &c. Railroad Co.*, 12 Michigan, 389; *S. C.* 86 Am. Dec. 64; *State* v. *Lean*, 9 Wisconsin, 279; *Clark* v. *Janesville*, 10 Wisconsin, 136; *Rochester* v. *Alfred Bank*, 13 Wisconsin, 432; *S. C.* 80 Am. Dec. 746; *Castello* v. *Landwehr*, 28 Wisconsin, 522; *Rensselaer & Saratoga Railroad* v. *Davis*, 43 N. Y. 137; *Cook* v. *Berlin Woolen Mills Co.*, 56 Wisconsin, 643; *S. C.* 43 Wisconsin, 433; *Benson* v. *Cutler*, 53 Wisconsin, 107; *Hadley* v. *Stewart*, 65 Wisconsin, 481; *Blodgett* v. *Hitt*, 29 Wisconsin, 169; *Green* v. *Dixon*, 9 Wisconsin, 532; *Pratt* v. *Thornton*, 28 Maine, 355; *S. C.* 48 Am. Dec. 492; *Spindler* v. *Atkinson*, 3 Maryland, 409; *S. C.* 56 Am. Dec. 755.

On January 26, 1888, the day on which the cause was argued, the death of Henry Ketchum, one of the appellees, was suggested, and on July 19, 1888, the appearance of his heirs and legal representatives was filed in the cause. On October 9, 1888, a motion was submitted asking for an order making the heirs and legal representatives of said Ketchum parties to the cause. On October 15th an order was made requiring the filing of affidavits to the effect that the persons named in the papers were the sole heirs and legal representatives of said Ketchum, and providing that in default thereof publication be made pursuant to the first section of rule 15. No affidavits having been filed pursuant to that order, on December 19, 1888, an order of publication was issued, and on July 6th, 1889, the order was duly published, and proof of publication thereof was filed in the clerk's office of this court September 12, 1889. The parties having failed to come in within the first ten days of this term, pursuant to the requirement of said rule, the appellant, on the 28th October, 1889, moved that such order or direction might be passed by the court as to it should seem

proper, or the exigency of the case might require. On the 4th of November, 1889, the court ordered that unless application should be made on behalf of the parties or either of them on or before the third Monday of that month to submit further argument in the case, it would be taken and considered upon the arguments then filed. No such application was made.

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

The principal question suggested by this appeal is, whether the complainant, as representing the railroad company, can maintain a suit for these lands; that is to say, whether the company was endowed by the legislature of Wisconsin with a capacity to receive an indefinite quantity of lands, with no limitation upon their use, or upon their sale, or whether they were limited to the lands necessary to such uses as were appropriate to the operations of a railroad.

It is not pretended that there is any general statute of the State of Wisconsin which authorizes either this company or any other corporation to purchase and hold lands indefinitely, as an individual could do, without regard to the uses to be made of such real estate. The charter of the company, approved April 12, 1866, Private Laws Wis. 1866, c. 540, p. 1331, authorizes it to acquire real estate, namely, the fee simple in lands, tenements and easements, for their legitimate use for railroad purposes. It is thus authorized to take lands 100 feet in width for right of way, and also such as is needed for depot buildings, stopping-stages, station-houses, freight-houses, warehouses, engine-houses, machine-shops, factories, and for purposes connected with the use and management of the railroad. This enumeration of the purposes for which the corporation could acquire title to real estate must necessarily be held exclusive of all other purposes, and, as the court said at the time of making its interlocutory decree, "it was not authorized by its charter to take lands for speculative or farming purposes."

It must be held, therefore, that there was no authority under the laws of Wisconsin for this corporation to receive an

indefinite quantity of lands, whether by purchase or gift, to be converted into money or held for any other purposes than those mentioned in its act of incorporation.

To this view of the subject counsel urges several objections. The first of these which we will notice is that the charter of the corporation is a private act of which the court cannot take judicial notice, and that as it was not pleaded nor offered in evidence, nor otherwise brought to the attention of the court, it could not be the foundation of its judgment. To this there are two sufficient answers. The first of which is, that if the statute creating this corporation gave it no power to receive and hold lands in the manner we have mentioned, then it had no such power by virtue of any law of the State of Wisconsin; for a corporation, in order to be entitled to buy and sell, to receive and hold, the title to real estate, must have some statutory authority of the State in which such lands lie, to enable it to do so, and the absence of such provision in the law of its incorporation does not create any general statute which authorizes any such right.

Another answer is, that in the charter of the railroad company itself, Laws of Wisconsin of 1866, chapter 540, section 14, it is expressly enacted that "this act is hereby declared to be a public act, and shall take effect and be in force from and after its passage and publication." To this it is replied by counsel for appellant that the statute of Wisconsin cannot make that a public law which in its essential nature is a private law. However this may be, we do not doubt the authority of the legislature of a State to enact that after the passage and publication of one of its statutes the courts of the State shall be bound to take judicial notice of it without its being pleaded or proven before them. This rule, thus prescribed for the government of the courts of the States, must be binding in proceedings in federal courts in the same State. Indeed, the distinction between public and private acts has become very artificial and shadowy since legislative bodies have adopted the principle of publishing in printed form all statutes which they pass. Some of the States keep up the distinction by making a difference in the manner in which

public and private acts shall be published, and in such cases this difference is to be observed and may become of some consequence, but the power of the legislature to declare in any case that after the passage and publication of any of its laws they shall be judicially noticed as public acts cannot, we think, be doubted.

It is next objected to the principle adopted by the court that the limitation upon the power of the corporation to receive land is one which concerns the State alone, and the title to such lands in a corporation can only be defeated by a proceeding in the nature of a *quo warranto* on behalf of the State. The case of *National Bank* v. *Matthews*, 98 U. S. 621, is strenuously relied on to support this view. We need not stop here to inquire whether this company can hold title to lands, which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in the railroad company, or attempted to be so vested. The railroad company is plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title and to own such lands, and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company in violating the law and enabling the company to do that which the law forbids.

Another alleged error in the decree of the court relates to that part of it which authorizes Hiles to recover the value of his improvements if the corporation chooses to take the improvements. We do not think this objection sufficient to reverse the decree. In the first place, the right of the plaintiff to have this land is not based so much upon the ground of the defendants having purchased it for the benefit of the road

as upon the offer of counsel of Hiles to convey it in case he were paid for the improvements. But if we suppose that Hiles held this land in trust for the benefit of the plaintiffs, and is willing to acknowledge that trust, there is no reason why, in a court of equity, when the complainant asserts his right to the land and claims to recover both the title and possession from his trustee, he should not pay the value of the improvements which that trustee has placed upon it. It is further to be observed that the option is given to complainant to take these improvements with the land or to reject the improvements and take the land without them, in which latter case he is merely required to give the owners of the improvements access to the land for the purpose of removing them. If he desires the improvements he can keep them by paying for them. Hiles paid for the land when he got the title, and we see nothing unjust or inequitable in his receiving compensation for improvements made in good faith upon the land which he is now willing to convey to the company, if the company chooses to take them at their appraised value.

We are urged to consider that if this decree is affirmed dismissing the bill of the railroad company, the defendants will be left in the possession of property fraudulently acquired, of considerable value, for which they gave no consideration. The answer to this is, that such question cannot be raised by the plaintiff in this case, because, having no right to take the property, it is not injured by a decree of the court which fails to grant such right. The other questions must be between the defendants in this case and those from whom they took deeds of conveyance, or such other parties, public or private, as may show that they have an interest in the controversy.

The decree of the Circuit Court is

Affirmed.

Mr. Chief Justice Fuller did not hear this case and took no part in its decision.

RICHARDSON'S EXECUTOR *v.* GREEN.

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

No. 19. Argued October 17, 18, 1889. — Decided January 13, 1890.

While the relations of a party towards a corporation, as a director and officer, or as its principal stockholder, do not preclude him from entering into contracts with it, from making loans to it, and from taking its bonds as collateral security, a court of equity will refuse to lend its aid to their enforcement unless satisfied that the transaction was entered into in good faith, with a view to the benefit of the company as well as of its creditors, and not solely with a view to his own benefit.

In the case of a corporation, as in that of a natural person, any conveyance of its property, without authority of law, in fraud of its creditors, is void as to them.

The capital stock of a corporation, when it becomes insolvent, is, in law, part of its assets, to be appropriated to the payment of its debts, and if any part of it has been issued without being fully paid up, a court of equity may require it to be paid up.

R. loaned to a railroad company $100,000 upon its notes, and received from it 1250 shares of paid-up stock as a bonus, and 200 mortgage bonds of the company, and the practical control of the board of directors of the corporation. After this he demanded of this board 100 more bonds, as further collateral, and they agreed to it. Subsequently he proposed to the board that he would make further advances if they would put 300 more bonds in his hands as collateral, and they assented to this proposal; but he never made such further advances. These 400 bonds, together with other bonds and property of the company, then came into his hands at a time when he was acting as and claiming to be the treasurer of the company. After the insolvency of the company took place, R. claimed to hold these 400 bonds individually, as collateral for his debt; *Held*, that, as between him and the other creditors of the company, he could not, under the circumstances, hold them as collateral for his debt.

At the last term of court motions to dismiss *Nelson* v. *Green* and *Nelson et al.* v. *Green* were argued at the same time with a motion to dismiss this case, and the motion was granted as to those cases, and denied as to this case. After the entry of judgment counsel in those cases moved on behalf of the appellants that the sum of $450 which had been deposited with the clerk for copies of the record should be refunded; *Held*, (the judgment being announced in delivering the opinion and announcing the judgment in this case,) that $200 of that amount should be refunded.

In equity. The previous proceedings in this case on a motion to dismiss are reported in *Richardson* v. *Green*, 130

U. S. 104. The case now made, at the hearing on the merits, is stated in the opinion.

Mr. Lyman D. Norris for appellants.

Mr. Daniel P. Hays for Sickles and Stevens, appellees.

Mr. T. J. O'Brien for Sickles, Stevens and the Wrought Iron Bridge Company, appellees.

Mr. J. Hubley Ashton, (with whom was *Mr. Henry M. Dechert* and *Mr. Henry T. Dechert* on the brief,) for Bower & Co. and Betz, appellees.

Mr. D. A. McKnight for Thomas W. Ferry, Edward P. Ferry and Nims, appellees.

Mr. Justice Lamar delivered the opinion of the court.

This is a suit in equity, originally brought in the Circuit Court of the United States for the Western District of Michigan by Ashbel Green and William Bond, trustees, against the Chicago, Saginaw and Canada Railroad Company, a corporation organized under the laws of the State of Michigan, to foreclose a mortgage given by that company on all its property and effects of whatsoever description to the plaintiffs, to secure the payment of 5500 of its bonds of $1000 each, payable to said trustees or bearer.

The suit was commenced on the 16th of November, 1876. A receiver was at once appointed. The company made no defence, but numerous parties, holders of the bonds thus secured, and others with claims of various kinds against the company, with leave of the court, intervened in the case, and were allowed to prove their respective claims. The controversy resolved itself into a contest for priority among the respective claimants in the distribution of the proceeds of the sale of the mortgaged property thereafter to be made.

On the 30th of June, 1882, a decree was rendered that the bill was well filed, and that the complainants were entitled to

a foreclosure. The matter was referred to a master to take testimony and report upon the validity, and also the priority, of the various claims filed. On the 6th of November, 1882, the master filed his report, in which he divided the claims presented into four classes, numbered A, B, C and D, respectively. In class C he placed the claims secured by the first mortgage bonds, and the amount of said security. In this class was the claim of Benjamin Richardson for money furnished to aid in the construction of the road, amounting, with interest, to $273,282.87, secured, as the master found, by 200 bonds, amounting to $374,904. Exceptions to this report were filed by nearly all of the parties interested, but, in the main, it was confirmed by the court, and, on the 3d of May, 1883, a decree was entered on the question of priority among the respective claimants in the distribution of the fund arising from the sale of the mortgaged property, which had occurred. This decree, among other things, provided that, after certain expenses and certificates given by the receiver had been paid, the remainder of the fund should be ratably divided among the bond claimants, and where the bonds were held as collateral security no greater amount should be allowed than sufficient to satisfy the debt thus secured.

Benjamin Richardson's claim is in this class. It was for 600 bonds claimed as collateral security for the amount of money advanced by him for the construction of the road, and for 1105 other bonds which he alleged he had redeemed from certain bankers in London; and, in another form, was for 3574 bonds which he had purchased at an execution sale in New York City that was had to satisfy a judgment he had obtained against the railroad company in the Court of Common Pleas for the city and county of New York for the amount of his debt with interest. The decree allowed Richardson's claim as respects 200 of the 600 bonds, but rejected it as to the other bonds claimed by him.

Subsequently, that decree was amended by the decree of October 8, 1883, so as to correct certain mistakes in the calculation of interest upon the bonds. The effect of this latter decree was to reduce Richardson's share of the proceeds by

$2173.91 from what the original decree of May 3, 1883, had made it; and also to reduce in like manner the share of one of the other intervening parties, the Wrought Iron Bridge Company of Canton, Ohio, by the sum of $183.60.

Four separate appeals were taken from the decree of May 3, 1883, and an appeal was also taken by Richardson and his assignee, Henry Day, from the amended decree of October 8, 1883. At the last term of the court all the appeals were dismissed except that of Richardson and Day from the decree of October 8, 1883. *Richardson* v. *Green*, 130 U. S. 104. Before the decision at the last term of the court was rendered Richardson died, and his legal representatives are now prosecuting the appeal. As a decision upon the questions presented by this appeal affects the distribution decreed by the court below of $137,154.94 among the other claimants, it becomes necessary to examine the facts and to give consideration to the equities which relate to the claims of all those parties.

The Chicago, Saginaw and Canada Railroad Company was organized about the 4th of December, 1872, under an act of the Michigan legislature approved April 18, 1871, with a capital stock of $4,200,000, divided into 4200 shares, for the purpose of building a railroad from St. Clair, in the eastern part of the State, to Grand Haven, on Lake Michigan, a distance of about 210 miles.

The original incorporators each subscribed for 210 shares of this capital stock, five per cent of which was paid in. This was all the stock ever subscribed, and all the money paid in on any stock. Nine of those corporators were elected directors, all but three of whom resigned in 1873, transferring their stock, it is supposed, to those three. The stock subscribed and the money paid on it may, for all practical purposes, be considered as having afterwards disappeared from the organization.

For the purpose of raising funds to build the road and equip it the corporation executed a mortgage and issued 5500 seven per cent bonds of $1000 each, due in 30 years, with interest payable semi-annually, and placed them in the hands of its executive committee to be put upon the market. Before selling any of its bonds, however, the corporation borrowed con-

siderable money from various parties, giving the bonds as security, at the rate of two dollars in bonds for every dollar borrowed, and also giving, as a bonus, to the parties from whom the money was borrowed, a large amount of capital stock.

These loans were negotiated with the following persons: (1) With a syndicate of four persons in Philadelphia, designated in the record as the "Philadelphia parties," who advanced money to the company on the terms above stated until the amount aggregated, according to the report of the master, $143,629.62. The number of bonds pledged to the syndicate, as collateral security for this loan, was 462. The Philadelphia parties claimed before the court below to be entitled to prove all the bonds held by them to the full amount of principal and accrued interest, and to a share in the proceeds of the fund derived from the sale of the mortgaged property to the extent of their loans and the interest thereon. The decree of the court allowed their claim, to the extent of 287.26 bonds only, that number being twice the amount of the principal advanced. The second party from whom the company obtained a loan was the appellant Richardson, upon terms hereinafter stated. The third party was George G. Sickles of New York, who loaned the company $100,000 upon a pledge of 250 of the bonds, as collateral, and also a bonus of $100,000 full paid stock. Afterwards his son, Daniel E. Sickles, bought 163 of the bonds for the consideration that he would assume and pay the debt due his father, which he afterwards did. The bonds held by the elder Sickles were then returned to the company. Daniel E. Sickles claimed that, as an innocent purchaser, he was entitled to priority over the other collateral bondholders, who were the directors, officers and promoters of the company. His demand for priority was disallowed by the court; and the only part of his claim that was allowed was, that as innocent purchaser of the 163 bonds he might prove them to the full amount of his principal and interest.

After the negotiation for the three loans above named, Thomas M. Nelson contracted with the company to ballast and iron the first twenty miles of the road from the town of

St. Louis west, etc. This contract he substantially performed. Two months afterwards he entered into another contract with the company to clear, grub and grade the road, and build bridges and culverts on the second division thereof to Lakeview. Part of this second contract was assigned to the claimant Soule. This contract also, with the exception of a part of the grading, was performed by these parties. They had no security for the payment of their services. They relied on the solvency of the company and the assurances of Richardson, who was then a director and the treasurer of it, that arrangements were perfected for the payment of the work as fast as it progressed. The company failed to pay the amount due on these contracts. Suits were brought, judgments obtained, and executions issued which were returned *nulla bona.* They presented their claims to the master, who reported in their favor, and allowed them priority over the bondholders to the amount of $16,342.68. Exceptions to this finding having been filed were sustained by the court below, which allowed their debt, but put it in the fourth class, to be paid *pro rata* from any surplus remaining after the bondholders were paid.

The claim of the Wrought Iron Bridge Company was based upon a contract with the railroad company, under which it built an iron bridge across the Saginaw River, which was sold by the receiver for the sum of $20,000. This claimant was allowed a share in the proceeds of the sale on the basis of the 66 bonds of which it had become the actual owner.

The claim of Stevens was based upon a *bona fide* loan made to the company by him. By the decree of the court below he was allowed a share in the funds to the extent of 32 bonds.

Any modification of the decree of the court below favorable to the contention of the appellants herein will correspondingly reduce the allowances made to the above-mentioned claimants.

The loan of $100,000 by Richardson to the railroad company, on which he obtained the first 200 bonds, as collateral, was made by him on the 31st of March, 1875, under a contract with the company, in which he agreed to lend the corporation that amount upon certain terms, which, among others, were, (1) that the company should deliver to him 200 mortgage

bonds of $1000 each; (2) that, within fourteen days, he should be elected a director of the company; (3) that John A. Elwell, of New York City, should be employed by the company at a salary of $2500 and his personal expenses, for the purpose of superintending the construction of the road and of looking after the interests of Richardson; (4) that as a further collateral security the company should lease the first 20 miles of the road as soon as it should be completed, and assign such lease to Richardson, and should also assign to him all the subsidy notes pertaining to that division of the road, he to retain all the money derived from the lease and subsidy notes, and render unto the company, at final settlement, seven per cent interest upon the money so received; and (5) that the company should execute and deliver to Richardson 1250 full paid shares of capital stock of $100 each. Although, on its face, this was to be fully paid up stock, it was understood that no money was to be actually paid for it, the consideration, as recited in the agreement, being Richardson's services, good offices and influence in favor of the company in the financial world.

In the contest for priority among the claimants before the master the judgment creditors of the corporation claimed that they entered into the contracts with the company whereon they obtained their judgments relying upon its resources, which they were led to think were ample by reason of the amount of the outstanding paid up stock in the hands of such responsible stockholders and owners as Richardson and the Philadelphia parties; and it was contended that those stockholders should not be allowed to share in the proceeds arising from the sale of the mortgaged property on the basis of the bonds held by them, as collateral, unless they should first pay to the company the full amount of the shares of stock of which they had held themselves out to the world as the owners. The master concurred in this view, but, because there was no proof of the actual value of the stock, he declined to make any deduction from the amount due to Richardson, but limited his claim to the 200 bonds. The appellants received the amount which the decree allowed, but appealed to this court from that decree, contending that they were entitled to a

larger share of the fund on the basis of the additional 400 bonds.

To determine the merits of the contention of the appellants, a somewhat minute statement of the circumstances which led the board of directors to vote to Richardson those 400 additional bonds becomes necessary. The 1250 shares of paid up stock for which he paid nothing made him the largest stockholder in the company. He and the Philadelphia parties held all the outstanding stock with the exception of a few shares, and the entire and absolute control of the corporation was thus in their hands. Richardson soon controlled a majority of the board, and dominated its proceedings. He was at once made a director, according to the contract. He became chairman of its executive committee and its managing director. The lease of the first 20 miles of the road was made to him, and that part was turned over to his possession. He had John A. Elwell, his coadjutor and representative, elected a director, who became, successively, secretary, auditor and a member of the executive committee of the board. He afterwards caused Ambrose, Hamm and Cooper to be put upon the board of directors, to each of whom he assigned small portions of his stock to enable them to vote in furtherance of his schemes and interests; and the 1250 shares of paid up stock were in due time issued to him.

At a meeting of the board of directors, held on the 5th of July, 1875, although he had advanced nothing beyond his original loan already secured, he demanded 100 additional bonds, representing $100,000, as collateral, and the board, yielding to his exactions, unanimously adopted a resolution directing the secretary and treasurer to deposit with him that number of bonds for such purpose. Within one month afterwards, to wit, August 5, 1875, Richardson was unanimously elected treasurer of the company, to fill the vacancy caused by the resignation of E. P. Ferry, which he had tendered, to take effect when his accounts should be adjusted by the executive committee, and when the personal obligations he had made should be settled, or he be relieved therefrom. The board of directors also voted to Richardson 300 additional first mort-

gage bonds as collateral. How he accomplished these results, to wit, the resignation of Ferry, his own election as Ferry's successor, and also the vote to himself of the 300 bonds, is very fully explained by the testimony of the directors and of Richardson himself. Ferry thus states why he resigned: "Mr. Richardson said to me that he thought that, advancing as much money as he did, he not only should have all the moneys of the company in his hands, as treasurer, to see that they were properly disbursed, but also the securities of the company under his control." In explanation of his tendering his resignation, to take effect upon being settled with and relieved from personal responsibility, he says: "I had endorsed the company's notes to the amount of about $20,000, and furnished them with money, both. I had advanced the company, as treasurer, from my own funds, in the neighborhood of $10,000. I think it was $9000 and something." He further stated that Mr. Richardson assured him that the adjustment and release asked for should be effected. He also stated that Richardson had never performed those promises. The vote of 300 bonds to Richardson is thus explained by himself: "I demanded of the board 300 more bonds, and got them by resolution of the board." The resolution directed a conveyance to Richardson of 300 of the first mortgage bonds of the company upon the consideration of advances made and to be made by him. The fact is, that the sum actually advanced by him in addition to his original loan, for which these 400 bonds were successively voted to him, amounted to a little over $31,000. The terms upon which he made the demand for these additional bonds are stated by Ferry and Elwell. At this same meeting, held August 3, 1875, Richardson introduced the following resolution:

"*Resolved*, That the president and secretary be, and they are hereby, authorized to execute a contract for the purpose of grading, tying and bridging the company's located road from its western terminus to Lakeview."

Elwell testifies that Richardson stated to the board that if they would, by resolution, authorize him to receive 300 additional bonds of the company of $1000 each, he would make

further advances to a sufficient amount for the company to go on with the extension and equipment of the road to Lakeview. It was in consideration of these promised advances that the resolution was adopted directing the 300 bonds to be conveyed to him. This promise was never fulfilled by Richardson. Elwell testifies that he advanced no money for the extension or equipment of the road to Lakeview, nor did he purchase any iron or other material to be used on that part of the road. Both Richardson and Ferry, according to their own testimony, considered that the action of the board of directors placed Richardson, as treasurer, in the shoes of Ferry, at least with regard to the custody of the unissued bonds of the company. These bonds, 2985 in number, were deposited with a Safe Deposit Company in New York City, subject to the control of Ferry. Ferry immediately drew an order on that company authorizing it to deliver to Richardson all the bonds belonging to the railroad company deposited with it, and, through Elwell, gave to Richardson the key to the vault in which they were kept, in order that he (Richardson) might take possession of them. Armed with this order to the Trust Company to deliver the bonds to him, as treasurer, Richardson, on the 20th of August, 1875, in company with Messrs. O. W. Child and M. J. Baney, proceeded to the place of business of the Trust Company, and, his order having been accepted by that company, took possession of all the unissued bonds there belonging to the railroad company, Messrs. Child and Baney counting them and making a memorandum of them. This memorandum of the number counted included the 400 now claimed by the appellants, as collateral security. On the following day, Richardson, claiming to act under the authority of the aforesaid resolutions of the board of directors voting the 400 bonds to him as collateral security, and the order of the president of the company to Ferry, separated 400 of the bonds from the remainder, (Child and Baney assisting him,) and placed them in a tin box, which he afterwards kept in his personal possession.

On the 11th of October, 1875, Richardson was appointed managing director, irrevocable, and chairman of the executive

committee; and, on the 12th of the same month, he gave to Ferry the following receipt:

"Received of Edward P. Ferry, treasurer of the Chicago, Saginaw & Canada Railroad Co., twenty-two hundred and eighty-nine (2289) of the first-mortgage bonds of the company, numbered as detailed by the memorandum above, dated New York, Aug. 20, '75, and signed by O. W. Child & M. J. Baney, placed in my custody as chairman of the executive committee of said R. R. Co., in accordance with the resolution of the board of directors passed Oct. 11, '75, for custody, disposal, or sale.

"BENJAMIN RICHARDSON.

"Endorsed: Benjamin Richardson. Receipt — 2289 bonds. Oct. 12, 1875."

The list thus receipted for by Richardson as chairman of the executive committee, included the 400 bonds numbered from 3201 to 3600, inclusive, which he previously, as before stated, had separated from the original number, and claimed had been pledged to him as collateral security. It is safe to say, too, we think, that no one interested in the affairs of the company, except Elwell and Richardson, knew, at that time, that Richardson was holding those 400 bonds in any other capacity than as treasurer of the company. Elwell testified that at the meeting of October 11, 1875, none of the other parties knew that Richardson had those bonds.

W. J. Kelley testified that, at a meeting of the board of directors on that day, the understanding of the board derived from Richardson's statement was, that he had in his possession only the original 200 bonds as collateral. Secured in the possession of the company's bonds, Richardson refused to comply with the conditions on which Ferry had resigned. On the 16th of August, 1875, Elwell enclosed in a letter to Richardson two renewal notes to be substituted for those on which Ferry had been endorser, saying: "Mr. Ferry demands that, before he resigns his office of treasurer and turns everything over to you, you shall endorse the renewal notes person-

ally, as he did the original ones, and it is for that purpose that I send them, and they ought to be returned to Mr. Ferry immediately, so as to reach him the last of this week, to be used in the bank next Monday. . . . Mr. Ferry gave me one of his envelopes stamped, in which you had better enclose the notes to him. . . . Mr. Ferry has agreed to turn over to you or to deliver to me for you on your order all books, accounts, vouchers, etc., in his possession as treasurer upon the two notes being returned to him endorsed." Richardson remonstrated with Elwell against this, and on the 21st of the same month he replied to Elwell's next letter, declining to sign the notes, and declaring himself indifferent to Elwell's retention of the books and papers pertaining to the office of treasurer, inasmuch as he (Richardson) had already become not only the treasurer, but also the receiver, advancer and chief controller of the company. On that day the board of directors voted 120 bonds to Richardson as a bonus. Counsel for the appellants insist in their brief that this was done in his absence, and that he repudiated this resolution and refused to take those bonds. This statement is in conflict with that of Kelley, president of the company, who testifies that Mr. Richardson was present, and, so far from objecting to the vote of the bonus to him of 120 bonds, he insisted upon it; but as they make no claim on these bonds as a bonus, it is not necessary to add anything further, except the remark that the action of the board illustrates the readiness of the directors to subserve all Richardson's wishes.

At the meeting of July 8, 1876, the board, in anticipation of the foreclosure of the mortgage then determined on, passed resolutions auditing the entire account of Richardson against the company, and declared the sum of $185,584.18 to be due to him from it. Another resolution, unanimously adopted, ratified and approved the bonds issued to him for that aggregate sum. A third resolution was adopted directing the secretary to execute and deliver to him the notes of the company at seven per cent, payable at such times as could be agreed on with Richardson, and that there should be embodied in the note an authority to the holder, in default of payment, to sell such

bonds without notice and with the right to become himself the purchaser if sold at public sale. On the same day, immediately after the meeting, Elwell, the secretary, gave to Richardson those notes, in which were recited the numbers of the 600 bonds under discussion. On the same day, Richardson and Ferry addressed to the mortgage trustees a written request to institute proceedings to foreclose the mortgage. These notes, on the 17th of July, at the request of Richardson, were torn up by Elwell, and demand notes, bearing the same date, substituted therefor. Forthwith Richardson commenced suit against the corporation in the Court of Common Pleas of the city of New York on those notes; and on the 12th of August obtained the judgment hereinbefore mentioned. Execution was issued on that judgment, and, as the proofs clearly show, the sheriff levied upon and sold all the bonds of the company which had been placed in Richardson's custody, namely, the 600 bonds which he claimed had been pledged to him as aforesaid, and 2974 other bonds, including 1105 which he claimed to have redeemed from a bank in London. At the sale Richardson purchased all those bonds at the price of $50 each, $178,700. A short time after this sale and purchase, to wit, November 16, 1876, this suit for foreclosure was commenced, and as an intervener therein he claimed that by virtue of his purchase at the sheriff's sale he became the absolute owner of the entire 3574 bonds. Afterwards he appears to have confined his claim to the 600 bonds alleged to have been held by him originally as collateral security and the 1105 bonds just referred to. It would seem from the briefs filed in this court by counsel on behalf of appellants that the claim here is confined to the 400 bonds above described.

In view of all the facts and circumstances presented by this record we are unable to see any such superior equity arising out of the transactions of Richardson with this company as entitles him to a priority over the other creditors in the distribution of the fund in question; or anything in his mode of getting possession of the 400 bonds which gives him a better claim to them than that of the other creditors. While we may not be prepared to concur with the master in some of the rea-

sons upon which he based his report, yet we do not think either that report or the decree of the court below confirming it contains any error of which the appellants can complain.

Richardson's relation to the subject matter of this controversy was threefold: (1) That of a creditor of an insolvent corporation claiming for his debt priority of payment over those of all other creditors, out of the fund arising from a foreclosure sale of the mortgaged property; (2) that of a director and officer of that corporation at the time his debt against it was created; and (3) that of the largest shareholder of its capital stock. Undoubtedly his relation as a director and officer, or as a stockholder of the company, does not preclude him from entering into contracts with it, making loans to it and taking its bonds as collateral security; but courts of equity regard such personal transactions of a party in either of these positions not, perhaps, with distrust, but with a large measure of watchful care; and unless satisfied by the proof that the transaction was entered into in good faith, with a view to the benefit of the company as well as of its creditors, and not solely with a view to his own benefit, they refuse to lend their aid to its enforcement. In *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587, 588, Mr. Justice Miller, delivering the opinion of the court, said: "That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others."

In relation to the rights and liabilities of a stockholder, this court said in *Sawyer* v. *Hoag*, 17 Wall. 610, 620, Mr. Justice Miller also delivering the opinion of the court: "We think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation." Proceeding to show that this trust cannot be defeated by a simulated payment of the stock subscription, nor by any device short of

an actual payment in good faith, he concluded with these words: "It is, therefore, but just that, when the interest of the public or of strangers dealing with this corporation is to be affected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be subject to a rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him."

In the case last cited the stockholder nominally paid the stock subscription, but the money was immediately taken back as a loan, and it was claimed by him as a valid payment. The transaction was characterized by the court as a "fraud upon the public who were expected to deal with them."

In *Graham* v. *Railroad Co.*, 102 U. S. 148, 161, this court said, Mr. Justice Bradley delivering the opinion: "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."

In the more recent case of *Wabash, St. Louis & Pacific Railway Co.* v. *Ham*, 114 U. S. 587, 594, it was said by this court, speaking through Mr. Justice Gray: "The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of property of the debtor, without authority of law, and in fraud of existing creditors, is void as against them."

Can the transactions between Richardson and the insolvent

corporation of which he was largely the owner and controller, especially with respect to the claim he is urging in this case, stand the test of the fairness and good faith which, as a director and stockholder, he owed to the corporation, its creditors and *bona fide* bondholders? His very first transaction with the corporation, by which he introduced himself into it as a stockholder, was an illegal and fraudulent act. We refer to the agreement on the part of the company to issue to Richardson 1250 shares of bonus stock. At the time this agreement was made and the stock issued in pursuance thereof, the statutes of Michigan provided: "That it shall not be lawful for any railroad company, existing by virtue of the laws of this State, nor for any officer of any such company, to sell, dispose of, or pledge any shares in the capital stock of such company, nor to issue certificates of shares in the capital stock of such company until the shares so sold, disposed of, or pledged, and the shares for which such certificates are to be issued shall have been fully paid." 2 Comp. Laws Mich. par. 7757.

We have seen that all the acts of Richardson as director, stockholder, chairman of the executive committee and treasurer, all of which offices he held at one time, had their origin in this bonus stock. After having exercised all the privileges and powers of a stockholder in the corporation, it cannot be seriously contended that he is to be held exempt from the liabilities which would attach to a *bona fide* shareholder who has taken shares purporting to be paid up, but which in truth are not paid up. The case of *Scovill* v. *Thayer*, 105 U. S. 143, 153, 154, bears a close analogy to this. Mr. Justice Woods delivering the opinion of the court in that case said: "The stock held by the defendant was evidenced by certificates of full-paid shares. It is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it. . . . But the doctrine of this court is, that such a contract, though binding on the company, is a fraud in law on its creditors, which they can set aside; that when their rights intervene and their claims are to be satisfied, the stockholders can be

required to pay their stock in full." The same rule is laid down in *Ex parte Daniell*, 1 DeG. & J. 372. In that case the directors of the company allotted to themselves a number of shares by a resolution that the shares so allotted were to be treated as paid up stock in full. Daniell, one of the directors, was not present at the time the resolution was adopted, but he afterwards accepted the shares allotted to him. An order having been made for winding up the company, assessments were made upon those shares for the purpose, it is supposed, of paying the debts of the company. It was held that Daniell was liable to those assessments to the same extent as if the resolution had not provided that the shares were to be treated as paid up stock.

The principle underlying all of the decisions which we have cited upon this point is, that the capital stock of a corporation, when it becomes insolvent, is in law assets of the corporation, to be appropriated to the payment of its debts; and that creditors have the right to assume that the stock issued by the corporation and held by its stockholders as paid up stock had been paid up, or, if unpaid, that a court of equity, at the instance of the proper parties, could require it to be paid up. In the case now before us, the bonds claimed by the appellants were voted to Richardson by his associate directors, every one of whom owed his election to the holders of this bonus stock alone. The total amount of the advances made by him, for which these bonds are collateral, is very little larger than one-half of the amount of the stock which he had as paid up stock. If the stock given to him and the Philadelphia parties had been really paid up stock, there would have been no insolvency on the part of this corporation.

Irrespective of the question whether he can be made liable for the face amount of this stock, or for its proved value, the facts we have detailed certainly do not entitle his claim to outrank that of any *bona fide* creditor, whether secured or unsecured, in the matter of distribution.

The master found that the 400 bonds had never been delivered by the company to Richardson in his individual capacity, in pledge as collateral security for the moneys advanced. It

is strenuously argued in behalf of appellants that the evidence taken under the order of the court, after the findings of the master had been made and his report filed, for the purpose of explaining the receipt given by Richardson to his predecessor, Ferry, is sufficient to overturn the master's report on that point. That evidence was before the court when it rendered the decree complained of, and, so far as the decree shows, it was not regarded as essentially modifying the facts as found by the master. We think the conclusion of the court was correct. We do not deny that cases may arise in which, if everything were admitted to be fairly done, with the knowledge and acquiescence of the company, such a personal possession as that which Richardson obtained, although not such an actual delivery as the board had intended and directed, might be considered as equivalent to a legal delivery. But under the special circumstances of this case, in view of the unfair means employed by Richardson to have the entire body of the company's bonds transferred from the custody of Ferry into his own custody, and the clandestine manner in which he took out the 400 from that body, not only without notice of the fact to the company, but with an implied, if not an expressed, denial of the transactions, we do not think that he can be regarded as standing in the position of a legal and equitable pledgee; or that he ever acquired, as such pledgee, a lien on the 400 bonds. But even if there could be any doubt on this point, Richardson himself by his own act has removed it. He waived and abandoned all claim to any lien, as a pledgee, by his voluntary surrender and delivery of the bonds to the sheriff of the county of New York, as the property of the company, to be sold under execution. If the 400 bonds were not delivered to Richardson, as we think the court below correctly held, it follows that the unissued bonds were not subject to attachment or to execution as valid and binding obligations against the company, and that Richardson's purchase at the sheriff's sale vested in him no title or ownership in them.

Counsel for the appellants in their brief put not a little stress upon the fact that Richardson's claim is based upon the

advance of actual money for the enterprise to the full amount of $185,584.18. The answer to this is, that the decree of the court below recognized his claim to the entire amount and gave him his ratable share of the proceeds of the sale, upon the footing of the 200 bonds delivered to him, up to the amount of $273,282.87. We are of the opinion that that decree gave him the fullest measure of allowance to which he could possibly be justly entitled.

It is hardly necessary to say much with respect to the claim of Richardson to the 1105 bonds alleged by him to have been redeemed as aforesaid. Upon this question the master says:

"The case is briefly this: The board of directors sent one of their number as financial agent to Europe with authority to negotiate a sale of bonds. While there, to defray expenses, he borrowed a sum of money from a Mr. Stevens and pledged to him 50 of the bonds as collateral security; these, together with the 1105 bonds, this agent and Stevens deposited with the Consolidated Bank of London, with agreement that the bonds should not be delivered to any one without the joint order or consent of the agent and Stevens. The agent was withdrawn from Europe; the indebtedness due Stevens was allowed to go to protest, and the directors were fearful Stevens would not only sell the bonds pledged, but would also sell the 1105, and the purchaser obtain title to the whole, and thus render nearly valueless the securities held by the directors. To prevent this calamity Richardson advanced the money, charged it to the company, and received its notes therefor. He then attempted to do what he was fearful might have been done in London, namely, levy upon and sell the 1105 bonds, and himself become the purchaser at a nominal sum, and thus gain an unconscionable advantage over other bondholders. It is a general rule that fraud or any gross misconduct on the part of the salvors in connection with the property saved will work a forfeiture of the salvage, and the evidence in this case with reference to the means employed to obtain a levy on the bonds in question and the sale thereof fully justifies us in the conclusion which I have reached that no allowance ought to be made to Richardson by way of 'equitable salvage' for the

moneys advanced by him to obtain the return of the bonds to the company."

We fully agree with what is said by the master, and do not deem it essential to add anything further on that point.

As regards the decree of October 8, 1883, we think it sufficient to say that the corrections made by it, as regards the calculations of interest on the bonds, in the original decree were correct and proper, and were warranted by the law. The original decree had allowed interest on some of the bonds owned and held as collateral security from the date of their issue. The amendatory decree simply allowed such interest to be calculated from the date when the bonds were actually delivered to the owners and holders of them. Such correction was eminently legal and just.

The decree of the court below is affirmed.

NELSON *et al. v.* GREEN. NELSON *v.* GREEN. Appeals from the Circuit Court of the United States for the Western District of Michigan. Nos. 947 and 1027 of October term, 1888.

These cases were heard with *Richardson* v. *Green* on the motions to dismiss at the last term of court, and are reported with it in 130 U. S. 104. After the announcement of the judgment on the motions on the 13th of March, 1889, *Mr. William A. McKenney,* on behalf of Nelson, on the 22d of April, 1889, moved to have four hundred and fifty dollars refunded, which Nelson had been obliged to deposit with the clerk. After announcing the foregoing opinion and judgment,

MR. JUSTICE LAMAR delivered the opinion of the court on this motion.

In connection with this case a motion has been made by Thomas M. Nelson, one of the intervening petitioners in the suit, whose appeals were dismissed at the last term of the court, to have refunded to him the sum of $450 deposited with the clerk under the order of this court of January 14, 1889, requiring such deposit to be made in order that his counsel might have two printed copies of the record.

Statement of the Case.

This motion is based upon the following grounds:

(1) That the petitioner was not one of the principal litigants in the appeals, but was simply an intervening judgment creditor, having no interest in the matter of the controversy between the bondholders and the trustees;

(2) That his demand is quite small when compared with the amount involved in the controversy between the principal litigants; and

(3) That he was not a necessary party to the determination of the questions involved in the controversy between the main parties to the litigation, but simply intervened as the only manner in which he could protect his rights under his judgment against the company for work and labor performed for it in the construction of the road.

The motion is granted to the extent of $200.

MASON *v.* PEWABIC MINING COMPANY.

PEWABIC MINING COMPANY *v.* MASON.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

Nos. 168, 240. Argued December 17, 18, 1889. — Decided January 13, 1890.

On the dissolution of a corporation at the expiration of the term of its corporate existence, each stockholder has the right, as a general rule, and in the absence of a special agreement to the contrary, to have the partnership property converted into money, whether such a sale be necessary for the payment of debts, or not.

Directors of a corporation, conducting its business and receiving moneys belonging to it after the expiration of the term for which it was incorporated, will be held to an account on the dissolution and the final liquidation of the affairs of the corporation in a court of equity.

IN EQUITY. The court, in its opinion, stated the case as follows:

These are an appeal and a cross-appeal from a decree of the Circuit Court of the United States for the Western District of

Statement of the Case.

Michigan. On March 31st, 1884, there was filed in the Circuit Court for that district the bill of complaint of Thomas G. Mason, William Hart Smith and Sullivan Ballou, who describe themselves as citizens of the State of New York, against The Pewabic Mining Company, a corporation existing under the laws of the State of Michigan, Johnson Vivian, a citizen of the State of Michigan, and Henry Billings, Thomas H. Perkins, Alden B. Buttrick and Daniel L. Demmon, citizens of the State of Massachusetts, and The Pewabic Copper Company, a corporation created under the laws of the State of Michigan. The bill professes to be filed on behalf of the complainants above named, and of all the stockholders in the Pewabic Mining Company who may desire to join herein and take the benefit of the proceedings of the court. The bill is too long to copy in full in this opinion. The substance of it is, that the complainants were members of the Pewabic Mining Company, a corporation organized under the laws of Michigan on the 4th day of April, 1853, with a capital stock of twenty thousand shares of $25 each, afterwards increased to forty thousand, which was invested in a copper mine near Houghton, Michigan. The complainants allege themselves to be, at the time of the filing of the bill, the owners of 2650 shares of the stock of the company. They allege that the charter of the company expired on April 4th, 1883, but that nevertheless the directors who were elected in March of that year, disregarding this fact, continued the ordinary business of the corporation, and among other things made an assessment of $88,000 on the capital stock, which was paid. They further allege that at the annual meeting of the stockholders on the 26th of March, 1884, for the election of directors and for other purposes, the following resolutions were adopted, against the vote and the protests of the complainants:

"*Resolved*, That the board of directors be authorized to sell and dispose of the property of the company for a sum not less than $50,000; that the president and secretary be authorized to execute all conveyances necessary to carry out the contract for the sale of the property of this company made by the board of directors, and that the board of directors be,

and hereby are, authorized to close up the business of the company.

"*Resolved*, That it is the sense of this meeting of stockholders that the property shall be sold to a new corporation, organized under the laws of Michigan, on the basis of forty thousand shares, and that the stock of such new corporation shall be issued to and received by the stockholders of this company in payment for the same, stockholders to have the right to receive [an] equal number of shares in [the] new company, if they so elect, on surrendering certificates of this company, within thirty days after April 12, 1884, and in case a stockholder does not take stock of the new corporation he is to receive his *pro rata* share in money."

The vote in favor of the adoption of these resolutions was 27,919 shares against 6754 shares in the negative. On the same day a certificate of incorporation under the laws of Michigan was executed, forming the Pewabic *Copper* Company, and filed two days afterwards. Its capital stock was also forty thousand shares at $25 each, which was taken up by the defendant corporators, who, with two others, were named as the first directors, being the same persons who controlled the old company. The third article of this association declared that no cash is actually paid on the capital stock. The cash value of real and personal property conveyed to the company contemporaneously with its organization is the sum of $50,000.

The constitution of the State of Michigan declares, Article XV, section 10, that no corporation, except for municipal purposes or for the construction of railroads, plank-roads and canals, shall be created for a longer time than thirty years. A statute of Michigan (1 Howell's Statutes, § 4867) enacts that all corporations whose charters shall expire by their limitation, or shall be annulled by forfeiture or otherwise, shall nevertheless continue to be bodies corporate for the term of three years after the time they would have been so dissolved, for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their concerns, dispose of and convey their property, and

divide their capital stock, but not for the purpose of continuing the business for which such corporations have been or may be established.

The bill prayed for an injunction and restraining order forbidding the defendants from carrying out the purpose of transferring the property of the Pewabic Mining Company to the new corporation. It also prayed for the appointment of a receiver to take charge of the effects of the Pewabic Mining Company, that they might be sold, the debts of the company paid, and the remainder of the proceeds distributed among the stockholders.

The defendants answered the bill, admitting substantially its principal allegations, stating as an excuse for continuing the operations of the company beyond the period of its thirty years' existence that they were not aware of the time when that thirty years expired. They assert that, in all they had done since, they had acted honestly and fairly, and had the assent of the majority of the stockholders; that the arrangement under which they proposed to transfer the property of the Pewabic Mining Company to the new corporation was one which met with the approval of the majority of the stockholders, and a still greater preponderance of the stock in the corporation. They allege that they offered to pay the dissenting stockholders for their stock at the rate of $50,000 for the value of the whole stock, which was the sum at which it was to be sold to the new company, or to permit them to exchange it for stock in the new company, share for share, and they insist that this was just and fair, and what they had a right to do, and that they should still be permitted to carry out this plan. They say that the complainants, in refusing to accede to the new arrangement, are acting in the interest of rival copper mining companies, whose mines adjoin that of the Pewabic Company, and that their object is to force a sale at public auction, when those companies, whose shareholders are wealthy, will have an unfair advantage in purchasing the property below its real value. They repeat their offer to pay the defendants for the *pro rata* value of their stock, estimating the whole at $50,000, or to exchange it for stock in the new company. Replication was filed.

The court refused the appointment of a receiver, but did issue a restraining order against the defendants to prevent the consummation of the sale to the Pewabic Copper Company. A special master was appointed, with all the powers usually possessed by a master in chancery, to whom the case was referred, with directions to ascertain what assets and property, real and personal, were owned by the defendant, the Pewabic Mining Company, on the 26th day of March, A.D. 1884, and also what assets and property, real and personal, said company owned at the time of filing the bill of complaint in this case, on the 31st day of March, 1884; and also to ascertain the fair cash value of such assets and property at the several dates aforesaid, distinguishing the value of the several parcels and kinds of said property, and for that purpose to take testimony and make report thereon.

The report of the master shows the value of the property belonging to the Pewabic Mining Company to be much greater than $50,000, and the defendants concede it to be worth $75,000, which they profess a willingness to pay. The master took many depositions as to the value of this property on the part of plaintiffs and defendants, and he says: "Between the extremes of the testimony I find it very difficult to say what these several parcels of property are worth, but for the purposes of this reference I find the value of the several classes as follows:

"Stamp mill plant, including pumps and buildings	$40,000 00
Mining equipment, not including dwellings	35,000 00
89 dwellings	30,000 00
Wood and timber	27,398 59
Mining supplies	30,000 00
Cash on hand	9,197 32
Copper on hand	43,757 66
Water front, stamp mill site	2,000 00
Real estate and mining rights	250,000 00
Mine buildings and shops	30,000 00
Bills receivable	1,058 67
"Total	$498,412 24"

Statement of the Case.

Upon final hearing, the Circuit Court decreed that the equity of the case is with the complainants, and "that the affairs of the Pewabic Mining Company be and are hereby decreed to be wound up." It then directs that "all the assets and property of the Pewabic Mining Company be sold at public vendue for cash to the highest bidder: *Provided*, That if at such sale the bid for the aggregate of the property and assets should not be in excess of $50,000 above the amount of the debts of the company existing at the time of the sale, then the arrangement for the sale of such property, made at the stockholders' meeting in Boston on the 26th day of March, 1884, as set up in defendants' answer, shall be carried out under the direction of the special master, hereinafter designated, and as provided by the resolution adopted by the stockholders at said meeting." . . . It was further ordered that "the cause be referred to Peter White, as special master, for the following purposes, and with the following powers, to wit: That said master proceed to ascertain the assets and property and the amount of debts of said Pewabic Mining Company, and to this end he may consider the evidence already taken in the cause, and may further, upon notice to the solicitors of the different parties, set days for hearing evidence, and either party may produce witnesses as in the ordinary course of a master's proceedings, and that he report to this court the proceedings and findings thereon, and that after ascertaining the assets and debts of said company, and making report thereof to this court, said master shall proceed to the sale of said property at public vendue to the highest bidder in one body, after giving the notice required by law, and that he make report thereof. And it is further decreed that if the highest bid for such property at such sale shall amount to more than $50,000 over and above the indebtedness of said Pewabic Mining Company, then that the arrangement for the sale of said property, made at said meeting of the stockholders at Boston, must be set aside and held to be null and void, and the Pewabic Mining Company be enjoined perpetually from selling to the Pewabic Copper Company, and that company is enjoined from receiving its transfer of the property." It is then decreed "that the

defendants Vivian, Billings, Perkins, Buttrick and Demmon, directors of said Pewabic Company, are not liable to pay to complainants and other stockholders any money received by them since the expiration of the charter of said Pewabic Mining Company, April 4, 1883, and that an accounting by said defendant directors is hereby denied as to such expenditure made by them after the expiration of the charter."

The complainants in the bill prayed an appeal from that part of the decree which refused the prayer for an accounting on the part of the directors of the Pewabic Company of their transactions since the date of the expiration of the charter. This appeal is numbered on our docket 168. The defendants all appeal from the principal decree, which directs a sale of the property and the distribution of its proceeds among the stockholders of the Pewabic Mining Company in the event that a sum is bid for all of said property in a lump which exceeds the amount of the indebtedness of the Pewabic Mining Company and the sum of $50,000, which appeal is numbered 240.

Mr. Don M. Dickinson (with whom was *Mr. Alfred Russell* on the brief) for Mason and others.

Mr. Thomas H. Talbot for Pewabic Mining Company and others.

The complainants have no absolute right to a compulsory sale. An order of sale in such a case as this is, like an injunction, "not of right but of grace." *Sparhawk* v. *Union Passenger Railway Co.*, 54 Penn. St. 401, 454. A court of equity is not bound to decree a dissolution, even when a majority of directors and stockholders request it to be done. *In re Niagara Ins. Co.*, 1 Paige, 258. The necessity for it must be clearly shown. In the present case it is entirely unnecessary. Fifteen-sixteenths of the stockholders resist the application for it. "The particular interest of the few must give way to the general interest of the many." *In re Niagara Ins. Co.*, *ubi supra.* The evidence shows that it is for the interest of the stockholders that the business should be continued. The interest

of the complainants in a compulsory sale is adverse to that of a great majority of the stockholders. Under such circumstances the interest of a "corporator" is not to be considered, *Irvin* v. *Susquehanna &c. Turnpike Co.*, 2 Penn. 466, 471; but the interest of the "company." *Filder* v. *London, Brighton &c. Railway Co.*, 1 Hem. & Mil. 489; *Waterbury* v. *Merchants' Union Express Co.*, 50 Barb. 157, 168; *Belmont* v. *Erie Railway Co.*, 52 Barb. 637, 662. The court will always inquire whether the bill is really a stockholders' bill, or whether it is brought to serve other purposes of the complainant. *Forrest* v. *Manchester, Sheffield &c. Railway Co.*, 4 De G. F. & J. 126, 130; *Sparhawk* v. *Union Passenger Railway Co.*, 54 Penn. St. 401, 454; *Ffooks* v. *Southwestern Railway Co.*, 1 Sm. & Gif. 142, 167; *Robson* v. *Dodds*, L. R. 8 Eq. 301.

It is within the power of a court of equity to permit the majority to go on with the work, imposing such terms in favor of the minority as it shall deem just. *Lanman* v. *Lebanon Valley Railroad*, 30 Penn. St. 42; *State* v. *Bailey*, 16 Indiana, 46, 51; *S. C.* 79 Am. Dec. 405.

The case nearest parallel to the present is to be found in England. A quarry company being in process of liquidation, with a view to winding up, the holders of a majority of the paid-up shares conceived the purpose of continuing the company, and accordingly, by a representative, prayed that "all further proceedings in relation to the winding up of the company might be stayed." One holder of a hundred and fifty shares, considering the experiments intended by the majority, and for which he would have to contribute, "would be fruitless," appeared in opposition to the above prayer, being "desirous that the liquidation should proceed, and the slate quarry sold in the usual way." He was not allowed to stand in the way of the wishes of his fellow-shareholders. He was merely allowed fourteen days "within which to elect whether he will remain a member of the company, or will retire and give up his shares;" on his election to retire, the value of his interest to be referred for ascertainment, and thereafter to be paid by the petitioner. *In re South Barrule Slate Quarry Co.*, L. R. 8 Eq. 688.

Opinion of the Court.

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

With regard to the main question, the power of the directors and of the majority of the corporation to sell all of the assets and property of the Pewabic Mining Company to the new corporation under the existing circumstances of this case, we concur with the Circuit Court. It is earnestly argued that the majority of the stockholders — such a relatively large majority in interest — have a right to control in this matter, especially as the corporation exists for no other purpose but that of winding up its affairs, and that, therefore, the majority should control in determining what is for the interest of the whole, and as to the best manner of effecting this object. It is further said that in the present case the dissenting stockholders are not compelled to enter into a new corporation with a new set of corporators, but have their option, if they do not choose to do this, to receive the value of their stock in money.

It seems to us that there are two insurmountable objections to this view of the subject. The first of these is that the estimate of the value of the property which is to be transferred to the new corporation and the new set of stockholders is an arbitrary estimate made by this majority, and without any power on the part of the dissenting stockholders to take part, or to exercise any influence, in making this estimate. They are therefore reduced to the proposition that they must go into this new company, however much they may be convinced that it is not likely to be successful, or whatever other objections they may have to becoming members of that corporation, or they must receive for the property which they have in the old company a sum which is fixed by those who are buying them out. The injustice of this needs no comment. If this be established as a principle to govern the winding up of dissolving corporations, it places any unhappy minority, as regards the interest which they have in such corporation, under the absolute control of a majority, who may themselves, as in this case, constitute the new company, and become the pur-

chasers of all the assets of the old company at their own valuation.

The other objection is that there is no superior right in two or three men in the old company, who may hold a preponderance of the stock, to acquire an absolute control of the whole of it, in the way which may be to their interest, or which they may think to be for the interest of the whole. So far as any legal right is concerned, the minority of the stockholders has as much authority to say to the majority as the majority has to say to them, "We have formed a new company to conduct the business of this old corporation, and we have fixed the value of the shares of the old corporation. We propose to take the whole of it and pay you for your shares at that valuation, unless you come into the new corporation, taking shares in it in payment of your shares in the old one." When the proposition is thus presented, in the light of an offer made by a very small minority to a very large majority who object to it, the injustice of the proposition is readily seen; yet we know of no reason or authority why those holding a majority of the stock can place a value upon it at which a dissenting minority must sell or do something else which they think is against their interest, more than a minority can do.

We do not see that the rights of the parties in regard to the assets of this corporation differ from those of a partnership on its dissolution, and on that subject Lindley on Partnership says, Book 3, c. 10, § 6, sub-div. 4, page 555, original edition:

"In the absence of a special agreement to the contrary, the right of each partner on a dissolution is to have the partnership property converted into money by a *sale*, even though a sale may not be necessary to the payment of debts. This mode of ascertaining the value of the partnership effects is adopted by courts of equity, unless some other course can be followed consistently with the agreement between the partners, and even where the partners have provided that their shares shall be ascertained in some other way, still, if owing to any circumstance their agreement in this respect cannot be carried out, or if their agreement does not extend to the event which has in fact arisen, realization of the property by a sale is the only alternative which a court of equity can adopt."

The authorities cited by Lindley for this proposition amply support it.

In the case of *Crawshay* v. *Collins*, 15 Ves. 218, a commission of bankruptcy had been issued against Noble, one of the members of a partnership engaged in the business of manufacturing pumps and engines. The assignee of Noble filed a bill, asking for a division of the assets, which consisted largely of patents, and upon a very full argument upon the subject, Lord Eldon says: "Another mode of determination of a partnership is not by effluxion of time, but by the death of one partner." The question then is, he says, "whether the surviving partners, instead of settling the account and agreeing with the executor as to the terms upon which his beneficial interest in the stock is still to be continued, subject still to the possible loss, can take the whole property, do what they please; and compel the executor to take the calculated value. That cannot be without contract for it with the testator. The executor has a right to have the value ascertained in the way in which it can be best ascertained, by sale."

In 17 Ves. 298, a case more analogous to the present one came before the court. In that case (*Featherstonhaugh* v. *Fenwick*) the parties were engaged as partners in the business of manufacturing glass, and after deciding one of the questions in the case, to wit, that the partnership was dissolved or should be dissolved by decree of the court, the master of the rolls, Sir William Grant, proceeded to say: "The next consideration is whether the terms upon which defendants proposed to adjust the partnership concern were those to which the plaintiff was bound to accede. The proposition was that a value should be set upon the partnership stock, and that they should take his proportion of it at that valuation, or that he should take away his share of the property from the premises. My opinion is clearly that these are not terms to which he is bound to accede. They had no more right to turn him out than he had to turn them out, upon those terms. Their rights were precisely equal: to have the whole concern wound up by a sale, and a division of the produce. As therefore they never proposed to him any terms which he was bound to accept, the

consequence is that, continuing to trade with his stock, and at his risk, they come under a liability for whatever profits might be produced by that stock." He then refers to the case of *Crawshay* v. *Collins*, just cited, with approval.

In the case of *Hale* v. *Hale*, 4 Beavan, 369, Joseph Hale, who carried on the trade of a brewer in partnership with George Hale and two other persons, died leaving a will. The master of the rolls, in discussing the relative rights of the surviving partners and the executor of the deceased, says in regard to the executor: He "is not obliged to submit to the statement of the account which is made by the continuing partners; clearly not, in the absence of all contract to that effect, which is admitted to be the case here. He has a right to say, 'I must have the actual value of my partnership assets determined, and though it may be very inconvenient for you to ascertain the value in the mode prescribed by the law, yet if we cannot otherwise agree, I must have it ascertained by the only mode by which it can be ascertained accurately, namely, by a sale for what it will fetch in the market.'"

The next case, *Wilde* v. *Milne*, 26 Beavan, 504, was a case bearing a closer analogy to this, because the parties were engaged in the mining business, to wit, working a colliery. In consequence of some disagreements, the plaintiff gave notice to dissolve, and instituted this suit to have the partnership wound up. He did not allege that there were any debts, but prayed that the partnership property might be sold and applied to the payment of the debts, and that the surplus might be divided. This was resisted by defendant Milne alone. On the hearing, the master of the rolls, Sir John Romilly, said: "I am clearly of opinion that this is an ordinary case of partnership, and when it is dissolved or terminated, any one of the partners is entitled to have the whole assets disposed of. In this case it is admitted that any one can put an end to the partnership. The result is, that that which forms the partnership assets must be disposed of for the purpose of settling the account between the partners. I consider this established by *Crawshay* v. *Maule*, 1 Swanston, 518, 526." And after pointing out the difficulty in the mode of dividing the property, which consisted

partly of real estate, of the use of the shaft, of the machinery and engines, etc., he said: "The court is compelled by the exigency and circumstances of these cases to direct a sale."

The case of *Rowlands* v. *Evans* and *Williams* v. *Rowlands*, 30 Beavan, 302, arose out of another partnership in mining business very much like the case before us. Some of the partners interested desired that the mining business might be carried on by a miner and receiver, but the plaintiff objected to this. One of the partners had become a lunatic, and his business was in the hands of a committee, and the question was whether the partnership be dissolved and the property sold, or a receiver appointed to conduct the operations of the concern. The master of the rolls said: "I do not think the point is touched by the decisions. The difficulty is this: the court cannot compel persons to be in this situation;—either to carry on business with the committee of a lunatic, subject to all the inconveniences of having a manager appointed by the court, . . . and subject to appeal to the House of Lords. . . . No one would bid for a share in a mine to be carried on with the committee of a lunatic, nor could the value of the share of the lunatic be properly ascertained under such circumstances. I think that the value of the whole must be ascertained by a sale by auction, and that some indifferent person well acquainted with these matters should be directed to sell the property, and that all parties should have liberty to bid."

In the case of *Burdon* v. *Barkus*, 4 De G., F. & J., 42, which came before the Lords Justices of Appeal from the Vice Chancellor's Court, Lord Justice Turner, delivering the opinion said: "The next inquiry to be considered is the inquiry as to the valuation of the stock and plant, which is objected to on both sides; by the defendant, as importing that the stock is to be valued; by the plaintiff, as importing that it might be valued as the stock of a going concern. I think that both of these objections are well grounded. There was no agreement between these parties for the stock and plant being taken by either party at a valuation on the termination of the partnership, and in the absence of such an agreement a partner cannot, as I conceive, be compelled to take, nor can he com-

pel his copartner to take, the stock at a valuation. Each is entitled to have it ascertained by sale, and as to the defendant's claim to have the stock dealt with as the stock of a going concern, I do not see how it can be maintained, for the plaintiff is certainly not bound to continue the concern."

These English authorities would seem to be conclusive of the right of the plaintiffs in the present case to have a sale of the property. The same doctrine is very decisively announced in the case of *Dickson* v. *Dickinson*, 29 Connecticut, 600. This was a bill in regard to a partnership, the main object of which was to procure the division of certain property which the plaintiffs claimed to belong to the partnership. The court said: "The plaintiff has no equitable claim to a decree in his favor. So far as the bill asks for the division of the property, we had supposed this object could only be effected by a sale of the property and a conversion of it into cash, and then dividing the cash, because as between partners there is no other mode, where they do not agree, of ascertaining the value of partnership property or of disposing of it."

The court then refers to the case of *Sigourney* v. *Munn*, 7 Connecticut, 11, and cites the language of Judge Hosmer in that case, as follows: "In every case in which a court of equity interferes to wind up the concerns of a partnership, it directs the value of the stock to be ascertained in the way in which it can best be done, that is, by the conversion of it into money. Every party may insist that the joint stock shall be sold."

In the Supreme Court of Michigan, in *Godfrey* v. *White*, 43 Michigan, 171, which is mainly important as showing the concurrence of the highest court of the State under whose laws the Pewabic Mining Company was organized, that court decided that certain lands which constituted a part of the partnership property should not be partitioned between the partners, but should be sold and the proceeds divided. See also *Briges* v. *Sperry*, 95 U. S. 401.

We do not say that there may not be circumstances presented to a court of chancery, which is winding up a dissolved corporation and distributing its assets, that will justify a decree ascertaining their value, or the value of certain parts of them,

and making a distribution to partners or shareholders on that basis; but this is not the general rule by which the property in such cases is disposed of in the absence of an agreement.

We are of opinion that on the appeal of the defendants from this part of the decree, it must be affirmed.

However honest the directors may be who conducted the business of this corporation for nearly a year after its dissolution without any attempt to wind it up, but who, on the contrary, assessed $88,000 on the shares of the stock and collected it, and did much other of the ordinary business of mining operations, it seems to us eminently proper that in this proceeding, by which the court undertook to wind up the affairs of the corporation, to pay its debts, and to realize its assets and distribute them among the shareholders, these directors should account for what they did in that time. We do not decide, nor do we think it was necessary for the court below to have decided, whether those directors had anything in their hands which should be accounted for in the final liquidation of the partnership affairs, or whether they had not. It is the object of such an inquiry as that sought by complainants in their bill to ascertain this fact. It was not a part of the matter referred to the commissioner in the former reference. We think it is a proper subject of investigation to be made by a master to whom the matter shall be referred, with express directions to ascertain and report upon that subject. See authorities already cited.

That part of the decree, therefore, of the court denying this relief is reversed, and the case remanded to the court below with directions to appoint a master, and to direct such an inquiry and report.

Bradley, J. I think the opinion of the court asserts too strongly the right of the minority stockholders to insist upon a sale. In many cases in this country a valuation of the interest of a minority, under the direction of the court, has been deemed a proper method of ascertaining their share in the assets, where a sale would be prejudical to the interests of the whole.

Mr. Justice Gray was not present at the argument, and took no part in the decision of this case.

SAN FRANCISCO CITY AND COUNTY *v.* ITSELL.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 1506. Submitted January 8, 1890. — Decided January 20, 1890.

This court has no jurisdiction to review a judgment of the highest court of a State, unless a federal question has been, either in express terms or by necessary effect, decided by that court against the plaintiff in error.

THE original action was ejectment, brought in the Superior Court of San Francisco by the city and county of San Francisco to recover a tract of land in San Francisco, of which the plaintiff alleged that it was seized in fee, and entitled to the possession, in trust for the use of the State of California and of the people of the city and county as a public plaza, park, common or square, and commonly known as Hamilton square or plaza.

It was duly pleaded in the answer, and found by the court, (a trial by jury having been waived by the parties,) as follows:

1st. In July, 1869, a compromise was agreed upon between the city and one Tompkins, who claimed this and other land, by which the officers of the city, under an ordinance of the board of supervisors, executed a conveyance of the land to Tompkins, and in consideration thereof Tompkins conveyed to the city the other land claimed by him. On February 19, 1870, the ordinance and conveyances were ratified and confirmed by act of the legislature of California. On July 23, 1869, Tompkins conveyed this land to one Palmer.

2d. On September 11, 1869, Palmer brought an action against the city, in a court of the State having jurisdiction of the subject matter and of the parties, alleging that he had the title in fee and the right of possession of this land, and that the city claimed an adverse interest, but had no title, interest or estate therein; the city appeared and denied his allegations, and the issue was decided in his favor, and it was adjudged that he was the lawful owner in fee simple absolute of the land, and that the city had no estate, right, title or interest

therein, and be forever restrained and debarred from asserting any. That judgment remained in full force and effect. And on May 21, 1875, Palmer conveyed this land to one Hollis, from whom by mesne conveyances these defendants claimed title.

The Superior Court gave judgment for the defendants, and the plaintiff appealed to the Supreme Court of California, which affirmed the judgment; and the plaintiff sued out this writ of error.

Opinions of the Supreme Court Commissioners and of the Supreme Court of the State were filed in the case and copied in the record. The Commissioners were of opinion that under the rule stated in *Hoadley* v. *San Francisco*, 50 California, 265; *Sawyer* v. *San Francisco*, 50 California, 370, and *Hoadley* v. *San Francisco*, 70 California, 320, and 124 U. S. 639, the compromise could not be sustained, for want of power in the city to make it; but that the judgment pleaded was a bar, according to the decision in *San Francisco* v. *Holliday*, 76 California, 18. The Supreme Court was of opinion that the judgment should be affirmed, for the reasons given in the opinion of the Commissioners. 22 Pacific Reporter, 75.

Mr. John L. Love, *Mr. George Flournoy* and *Mr. J. B. Mhoon*, for plaintiff in error.

Mr. Thomas D. Riordan, *Mr. William Leviston* and *Mr. George Leviston*, for defendants in error.

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

This court has no jurisdiction to review a judgment of the highest court of a State, unless a federal question has been, either in express terms or by necessary effect, decided by that court against the plaintiff in error. Rev. Stat. § 709; *New Orleans Waterworks* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18; *De Saussure* v. *Gaillard*, 127 U. S. 216; *Hale* v. *Akers*, 132 U. S. 554.

In the present case, the record of the pleadings, findings of

fact and judgment shows that it was unnecessary for that court to decide, and its opinion filed in the case and copied in the record shows that it did not decide, any question against the plaintiff in error, except the issue whether the former judgment rendered against it and in favor of the grantor of the defendants in error was a bar to this action. That was a question of general law only, in nowise depending upon the Constitution, treaties or statutes of the United States. *Chouteau* v. *Gibson*, 111 U. S. 200.

Writ of error dismissed for want of jurisdiction.

SCHRADER *v.* MANUFACTURERS' NATIONAL BANK OF CHICAGO.

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

No. 1370. Submitted January 9, 1890. — Decided January 20, 1890.

A national bank went into voluntary liquidation in September, 1873. Before that it had become liable to a state bank, as guarantor on sundry notes, made by a third person, and which were discounted for it by the state bank. In August, 1874, transactions took place between the maker of the notes and the state bank, and the person who acted as the president of the national bank, whereby the maker was released from further liability on the notes, but such acting president attempted to continue, by agreement, the liability of the national bank as guarantor. In a suit begun in October, 1876, a judgment on the guaranty was obtained in May, 1880, by the state bank against the national bank. In a suit brought by a creditor against the national bank and its stockholders to enforce their statutory liability for its debts, the court on an application made in June, 1887, enquired into the liability of the stockholders to have the claim of the state bank enforced as against them, in view of the transactions of August, 1874, and disallowed that claim; *Held*,

(1) It was proper to reëxamine the claim;

(2) The judgment against the bank was not binding on the stockholders, in the sense that it could not be reëxamined;

(3) The guaranty of the bank was released as to the stockholders by the release of the maker of the notes;

(4) The rights of the stockholders could not be affected by the acts of the president done after the bank had gone into liquidation.

In equity. The case is stated in the opinion.

Mr. Franklin A. McConaughy for appellant.

Mr. Henry G. Miller for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This is a case growing out of that of *Richmond* v. *Irons*, 121 U. S. 27, and involves a claim against the assets of the Manufacturers' National Bank of Chicago. In the suit of Irons against that bank, by an order of the Circuit Court of the United States for the Northern District of Illinois, one Harvey was appointed receiver of the bank. That court, on July 23, 1883, referred it to a master, to report the amount of the debts of the bank, the value of its assets, and the amount of assessment necessary to be made on each share of its capital stock in order to pay its debts. Among the claims presented before the master was that of the assignee of the People's Bank of Belleville, Illinois, who claimed to be a creditor in the sum of $84,103.48; and the master reported in favor of the claim. It was based on a judgment for $67,277 obtained in the same Circuit Court, May 31, 1880, by the People's Bank against the Manufacturers' Bank. The judgment was founded on eight promissory notes for $5000 each, dated August 5, 1873, made by Henry E. Picket, payable one year after date, to the order of Picket, at the Manufacturers' Bank, with interest at ten per cent per annum, payable semi-annually, and with ten per cent per annum interest after maturity, endorsed by Picket, the payment of each note, principal and interest at maturity being guaranteed by the Manufacturers' Bank. The notes were secured by a trust deed on real estate, made by Picket to one Joseph A. Holmes.

On the 1st of June, 1886, the Circuit Court made a decree directing various shareholders to pay to the receiver, for the benefit of the creditors of the bank, certain sums of money. An appeal was taken to this court by several of the stockholders and was heard, and is the case reported as *Richmond* v. *Irons*, 121 U. S. 27. The decision was announced March 28,

1887, the decree of the Circuit Court was reversed, and the cause was remanded with directions to proceed in conformity with the opinion of this court. After that decision, and before the mandate was presented to the Circuit Court, and on the 20th of June, 1887, on the application of several of the stockholders, the case was referred back to the master, to report again upon the amount of the debts due by the bank, and upon the amount of the assessment necessary to be made on each share of its capital stock, to pay its debts, and upon the amount payable by each shareholder on such assessment, and also to take further proofs in regard to the validity of the claim of the People's Bank, as against the stockholders of the Manufacturers' Bank, and as to whether that claim had been in whole or in part released, discharged, or defeated, by reason of any new matters stated in such application.

On the 16th of June, 1888, the master reported that the claim of the People's Bank ought to be disallowed upon the new proofs taken. Those proofs accompanied his report. The assignee of the People's Bank excepted to the report, and the matter was heard before Judge Blodgett. His opinion is reported in 36 Fed. Rep. 843. He confirmed the report and overruled the exceptions, and, on the 27th of March, 1889, a decree was entered upon the mandate of this court, vacating the decree of June 1, 1886, giving a list of the valid, outstanding claims against the bank, (which did not include the claim of the assignee of the People's Bank,) adjudging what sums were to be paid by the various stockholders, and taxing costs to the amount of $158.60 against the People's Bank and its assignee. The assignee appealed to this court from the decree, because it disallowed his claim, and because of the award of costs against the People's Bank and its assignee.

The Manufacturers' Bank became insolvent and suspended payment on September 23, 1873, and, in pursuance of the national banking act, went into voluntary liquidation on September 26, 1873.

In regard to the claim of the assignee of the People's Bank, the master reported as follows: "I find and report that the claim of the assignee of the People's Bank of Belleville is

based upon the guaranty of the Manufacturers' National Bank of promissory notes made by Henry E. Picket, and secured by real estate, amounting in the outset to $50,000; that this guaranty was made by Ira Holmes, who was an officer of said Manufacturers' National Bank, and before the failure of the bank; that these notes were secured by a trust deed to Joseph A. Holmes upon the undivided half of the northwest quarter of section ten, township thirty-seven north, range fourteen east, being (80) eighty acres, one undivided half of which eighty acres was owned by said Picket (and a five-acre tract and twenty-six lots) and the other undivided half of said eighty acres by said Ira Holmes individually; that after the maturity of these notes and in the month of August, A.D. 1874, Ira Holmes made a written contract with the People's Bank, by which he was to give and did give the bank his promissory notes aggregating the sum of $87,465, to secure the Picket notes, (and other indebtedness for which the bank was not liable,) payable in one, two, three and four years, securing the payment thereof by a trust deed upon said property and the southwest quarter of said northwest quarter, containing forty acres additional, and that subsequently foreclosure proceedings were had upon the trust deed made by Picket, resulting in the placing of the title to the entire tract in the name of said Ira Holmes, and the amount for which the property was sold, to wit, the sum of ten thousand dollars, was credited upon the notes of said Picket, leaving due at that time upon the Picket notes the sum of forty thousand dollars, for the payment of which, and the notes of said Ira Holmes, the entire tract remained charged, said Picket having, for the purpose of enabling the parties to carry out the arrangement referred to, executed a quit-claim deed of his interest in said property to said Ira Holmes. I find, as a matter of fact, that the consideration for the conveyance of said Picket was his release from the payment of his notes, which were thereafter held under the terms of the contract between Ira Holmes and the People's Bank, for the purpose of preserving the guaranty of the bank; that said arrangement changed the original contract of guaranty made by the Manufacturers' National Bank, by the taking of the

new security and the extension of time resulting therefrom upon the original indebtedness. I find further, that the deed executed by said Picket, as the result of the agreement referred to, was made under an arrangement between said Holmes and Picket, and assented to by said People's Bank of Belleville, that said Picket was to be released and discharged from any further liability or payment upon the original indebtedness. By reason of which I find that the Manufacturers' National Bank, the original guarantor, became discharged from all further liability on account of such undertaking of guaranty, and recommend that the claim against it be disallowed."

Judge Blodgett, in his opinion in 36 Fed. Rep. 843, said: "This claim of the People's Bank of Belleville is based upon a guaranty of payment made by the Manufacturers' National Bank of eight notes of $5000 each, given by Henry E. Picket, dated August 5, 1873, and due in one year from date, which were discounted for the Manufacturers' National Bank, soon after their date, by the People's Bank of Belleville. These notes were secured by a trust deed upon land in the vicinity of the city of Chicago. The Manufacturers' National Bank suspended payment and went into voluntary liquidation on or about the 23d of September, 1873, and, when these notes matured, about a year afterwards, dealings were had between the People's Bank of Belleville and Ira Holmes, then acting as president of the Manufacturers' National Bank, in liquidation, and assuming to act also for his bank, by which the title to the real estate held as security for the payment of these notes was transferred to Holmes, and Holmes thereupon gave his notes for the amount due on the Picket notes, and also for a large amount of other indebtedness held by the People's Bank, on which the Manufacturers' National Bank or Holmes or both were liable, and, as is found by the master, Picket, in consideration of a quit-claim deed from himself and wife to Holmes, of the land covered by the trust deed securing his notes, was released from further liability on these notes. The master found that this release of Picket from the notes which the Manufacturers' National Bank had guaranteed operated to release the guarantor, and hence the master rejected the claim.

I do not intend to go into an analysis or statement of the proof upon which the master made his finding, as it will be sufficient to say that I have examined these proofs, and am of opinion that they fully sustain the master's conclusions. It is urged, however, that, as the proof shows that the People's Bank of Belleville brought suit on this guaranty now in question and obtained judgment thereon, such judgment is conclusive against the defendants in this case, who are stockholders in the Manufacturers' National Bank, against whom an assessment is asked. Aside from the authorities cited, which satisfy me that the stockholders of the Manufacturers' National Bank are not concluded by this judgment, which was rendered after the bank went into liquidation, I think the fact shown in this record, that the dealings between the People's Bank of Belleville and Holmes and Picket, by which Picket was released, were unknown to the defendant stockholders at the time this judgment was rendered, should allow these stockholders to go behind the record of that judgment, and raise the question before the court, in this suit, whether the guaranty was released by the release of Picket, the principal debtor, whose notes were guaranteed. The exceptions to the master's report are therefore overruled and the report confirmed."

The contention of the appellant is that, by the transaction in question, Picket was not released. Reliance for this view is had upon an instrument in writing, made on the 27th of August, 1874, between Ira Holmes, as one party, and the People's Bank of Belleville as the other. By that paper Holmes agreed with the bank that he would, on the 1st of September, 1874, execute to it his eighteen promissory notes, of that date, each bearing interest at the rate of 10 per cent per annum from its date, payable semi-annually; the total amount of the eighteen notes to be $87,465.10, and Holmes simultaneously to execute to one Thomas, as trustee, eighteen deeds of trust to secure the eighteen notes, each deed to secure one note, the bank agreeing to foreclose at once the Picket deed of trust, and to procure the trustee therein to sell the land covered thereby, under its provisions, at the expense of Ira Holmes, and to cause said land to be bought in at such

sale and conveyed to Ira Holmes. The instrument contained a provision "that the notes mentioned in the encumbrances now existing upon said land shall stand as additional security for said People's Bank, as far as they go, for the indebtedness to be created by the said Holmes as hereinbefore mentioned." Under this agreement, the proceedings took place which are set forth in the report of the master.

On the 2d of September, 1874, a paper was executed by the Manufacturers' National Bank, by Ira Holmes as its president, and accepted in writing by the People's Bank of Belleville, by C. W. Thomas as its attorney, which recited the fact of the making of the ten promissory notes by Picket on the 5th of August, 1873, and the securing of the same by a trust deed, and then proceeded as follows: "And whereas the said Manufacturers' National Bank afterwards, and before said notes matured, delivered them to the People's Bank of Belleville, and, for a valuable consideration, guaranteed the prompt payment of said notes and interest to said People's Bank; and whereas the said Picket, before said notes fell due, became insolvent, and the land mentioned in said trust deed was subject to heavy prior encumbrances, which said People's Bank has removed, it is agreed between the said People's Bank of Belleville and the said Manufacturers' National Bank that the guaranty of the said Manufacturers' National Bank upon eight of said notes shall be and remain binding upon said National Bank, and that any agreement which has been or may be made between the People's Bank and said Picket, in regard to said Picket's liability as maker or endorser of said notes, shall never be construed to release or in anywise affect said guaranty upon eight of said notes."

On the same 2d of September, 1874, the Manufacturers' National Bank, by Ira Holmes as its president, executed an instrument whereby it agreed that no release of the Picket deed of trust "shall operate to release said bank from its guaranty of eight of the notes in said deed named, to be selected and retained by the People's Bank of Belleville, the present legal holder of all of said notes in said deed named; and the said Manufacturers' National Bank further agrees

that no release of the maker or endorser of said notes shall operate to relieve said National Bank of its liability upon said guaranty of eight of the same, the said Manufacturers' National Bank hereby continuing its guaranty of eight of said notes, notwithstanding any agreement which may be or may have been made between the holder of the same and the maker or endorser thereof, and notwithstanding any sale which may be made under said deed of trust."

In its opinion in the case of *Richmond* v. *Irons*, at page 59, this court considered that part of the decree appealed from which directed payment of the claims reported by the master under the denomination of Class D, amounting in the aggregate to $185,119.34, and which were designated by the master as claims "arising before the failure of the bank, upon which worthless collaterals were subsequently received." These were claims which, after the bank went into liquidation, were settled between the parties by the acceptance out of the assets of the bank, by the creditors, of bills receivable, in payment of their claims, and which bills receivable contained guaranties of payment then made in the name of the bank. Upon that point this court said: "It is averred by the appellees that they are claims arising for the most part, if not in all instances, upon endorsements and guaranties made in the name of the bank by Holmes, its president, after the suspension of the bank, and while it was in liquidation. It appears clearly from the evidence that, in many cases, parties having claims against the bank accepted from Holmes commercial paper held by the bank, which it had received in the course of its business, and which constituted a part of its assets, running some of it several months and some of it several years, bearing interest, some at the rate of eight and some at the rate of ten per cent per annum, endorsed and guaranteed in the name of the bank by Holmes as president. The books of the bank show that in these cases the paper so received was charged against the account of the party receiving it, thus closing the account as settled. In these cases, it is testified by Holmes that the creditors gave their checks to the bank for the amount standing to their credit. In some cases, the creditors or their agents

testifying to the transactions, without contradicting Holmes in respect to what was in fact done, nevertheless state that the paper accepted by them was received, not in payment, but as security. It is obvious, however, that in most, if not all instances, the witnesses are referring to the security which they supposed they had received and were entitled to rely upon, by means of the endorsement and guaranty of the paper thus received, made by Holmes as president in the name of the bank. They certainly acted upon this belief, for in many instances they proceeded to obtain judgments against the bank, after the maturity and dishonor of the paper so received upon these endorsements and guaranties, and in this proceeding proved their claims in that form by transcripts of such judgments. It is true that, in the final decrees, the master was directed to correct his computation of interest so as to equalize the claims of the creditors by allowing interest at a uniform rate from the time of the suspension upon the amounts as they appeared to be due from the books of the bank, but all the claims in Class D, notwithstanding the settlements made, were included in the amounts found due and ordered to be paid. In this respect we are of the opinion that the decree is erroneous. Those creditors who made settlements after the bank was put into liquidation and received from the president in that settlement paper of the bank, or, as in some cases, the individual notes of Holmes himself, endorsed or guaranteed in the name of the bank, are not to be considered as creditors of the bank entitled to subject the stockholders to individual liability. The individual liability of the stockholders, as imposed by and expressed in the statute, is indeed for all the contracts, debts and engagements of such association, but that must be restricted in its meaning to such contracts, debts and engagements as have been duly contracted in the ordinary course of its business. That business ceased when the bank went into liquidation; after that there was no authority on the part of the officers of the bank to transact any business in the name of the bank so as to bind its shareholders, except that which is implied in the duty of liquidation, unless such authority had been expressly conferred by the shareholders.

No such express authority appears in this case, and the power of the president or other officer of the bank to bind it by transactions after it was put into liquidation is that which results by implication from the duty to wind up and close its affairs. That duty consists in the collection and reduction to money of the assets of the bank, and the payment of creditors equally and ratably so far as the assets prove sufficient. Payments, of course, may be made in the bills receivable and other assets of the bank *in specie*, and the title to such paper may be transferred by the president or cashier by an endorsement suitable to the purpose in the name of the bank, but such endorsement and use of the name of the bank is in liquidation and merely for the purpose of transferring title. It can have no other effect as against the shareholders by creating a new obligation. It does not constitute a liability, contract, or engagement of the bank for which they can be held to be individually responsible. Every creditor of the bank, receiving its assets under such circumstances, knows the fact of liquidation, and is chargeable with knowledge of its consequences; he takes the assets received at his own peril; he is dealing with officers of the bank only for the purpose of winding up its affairs. If he accepts something in lieu of an existing obligation looking to future payment it must be from other parties. It is not within the power of the officers of the bank, without express authority, by such means to prolong indefinitely an obligation on the part of the shareholders, which is imposed by the statute only as a means of securing the payment of debts by an insolvent bank when it is no longer able to continue business, and for the purpose of effectually winding up its affairs. This is the very meaning of the word 'liquidation.'"

It was proper for the Circuit Court, after the decision of this court, to permit the claim of the People's Bank to be reexamined, to ascertain whether it was a valid claim against the stockholders of the Manufacturers' Bank. It is true that on the 31st of May, 1880, the People's Bank recovered in the Circuit Court a judgment against the Manufacturers' Bank for $67,277, in an action brought against the latter as guarantor

of the eight notes; but, as the suit in which that judgment was recovered was not commenced until the 20th of October, 1876, more than three years after the Manufacturers' Bank went into liquidation, the judgment against the corporation was not binding on the stockholders in the sense that it could not be reëxamined; and the transactions of August and September, 1874, also took place about a year after the bank went into voluntary liquidation. *Moss* v. *McCullough*, 5 Hill, 131; *Miller* v. *White*, 50 N. Y. 137; *McMahon* v. *Macy*, 51 N. Y. 155; *Trippe* v. *Huncheon*, 82 Indiana, 307.

When this judgment was rendered, on the 31st of May, 1880, the transactions of August and September, 1874, between the People's Bank and Holmes and Picket, were not known to the stockholders of the Manufacturers' Bank; and it is quite clear that they are entitled to go behind the record of that judgment and raise the question whether the guaranty of the Manufacturers' Bank was released, as to them, by the release of Picket, the principal debtor, whose notes were guaranteed by that bank.

We are satisfied, on the evidence, that the consideration for the deed from Picket to Ira Holmes was, that Picket should be released as maker of the notes held by the People's Bank, which the Manufacturers' National Bank had guaranteed. As to what is contained in the two papers dated September 2, 1874, the meaning of them is that the liability of the Manufacturers' National Bank, as guarantor upon the eight notes of Picket, should continue notwithstanding the release of the land from the Picket deed of trust by a sale under the power contained in that deed, in pursuance of the agreement made with Ira Holmes, and notwithstanding the release of Picket, as maker of the notes, from further liability upon them. The sale under the Picket trust deed was made simply to release the security, by placing the title in Holmes, and was not made for the purpose of paying the notes; and the agreement of Holmes, made after the bank went into liquidation, to continue its guaranty upon the notes, a liability under which the People's Bank is now attempting to enforce against the stockholders, is not binding upon them, in view of what was said

by this court in the case of *Richmond* v. *Irons*, before quoted.

The decree of the Circuit Court is

Affirmed.

Mr. Chief Justice Fuller, having been of counsel in *Richmond* v. *Irons*, took no part in the consideration or decision of this case.

STUART *v.* BOULWARE.

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

No. 1495. Submitted January 6, 1890. — Decided January 20, 1890.

An allowance of counsel fees on behalf of a receiver is made to the receiver, and not to the counsel.

A receiver is an officer of the court, entitled to apply to the court for instruction and advice, and permitted to retain counsel, whose fees are within the just allowances that may be made by the court.

Allowances to a receiver for counsel are largely discretionary, and the action of the court below in this respect is treated by an appellate court as presumably correct.

Motions to dismiss or affirm. The case is stated in the opinion.

Mr. W. Hallett Phillips for the motions.

Mr. John E. Kenna and *Mr. M. F. Morris* opposing.

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

William A. Stuart filed a bill against the Greenbrier White Sulphur Springs Company and others in the Circuit Court of the United States for the District of West Virginia, praying among other things for the appointment of a receiver, and upon the 13th day of April, 1883, A. L. Boulware of the city of Richmond, Virginia, was appointed by consent "receiver of

all the estate, both real and personal, of the defendant company." He was required to give bond in the sum of $50,000, to make an inventory of the property upon taking possession, and to file it with the clerk of the court, to keep a full, clear and accurate statement of his acts and doings, and to render an account monthly. It was further ordered that "until further orders the defendant company shall be allowed to conduct its business of hotel-keeping as it may deem best for the interest of said company and its creditors, and its leases and contracts for the proper conduct of its business already made shall be allowed by the receiver to stand, but the receiver shall collect and account for the receipts of the company, allowing the said company all expenditures necessary economically to conduct its business, and shall report his receipts and allowances monthly to this court." The receiver gave bond and entered upon the discharge of his duties accordingly. It appears that the property at the time was leased as a hotel, but with the season of 1883 that lease terminated, and thereafter the receiver rented the property from year to year under the authority of the court. The rents for five successive seasons amounted to $100,000 and upwards, of which this record shows the receipt of more than $70,000, (including some amounts from sales,) the disbursement by the receiver of more than $67,000, the subsequent receipt of something over $14,000; and that all of the rents had been received and accounted for except the receipts for the last season, the receipts and disbursements for that year having been reported to the court, but that report not appearing in this record. The record contains various petitions, reports and accounts, by the receiver, and orders thereon, and it is also shown that the receiver sold cattle, horses, wines and liquors belonging to the company, took various journeys with his counsel to Baltimore, New York and Parkersburg, and had litigation. In September, 1887, the Greenbrier White Sulphur Springs property proper, and some other property of the company, was sold by special commissioners appointed by the court, for $380,700, to the complainant, Stuart.

On the 26th day of October, 1885, the receiver was "author-

ized to retain to his own use, out of any funds in his hands as such receiver and on account of his services, the sum of thirty-five hundred ($3500) dollars, and he is further authorized to pay Leigh R. Page, esquire, the sum of eighteen hundred ($1800) dollars on account of his services as counsel to said receiver."

On the 5th day of February, 1889, the receiver filed his petition, setting forth that during his said receivership, acting under authority from the court, he had rented out the property for five successive seasons for more than $100,000, all of which had been accounted for except the receipts from the last year's renting, and the receipts and disbursements for that year had been reported to the court, and that, as soon as his report, which had been filed, had been acted upon by the court, which he asked might be speedily done, he was ready to submit his accounts to the auditor to examine and settle the same; that his duties as such receiver had terminated; that his services in that capacity had been arduous and exacting; that he had been allowed $3500 on account for those services, and desired to settle with his counsel, Mr. Page, for professional services rendered to him with "diligence and fidelity during the whole of said receivership;" that $1800 had been allowed said counsel under a special order in the fall of 1885, but he had, however, paid counsel $2500. In consideration of the premises the receiver prayed the court to allow him and his counsel such further compensation as the court might deem reasonable and proper. The matter coming on to be heard upon this petition, and having been argued by counsel, the court ordered "that the sum of four thousand, five hundred ($4500) dollars be, and the same is hereby, allowed to the said Boulware in full compensation for his said services, and the sum of two thousand ($2000) dollars be, and the same is hereby, allowed to the said Leigh R. Page in full compensation for his services as counsel to said receiver."

From this decretal order the complainant, Stuart, prayed an appeal to this court, which is now before us on a motion to dismiss or affirm. Counsel for appellees contends that these allowances should be taken separately, and as neither of them

amounts to $5000, that the appeal should be dismissed. On the other hand it is argued, and in this we concur, that if it were proper for the receiver to employ counsel, the allowance of reasonable counsel fees is to the receiver and not directly to the counsel, and that such fees would constitute only one of the items in the receiver's account; that the counsel had no cause of action, but the allowance was in legal effect to the receiver to enable him to make compensation for professional services. It is also insisted, as a second ground of dismissal, that Stuart prosecuted the suit as a creditor, "on behalf of himself and of other creditors of the company, who may come in and contribute to the costs of the suit, and that the record does not show that Stuart claims an interest sufficient in amount to give the court jurisdiction." But it appears from the record that Stuart claimed to be the holder and owner of a very large amount of the debts, which were first liens upon the property, and to which the surplus of the cash payment which would remain after paying the costs of suit and expenses of sale would be applicable; that the sale was for $380,700, and of that sum $38,070 was paid in cash, and that Stuart insisted that after deducting the costs of suit and expenses of sale therefrom, the larger part, if not the whole of the balance, should be repaid to him, so that Stuart's interest as claimed might cover more than $5000, if the disallowances should be sufficiently large. But while, therefore, we shall overrule the motion to dismiss, it is unquestionable that there was color for it, and that we can consider the motion to affirm in accordance with the rule on that subject.

The receiver is an officer of the court and subject to its directions and orders, and while, in the discharge of his official duties, he is at all times entitled to apply to the court for instruction and advice, he is also permitted to obtain counsel for himself, and counsel fees are considered as within the just allowances that may be made by the court. The order of October 26, 1885, recognizes the employment by the receiver of counsel in this litigation, although no specific original order giving that authority is found in the record. So far as the allowances to counsel are concerned, it is a mere question as to

their reasonableness. Nor is there any doubt of the power of courts of equity to fix the compensation of their own receivers. That power results necessarily from the relation which the receiver sustains to the court, and in the absence of any legislation regulating the receiver's salary or compensation, the matter is left entirely to the determination of the court from which he derives his appointment.

The compensation is usually determined according to the circumstances of the particular case, and corresponds with the degree of responsibility and business ability required in the management of the affairs entrusted to him, and the perplexity and difficulty involved in that management. Like all questions of costs in courts of equity, allowances of this kind are largely discretionary, and the action of the court below is treated as presumptively correct, "since it has far better means of knowing what is just and reasonable than an appellate court can have," as was remarked by Mr. Justice Bradley in *Trustees* v. *Greenough*, 105 U. S. 527, 537, where the subject is considered.

We find nothing in this record justifying us in arriving at the conclusion that these allowances were excessive. Considering the number of years covered by the receivership, the responsibility involved, the evident difficulties surrounding the receiver, and the amounts collected and disbursed, it would be going very far to hold the action of the Circuit Court to have been an abuse of discretion. The motion to affirm will therefore be sustained.

Motion to dismiss denied. Motion to affirm granted.

OHIO CENTRAL RAILROAD COMPANY *v.* CENTRAL TRUST COMPANY OF NEW YORK.

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

No. 1288. Submitted December 23, 1889.— Decided January 20, 1890.

A bill in equity for the foreclosure of a mortgage of a railroad for non-payment of overdue interest, the principal being payable at a future day, was taken *pro confesso*, the company appearing but not answering. A sale was made under the decree of the court, and, it appearing that there was a surplus over and above what was necessary to pay the overdue interest, costs and expenses, the court ordered it to be applied to the reduction of the principal sum due upon the bonds, and entered a decree that the balance of such principal sum, remaining after such application, was due and payable from the company to the holders of the bonds, and that the trustee recover it for them, with interest until paid; *Held:*

(1) That the application of the surplus was properly made;

(2) That the decree, declaring the remainder of the principal sum due and immediately payable, was irregular and was not warranted by the pleadings.

The defendant in a bill in equity, taken *pro confesso*, is not precluded from contesting the sufficiency of the bill or from insisting that the averments contained in it do not justify the decree.

A decree on a bill taken *pro confesso* may be attacked on appeal, if not confined to the matter of the bill.

The 92d rule in equity does not authorize a decree to be entered in a suit in equity for the foreclosure of a mortgage for a balance due to the complainant over and above the proceeds of the sale, if, as a matter of fact, such balance has not become payable.

A railroad company, whose road, property and franchises have been sold under a decree for the foreclosure of a mortgage entered on a bill taken *pro confesso*, may prosecute an appeal from the final decree distributing the proceeds of the sale and adjudging a balance still due the mortgage creditors.

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

The Central Trust Company of New York filed its bill on the 7th day of January, A.D. 1884, in the Circuit Court of the United States for the Northern District of Ohio against The

Ohio Central Railroad Company, alleging the creation prior to January 1, 1880, of a corporation by that name, and its execution on January 1, 1880, of three thousand bonds for one thousand dollars each, bearing that date and payable to bearer on January 1, 1920, at six per cent interest, payable semi-annually on the first days of January and July, to secure which it executed and delivered to the Central Trust Company a deed of trust and mortgage covering the main line of said Ohio Central Railroad, which mortgage was duly recorded. The bill also alleged that the original Ohio Central Railroad Company, subsequently to the first day of January, 1880, and to the execution and delivery of the bonds and mortgage thereinbefore described, made and entered into an agreement of consolidation with a corporation known as the Atlantic and Northwestern Railroad Company, under the name of The Ohio Central Railroad Company. It further alleged default in the payment of interest on the said bonds, January 1, 1884; that the coupons were duly presented and payment was demanded, but refused; and that about the first of January, 1880, the defendant executed and delivered a second mortgage on the same property, to the same trustee, to secure three thousand income bonds for one thousand dollars each, payable to bearer, which was duly recorded; that the holders of these income bonds were very numerous and unknown to complainant; and that their interest and lien and that of complainant as their trustee accrued subsequently to and subject to the lien of the first mortgage. The bill set forth the insufficiency of the mortgaged property to pay the mortgage debts; that there was a large floating indebtedness; that creditors had commenced legal or equitable proceedings for the enforcement of their claims; that complainant had commenced a suit for the foreclosure of a certain other mortgage upon a portion of the property not embraced or covered by the two mortgages first mentioned, in which a receiver had been appointed; and that a multiplicity of suits, judgments and liens would obstruct the operation of the road and cause great loss to the holders of the bonds and sacrifice of property, etc.

The bill prayed for an answer; that an account be had of

the bonds secured by said several mortgages, "and of the amount due on said first mortgage bonds for principal and interest or either;" that the names of the holders of said bonds might be ascertained and an account taken of all the liens and incumbrances according to their priorities; that said first mortgage be decreed to be a first lien upon all the property described therein; that the property be sold free from the claims of all parties or all who were in any manner represented; that the defendant and others claiming under it be barred and foreclosed; "that the said judgment or decree may contain such provisions for the ascertainment of the priorities of the said incumbrances and of the due application of the proceeds of such sale according to the rights of the parties as may be just and equitable;" that a receiver might be appointed, and an injunction issue *pendente lite;* and a prayer for general relief. A copy of the first mortgage, including bond and coupon, was attached to the bill.

The defendant, The Ohio Central Railroad Company, having entered its appearance, and having failed to plead, answer, or demur, the bill was taken as confessed, and, on the 10th day of December, 1884, a decree for sale was duly entered in the cause. The decree accorded with the averments of the bill, and adjudged that the default continued after the commencement of the suit, and that two instalments of interest on the first mortgage bonds were due and unpaid, by reason of the default as to the first of which the mortgage or deed of trust had become absolute, and the complainant entitled to a decree for the sale of all the mortgaged property "to satisfy the principal and interest of said bonds secured by said main-line first mortgage." The decree directed payment within thirty days of the amount of the two instalments of interest due, with interest and costs, and in default of such payment ordered the sale of the mortgaged property and the application of the proceeds to costs of suit, expenses of sale, trustees' compensation and expenses; claims having priority over the main-line first mortgage; coupons due, and to become due before distribution, upon said first mortgage bonds; the principal of the first mortgage bonds; and the surplus, if any, to be paid into court

subject to its further order. The sale took place on April 15, 1885, and the mortgaged property was sold to Canda, Opdyke and Burt, as purchasing trustees, for one million dollars, which sale was confirmed June 25, 1885, and the mortgaged property was conveyed to the said purchasers. Prior to the confirmation of sale, but after the sale had been reported, a reference was had to ascertain the distributive share of the proceeds of sale due on the principal of each bond secured by the first mortgage, and what sum the purchasers should bring into court to pay the distributive share of whatever bonds might be found outstanding. A report was made that after the payment of interest there would be $197.31\frac{2}{3}$ to apply on the principal of each first mortgage bond; and in the order confirming the sale the report of the special master was confirmed, payment of compensation and expenses directed, and the balance ordered to be applied on the principal of said main-line first mortgage bonds. The last clause of this order of June 25, 1885, was as follows:

"And all further questions in respect to the accounts of said receiver and to judgment for any deficiency herein and all other questions arising in this cause are reserved until the coming in of the report of said special master commissioner of his acts and doings under this order and the filing of said receiver's account."

On the 22d of June, 1887, the following decree and judgment was entered by the court:

"This day this cause came on for further hearing, and it appearing to the court that from the proceeds of the sale of the property of said defendant company in this cause heretofore made there had been paid upon each of the three thousand bonds secured by the first main-line mortgage, in the bill of complaint set forth, the interest coupons thereon up to and including June 30th, 1885, and the sum of one hundred and ninety-seven and thirty-one and two-thirds one-hundredths dollars ($197.31\frac{2}{3}$) to be applied upon the payment of the principal of each of said bonds, said payment to bear date of June 30th, 1885, and that no other payments of either principal or interest have been made upon any of said bonds than as

aforesaid, the court therefore finds that there is due from said defendant, The Ohio Central Railroad Company, to the complainant, as trustee for the holders of said bonds secured by said first main-line mortgage, upon each of said bonds, the sum of eight hundred and two and sixty-eight and one-third one-hundredths dollars ($802.68\frac{1}{3}$), which sum should bear interest at the rate of six per cent per annum until paid.

"And the court further finds that no fund has come under the control of this court from which any payment can be made upon the three thousand main-line income bonds in the bill of complaint set forth, and that no payments of any kind have been made upon any of said income bonds. Wherefore the court finds that there is due from the defendant, The Ohio Central Railroad Company, to the complainant, as trustee of the holders of said income bonds, upon each of said bonds, the sum of one thousand ($1000) dollars.

"Wherefore it is ordered, adjudged and decreed that the complainant, The Central Trust Company of New York, as trustee for the holders of said three thousand bonds secured by said first main-line mortgage, have and recover from the defendant, The Ohio Central Railroad Company, the sum of eight hundred and two and sixty-eight and one-third one-hundredths dollars ($802.68\frac{1}{3}$) on each of said bonds, to wit, the sum of $2,408,050, with six per cent interest per annum from July 1st, 1885, and that the said complainant, as trustee for the holders of said three thousand main-line income bonds, have and recover from said defendant, The Ohio Central Railroad Company, the sum of one thousand dollars ($1000) on each of said bonds, to wit, the sum of three million dollars, and that execution issue therefor."

From this decree the pending appeal was prosecuted.

Mr. Ashbel Green, *Mr. H. L. Terrell*, and *Mr. Thomas Thacher* for appellant.

Mr. Stevenson Burke for appellee.

1. The record shows that the railroad property, together with the *franchises* of the company, were sold under the decree of

the Circuit Court, and that the sale so made was confirmed. The company is therefore in liquidation or insolvent, unable to meet its liabilities, its franchises mortgaged and sold. Under these circumstances there is no corporate power left in the railroad company to prosecute this or any other action.

The point is made, however, that the bonds were not due at the time execution was issued, and that, notwithstanding the fact that the railroad company is in liquidation, and notwithstanding the fact that it has been sold out and a partial payment made upon its bonds to fall due in the future, neither the trustee nor the holders of the bonds can proceed to execution against the railroad company in liquidation until the indebtedness evidenced by the bonds shall fall due by the terms of the bonds.

It is manifest that the only purpose of the final order was to establish a basis upon which to file a creditor's bill against the railway company and its stockholders. Confessedly the Circuit Court had full jurisdiction to ascertain and determine the amount of indebtedness remaining due and unpaid upon the bonds in question, and whether the order for execution under the circumstances is erroneous, is really the only question for consideration here. It is manifest that, so far as the final order or decree of the court determines and settles the balance due and unpaid upon the bonds, there is no error in the order, and the only error, if any, is in the ordering of execution.

2. Whether there is any error in the ordering of execution must depend upon the practice of equity courts in such cases, and upon the rules of practice established by this court. The case comes within the 92d rule, which provides, "in suits in equity for the foreclosure of mortgages in the Circuit Courts of the United States . . . a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same."

We understand this rule to provide "that a decree may be rendered for any balance that may be found due to the complainant."

By "due" we understand any existing indebtedness con-

nected with the subject of the action, whether such indebtedness is presently payable or not.

Indeed, when a corporation becomes insolvent, and its property and franchises are sold and disposed of, and there is a balance remaining unpaid to its creditors, the case is one for a court of equity to deal with, and clearly a court of equity in such a case has jurisdiction to ascertain and determine the amount remaining unpaid upon the indebtedness; and the corporation being in liquidation, being insolvent, we think the court would have the power to issue execution, collect in its assets and make the proper distribution of the same among its creditors. The decree ordering execution should be affirmed.

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

These first mortgage bonds matured January 1, 1920, and there was no provision in them nor in the mortgage that they should become due or could be declared due before that date; nor were there any allegations in the bill upon which to predicate a finding or decree to that effect.

The mortgage provided that in case of entry by the trustee for nonpayment of interest, or of principal at maturity, the income and revenue should be applied to the payment of such interest and the residue to the payment of the principal; and that, if the property went to sale, the net proceeds should be applied "to the ratable payment of principal and the then accrued interest of all the said bonds, whether the principal be then due or not;" but if, in case of entry or of proceedings to sell for default in payment of interest before the bonds should become due, and before the sale should be made, the interest in arrears should be paid and satisfied, together with all costs, expenses, etc., that then the proceedings should be discontinued and possession of the mortgaged premises restored as if default or entry had not occurred. While, therefore, the intention is clear that the bonds were not to become due before the specified date of maturity, the proceeds of sale, after the satisfaction of the accrued amount, were properly applied upon the

outstanding liability. *Chicago & Vincennes Railroad Co.* v. *Fosdick*, 106 U. S. 47, 68.

Neither in the pleadings nor in the reports of the special master, nor in any part of the record, can we discover the basis for the statement: "The court therefore finds that there is due from said defendant, The Ohio Central Railroad Company, to the complainant as trustee for the holders of said bonds secured by said first main line mortgage, upon each of said bonds, the sum of eight hundred and two and sixty-eight and one-third one-hundredths dollars ($802.68\frac{1}{3}$)." Certainly, as $197.31\frac{2}{3}$ had been realized on each bond, $802.68\frac{1}{3}$ remained to be paid, but only according to the tenor of the bond.

There are no allegations in the bill as to when the income bonds matured, nor is a copy of the second mortgage given.

The deficiency decree says that "the court further finds that no fund has come under the control of this court from which any payment can be made upon the three thousand main line income bonds in the bill of complaint set forth, and that no payments of any kind have been made upon any of said income bonds. Wherefore the court finds that there is due from the defendant, The Ohio Central Railroad Company, to the complainant, as trustees of the holders of said income bonds, upon each of said bonds, the sum of one thousand ($1000) dollars."

But the conclusion does not follow that because no payment had been made on the income bonds, therefore they had matured; and unless they had matured by lapse of time, or otherwise as provided, the amount could not be decreed to be due.

The bill was taken as confessed, but that fact did not in itself justify giving complainant more than it claimed. In *Thomson* v. *Wooster*, 114 U. S. 104, the general nature and effect of an order taken on a bill *pro confesso*, and of a decree *pro confesso* regularly made thereon, and of our rules of practice on the subject, are discussed in the opinion of the court by Mr. Justice Bradley, and it is there held that under the rules and practice of this court in equity "a decree *pro confesso* is not a decree as of course according to the prayer of

the bill, nor merely such as the complainant chooses to take it; but that it is made (or should be made) by the court, according to what is proper to be decreed upon the statements of the bill, assumed to be true." If the allegations are distinct and positive, they may be taken as true without proof; but if they are indefinite, or the demand of the complainant is in its nature uncertain, the requisite certainty must be afforded by proof. But in either event, although the defendant may not be allowed, on appeal, to question the want of testimony or the insufficiency or amount of the evidence, he is not precluded from contesting the sufficiency of the bill, or from insisting that the averments contained in it do not justify the decree.

Under the 18th rule in equity, where the bill is taken *pro confesso*, the cause is proceeded in *ex parte*, "and the matter of the bill may be decreed by the court;" and hence if a decree be passed not confined to the matter of the bill, it may be attacked on appeal for that reason.

By the 92d rule it is provided that in suits in equity for the foreclosure of mortgages, "a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales." Assuming that a deficiency decree might be rendered in the absence of a specific prayer for that relief, nevertheless the case made by the bill must show that the amount is due, for otherwise it cannot properly be found so. This rule does not authorize the Circuit Courts to find a balance due because partial extinguishment has been effected by a sale, if, as matter of fact, the indebtedness is not then payable.

The bill here did not seek relief as to the second mortgage, which is only referred to as a subordinate lien, nor did it claim that anything except interest was due upon the first mortgage. It sought the establishment and enforcement of the first mortgage lien and the foreclosure of the equity of redemption. The amount realized paid the outstanding interest and a part of the principal. Under such circumstances, and upon these pleadings, this deficiency decree, which is a judgment for the recovery of so much money, with execution, was improvidently entered.

Statement of the Case.

Without discussing the extent of the franchises authorized to be sold under the mortgage, we are of opinion that this appeal was properly taken in the name of the defendant company. *Willamette Manufacturing Company* v. *Bank of British Columbia*, 119 U. S. 191, 197; *Memphis & Little Rock Railroad Company* v. *Railroad Commissioners*, 112 U. S. 609, 619.

The deficiency decree of June 22, 1887, is reversed at appellee's costs, and the cause remanded with directions to proceed therein as may be just and equitable.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* BOSWORTH.

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

No. 79. Argued November 11, 12, 1889. — Decided January 20, 1890.

A condemnation under the confiscation act of July 17, 1862, 12 Stat. 589, of real-estate owned in fee by a person who had participated in the rebellion, and a sale under the decree, left the remainder, after the expiration of the confiscated life-estate, so vested in him that he could dispose of it after receiving a full pardon from the President.

This was an action brought by Millard Bosworth and Charles H. Bosworth, only surviving children of A. W. Bosworth, deceased, to recover possession of one undivided sixth part of a certain tract of land in New Orleans, which formerly belonged to their said father. The petition stated that the latter, having taken part in the war of the rebellion and done acts which made him liable to the penalties of the confiscation act of July 17th, 1862, 12 Stat. 589, the said one-sixth part of said land was seized, condemned and sold under said act, and purchased by one Burbank in May, 1865; that the said A. W. Bosworth died on the 11th day of October, 1885; and that the plaintiffs, upon his death, became the owners in fee simple of the said one-sixth part of said property, of which the defendants, The Illinois Central Railroad Company, were in possession.

Statement of the Case.

The company filed an answer, setting up various defences; amongst other things tracing title to themselves from the said A. W. Bosworth, by virtue of an act of sale executed by him and his wife, before a notary public, on the 23d day of September, 1871, disposing of all their interest in the premises, with full covenant of warranty. They further alleged that said Bosworth had, before said act of sale, not only been included in the general amnesty proclamation of the President, issued on the 25th of December, 1868, but had received a special pardon on the 2d of October, 1865, and had taken the oath of allegiance, and complied with all the terms and conditions necessary to be restored to, and reinvested with, all the rights, franchises and privileges of citizenship.

The parties having waived a trial by jury, submitted to the court an agreed statement of facts in the nature of a special verdict, upon which the court gave judgment in favor of the plaintiffs. To that judgment the present writ of error was brought.

Those portions of the statement of facts which are deemed material to the decision of the case are as follows, to wit:

"1st. The plaintiffs, Millard Bosworth and Charles H. Bosworth, are the only surviving legitimate children of Abel Ware Bosworth, who died intestate in the city of New Orleans on the eleventh day of October, 1885, and have accepted his succession with benefit of inventory.

"2nd. By act before Edward Barnett, notary, on the 25th day of April, 1860, Abel Ware Bosworth purchased from H. W. Palfrey and others a one-third undivided interest in fee simple title and full ownership in and to the property described in the petition of the plaintiffs in this cause.

"3rd. On the breaking out of the war between the States Abel W. Bosworth entered the Confederate army and bore arms against the government of the United States from about March, 1861, until April, 1865.

"4th. Under and by virtue of the confiscation act of the United States, approved July 17th, 1862, and the joint resolution contemporary therewith, the said property was seized by the proper officer of the United States, and on the 20th day

of January, 1865, a libel of information was filed against the said property as the property of A. W. Bosworth, in the District Court of the United States for the Eastern District of Louisiana.

"Into these proceedings intervened Mrs. Rachel Matilda Bosworth, wife of said Abel Ware Bosworth, to protect her community interests in said property, and, after due proceedings had, the said court entered a decree of condemnation as to A. W. Bosworth and a decree in favor of Mrs. Rachel Matilda Bosworth, recognizing her as the owner of one-half of said one-third undivided interest in and to said property.

"A *venditioni exponas* in due form of law issued to the marshal for the sale of said property under said decree, and at said sale "all the right, title and interest of A. W. Bosworth in and to the one undivided third part of said property" (reserving to Mrs. Rachel M. Bosworth her rights therein, as per order of the court) was adjudicated on the — day of the month of May, 1865, to E. W. Burbank for the price and sum of $1700, and the marshal executed a deed in due form of law to said Burbank for the same."

"6th. That on the second day of October, 1865, Andrew Johnson, President of the United States, granted to said A. W. Bosworth a special pardon, a duly certified copy of which, together with the written acceptance by said Bosworth thereof, is hereto annexed, made part of this statement of facts, and marked 'Document A.'

"7th. That on the 23rd day of September, 1871, by act before Andrew Hero, Jr., notary public, the said A. W. Bosworth and Mrs. Rachel Matilda Bosworth, his wife, sold, assigned and transferred to Samuel H. Edgar, with full warranty under the laws of Louisiana, all their right, title and interest in and to the said property, including the one-sixth undivided interest claimed in this suit by the plaintiffs and described in the petition, for the price and sum of eleven thousand six hundred and sixty-six .66⅔ dollars.

"8th. That on the 18th day of December, 1872, the said E. W. Burbank, by act before the same notary, transferred all his right, title and interest in the nature of a quitclaim to

S. H. Edgar aforesaid for the price and sum of five thousand one hundred dollars.

"9th. That the said S. H. Edgar by act executed before Charles Nettleton, a duly authorized commissioner for Louisiana in New York City, on the 10th day of October, 1872, and duly recorded in the office of the register of conveyances for the parish of Orleans on the 30th day of October, 1872, sold and transferred the same property, with full warranty under the laws of Louisiana, unto the New Orleans, Jackson and Great Northern Railroad Company.

"10th. That by various transfers made since said date, as set forth in the answers filed in this suit, the said property has come into the possession of the Chicago, St. Louis and New Orleans Railroad Company, who has leased the same to the Illinois Central Railroad Company, which said company holds said property under said lease.

"14th. It is further agreed as a part of this statement of facts that the President of the United States on the 25th day of December, 1868, issued a general amnesty proclamation, and the terms of said proclamation as found in the Statutes at Large of the United States are made part of this statement of facts."

The following is a copy of the special pardon (Document A), referred to in the statement of facts, and of the written acceptance thereof, to wit:

"Andrew Johnson, President of the United States of America, to all to whom these presents shall come, greeting:

"Whereas A. W. Bosworth, of New Orleans, Louisiana, by taking part in the late rebellion against the government of the United States, has made himself liable to heavy pains and penalties;

"And whereas the circumstances of his case render him a proper object of executive clemency:

"Now, therefore, be it known that I, Andrew Johnson, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons to me thereunto moving, do hereby grant to the said A. W. Bosworth a

full pardon and amnesty for all offences by him committed, arising from participation, direct or implied, in the said rebellion, conditioned as follows:

"1st. This pardon to be of no effect until the said A. W. Bosworth shall take the oath prescribed in the proclamation of the President, dated May 29th, 1865.

"2nd. To be void and of no effect if the said A. W. Bosworth shall hereafter at any time acquire any property whatever in slaves or make use of slave labor.

"3rd. That the said A. W. Bosworth first pay all costs which may have accrued in any proceedings instituted or pending against his person or property before the date of the acceptance of this warrant.

"4th. That the said A. W. Bosworth shall not, by virtue of this warrant, claim any property or the proceeds of any property that has been sold by the order, judgment or decree of a court under the confiscation laws of the United States.

"5th. That the said A. W. Bosworth shall notify the Secretary of State, in writing, that he has received and accepted the foregoing pardon.

"In testimony whereof I have hereunto signed my name and caused the seal of the United States to be affixed.

"Done at the city of Washington this second day of October, A.D. 1865, and of the Independence of the United States the ninetieth.

"ANDREW JOHNSON.

"By the President: WILLIAM H. SEWARD,

"[SEAL] *Secretary of State.*"

"WASHINGTON, D.C., *October 5th*, 1865.

"Honorable William H. Seward, Secretary of State.

"SIR: I have the honor to acknowledge the receipt of the President's warrant of pardon, bearing date October 2d, 1865, and hereby signify my acceptance of the same with all the conditions therein specified.

"I am, sir, your obedient servant,

"A. W. BOSWORTH."

Argument for Defendants in Error.

The proclamation of general amnesty and pardon issued on the 25th day of December, 1868, referred to in the last article of the statement of facts, is found in volume 15, pp. 711, 712, of the Statutes at Large. After referring to several previous proclamations, it proceeds as follows, to wit: "And whereas, the authority of the Federal government having been reëstablished in all the States and Territories within the jurisdiction of the United States, it is believed that such prudential reservations and exceptions as at the dates of said several proclamations were deemed necessary and proper may now be wisely and justly relinquished, and that a universal amnesty and pardon for participation in said rebellion extended to all who have borne any part therein will tend to secure permanent peace, order and prosperity throughout the land, and to renew and fully restore confidence and fraternal feeling among the whole people, and their respect for and attachment to the national government, designed by its patriotic founders for the general good: — now, therefore, be it known that I, Andrew Johnson, President of the United States, by virtue of the power and authority in me vested by the Constitution, and in the name of the sovereign people of the United States, do hereby proclaim and declare unconditionally, and without reservation, to all and to every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason against the United States, or of adhering to their enemies during the late civil war, with restoration of all rights, privileges and immunities under the Constitution and the laws which have been made in pursuance thereof."

Mr. Girault Farrar and *Mr. Thomas J. Semmes* for plaintiffs in error. *Mr. James Fentress* was with them on their brief.

Mr. Edgar H. Farrar (with whom was *Mr. Ernest B. Kruttschnitt* on the brief) for defendants in error.

The whole argument of the plaintiffs in error is a covert attack upon the settled jurisprudence of this court, as declared

in *Wallach* v. *Van Riswick*, 92 U. S. 202; *Chaffraix* v. *Shiff*, 92 U. S. 214; *Semmes* v. *United States*, 91 U. S. 21; *Pike* v. *Wassell*, 94 U. S. 711; *Wade* v. *French*, 102 U. S. 132; *Avegno* v. *Schmidt*, 113 U. S. 293; and *Shields* v. *Shiff*, 124 U. S. 351.

There is a labored attempt made to establish a discrepancy between the doctrine of *Avegno* v. *Schmidt* and *Shields* v. *Shiff*, and the doctrine of *Wallach* v. *Van Riswick*, *Pike* v. *Wassell*, and *French* v. *Wade*, and to draw a distinction between these latter cases and the case at bar.

It is insisted that this court in *Avegno* v. *Schmidt* has held that the confiscation proceedings left the fee of the property in the confiscatee, or retained it in the United States; consequently, that the pardon of the offender restored him the fee if it remained in him after the confiscation proceeding, or restored it to him if it remained in the United States.

A mere inspection of these two opinions shows that this claim is unfounded.

If this court has decided anything without variance, it has decided that the confiscation proceedings absolutely divested every right, title and interest which the confiscatee had in the property; that it entirely separated his estate from that of his heirs, and that it entirely paralyzed his power over the property during his life, either to affect it by deed or to devise it by will.

In all of those cases the court has refused, and found it unnecessary, to decide where the fee was after the confiscation.

The common law doctrine that the fee cannot be in abeyance, it has positively declared not applicable to the case and not material to determine, and that whatever may have been the common law doctrine, that doctrine must yield to the statute.

In answer to the suggested difficulty that if the ancestor was not seized of the property at his death the heir could not take it, the court has declared that it was not necessary either at common law, or under this statute, that the ancestor should be seized in order that the heir might take by inheritance.

In answer to the plea that the pardon and the amnesty proclamation had restored to the confiscatee the power to dispose

of the property and to bind his heirs by warranty deeds, the court has declared, from the above principles, that the pardon could not give back the property which had been sold, nor any interest in it, either in possession or expectancy.

The whole argument on the other side may be summed up in the statement that the pardon for treason restored the fee, or the right to control the fee, in property seized, condemned and sold as enemy's property under the laws of war. This is the very proposition which the court, for the reasons above given, has denied both in the Wallach and in the Semmes cases.

There is no argument or suggestion in the plaintiffs' brief as to how the pardon of the claimants' ancestor for his offences against the government could deprive his heirs of the benefit secured solely to them by the joint resolution of Congress. The confiscation was an accomplished fact, and whatever rights grew out of that fact were already vested when the pardon was granted.

There would be as much reason to hold that the pardon divested the title of the purchaser of the estate for the life of the public enemy, who was also a public offender, as to hold that it annulled the effect of the joint resolution and divested the rights thereby secured ultimately to the heirs on the death of their ancestor.

He was entirely disseized by the confiscation of the whole estate, and they were authorized to take this whole estate, at his death, as his heirs, by descent, although there was no seizin in him at the time of his death. The pardon may have made him a "new man," but it did not make new facts or destroy vested rights. *Knote* v. *United States*, 95 U. S. 149, 153; *Osborn* v. *United States*, 91 U. S. 474.

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

The principal question raised in the present case is, whether, by the effect of the pardon and amnesty granted to A. W. Bosworth by the special pardon of October, 1865, and the general proclamation of amnesty and pardon of December

25th, 1868, he was restored to the control and power of disposition over the fee simple or naked property in reversion expectant upon the determination of the confiscated estate in the property in dispute. The question of the effect of pardon and amnesty on the destination of the remaining estate of the offender, still outstanding after a confiscation of the property during his natural life, has never been settled by this court. That the guilty party had no control over it in the absence of such pardon or amnesty, has been frequently decided. *Wallach* v. *Van Riswick*, 92 U. S. 202; *Chaffraix* v. *Shiff*, 92 U. S. 214; *Pike* v. *Wassell*, 94 U. S. 711; *French* v. *Wade*, 102 U. S. 132; and see *Avegno* v. *Schmidt*, 113 U. S. 293; *Shields* v. *Schiff*, 124 U. S. 351. But it has been regarded as a doubtful question, what became of the fee, or ultimate estate, after the confiscation for life. "We are not called upon," said Justice Strong, in *Wallach* v. *Van Riswick*, "to determine where the fee dwells during the continuance of the interest of a purchaser at a confiscation sale, whether in the United States, or in the purchaser, subject to be defeated by the death of the offender." 92 U. S. 212. It has also been suggested that the fee remained in the person whose estate was confiscated; but without any power in him to dispose of or control it.

Perhaps it is not of much consequence which of these theories, if either of them, is the true one; the important point being, that the remnant of the estate, whatever its nature, and wherever it went, was never beneficially disposed of, but remained (so to speak) in a state of suspended animation. Both the common and the civil laws furnish analogies of suspended ownership of estates which may help us to a proper conception of that now under consideration. Blackstone says: "Sometimes the fee may be in *abeyance*, that is (as the word signifies) in expectation, remembrance and contemplation of law; there being no person in *esse* in whom it can vest and abide; though the law considers it as always potentially existing, and ready to vest when a proper owner appears. Thus in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John

nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est haeres viventis;* it remains, therefore, in waiting or abeyance during the life of Richard." 2 Bl. Com. 107. In the civil law, the legal conception is a little different. Pothier says[1]: "The dominion of property (or ownership), the same as all other rights, as well *in re* as *ad rem*, necessarily supposes a person in whom the right subsists and to whom it belongs. It need not be a natural person; it may belong to corporations or communities, which have only a civil and intellectual existence or personality. When an owner dies, and no one will accept the succession, this dormant succession (*succession jacente*) is considered as being a civil person and as the continuation of that of the deceased; and in this fictitious person subsists the dominion or ownership of whatever belonged to the deceased, the same as all other active and passive rights of the deceased; *hæreditas jacens personæ defuncti locum obtinet.*" Droit de Domaine de Propriété, Partie I, c. 1, § 15.

But, as already intimated, it is not necessary to be over curious about the intermediate state in which the disembodied shade of naked ownership may have wandered during the period of its ambiguous existence. It is enough to know that it was neither annihilated, nor confiscated, nor appropriated to any third party. The owner, as a punishment for his offences, was disabled from exercising any acts of ownership over it, and no power to exercise such acts was given to any other person. At his death, if not before, the period of suspension comes to an end, and the estate revives and devolves

[1] Le domaine de propriété, de même que tous les autres droits, tant *in re* qu' *ad rem*, suppose nécessairement une personne dans laquelle ce droit subsiste, et à qui il appartienne. Il n'est pas nécessaire que ce soit une personne naturelle, telle que sont les personnes des particuliers, à qui le droit appartienne : ce droit, de même que toutes les autres espèces de droits, peut appartenir à des corps et à des communautés, qui n'ont qu'une personne civile et intellectuelle. Lors qu'un propriétaire étant mort, personne ne veut accepter sa succession, cette succession jacente est considérée comme étant une personne civile, et comme la continuation de celle du défunt; et c'est dans cette personne fictive que subsiste le domaine de propriété de toutes les choses qui appartenaient au défunt, de même que tous les autres droits actifs et passifs du défunt: *Hæreditas jacens personæ defuncti locum obtinet.*

to his heirs at law. In *Avegno* v. *Schmidt*, 113 U. S. 293, and in *Shields* v. *Schiff*, 124 U. S. 351, this court held that the heirs of the offender, at his death, take by descent from him and not by gift or grant from the government. They are not named in the confiscation act, it is true, nor in the joint resolution limiting its operation. The latter merely says, "nor shall any punishment or proceedings under said act be so construed as to work a forfeiture of the real estate of the offender, beyond his natural life." The court has construed the effect of this language to be, to leave the property free to descend to the heirs of the guilty party. *Bigelow* v. *Forrest*, 9 Wall. 339; *Wallach* v. *Van Riswick*, 92 U. S. 202, 210. Mr. Justice Strong, in the latter case, speaking of the constitutional provision, that no attainder of treason should work corruption of blood or forfeiture, except during the life of the person attainted, (which provision was the ground and cause for passing the joint resolution referred to,) said "No one ever doubted that it was a provision introduced for the benefit of the children and heirs alone; a declaration that the children should not bear the iniquity of the fathers."

But, although the effect of the law was to hold the estate, or naked ownership, in a state of suspension for the benefit of the heirs, yet they acquired no vested interest in it; for, until the death of the ancestor, there is no heir. During his life it does not appear who the heirs will be. Heirs apparent have, in a special case, been received to intervene for the protection of the property from spoliation. *Pike* v. *Wassell*, 94 U. S. 711. This was allowed from the necessity of the case, arising from the fact that the ancestor's disability prevented him from exercising any power over the property for its protection or otherwise, and no other persons but the heirs apparent had even a contingent interest to be protected.

It would seem to follow as a logical consequence from the decision in *Avegno* v. *Schmidt* and *Shields* v. *Schiff*, that after the confiscation of the property the naked fee (or the naked ownership, as denominated in the civil law), subject, for the lifetime of the offender, to the interest or usufruct of the purchaser at the confiscation sale, remained in the offender him-

self; otherwise, how could his heirs take it from him by inheritance? But, by reason of his disability to dispose of, or touch it, or affect it in any manner whatsoever, it remained, as before stated, a mere dead estate, or in a condition of suspended animation. We think that this is, on the whole, the most reasonable view. There is no corruption of blood; the offender can transmit by descent; his heirs take from him by descent; why, then, is it not most rational to conclude that the dormant and suspended fee has continued in him?

Now, if the disabilities which prevented such person from exercising any power over this suspended fee, or naked property, be removed by a pardon or amnesty, — so removed as to restore him to all his rights, privileges and immunities, as if he had never offended, except as to those things which have become vested in other persons, — why does it not restore him to the control of his property so far as the same has never been forfeited, or has never become vested in another person? In our judgment it does restore him to such control. In the opinion of the court in the case of *Ex parte Garland*, 4 Wall. 333, 380, the effect of a pardon is stated as follows, to wit: "A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and, when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him as it were a new man, and gives him a new credit and capacity. There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment."

The qualification in the last sentence of this extract, that a pardon does not affect vested interests, was exemplified in the case of *Semmes* v. *United States*, 91 U. S. 21, where a pardon was held not to interfere with the right of a purchaser of the forfeited estate. The same doctrine had been laid down in

The Confiscation Cases, 20 Wall. 92, 112, 113. It was distinctly repeated and explained in *Knote* v. *United States*, 95 U. S. 149. In that case property of the claimant had been seized by the authorities of the United States on the ground of treason and rebellion; a decree of condemnation and forfeiture had been passed, the property sold, and the proceeds paid into the treasury. The court decided that subsequent pardon and amnesty did not have the effect of restoring to the offender the right to these proceeds. They had become absolutely vested in the United States, and could not be devested by the pardon. The effect of a pardon was so fully discussed in that case that an extract from the opinion of the court will not be out of place here. The court says: "A pardon is an act of grace by which an offender is released from the consequences of his offence, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offence, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position. But it does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it. The offence being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offence, or which have been acquired by others whilst that judgment was in force. If, for example, by the judgment, a sale of the offender's property has been had, the purchaser will hold the property notwithstanding the subsequent pardon. And if the proceeds of the sale have been paid to a

party to whom the law has assigned them, they cannot be subsequently reached and recovered by the offender. . . . So also if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. . . . Where, however, property condemned, or its proceeds, have not thus vested, but remain under control of the Executive, or of officers subject to his orders, or are in the custody of the judicial tribunals, the property will be restored or its proceeds delivered to the original owner, upon his full pardon."

The last portion of the above extract was justified by the decision in the case of *Armstrong's Foundry*, 6 Wall. 766, where a pardon was received by Armstrong after his foundry had been seized, and whilst proceedings were pending for its confiscation. He was even allowed to plead the full pardon as new matter in this court whilst the case was pending on appeal; and the court held, and decided, that this pardon relieved him of so much of the penalty as accrued to the United States, without any expression of opinion as to the rights of the informer.

The citations now made are sufficient to show the true bearing and effect of the pardon granted to Bosworth, and of the general proclamation of amnesty as applied to him. The property in question had never vested in any person when these acts of grace were performed. It had not even been forfeited. Nothing but the life interest had been forfeited. His power to enjoy or dispose of it was simply suspended by his disability as an offender against the government of the United States. This disability was a part of his punishment. It seems to be perfectly clear, therefore, in the light of the authorities referred to, that when his guilt and the punishment therefor were expunged by his pardon this disability was removed; in being restored to all his rights, privileges and immunities, he was restored to the control of so much of his property and estate as had not become vested either in the government or in any other person; — especially that part or quality of his estate which had never been for-

feited, namely, the naked residuary ownership of the property, subject to the usufruct of the purchaser under the confiscation proceedings.

This result, however, does not depend upon the hypothesis that the dead fee remained in Bosworth after the confiscation proceedings took place; it is equally attained if we suppose that the fee was *in nubibus*, or that it devolved to the government for the benefit of whom it might concern. We are not trammelled by any technical rule of the common or the civil law on the subject. The statute and the inferences derivable therefrom make the law that controls it. Regarding the substance of things and not their form, the truth is simply this: a portion of the estate, limited in time, was forfeited; the residue, expectant upon the expiration of that time, remained untouched, undisposed of; out of the owner's power and control, it is true, but not subject to any other person's power or control. It was somewhere, or possibly nowhere. But if it had not an actual, it had a potential, existence, ready to devolve to the heirs of the owner upon his death, or to be revived by any other cause that should call it into renewed vitality or enjoyment. The removal of the guilty party's disabilities, the restoration of all his rights, powers and privileges, not absolutely lost or vested in another, was such a cause. Those disabilities were all that stood in the way of his control and disposition of the naked ownership of the property. Being removed, it necessarily follows that he was restored to that control and power of disposition.

It follows from these views, that the act of sale executed by A. W. Bosworth and his wife in September, 1871, was effectual to transfer and convey the property in dispute, and that the judgment of the Circuit Court in favor of the plaintiffs below (the defendants in error) was erroneous. That judgment is, therefore,

Reversed and the cause remanded, with instructions to enter judgment for the defendants below, the now plaintiffs in error.

Mr. Justice Blatchford did not sit in this case, or take any part in its decision.

COLE *v.* CUNNINGHAM.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

No. 74. Submitted November 6, 1889. — Decided January 20, 1890.

The Constitution of the United States, in proper cases, permits equity courts of one State to control persons within their jurisdiction from prosecuting suits in another State.

It is no violation of that provision of the Constitution of the United States which requires that full faith and credit shall be given in each State to the judicial proceedings of every other State, if a court in one State, (in which proceedings have been begun, under a general insolvent law of the State, to distribute the estate of an insolvent debtor among his creditors,) enjoins a creditor of the insolvent, (who is a citizen of the same State, and subject to the jurisdiction of the court,) from proceeding to judgment and execution in a suit against the insolvent in another State, begun by an attachment of his property there, after knowledge of his embarrassment and actual insolvency, which property the insolvent law of the State of the debtor's residence requires him to convey to his assignee in insolvency, for distribution with his other assets — there being nothing in the law or policy of the state in which the attachment is made, opposed to those of the State of the creditor and of the insolvent debtor.

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

Daniel C. Bird, a citizen and inhabitant of Massachusetts, unable to meet his bills at maturity, suspended payment March 2, 1885, being at the time indebted to Butler, Hayden & Co., a copartnership composed of Charles S. Butler and N. F. T. Hayden, citizens and residents of Massachusetts, doing business in that State. On the night of the 4th or 5th of March, 1885, Butler, Hayden & Co. were informed by Bird that he had stopped payment, and that the firm of Aaron Claflin & Co., of New York, were indebted to him in a considerable sum for goods consigned by him to that firm to be sold on his account, and upon which Claflin & Co. had made advances but not to their full value. March 6th, Butler, Hayden & Co. executed an assignment of their claims against Bird to one Fayerweather, a resident of the State of New York, which assignment was made without consideration, and without previous communication with Fayerweather. March 11th and March 25th two

actions were commenced in New York in the name of Fayerweather on the claims of Butler, Hayden & Co. against Bird as defendant, and the firm of Claflin & Co. were summoned as garnishees. March 13, 1885, a meeting of Bird's creditors was held, and a committee appointed to investigate his affairs and make a report. On the 20th of March a second meeting of Bird's creditors was held, at which a report was submitted by the committee. April 23, 1885, a proposal for composition under the statutes of Massachusetts in that behalf was filed by Bird, returnable May 4th. May 20th, the composition proposal having been withdrawn, regular proceedings in insolvency were continued therein, and June 1, 1885, Richard Cunningham and Henry Tolman, Jr., were duly appointed assignees in insolvency of the estate of said Bird by the court of insolvency for the county of Plymouth, Massachusetts. Hayden, of Butler, Hayden & Co., was present at one of these creditors' meetings. The suits in New York were brought in a court of competent jurisdiction, and the attachments and proceedings were regular and in conformity with the laws of New York; they are still pending, and no judgment has yet been obtained therein.

On the 19th of June the assignees in insolvency brought a bill in equity in the Supreme Judicial Court for the county of Suffolk, in the State of Massachusetts, against Butler and Hayden, copartners as Butler, Hayden & Co., praying that Butler, Hayden & Co., their agents, servants, attorneys, and solicitors, might be enjoined and restrained from proceeding to further continue the suits against Bird, begun by them in the name of Fayerweather, and from attempting to collect by suit or otherwise, in the name of Fayerweather or any other person, for their own benefit, from Claflin & Co., any money or other thing on account of the claim against Bird; that they be ordered to refrain from further prosecuting the suits in New York, in which Claflin & Co. were summoned as garnishees; or that they be ordered to transfer to the assignees all their right, title and interest by, or under, or on account of their claim pretended to have been assigned to Fayerweather, so that the assignees may have, as the effect of said order, full

right to receive all money due from Claflin & Co. without any hindrance or interference upon the part of Butler, Hayden & Co. therewith; and a prayer for general relief.

Butler, Hayden & Co. answered the bill, denying any knowledge of Bird's insolvency, and claiming that the assignment to Fayerweather was made in good faith, and that the rights of Fayerweather, as a citizen of New York, under said assignment cannot be in any way affected by the insolvency of Bird; and afterwards amended the answer, and claimed that even if the assignment to Fayerweather was invalid, the attachment proceedings in New York were regular, and gave a valid lien on the property attached; and that, by the Constitution of the United States, the rights and interests gained by the attachments in New York cannot be taken away by the courts of Massachusetts without violating the provision that full faith and credit must be given in each State to the judicial proceedings of every other State.

The case was heard by a single judge upon certain agreed facts and additional evidence, and reserved by him for the consideration of the full court. It was stipulated "that either party may refer to the statutes of the United States, the statutes of the State of New York, and the several decisions of the State of New York, with the same effect as if the same were regularly introduced in evidence." The Supreme Judicial Court found, in addition to the matters hereinbefore stated, that it was fairly proven from the evidence "that the defendants, with full knowledge that Bird was insolvent, anticipating that there might be proceedings in insolvency in this State, and intending to secure to themselves, to the exclusion of other creditors, the avails of the debt owing to Bird by Claflin & Co., made the transfer of their claims to Fayerweather, and that the suits in New York now carried on in his name are subject to their control and conducted for their benefit. The attachments made in New York by process of garnishment are to be treated, so far as the defendants are concerned, as made by them." The court concluded its opinion, which is certified as a part of this record, and is reported in 142 Mass. 47, thus:

Citations for Plaintiffs in Error.

"In the case at bar it is true that the defendants had made their attachment through Fayerweather in New York before there had been an assignment in insolvency in this State actually executed, but this was done with full knowledge on their part that the debtor, Bird, was embarrassed and had suspended payment, and necessarily with intent to avoid the effect of the assignment, so far as the property attached was concerned. As residents of this State, they cannot be allowed to this extent to defeat the operation of the assignment, and thus to obtain a preference over other creditors resident here. They are within the limits of the jurisdiction of this court, and amenable to its process, and should be enjoined from prosecuting a suit the effect of which, if successful, will be to work a wrong and injury to other residents of the State."

The court thereupon entered a decree for the injunction prayed for, and Butler, Hayden & Co. sued out a writ of error from this court.

Mr. Henry D. Hyde and *Mr. M. F. Dickinson, Jr.*, (with whom was *Mr. Hollis R. Bailey* on the briefs,) for plaintiffs in error, cited: *Christmas* v. *Russell*, 5 Wall. 290, 300; *Green* v. *Van Buskirk*, 7 Wall. 139, 145; *Warner* v. *Jaffrey*, 96 N. Y. 248, 259; *Sartwell* v. *Field*, 68 N. Y. 341; *Dunlop* v. *Patterson Fire Ins. Co.*, 74 N. Y. 145; *Anthony* v. *Wood*, 29 Hun, 239; *McGinn* v. *Ross*, 11 Abb. Pr. (N. S.) 20; *Hibernian Nat. Bank* v. *Lacombe*, 84 N. Y. 367, 385; *Jenks* v. *Ludden*, 34 Minnesota, 486; *Kidder* v. *Tufts*, 48 N. H. 121, 126; *Paine* v. *Lester*, 44 Connecticut, 196, 204; *Rhawn* v. *Pearce*, 110 Illinois, 350; *Kelly* v. *Crapo*, 45 N. Y. 86; *Fuller* v. *Cadwell*, 6 Allen, 503; *Crapo* v. *Kelly*, 16 Wall. 610; *Hervey* v. *R. I. Locomotive Works*, 93 U. S. 664; *Taylor* v. *Carryl*, 20 How. 583; *Cooper* v. *Reynolds*, 10 Wall. 308; *Pennoyer* v. *Neff*, 95 U. S. 714; *Whipple* v. *Robbins*, 97 Mass. 107; *S. C.* 93 Am. Dec. 64; *American Bank* v. *Rollins*, 99 Mass. 313; *Garity* v. *Gigie*, 130 Mass. 184; *Wallace* v. *McConnell*, 13 Pet. 136, 151; *Nicoll* v. *Spowers*, 105 N. Y. 1; *Keller* v. *Paine*, 107 N. Y. 83, 90; *Bicknell* v. *Field*, 8 Paige, 440; *Harris* v. *Pullman*, 84 Illinois, 20; *Dehon* v. *Foster*, 4 Allen,

545; *Dehon* v. *Foster*, 7 Allen, 57; *Lawrence* v. *Batcheller*, 131 Mass. 504.

Mr. Eugene M. Johnson, for defendants in error, cited: *Dehon* v. *Foster*, 4 Allen, 545; *Keyser* v. *Rice*, 47 Maryland, 203; *Quidnick Co.* v. *Chaffee*, 13 R. I. 367; *Snook* v. *Snetzer*, 25 Ohio St. 516; *Vermont & Canada Railroad* v. *Vermont Central Railroad*, 46 Vermont, 792, 797; *Great Falls Manfg. Co.* v. *Worster*, 23 N. H. 462; *Bushby* v. *Munday*, 5 Madd. 297, 307; *Beckford* v. *Kemble*, 1 Sim. & Stu. 7; *Attwood* v. *Banks*, 2 Beavan, 192; *Hill* v. *Turner*, 1 Atk. 515; *Glascott* v. *Lang*, 3 Myl. & Cr. 451; *Hope* v. *Carnegie*, L. R. 1 Ch. 320; *Ex parte Tait*, L. R. 13 Eq. 311; *In re Chapman*, L. R. 15 Eq. 75; *Sartwell* v. *Field*, 66 N. Y. 341; *Massie* v. *Watts*, 6 Cranch, 148; *Phelps* v. *McDonald*, 99 U. S. 298; *Corbett* v. *Nutt*, 10 Wall. 464; *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 444; *Watkins* v. *Holman*, 16 Pet. 25.

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

The question to be determined is, whether a decree of the Supreme Judicial Court of Massachusetts, restraining citizens of that commonwealth from the prosecution of attachment suits in New York, brought by them for the purpose of evading the laws of their domicil, should be reversed upon the ground that such judicial action in Massachusetts was in violation of Article 4, sections 1 and 2 of the Constitution of the United States, which read as follows:

"Sec. 1. Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

"Sec. 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The act of May 26, 1790, 1 Stat. 122, now embodied in § 905 of the Revised Statutes, after providing the mode of authenticating the acts, records and judicial proceedings of the States, declares:

"And the said records, and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken."

This does not prevent an inquiry into the jurisdiction of the court, in which a judgment is rendered, to pronounce the judgment, nor into the right of the State to exercise authority over the parties or the subject matter, nor whether the judgment is founded in, and impeachable for, a manifest fraud. The Constitution did not mean to confer any new power on the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of the States domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence. No execution can be issued upon such judgments without a new suit in the tribunals of other States, and they enjoy, not the right of priority or privilege or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws, in their character of foreign judgments. *McElmoyle* v. *Cohen*, 13 Pet. 312, 328, 329; *D'Arcy* v. *Ketchum*, 11 How. 165; *Thompson* v. *Whitman*, 18 Wall. 457; *Pennoyer* v. *Neff*, 95 U. S. 714; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 292; *Christmas* v. *Russell*, 5 Wall. 290; Story, Constitution, §§ 1303 *et seq.*; and Story, Conflict of Laws, § 609. And other judicial proceedings can rest on no higher ground.

These well-settled principles find pertinent illustration in the decisions of the highest tribunal of the State of New York, to one of which we refer, as the contention is that the decree under review was in some way an unconstitutional invasion of the jurisdiction of that State.

In *Dobson* v. *Pearce*, 12 N. Y. (2 Kernan) 156, the plaintiff in a judgment, recovered in New York, brought an action upon it in the Superior Court of Connecticut, whereupon the defendant in the judgment filed a bill against the plaintiff on the equity side of the same court, alleging that the judgment

was procured by fraud, and praying relief. The plaintiff in the judgment appeared in and litigated the equity suit, and the court adjudged that the allegations of fraud in obtaining the judgment were true, and enjoined him from prosecuting an action upon it. He assigned the judgment, and it was held in a suit in New York, brought thereon by the assignee, that a duly authenticated copy of the record of the decree in the Connecticut Court was conclusive evidence that the judgment was obtained by fraud.

The Court of Appeals held that while a judgment rendered by a court of competent jurisdiction could not be impeached collaterally for error or irregularity, yet it could be attacked upon the ground of want of jurisdiction, or of fraud or imposition; that the right of the plaintiff in the judgment was a personal right, and followed his person; that when the courts of Connecticut obtained jurisdiction of his person by the due service of process within the State, these courts had full power to pronounce upon the rights of the parties in respect to the judgment, and to decree concerning it; that the jurisdiction of a court of equity anywhere, to restrain suit upon a judgment at law, upon sufficient grounds, was one of the firmly established parts of the authority of courts of equity; and that it could not be held that a court of equity in one State had no jurisdiction to restrain such a suit upon a judgment of a court of law of another State. If the objection to so doing was founded upon an assumed violation of the comity existing between the several States of the United States, that did not reach to the jurisdiction of the court, a rule of comity being a self-imposed restraint upon an authority actually possessed; and as to the objection that the Constitution of the United States and the laws made in pursuance of it inhibited the action of the Connecticut courts, this could not prevail, since full faith and credit are given to the judgment of a state court, when in the courts of another State it receives the same faith and credit to which it was entitled in the State where it was pronounced. *Pearce* v. *Olney*, 20 Connecticut, 544; *Engel* v. *Scheuerman*, 40 Georgia, 206; *Cage* v. *Cassidy*, 23 How. 109.

The intention of section 2 of Article 4 was to confer on the

citizens of the several States a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances, and this includes the right to institute actions. The fact of the citizenship of Butler and Hayden did not affect their privilege to sue in New York and have the full use and benefit of the courts of that State in the assertion of their legal rights; but as that fact might affect the right of action as between them and the citizens of their own State, the courts of New York might have held that its existence put an end to the seizure of their debtor's property by Butler, Hayden & Co. in New York. If, however, those courts declined to take that view, it would not follow that the courts of Massachusetts violated any privilege or immunity of Massachusetts's own citizens in exercising their undoubted jurisdiction over them.

Discharges under state insolvent laws exemplify the principle. Where the effect of the insolvent law is to relieve the debtor from liability on his contracts, such discharge, if the creditor and debtor have a common domicil, or the creditor, though non-resident, has voluntarily become a party to the proceedings, avails the defendant in all courts and places.

It was decided in *Sturges* v. *Crowninshield*, 4 Wheat. 122, that state legislatures have authority to pass a bankrupt or insolvent law, provided there be no act of Congress in force establishing a uniform system of bankruptcy, conflicting with such laws; and provided the law itself be so framed that it does not impair the obligation of contracts. Eight years later, in *Ogden* v. *Saunders*, 12 Wheat. 213, the court held that the power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States did not exclude the right of the States to legislate on the same subject, except when the power had actually been exercised by Congress, and the state laws conflicted with those of Congress; that a bankrupt or insolvent law of any State which discharged both the person of the debtor and his future acquisitions of property was not a law impairing the obligation of contracts, so far as respected debts contracted subsequent to the passage of the law; that a certificate of discharge under such law

could not be pleaded in bar of an action brought by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained. The insolvent law could have no extra-territorial operation, and the tribunal administering it would have no jurisdiction over citizens of other States. But this objection would not lie where such citizens had become parties to the proceedings. Hence in *Clay* v. *Smith*, 3 Pet. 411, it was held, where a citizen of Kentucky sued a citizen of Louisiana, and the defendant pleaded his discharge by the bankrupt law of Louisiana, that the plaintiff, who had received a dividend on his debt declared by the assignees of the defendant in Louisiana, had voluntarily made himself a party to those proceedings, abandoned his extra-territorial immunity from the bankrupt law of Louisiana, and was bound by that law to the same extent to which the citizens of Louisiana were bound. And it may be considered as settled that state insolvent laws are not only binding upon such persons as were citizens of the State at the time the debt was contracted, but also upon foreign creditors if they make themselves parties to proceedings under these insolvent laws, by accepting dividends, becoming petitioning creditors, or in some other way appearing and assenting to the jurisdiction. *Baldwin* v. *Hale*, 1 Wall. 223; *Gilman* v. *Lockwood*, 4 Wall. 409.

In New York an attachment is obtained on application to a judge of the Supreme Court, or a county judge, affidavit being made as to the validity of the claim and the grounds of the attachment, and a bond furnished with sufficient sureties. The judge in his discretion makes an order that a warrant of attachment be granted. The warrant is directed to the sheriff, and is subscribed by the judge, and requires the sheriff to attach and safely keep so much of the property as will satisfy the plaintiff's demand, with costs and expenses. This is served by the sheriff taking the property into his actual custody, or, in the case of a demand trusteed, by leaving a copy with the trustee or garnishee. The sheriff, under the direction of the court, must collect any debt or chose in action attached by him, and, if necessary, may bring an action in his own name, or in

that of the defendant, against the garnishee. Code of Civil Procedure, Title 3, 1 Bliss's New York Annotated Code, 545 *et seq.*

An attachment is in the nature of, but not, strictly speaking, a proceeding *in rem*, since that only is a proceeding *in rem* in which the process is to be served on the thing itself. If, in an attachment suit "the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer any demand which may be established against the defendant by the final judgment of the court. But, if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff." *Cooper* v. *Reynolds*, 10 Wall. 308, 318. The lien is inchoate, and the property attached held to await the result of the suit. If a judgment for the plaintiff is obtained, the lien becomes perfected and the property is applied to satisfy the judgment. If plaintiff fails in his action, the lien falls with it. And he may so fail by reason of the discharge of the defendant in insolvency, when he is a citizen of the same State, or has made himself a party to the proceedings in insolvency, or by the action of other courts of the State where the suit is pending, or elsewhere, if jurisdiction *in personam* be obtained. So that, after all, the inquiry is, whether, in a proper case, the equity courts of one State can control persons within their jurisdiction from the prosecution of suits in another. If they can, in accordance with the principles of equity jurisprudence and practice, no reason is perceived for contending that the Constitution of the United States prescribes any different rule. And the determination of what is a proper case for equity interposition would seem to be reposed in the court whose authority is invoked, though some remarks in that regard may not improperly be made.

The jurisdiction of the English Court of Chancery to restrain persons within its territorial limits and under its jurisdiction from doing anything abroad, whether the thing forbidden be

a conveyance or other act, *in pais*, or the institution or the prosecution of an action in a foreign court, is well settled.

In *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 444, Lord Hardwicke recognized the principle that equity, as it acts primarily *in personam* and not merely *in rem*, may, where a person against whom relief is sought is within the jurisdiction, make a decree, upon the ground of a contract, or any equity subsisting between the parties, respecting property situated out of the jurisdiction. 2 Lead. Cas. in Eq., (4th American edition,) 1806, and cases.

In *McIntosh* v. *Oglivie*, 4 T. R. 193, n.; *S. C.* 3 Swanston, 365, n.; *S. C.* 1 Dick. Ch. 119; Lord Hardwicke lays down the same doctrine as to restraining prosecution of suit. This case bears so close an analogy to that at bar that we give it in full, as follows, as reported in 4 T. R.:

"The plaintiff was the assignee of a bankrupt, the defendant a creditor, who before the bankruptcy went into Scotland and made arrestments on debts due to the bankrupt from persons there. Upon an affidavit of the defendant's having got this money into his hands, a *ne exeat* was granted; and a motion was now made on the behalf of the defendant to discharge it, upon a supposition that he had a right to the goods as creditor by his arrestments.

"The *Lord Chancellor* asked whether he had sentence before the bankruptcy; and, being answered in the negative, he said, 'Then it is like a foreign attachment, by which this court will not suffer a creditor to gain priority, if no sentence were pronounced before the bankruptcy. I cannot grant a prohibition to the Court of Sessions; but I will certainly make an order on the party here to restrain him from getting a priority, and evading the laws of bankruptcy here. If the gentleman were not going abroad, I would do nothing; but as he is, I will not discharge the writ without his giving security to abide the event of the cause.'"

Penn v. *Lord Baltimore* is cited with approval by Chief Justice Marshall in *Massie* v. *Watts*, 6 Cranch, 148, where a suit was instituted in the Circuit Court of Kentucky to compel the conveyance by the defendant of the legal title of land

in Ohio, on the ground that he had notice, when it was purchased, of the prior equity of the complainant. The defence was that the land was beyond the jurisdiction of the court and within the State of Ohio. This defence was overruled by the court below, and its decision affirmed by this court. "This court is of opinion," said the Chief Justice, "that in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." p. 160.

And in *Pennoyer* v. *Neff*, 95 U. S. 714, 723, it is said in the opinion of the court by Mr. Justice Field: "The State, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as such formalities can be complied with; and the exercise of this jurisdiction in no manner interferes with the supreme control over the property by the State within which it is situated. *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 444; *Massie* v. *Watts*, 6 Cranch, 148; *Watkins* v. *Holman*, 16 Pet. 25; *Corbett* v. *Nutt*, 10 Wall. 464."

In *Lord Portarlington* v. *Soulby*, 3 Mylne & K. 104, 106, Lord Chancellor Brougham reviews the history of the jurisdiction to restrain parties from commencing or prosecuting actions in foreign countries, and concludes: "Nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party, on whom this order is made, being within the power of the court." *Earl of Oxford's Case*, 1 Ch. Rep. 1; *S. C.* 2 Lead. Cas. in Eq. 1316.

Mr. Justice Story states the principle thus:

"But, although the courts of one country have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their own territorial limits. When, therefore, both parties to a suit in a foreign country are resident within the territorial

limits of another country, the courts of equity in the latter may act *in personam* upon those parties, and direct them, by injunction, to proceed no further in such suit. In such a case, these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject matter of the dispute, they consider the equities between the parties, and decree *in personam* according to those equities; and enforce obedience to their decrees by process *in personam*. . . . It is now held that whenever the parties are resident within a country, the courts of that country have full authority to act upon them personally with respect to the subject of suits in a foreign country, as the ends of justice may require; and, with that view, to order them to take, or to omit to take, any steps and proceedings in any other court of justice, whether in the same country, or in any foreign country." Story Eq. Jur. §§ 899, 900.

In *Phelps* v. *McDonald*, 99 U. S. 298, 308, Mr. Justice Swayne uses this language:

"Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ*, which he could do voluntarily, to give full effect to the decree against him. Without regard to the situation of the subject matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*."

Such is undoubtedly the result of the clear weight of authority, and the rule has been often applied by the courts of the domicil against the attempts of some of its citizens to defeat the operation of its laws to the wrong and injury of others.

Thus it was held by the Supreme Court of Ohio in *Snook* v. *Snetzer*, 25 Ohio St. 516, that where the statutes of that State exempted the earnings for personal service of a debtor, who was the head of a family and a citizen of the State, the

Ohio courts had authority to restrain a citizen of the county in which the equity action was commenced, from proceeding in another State to attach the earnings of such head of a family, with a view to evade the exemption laws of Ohio, and to prevent him from availing himself of the benefit of such law.

To the same effect is *Keyser* v. *Rice*, 47 Maryland, 203. The Court of Appeals of Maryland declared the power of the State to compel its own citizens to respect its laws, even beyond its own territorial limits, to be supported by the great preponderance of precedent and authority; and sustained an injunction to restrain the further prosecution in another State of an attachment, by which the defendant sought to recover wages due the complainant in Maryland and there exempt from attachment.

So in *Burlington and Missouri Railroad* v. *Thompson*, 31 Kansas, 180, though it was held that a foreign corporation doing business in Kansas might be garnisheed for a debt due to a non-resident employé, contracted outside of the State, and exempt from garnishment in the State where the defendant and garnishee resided, yet it was conceded by Judge Brewer, in delivering the opinion, "that in the courts of a State any citizen of that State may be enjoined from resorting to the courts of any other State for the purpose of evading the exemption laws of his own State;" and this was so decided in *Zimmerman* v. *Franke*, 34 Kansas, 650.

In *Wilson* v. *Joseph*, 107 Indiana, 490, the Supreme Court of Indiana ruled that an injunction would lie to restrain a resident of Indiana from prosecuting an attachment proceeding against another resident in the courts of another State, in violation of a statute which made it an offence to send a claim against a debtor out of the State for collection, in order to evade the exemption law. And see *Chaffee* v. *Quidnick Company*, 13 R. I. 442, 449; *Great Falls Manufacturing Co.* v. *Worster*, 23 N. H. (3 Foster) 462; *Pickett* v. *Ferguson*, 45 Arkansas, 177.

The rule is not otherwise in New York. It is true that in *Mead* v. *Merritt*, 2 Paige, 402, 404, the chancellor said: "I am not aware that any court of equity in the Union has deliberately decided that it will exercise the power, by process of in-

junction, of restraining proceedings which have been previously commenced in the courts of another State." And the reason urged against the exercise of the power was that if the courts of one State should see fit to enjoin proceedings in another, the latter might retaliate in like manner in enjoining proceedings in the first, and thus give rise to an endless conflict of jurisdiction. But this reasoning has not commended itself to the judicial mind, for the injunction is not directed to the courts of the other State, but simply to the parties litigant, and although the power should be exercised with care, and with a just regard to the comity which ought to prevail among coördinate sovereignties, yet its existence cannot at this day be denied.

In *Vail* v. *Knapp*, 49 Barb. 299, 305, an injunction was continued against citizens of New York, plaintiffs in attachment suits in Vermont, upon the ground that they were proceeding in Vermont in evasion of the laws of New York; and the court points out that, though as a general rule the courts of New York decline to interfere by injunction to restrain its citizens from proceeding in an action which has been commenced in a sister State, citing *Mead* v. *Merritt*, 2 Paige, 402; *Burgess* v. *Smith*, 2 Barb. Ch. 276, and other cases, yet "there are exceptions to this rule, and when a case is presented, fairly constituting such exception, extreme delicacy should not deter the court from controlling the conduct of a party within its jurisdiction to prevent oppression or fraud. No rule of comity or policy forbids it."

The same result was announced in *Dinsmore* v. *Neresheimer*, 32 Hun, 204, where the Supreme Court of New York held that an express company could maintain an action in New York to restrain the defendant, a resident of the State of New York, from prosecuting actions against the company in the District of Columbia, brought to avoid a decision of the Court of Appeals of New York, differing from the rule upon the same subject in the District of Columbia.

In *Erie Railway Co.* v. *Ramsey*, 45 N. Y. 637, the Court of Appeals, speaking through Folger, J., treats the general question as not admitting of doubt.

At the time of these proceedings, as for many years before, the Commonwealth of Massachusetts had an elaborate system of insolvent laws, designed to secure the equal distribution of the property of its debtors among their creditors. Under these insolvent laws all preferences were avoided, and all attachments in favor of particular creditors dissolved. The transfer of the debtor's property to his assignees in insolvency extended to all his property and assets, wherever situated. This was expressly provided as to such as might be outside of the State. By one of the sections of the chapter of the Public Statutes of Massachusetts treating of this subject, the debtor was required to do all acts necessary to give the assignees power to "demand, recover and receive all the estate and effects so assigned, especially any part thereof which is without this State." Mass. Pub. Stat. 1882, c. 157, § 74. Whenever the debtor had made, to the satisfaction of the judge in insolvency, a full transfer and delivery of all his estate, and conformed to the directions and requirements of the law, he was entitled to be absolutely and wholly discharged from his debts, with certain exceptions; but it was provided that a discharge should not be granted to a debtor whose assets did not pay fifty per cent of the claims proved against his estate, unless upon the assent in writing of a majority in number and value of his creditors who had proved their claims. §§ 80, 86.

Nothing can be plainer, than that the act of Butler, Hayden & Co. in causing the property of the insolvent debtors to be attached in a foreign jurisdiction, tended directly to defeat the operation of the insolvent law in its most essential features, and it is not easy to understand why such acts could not be restrained, within the practice to which we have referred.

But for the attachment suits the assignees in insolvency could have collected the claim of Bird against Claflin & Co., but could not have intervened in those suits and asked of the courts of New York the enforcement of their title. The rule in that State is, that by the comity of nations, the statutory title of foreign assignees in bankruptcy is recognized and enforced when it can be done without injustice to the citizens of the State, and without prejudice to creditors pursuing their remedies

under the New York statutes, provided also that such title is not in conflict with the laws or public policy of the State, and that the foreign court had jurisdiction of the bankrupt. *In re Waite*, 99 N. Y. 433.

Under such a rule it is evident that the remedy of the assignees was in equity and in the courts of their domicil.

This is the conclusion reached in *Kidder* v. *Tufts*, 48 N. H. 121, 126, referred to by counsel for appellant. That was a case where citizens of Massachusetts commenced in New Hampshire an attachment against certain other citizens of the former State; proceedings in insolvency against the defendants were afterwards instituted in Massachusetts; and, subsequently to this, certain New Hampshire creditors attached the same property and then moved for a continuance to await the proceedings in insolvency, for the purpose of pleading the insolvent's discharge in bar of the first attachment. But the court denied the motion, holding that the Massachusetts creditors had availed themselves of their strict legal rights as established and allowed by the statute law of New Hampshire, and, for the purpose of an attachment, might properly be considered subjects of that state government; but the court added: "If the subsequent attaching creditors have a remedy, and can in any way prevent the plaintiffs from obtaining a preference, their appeal should be made, as creditors of the defendants, to the Massachusetts courts, which may exercise their jurisdiction over their own citizens if they have violated any of their laws by their experiment here." *Hibernia Nat. Bank* v. *Lacombe*, 84 N. Y. 367, 386.

So in the case of *Paine* v. *Lester*, 44 Connecticut, 196, where a citizen of Rhode Island attached in Connecticut a debt due from a citizen of Connecticut to a corporation of Pennsylvania, which had made an assignment for the benefit of creditors, the lien of the attachment was held valid against the claim of the trustee in the assignment, because the right of the trustee in insolvency in Connecticut rested only on the comity which the court there could exercise or refuse to exercise at its discretion, while the plaintiff had a legal right, under the laws of Connecticut, to prosecute his suit.

Opinion of the Court.

In *Rhawn* v. *Pearce*, 110 Illinois, 350, the Supreme Court of Illinois declined to recognize at law the insolvent laws of Pennsylvania, by giving effect to a statutory assignment in that State, even as against an attaching creditor of the same State with the debtor. But the same tribunal found no difficulty in holding, in *Sercomb* v. *Catlin*, 128 Illinois, 556, that the courts of Illinois, on the application of a receiver appointed by them, could enjoin a person within the jurisdiction of the court from interfering in respect to property belonging to an insolvent copartnership for which the receiver had been appointed, although that property was outside of the jurisdiction, and *Chaffee* v. *Quidnick Co.*, 13 R. I. 442; *Dehon* v. *Foster*, 4 Allen, 545; and *Vermont & Canada Railroad Co.* v. *Vermont Central Railroad Co.*, 46 Vermont, 792, were cited.

Dehon v. *Foster*, 4 Allen, 545, is the leading case upon the subject, argued by eminent counsel on both sides, and decided upon great consideration. The Supreme Judicial Court of Massachusetts, speaking through Bigelow, C. J., points out that the jurisdiction of a court, as a court of chancery, to restrain persons within its jurisdiction from prosecuting suits, upon a proper case made, either in the courts of Massachusetts or in other States or foreign countries, rests on the clear authority vested in courts of equity over persons within the limits of their jurisdiction and amenable to process, to stay acts contrary to equity and good conscience; and that, as the decree of the court in such cases is directed solely at the party, it is wholly immaterial that such party is prosecuting his action in the courts of another state or country.

The action was a bill in equity to enjoin a citizen of Massachusetts from availing himself of an attachment of personal property in Pennsylvania, as against a debtor put into insolvency under the laws of Massachusetts, and thus preventing the same from coming to the hands of the assignee. The court held that it was obvious that the controversy was simply as to the relative rights of citizens of Massachusetts to personal property belonging to insolvent debtors, domiciled in that state, and raised no question involving a conflict of rights

between citizens of Massachusetts and another State, nor as to the validity of a foreign law, or of liens acquired under it. On the contrary, the case rested on the ground that the defendants, if allowed to proceed with their action, would perfect a lien then only inchoate under their attachment, and might thereby establish a valid title to the property of the insolvent debtors under the laws of Pennsylvania.

"Looking then at our own laws," said the court, "to ascertain which of the two parties to this suit has a paramount right or superior equity to the debts due to the insolvents from persons residing out of the state, there would seem to be but little, if any, room open for doubt or controversy." The fundamental principle of the insolvent laws of the commonwealth, that all the property of the debtor should be taken and equally distributed among his creditors, was remarked on, and the provisions of the statute intended to secure that end recapitulated. The inevitable conclusion was announced that, as the act of the defendants in causing the property of the insolvent debtors to be attached in a foreign jurisdiction tended directly to defeat the operation of the law by preventing a portion of the property of the debtors from coming to their assignees to be equally distributed among their creditors, and giving a preference to certain of their debtors, so that they would obtain payment of their debt in full, it was, therefore, an attempt by those creditors, citizens of Massachusetts, to defeat the operation of their own laws, to the injury of other creditors of the insolvents. And the court proceeded: "This is manifestly contrary to equity. The defendants, being citizens of this state, are bound by its laws. They cannot be permitted to do any acts to evade or counteract their operation, the effect of which is to deprive other citizens of rights which those laws are intended to secure. Certain it is that they could not in any manner or by any process take from the assignees of an insolvent debtor property belonging to him within this state, and appropriate it to the payment of their debt in full. To prevent such appropriation, if the law furnished no adequate and complete remedy, this court would interfere by suitable process in equity. We are unable to see

any reason for withholding such interference, merely because our citizens seek to accomplish the same purpose by resorting to a foreign jurisdiction, and with the aid of the laws of another state or country. An act which is unlawful and contrary to equity gains no sanction or validity by the mere form or manner in which it is done. It is none the less a violation of our laws, because it is effected through the instrumentality of a process which is lawful in a foreign tribunal. By interposing to prevent it, we do not interfere with the jurisdiction of courts in other states, or control the operation of foreign laws. We only assert and enforce our own authority over persons within our jurisdiction, to prevent them from making use of means by which they seek to countervail and escape the operation of our own laws, in derogation of the rights and to the wrong and injury of our own citizens."

To the argument that the bill could not be maintained, because the statutes of Massachusetts regulating the assignment and distribution of insolvent estates could have no extra-territorial effect or operation, the court answered that while it was true that the statutes of Massachusetts *ex proprio vigore* had no effect or operation in other states, it was also true that, by the comity of states and nations, the laws of one country are allowed to a certain extent to control the rights of persons and property in other countries, though not allowed to have any effect to the injury of the citizens of such other country. From this principle it followed as a necessary consequence, that personal property of a Massachusetts insolvent debtor, situated in Pennsylvania, would vest in the Massachusetts insolvent's assignees, with power to take possession of and collect it either in their own names or in the name of the insolvent, if they were not held or attached by virtue of a process or lien in favor of a creditor, which would be valid under the laws of Pennsylvania. Hence, if the attachment in Pennsylvania were valid and binding, the Massachusetts creditors would obtain a right, superior to that conferred under the Massachusetts laws on the assignees in insolvency, by the act of such creditors, in defeat of the operation of the laws of their own state; so that a proceeding in equity might properly be resorted to to compel

the defendants to desist from the prosecution of a suit which would have such an effect.

Nor did the court regard the fact as controlling to the contrary, that the attachment was made prior to the institution of the proceedings in insolvency, because the attachment tended to contravene the clear intent of the statutes, which aim to vest in the assignee all the property of the debtor which could have been assigned by him, or taken on execution against him, at the time of the commencement of the insolvent proceedings, "although the same is then attached on mesne process as the property of the debtor;" and because, aside from that, it appeared that the defendants, when they instituted process in Pennsylvania, and made their attachment, knew that the debtors were insolvent, and had reason to believe that proceedings in insolvency were about to be instituted against them, and caused the attachment to be made with an intent to obtain a preference over other creditors, and to avoid the operation of the insolvent laws of the commonwealth. Under such circumstances, priority gave no equity to the defendants. The purpose to interfere with and prevent the proper distribution of the insolvent's estate took away all claim to equitable consideration which might exist when priority was obtained in good faith. The decree accordingly went enjoining the defendants from prosecuting their attachments.

The objection was urged that the effect of the restraint might be to enable all non-resident creditors to appropriate property by attachment to the payment of their debts, and thereby to gain a preference over attaching creditors residing in Massachusetts as well as to prevent the property from passing to the assignees. This was of course a matter to be considered by the court in arriving at a conclusion as to granting the relief prayed. It may be remarked, however, that while as between citizens of the State of the forum, and the assignee appointed under the laws of another State, the claim of the former will be held superior to that of the latter by the courts of the former, yet this has not been so ruled in many of the States, as between an assignee appointed in another State and citizens of other States than that of his appointment, and of

the forum. Undoubtedly the fiction of law that the domicil draws to it the personal estate of the owner wherever it may happen to be, yields whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined, and always yields when the laws and policy of the State where the property is located invalidate a transfer, even though valid by the law of the assignor's domicil, in which state it was made, subject to the qualifications, that property once vested in the assignee and in his possession will not be disturbed, and that in some jurisdictions, when the attaching creditor is domiciled in the same state with the assignor, he may be precluded from disputing the assignment in a foreign court.

Whether the law of the common domicil of two or more litigants determines their title to property in another territory, so that an attaching creditor, whose domicil is the same as that of the assignor, cannot set up against an assignment the law of a foreign country where the property is actually situated, has been much discussed. It is certain that the law of the common domicil cannot overcome such registry and other positive laws of the other country as are distinctively politic and coercive. Wharton on Confl. Laws, §§ 369, 371. If a State provides that no title shall pass to property within its borders, except on certain conditions, such provision cannot be overridden by the law of any other State, which parties domiciled there may be held to have adopted. It was in this view that Mr. Justice Miller, referring to a voluntary conveyance, in *Green* v. *Van Buskirk*, 5 Wall. 307, 311, 312, said:

"There is no little conflict of authority on the general question as to how far the transfer of personal property by assignment or sale, made in the country of the domicil of the owner, will be held to be valid in the courts of the country where the property is situated, where these are in different sovereignties. The learned author of the Commentaries on the Conflict of Laws has discussed the subject with his usual exhaustive research. And it may be conceded that, as a question of comity, the weight of his authority is in favor of the proposition that such transfers will generally be respected

by the courts of the country where the property is located, although the mode of transfer may be different from that prescribed by the local law.

"But, after all, this is a mere principle of comity between the courts, which must give way when the statutes of the country where property is situated, or the established policy of its laws, prescribe to its courts a different rule."

Great contrariety of state decision exists upon this general topic, and it may be fairly stated that, as between citizens of the state of the forum, and the assignee appointed under the laws of another state, the claim of the former will be held superior to that of the latter by the courts of the former; while, as between the assignee and citizens of his own state and the state of the debtor, the laws of such state will ordinarily be applied in the state of the litigation, unless forbidden by, or inconsistent with, the laws or policy of the latter. Again, although, in some of the states, the fact that the assignee claims under a decree of a court or by virtue of the law of the state of the domicil of the debtor and the attaching creditor, and not under a conveyance by the insolvent, is regarded as immaterial; yet, in most, the distinction between involuntary transfers of property, such as work by operation of law, as foreign bankrupt and insolvent laws, and a voluntary conveyance, is recognized. The reason for the distinction is that a voluntary transfer, if valid where made, ought generally to be valid everywhere, being the exercise of the personal right of the owner to dispose of his own, while an assignment by operation of law has no legal operation out of the state in which the law was passed. This is a reason which applies to citizens of the actual *situs* of the property when that is elsewhere than at the domicil of the insolvent, and the controversy has chiefly been as to whether property so situated can pass even by a voluntary conveyance.

In *Warner* v. *Jaffray*, 96 N. Y. 248, the debtor, residing in New York, made a general assignment, for the benefit of creditors, to the plaintiff. He owned personal property situated in Pennsylvania, which was attached by New York creditors, having no actual notice of the assignment, before the assign-

ment had been recorded in Pennsylvania. A statute of that State provided that assignments of property situated there, made by a person not a resident therein, might be recorded in any county where the property was, and would take effect from its date, "provided that no *bona fide* purchaser, mortgagee, or creditor, having a lien thereon before the recording in the same county, and not having previous actual notice thereof, shall be affected or prejudiced." It was held that an injunction should not be granted against the New York creditors from prosecuting their attachment suits in Pennsylvania. The assignment, said the court, was a mere voluntary conveyance, and "did not operate upon the creditors of the assignor, nor place them under any obligations. It left them entirely free to act. They could utterly refuse to have anything to do with it, and retain their claims and enforce them in their own time, as best they could, against their debtor. The assignee became a trustee for such creditors of the assignor only as chose to accept him as such, and without their assent the assignment did not bring the creditors into any relation with the assignee, or with each other. The law did not take this insolvent's property for distribution among his creditors, but its distribution was his own act. Any one of his creditors could, notwithstanding the assignment, enforce his claim against any property of the assignor not conveyed by the assignment, without violating any rights or equities of the other creditors." The law of Pennsylvania was then referred to, and it was shown, as the fact was, that such an assignment was recognized in Pennsylvania, but that to give it effect before it had been recorded where the property was, would have been in contravention of the law of the State. Upon this ground the court distinguished *Ockerman* v. *Cross*, 54 N. Y. 29, where "it was held that a voluntary assignment by a debtor residing in Canada, valid by the laws of his domicil, and not invalidated by any law of this State, was valid here and operated to transfer the assignor's property situated here. That the decision would have been different if the assignment had been in contravention of our laws or policy, is fully recognized in the opinion of the court." And so also the court dis-

tinguished the case of *Bagby* v. *Atlantic, Mississippi & Ohio Railroad Co.*, 86 Penn. St. 291. There a receiver had been appointed in the State of Virginia of the property of the railroad company, and at the time of such appointment there was due to it, from a debtor in Pennsylvania, a certain sum of money which the receiver claimed. But after his appointment a creditor residing in Virginia went to the State of Pennsylvania and there commenced suit against the railroad company and attached the debt due it, and it was held that the receiver was entitled to the debt. And the Court of Appeals said: "The transfer of the title to the receiver was not in contravention of any law of Pennsylvania, and hence it was held that as against a citizen of Virginia, bound by its laws, the appointment of a receiver, binding upon him there, would, by comity, be held to be binding upon him in Pennsylvania."

In the case in hand, the Supreme Judicial Court of Massachusetts thought it proper to grant the injunction, since it was a case of the taking by the law of the insolvent's property for distribution among his creditors, who, so far as resident in the State of Massachusetts, were brought into relations with the assignee and with each other, which precluded them from enforcing their claim against the property of the assignor conveyed by the assignment, and rendered the effort to do so a violation of the rights and equities of the other creditors, and an absolute infraction of the law of their own domicil. Nor was there any law or policy of the State of New York contravened by the insolvent proceedings in question, or in itself inimical to the title of the assignees.

In *Lawrence* v. *Batcheller*, 131 Mass. 504, the defendant, Batcheller, a citizen of Massachusetts, had brought suits by attachment in other States against one Paige, also a citizen of Massachusetts, indebted to defendant, and in embarrassed circumstances, and garnisheed and ultimately collected various amounts due to Paige. Paige subsequently went into insolvency, and his assignees sued Batcheller at law to recover the money. The Supreme Judicial Court of Massachusetts held that the assignees could not recover because, as the attachments were made prior to the time when the assignment in insolvency took

effect, and, having been made in other States, were not dissolved by the proceedings in insolvency, and were valid by the laws of the States where they were instituted, they prevailed over the insolvency assignment, the statutes of Massachusetts not making a title so acquired void or voidable at the election of the assignees in insolvency. And the court, holding that courts of law will not always afford a remedy in damages for all wrongs which courts of equity might prevent, said: "Courts of equity recognize and enforce rights which courts of law do not recognize at all; and it is often on this ground that defendants in equity are enjoined from prosecuting actions at law." The distinction between the action as brought and *Dehon* v. *Foster* was treated as obvious.

What has been said is in harmony with the rule announced in *Green* v. *Van Buskirk*, 5 Wall. 307; *S. C.* 7 Wall. 139. In that case, Bates, who lived in New York, executed and delivered to Van Buskirk, who lived in the same State, a chattel mortgage on certain iron safes which were then in the city of Chicago. Two days after this, Green, who was also a citizen of New York, being ignorant of the existence of the mortgage, sued out a writ of attachment in the courts of Illinois, levied on the safes, and subsequently had them sold in satisfaction of the judgment obtained in the attachment suit. There was no appearance or contest in this attachment suit, and Van Buskirk was not a party to it, although he could have made himself such party and contested the right of Green to levy on the safes, being expressly authorized by the laws of Illinois so to do. It was conceded that by the law of Illinois mortgages of personal property, until acknowledged and recorded, were void as against third persons. Subsequently Van Buskirk sued Green in New York for the value of the safes mortgaged to him by Bates, of which Green had thus received the proceeds. The courts of New York gave judgment in favor of Van Buskirk, holding that the law of New York was to govern and not the law of Illinois, although the property was situated in the latter State, and that the title passed to Van Buskirk by the execution of the mortgage. The cause was then brought to this court and first considered upon a motion to

dismiss for want of jurisdiction. Mr. Justice Miller delivered the opinion overruling that motion. The cause then came on to be heard upon the merits, and the judgment of the Court of Appeals of New York was reversed. This court held that, as, by the laws of Illinois, an attachment on personal property would take precedence of an unrecorded mortgage, executed in another State where recording was not necessary, the judgment in attachment would be binding though the owner of the chattels, the attaching creditor and the mortgage creditor might all be residents of such other State; and Mr. Justice Davis, speaking for the court, said:

"It should be borne in mind, in the discussion of this case, that the record in the attachment suit was not used as the foundation of an action, but for purposes of defence. Of course, Green could not sue Bates on it, because the court had no jurisdiction of his person; nor could it operate on any other property belonging to Bates than that which was attached. But as, by the law of Illinois, Bates was the owner of the iron safes when the writ of attachment was levied, and as Green could and did lawfully attach them to satisfy his debt in a court which had jurisdiction to render the judgment, and as the safes were lawfully sold to satisfy that judgment, it follows that when thus sold the right of property in them was changed, and the title to them became vested in the purchasers at the sale. And as the effect of the levy, judgment and sale is to protect Green if sued in the courts of Illinois, and these proceedings are produced for his own justification, it ought to require no argument to show that when sued in the court of another State for the same transaction, and he justifies in the same manner, that he is also protected. Any other rule would destroy all safety in derivative titles, and deny to a State the power to regulate the transfer of personal property within its limits, and to subject such property to legal proceedings." 7 Wall. 148.

It will be perceived that it was manifestly inadmissible to hold that after Van Buskirk had permitted Green to go to judgment in a proceeding *in rem*, which appropriated the property as belonging to Bates, he could then get judgment

against Green for the conversion of what had so been adjudged to him, an adjudication which Van Buskirk had voluntarily declined to litigate in the proper forum, and had not sought in his own State to prevent. It was a contest between two individuals claiming the same property, and that property capable of an actual *situs*, and actually situated in Illinois. The attachment was not only levied in accordance with the laws of Illinois, but the laws of that State affirmatively invalidated the instrument under which Van Buskirk claimed. Clearly, then, the law of the domicil of Van Buskirk, Green and Bates could not overcome such registry and other positive laws of Illinois as were distinctively coercive. *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664; *Walworth* v. *Harris*, 129 U. S. 355.

In the case at bar, the attachment suits have not gone to judgment, and the assignees in insolvency have proceeded with due diligence as against these creditors, citizens of Massachusetts, who are seeking to evade the laws of their own State; nor is there anything in the law or policy of New York opposed to the law or policy of Massachusetts in the premises.

We find no infringement of the Constitution in the rendition of the decree, and it is accordingly

Affirmed.

Mr. Justice Miller, with whom concurred Mr. Justice Field and Mr. Justice Harlan, dissenting.

I dissent from the judgment and opinion of the court in this case. I am of opinion that the proceedings in the state court of New York, whether they be considered as the *bona fide* action of Fayerweather for his own benefit, or as merely representing the interests of Butler, Hayden & Co., were efficient in establishing a lien on the indebtedness of Aaron Claflin & Co., of New York, which by the laws of that State was superior to any right then held, or which could be acquired afterwards by the assignees in insolvency of Daniel C. Bird.

Indeed, it is not questioned in the very learned opinion of the court in this case that if Butler, Hayden & Co. had been permitted to go on with their proceeding in New York, they

would have secured an order in the court in which the proceedings were pending, that the garnishees, Aaron Claflin & Co., should pay the amount of their indebtedness to the plaintiff in that action. But the whole argument of the court is that, because Butler, Hayden & Co. were citizens of Massachusetts, they were under some superior obligation to the law of Massachusetts, and to be governed by the rights that law conferred, which prevented them from availing themselves of the law of New York that gave them this superior right.

I do not deny the general principle that a party found within the jurisdiction of a court and subject to its process may be restrained and enjoined from doing certain things in some other jurisdiction because the thing which he might attempt to do is opposed to the principles of equity or to the law of the place where he is found. And such might be the law in this case, but for the provision of the Constitution of the United States and the act of Congress, both of which are recited in the opinion of the court, which require that the "records and judicial proceedings of a State authenticated as aforesaid shall have such faith and credit given to them in every court in the United States as they would have by law or usage in the courts of the State from whence such records are or shall be taken." The record introduced from the court of New York in this case had the effect in that State to give Butler, Hayden & Co. a lien on the indebtedness of Aaron Claflin & Co., to their creditor, Bird, which in that court would have ripened into a judgment and been enforced. That was the faith and credit which the laws of New York gave to that proceeding. It initiated a right. It established a lien, and there was no power in the courts of Massachusetts to interrupt the course of these proceedings to the final result. That is to say, there was no power to do this directly. Had it the right to do it by seizing the persons of Butler, Hayden & Co. in Massachusetts, and compelling them there to forego the advantage which they had secured in the state courts of New York? When, therefore, Butler, Hayden & Co. were sued in equity in the courts of Massachusetts, and there was produced the record of these proceedings in the court of New York, the

question was presented to the courts of Massachusetts what effect they would give to those proceedings. Now they did not give the effect which the laws of New York gave to them. Neither the law nor the usage in the courts of New York admitted of such proceeding as that taken in the courts of Massachusetts.

If there was any error in proceedings in the court of New York, that error was subject to correction in due course of law in courts of justice of the State of New York, and Butler, Hayden & Co. had a right to insist on the validity of their proceedings being tested by the courts, and governed by the laws of the State of New York, and not by those of Massachusetts.

It is no answer to this to say that Butler, Hayden & Co. were citizens of Massachusetts and were found within its jurisdiction. The higher law of the Constitution of the United States places this restraint upon the courts of Massachusetts in dealing even with her own citizens, and if her citizens have obtained rights in the courts of New York which have become a part of the records and judicial proceedings of those courts, no matter how the law under which those rights are established may be opposed to the law of the State of Massachusetts, they are to be respected by the courts of Massachusetts because they are effectual over the parties and subject matter in New York, and because the Constitution of the United States and the act of Congress of May 26, 1790, assert the principle that the courts of Massachusetts must give full credit, by which is meant the same effect to the proceedings in New York which that State gives to them. The constitutional provision which makes this declaration is part of Article IV, and it is in immediate connection with its second section, which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." The meaning of this is to prevent conflicts between courts of the different States, over the same matters, by establishing the rule that whatever is done or decided in one State shall be respected in every other State when properly proved before it. It is one feature of the general idea which is found all through the Constitution.

These are the principles established after a most vigorous contest by the case of *Green* v. *Van Buskirk*, twice before this court, and reported in 5 Wall. 307, and 7 Wall. 139. In that case both the contesting parties lived in the State of New York and were citizens of that State. Each asserted a paramount title to certain safes which were in the city of Chicago. Green, although a citizen of New York with Van Buskirk, levied in the State of Illinois an attachment on these safes, on which Van Buskirk had a chattel mortgage executed in the State of New York but not recorded in Illinois. Green proceeded with his attachment and bought the safes under it, which he converted to his own use in Illinois. Afterwards he was sued by Van Buskirk in the State of New York for this conversion, and he set up and relied on the proceedings in the attachment suit in Illinois as a defence. The Supreme Court of New York held that as between its own citizens, its law upon the subject of chattel mortgages, which was the claim Van Buskirk had on the safes, should prevail, while Green insisted that the law of Illinois, where the proceedings in the attachment took place, and where the safes were, should govern. In the case as it first presented itself in this court a motion to dismiss for want of jurisdiction was made, which the court overruled on the ground that the case was to be governed by the law of Illinois under the Constitution of the United States and the act of Congress already referred to.

The case afterwards came on in 7 Wall. upon the further question whether the laws of Illinois were such as to give Green a right to that proceeding, and the court held that they were; that the attachment, judgment and sale in Illinois were valid, and that the state courts of New York were bound to give them effect in the proceeding of *Van Buskirk* v. *Green*.

The only difference between that case and the one now under consideration is, that at the time the court in Massachusetts intervened and undertook to prevent Butler, Hayden & Co. from pursuing their case in the courts of New York, there had been no judgment in favor of that company. But I am at a loss to see why the right established by Butler, Hayden & Co. in the courts of New York is not as much to be respected and

the same effect given to it according to its nature, as if the judicial proceeding had ripened into a judgment. It is very clear that, but for the injunction against Butler, Hayden & Co. they would have got such a judgment and would have obtained their money; and if they had been sued in Massachusetts for violating the laws of Massachusetts on that subject, it is equally clear, according to *Green* v. *Van Buskirk*, that the proceedings in the New York court would have been a good defence. I think, therefore, that the judgment of the court and the principles of the opinion are erroneous, and are opposed to the former decisions of this court.

Mr. Justice Brewer, not having been a member of the court when this case was considered, took no part in its decision.

KEYSER *v.* HITZ.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 42. Argued October 25, 28, 1889. — Decided January 6, 1890.

After the passage of the act of June 30, 1876, 19 Stat. 63, savings banks organized in the District of Columbia under an act of Congress, and having a capital stock paid up in whole or in part, were entitled to become national banking associations in the mode prescribed by Rev. Stat. § 5154.

A certificate signed by the Deputy Comptroller of the Currency as "Acting Comptroller of the Currency," is a sufficient certificate by the Comptroller of the Currency within the requirements of Rev. Stat. § 5154.

The record from the trial court must be taken in this court as it was presented to the appellate court below, and an objection to it, not made there, will not be considered here.

A transfer of stock in a bank to a person without his or her knowledge or consent, does not of itself impose upon the transferee the liability attached by law to the position of a shareholder in the association; but if, after the transfer, the transferee approves or acquiesces in it, or in any way ratifies it, (as, for instance, by joining in an application to convert the bank into a national bank,) or accepts any benefit arising from the ownership of such stock, he or she becomes liable to be treated as a shareholder, with such responsibility as the law imposes in such case; and this liability is the same whether new certificates have or have not been issued to the transferee after the transfer.

The endorsement, by the payee, of a check which appears on its face to be drawn by the cashier of a bank in payment of a dividend due the payee as a stockholder, estops him from denying knowledge of its contents or ownership of the shares.

A married woman in the District of Columbia may become a holder of stock in a national banking association, and assume all the liabilities of such a shareholder, although the consideration may have proceeded wholly from the husband.

The coverture of a married woman, who is a shareholder in a national bank, does not prevent the receiver of the bank from recovering judgment against her for the amount of an assessment levied upon the shareholders equally and ratably under the statute; but no opinion is expressed as to what property may be reached in the enforcement of such judgment.

THE case is stated in the opinion.

Mr. Leigh Robinson for plaintiff in error.

Mr. Enoch Totten for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action is based upon an assessment made by the Comptroller of the Currency on the stockholders of the German-American National Bank of the city of Washington, which suspended business on the 30th day of October, 1878, and of which the plaintiff in error was appointed receiver. The assessment was upon the stockholders, equally and ratably, to the amount of one hundred per centum of the par value of their shares. It was averred in the declaration filed by the receiver that the defendant, Jane C. Hitz, held or owned at the time of the bank's suspension two hundred shares of its stock, of the par value per share of one hundred dollars; and that by reason thereof the plaintiff was entitled to recover from her the sum of twenty thousand dollars, with interest on each half of that sum from the dates they should have been respectively paid, under the notice given by the receiver.

The defendant pleaded, first, that she was never indebted as alleged; second, that she never at any time held or owned shares of stock in this bank, and if it appeared upon its books or otherwise that any of the stock stood in her name, the entries to that effect were fraudulent, and were made for the

purpose of cheating her; third, that since August 15, 1856, she has been the wife of John Hitz. She filed an additional plea, averring that there was not, nor had ever been, any such national banking association as the German-American National Bank, of which the plaintiff was receiver; meaning, by this plea, that no such association was ever organized in conformity with the statutes of the United States.

There was evidence before the jury tending to establish the following facts:

In the year 1872 certain persons, among whom was John Hitz, the husband of the defendant, availed themselves of the provisions of the act of Congress of May 5, 1870, relating to the creation of corporations in the District of Columbia by general laws, as amended by the act of June 17, 1870, and formed a corporation by the name of the German-American Savings Bank of the city of Washington. 16 Stat. 98, 102, c. 80; Ib. 153, c. 131.

There appears, under date of January 21, 1876, upon the books of that bank, labelled "Stock Transfers and Ledger, German-American Savings Bank," entries showing the assignment and transfer to Jane C. Hitz of shares of stock, as follows: 173 shares by John Hitz, 10 shares by William F. Mattingly, (the latter acting by Samuel L. Mattingly, attorney,) 10 shares by R. B. Donaldson and 7 shares by C. E. Prentiss; in all, 200 shares. At the time these transfers purport to have been made, John Hitz was president of the bank, Donaldson vice president and Prentiss cashier; and they, with Mattingly and others, were its trustees. The stubs in the book of transfers state that new certificates for all the above stock were issued to Mrs. Hitz; but it was not distinctly shown that they were delivered to her, or were ever in her possession. It was, however, proven that the fourth dividend upon these shares, amounting to $800, was paid by the check of Prentiss, the cashier of the savings bank, dated May 1, 1876, which was in these words: "Pay to Jane C. Hitz, or order, $800, fourth dividend, payable this day on stock standing in her name on the books of this bank, and charge to dividend account, No. 3300." That check was endorsed: "Pay to the order of John

Hitz. Jane C. Hitz." Then follows this endorsement: "John Hitz, Consul-General," showing, as stated by Prentiss, that the proceeds of the check were deposited by John Hitz to his account in the bank as consul general. Similar checks were made for the fifth and sixth dividends on the same stock. They were payable, respectively, November 1, 1876, and November 1, 1877, and were endorsed in the same way as was the first check. As in the case of the first check, their proceeds were placed to the credit of John Hitz as consul general.

Among the original papers on file in the office of the Comptroller of the Currency were the following:

1. A document dated May 7, 1877, purporting to be signed by the stockholders of the German-American Savings Bank of Washington, then having a capital of $127,100, and to authorize the trustees thereof — John Hitz and others named — to convert that bank into a national banking association, by the name of the German-American National Bank of Washington, and make the articles of association and the organization certificate required by the statutes of the United States. Under the headings in that document of "Names of Stockholders" and "No. of shares owned by each," appear among other names those of John Hitz, 130 shares; R. B. Donaldson, 90 shares; W. F. Mattingly, 190 shares; C. E. Prentiss, 61 shares; John Hitz, trustee, 25 shares; John Hitz and C. E. Prentiss, trustees, 81 shares; and Jane C. Hitz, 200 shares.

2. The organization certificate, signed by the trustees, and verified by their oath, stating that they have been authorized by the stockholders of the German-American Savings Bank to change it into a national banking association, the stock of which shall be divided as it was then divided in the savings bank. That certificate contains a statement of the names, residence and number of shares held by each stockholder of the savings bank, and in the list appears the name of Jane C. Hitz, as holding 200 shares. It bears date May 7, 1877, and was filed with the Comptroller of the Currency May 13, 1877.

3. The articles of association of the German-American National Bank of Washington, which is accompanied by the cer-

tificate of J. S. Langworthy, as acting Comptroller of the Currency, under date of May 14, 1877, stating that that bank had complied with all the provisions of the Revised Statutes, relating to national banking associations, and was authorized to commence business as provided in section 5169 of the Revised Statutes. The national bank had the same officers and trustees as the savings bank.

No direct proof was made by the plaintiff that the signature purporting to be that of the defendant, on the above checks for dividends, was her genuine signature.

In reference to the stock of the German-American Savings Bank which, according to the entries in its books, was transferred by Mr. Mattingly, the latter, as a witness for the defendant, testified that he owned stock in that bank, but that he had never transferred any of it; that he never owned and did not himself transfer ten shares of stock to Mrs. Hitz; and that he did not purchase those shares, and did not know how they happened to stand in his name, although he supposed his brother, who executed the transfer in the witness's name, understood how it all occurred.

Mr. Donaldson testified for the defendant that, while he signed a transfer of ten shares of stock to Mrs. Hitz, he had no recollection whatever of the transaction; that he never owned the stock so transferred; and was never paid for it by any one.

Mrs. Hitz testified in her own behalf. The substance of her testimony was that she never bought, owned or voted any stock in the German-American Savings Bank or in the German-American National Bank; never knew until after the failure of the national bank that her name appeared among the stockholders on the books of either bank; never received any dividend declared or paid by either; and never received or held any certificates of stock in either bank. Being asked as to whether the signature of Jane C. Hitz to the paper purporting to be signed by the stockholders of the German-American Savings Bank, and authorizing its conversion into a national banking association, was her signature, she answered, in substance, that she knew nothing of that paper; did not remember to have signed it, although the signature resembled

hers; was not aware of the conversion of the savings bank into a national bank until after the failure of the latter; and as she never owned any of this stock, she would not have signed any paper for such change, if she had been asked to do so. Being shown the checks for dividends on the stock standing in her name, she stated that she had no recollection of seeing them until after the failure of the German-American National Bank. Again: "Q. What do you say as to the signature — did you write it? A. I cannot say. Q. Did you ever get any money on account of those checks? A. I never did. Q. Those checks appear to have been paid. Do you remember whether you ever had them in your possession or not? A. No, sir, I never had them in my possession. Q. What do you say? A. I am certain I never had them in my possession. Q. Can you account to the jury for the similarity of that signature to your own? A. I cannot. Q. Do you say you never wrote your name on the back of those checks? A. No, sir; I cannot say that. I have no recollection of having done so. I never did so knowing the nature of the checks; never did so at all, so far as I can recollect."

Upon cross-examination: "Q. You are unable to deny that that is your signature? A. I cannot positively deny that it is. Q. Can you deny at all that that is your signature? A. I can deny having any recollection of having signed them. Q. Can you deny that it is your signature? A. I cannot deny it. Q. Now, I will ask you whether, when you were in Europe, the salary of your husband as consul general was not paid to you? A. It was during part of the time that I was there. Q. To what did that salary amount? A. I think $3000."

Upon reëxamination the defendant was permitted, against the objection of the plaintiff, to state that she thought it would be impossible for her to have owned $20,000 of stock in the German Savings Bank and not have remembered it. Being asked whether, if she had seen the checks, she could have forgotten them, she said: "Had I seen them, knowing what they were, I should not have forgotten them — could not have forgotten them."

The foregoing is substantially the case made before the jury.

Before entering upon the examination of the questions raised by the plaintiff's assignments of error, it is necessary to consider certain propositions advanced by the defendant, which, if sound, might be sufficient to dispose of the case.

It is contended that the conversion of the German-American Savings Bank into a national banking association was unauthorized by any statute of the United States, and, consequently, that the appointment by the Comptroller of the Currency of the plaintiff as receiver, and the assessment made by that officer upon the stockholders of the bank — which assessment is the foundation of the present suit — were absolute nullities.

The privilege of becoming a national banking association is given by section 5154 of the Revised Statutes to "any bank incorporated by special law, or any banking institution organized under a general law of any State." These words, it is argued, do not embrace savings banks organized in the District of Columbia, and only to refer to banks or banking institutions created under the authority of some State, either by a special or general law. But all difficulty upon the subject is removed by the act of Congress, entitled "An act authorizing the appointment of receivers of national banks, and for other purposes," approved June 30, 1876, 19 Stat. 63, c. 156, the sixth section of which is as follows:

"That all savings banks or savings and trust companies organized under authority of any act of Congress, shall be, and are hereby, required to make, to the Comptroller of the Currency, and publish, all the reports which national banking associations are required to make and publish under the provisions of sections fifty-two hundred and eleven, fifty-two hundred and twelve, and fifty-two hundred and thirteen of the Revised Statutes, and shall be subject to the same penalties for failure to make or publish such reports as are therein provided; which penalties may be collected by suit before any court of the United States in the district in which said savings banks or savings and trust companies may be located. And all savings or other banks now organized or which shall

hereafter be organized, in the District of Columbia, under any act of Congress, which shall have capital stock paid up in whole or in part, shall be subject to all the provisions of the Revised Statutes, and of all acts of Congress applicable to national banking associations, so far as the same may be applicable to such savings or other banks: *Provided*, That such savings banks now established shall not be required to have a paid-in capital exceeding one hundred thousand dollars." 19 Stat. 64.

Under that act the German-American Savings Bank was required to make to the Comptroller of the Currency the reports which by sections 5211, 5212 and 5213 of the Revised Statutes were required from national banking associations. It also became subject to all the provisions of the Revised Statutes and of the acts of Congress relating to national banking associations, so far as those provisions were applicable to a savings bank organized in this district. It is too clear for dispute that, after the passage of the act of 1876, savings banks organized in this district under an act of Congress, and having a capital stock paid up in whole or in part, were entitled to become national banking associations in the mode, and subject to the conditions, prescribed by section 5154. Surely that section cannot be deemed inapplicable to savings banks of that class.

Another contention of the defendant is, that the German-American National Bank could not acquire the powers and privileges of a national banking association before receiving from the Comptroller of the Currency a certificate that the provisions of the statute relating to such associations had been complied with, and that it was authorized to commence the business of banking; that the certificate given under date of May 14, 1877, by J. S. Langworthy, as "Acting" Comptroller of the Currency, did not meet the requirements of the statute, because, it is argued, there was no such officer known to the law. Rev. Stat. § 5154. This point was not specifically made in the court below. But there is nothing of substance in it, even if it could properly be raised in this collateral proceeding. There is an officer designated a Deputy Comp-

troller of the Currency, who may exercise the powers and discharge the duties attached to the office of Comptroller, during a vacancy in that office, or during the absence or inability of the Comptroller. Rev. Stat. §§ 178, 327. The certificate alluded to was from the office of the Comptroller, and was under the seal of that office. Besides, this court takes judicial notice of the fact that Mr. Langworthy was, at the date of his certificate, Deputy Comptroller of the Currency. And it will be assumed that, at the date of his certificate, he was authorized to exercise the powers and discharge the duties of the Comptroller, and was therefore, at the time, Acting Comptroller.

It is further insisted that Langworthy's certificate is no part of the transcript. And the defendant has made a motion in this court to strike it from the record. It is clear from the affidavits submitted that the certificate was used at the trial in special term, and that it was accidentally omitted from the bill of exceptions taken by the plaintiff. This omission being discovered before the case was heard in general term, application was made to the trial justice, after the special term had adjourned without day, to amend the bill of exceptions so as to make this certificate a part of it. The application was granted — whether upon notice to the defendant or her counsel is not clearly shown — and the case was heard in the general term without any suggestion, so far as the record shows, that the certificate had been improperly made a part of the record after the bill of exceptions had been completed and signed. An objection of that character will not be considered where it was not presented to the court whose judgment is here for review. The record must be taken as it was presented to the general term.

We now proceed to consider the principal questions arising upon the requests for instructions and upon the charge of the court to the jury.

At the instance of the defendant the jury were instructed substantially as follows:

That if the stock in controversy was transferred upon the books of the German-American Savings Bank to and in the

name of the defendant without her knowledge and consent, she was entitled to a verdict, unless she subsequently ratified and confirmed such transfer;

That if the defendant was procured to sign the application to the Comptroller of the Currency for the organization of the German-American National Bank by fraudulent means and representations, such application must not be taken as confirming the transfer of the stock to her on the books of the savings bank;

That if the defendant was induced to endorse the three checks for dividends by means of fraud or misrepresentation, or by concealing from her the facts concerning them, such checks cannot be regarded as a confirmation of a transfer of the stock to her name, nor as evidence against her;

That if the stock was transferred to the defendant for fraudulent purposes, by or at the instigation of her husband, and without her knowledge or consent, such transfer was void, and she was entitled to a verdict; and,

That if, at or before the time of the transfer of the stock to the defendant on the books of the company, she had not purchased the stock or authorized it to be purchased, either directly or indirectly, and knew nothing about it, she was not liable, as a shareholder, to the assessment in question.

These instructions were, in effect, repeated in the elaborate charge to the jury.

The testimony of the defendant tended to show that the stock was originally transferred to her on the books of the German-American Savings Bank, without her knowledge or consent; and the issue upon that point was fairly submitted to the jury by the first instruction given at her instance. But some of the instructions given upon her motion, as well as the charge to the jury, erroneously assumed that there was evidence tending to show that she was procured, by fraudulent means and representations, to sign the application for the conversion of the savings bank into a national bank; that, by like means, or by concealment of the facts, she was induced to sign the checks for dividends; and that the transfer of the stock to her name was for fraudulent purposes, by or at the

instigation of her husband. There was, however, no evidence as to the circumstances under which her name was signed to the application addressed to the Comptroller, or under which the checks were endorsed in her name; absolutely none upon which to base the theory of fraud or false representations. It is true, as already suggested, there was evidence tending to show that the transfers of stock were made originally without defendant's knowledge; and the jury might reasonably have concluded, under all the evidence, that the transfers were made, and caused to be made, by her husband. But these facts neither proved, nor tended to prove, fraud upon the part of the husband. There was no proof that he was insolvent, and, therefore, it could not be presumed that the transfers were made with any intent to defraud his creditors. Besides, the intent with which the husband caused the transfers to be made to his wife was wholly immaterial. Even if the object was to conceal his property from creditors, the vital question remained whether the defendant became the owner of the stock within the meaning of the statute regulating the individual liability of the shareholders of national banking associations. In other words, the husband may have intended to commit a fraud upon his creditors, and the transfers of stock may have been made to the wife without first obtaining her consent; and yet she may have been, at the time of the bank's failure, liable to be assessed as a shareholder. There was no connection between her liability to be so assessed, and the alleged fraudulent intent with which the husband caused the transfers of stock to be made.

Whether she signed the application for the conversion of the savings bank into a national bank in the capacity of shareholder to the extent of two hundred shares, was wholly apart from any question of her knowledge, at the time of the transfers, of the motive which induced her husband in making or causing them to be made. If she became aware of the transfers, after they were made, and thereafter received the dividends, she became a shareholder for all purposes of individual liability in respect to the contracts, debts and engagements of the bank, as fully as if the transfers had been made originally

with her knowledge and consent. Whether she received the dividends or not depended upon the inquiry as to whether the checks for them were endorsed by her. If she endorsed them, or either of them, she is estopped to say that she did not know their contents, and was not the owner of the shares of stock upon which the dividends were declared; for each check discloses upon its face that it was payable to her order, and was for dividends on stock standing in her name on the books of the bank. This result is not at all affected by the fact that the proceeds of the checks went to the credit of John Hitz's account as consul general. If the defendant endorsed the checks in blank or to the order of her husband, and delivered them to him, the mode in which he disposed of the proceeds is of no consequence in the present suit.

We must not be understood as saying that the *mere* transfer of the stocks on the books of the bank, to the name of the defendant, imposed upon her the individual liability attached by law to the position of shareholder in a national banking association. If the transfers were, in fact, without her knowledge and consent, and she was not informed of what was so done — nothing more appearing — she would not be held to have assumed or incurred liability for the debts, contracts and engagements of the bank. But if, after the transfers, she joined in the application to convert the savings bank into a national bank, or in any other mode approved, ratified or acquiesced in such transfers, or accepted any of the benefits arising from the ownership of the stock thus put in her name on the books of the bank, she was liable to be treated as a shareholder, with such responsibility as the law imposes upon the shareholders of national banks.

The arguments of counsel were partly directed to the question whether new certificates of stock were issued by the savings bank, and delivered to the defendant, after the transfers were made on the books of that bank. It is sufficient, on this point, to say that the record made of the transfers upon the books of the bank was sufficient, as between her and the bank, to work a change of ownership, and new certificates were not necessary to her becoming the owner of the stock

so transferred. Nor can she escape liability by reason of the fact, if such be the fact, that no certificates were issued to her by the German-American National Bank. The statute expressly declares that the shares of the old bank may continue to be for the same amount each as they were before the conversion.

One other question raised by the defendant requires consideration. She contends that her coverture, at the time of the transfers, as well as when the bank failed, protected her against assessment upon the stock put in her name upon the books of the bank. The plaintiff's requests for instructions upon this point having all been granted by the court below, it is suggested that no question can arise upon the assignments of error in reference to the individual liability of married women for the debts, contracts and engagements of national banking associations of which they are shareholders. But if the defendant's position is correct, the judgment might be affirmed upon the ground that she was not, under any circumstances, liable to an assessment by the Comptroller. For this reason, and because this question will necessarily arise upon another trial, it is proper to give it some attention.

We do not understand the defendant to say that she was incapacitated by the laws in force in the District of Columbia from becoming the owner of bank stock. It was well said by Mr. Justice Cox, when the present case was first before the general term, *Keyser* v. *Hitz*, 2 Mackey, 473, 493, that a married woman "has the legal capacity to receive gifts, may be the obligee of a bond, or receive a transfer of stock in moneyed corporations, and this though the consideration may have proceeded wholly from the husband, and in such case she may hold against the legatees and heirs, but not against the creditors of the husband. *Fisk* v. *Cushman*, 6 Cush. 20." We speak of gifts, because the reasonable inference from all the evidence is that the defendant's husband made and caused to be made the transfers in question as a gift, though not, so far as the record shows, to her sole and separate use.

Assuming, then, that she was not incapacitated from becoming the owner of stock in a bank, and that she was a

shareholder in the savings bank, she became, upon the conversion of that bank into a national bank, a shareholder in the latter. Rev. Stat. § 5154. In that event she became, by force of the statute, individually responsible to the amount of her stock, at the par value thereof, for the contracts, debts and engagements of the national bank equally and ratably with other shareholders. Section 5151, which imposes such individual responsibility upon the shareholders of national banks, makes no exception in favor of married women. The only persons holding shares of national bank stock, whom the statute exempts from this personal responsibility, are executors, administrators, guardians, or trustees. § 5152. It is not for the courts, by mere construction, to recognize an exemption which Congress has not given. The hardship that may result where the ownership of national bank stock by a married woman is subject to the common law rights of the husband, in respect to its alienation, cannot control the interpretation of the statute. Such considerations are more properly for the legislative department. Upon this point, the case of the *Reciprocity Bank*, 22 N. Y. 9, 15, which involved the liability of a married woman as a shareholder in a state bank, is instructive. The constitution and statutes of New York made the shareholders in corporations and joint stock associations, for banking purposes, issuing bank notes, "individually responsible," etc. The Court of Appeals of that State, speaking by Chief Judge Comstock, said: "It is also said that *femes covert* are not liable to suit or judgment at the common law; and in general, this is true. It is also true that the apportionment of liability among stockholders in banks, when duly confirmed, becomes a judgment against each stockholder, to be enforced by execution as in other cases. But it was competent for the legislature to depart from the rules and analogies of the common law, and to make married women and their estates liable in this proceeding, as other stockholders in banks are made liable. This, we think, has been done, and it seems to us proper to add, that we see no reason why it ought not to be done, in order to effectuate the policy on which the constitutional provision and the statute are founded. It might go

far to defeat that policy, if married women could take and hold stock without liability to the creditors." See also, *Sayles* v. *Bates*, 15 R. I. 345.

This question arose in *Anderson* v. *Line*, in the Circuit Court of the United States for the Eastern District of Pennsylvania, where it was held by Judge McKennan, that a married woman was not exempted by reason of her coverture from the liability imposed by Congress upon shareholders in national banks. 14 Fed. Rep. 405. To the same effect is the decision of Judge Wheeler in *Witters* v. *Sowles*, 32 Fed. Rep. 767.

We are of opinion that the coverture of the defendant did not prevent the plaintiff from recovering a judgment against her for the amount of the assessment in question, if she was, within the meaning of the statute, a shareholder in the bank at the time of its suspension. But the question as to what property may be reached in the enforcement of such judgment is not before us, and we express no opinion upon it.

For the above errors committed by the court below in its instructions to the jury, the judgment is

Reversed, with directions to grant a new trial, and for further proceedings consistent with this opinion.

MR. JUSTICE MILLER dissented.

KNOX COUNTY *v.* HARSHMAN.

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

No. 1212. Submitted January 10, 1890. — Decided January 27, 1890.

A court of equity does not interfere with judgments at law, unless the complainant has an equitable defence of which he could not avail himself at law, or had a good defence at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents.

Harshman v. *Knox County*, 122 U. S. 306, affirmed.

Where by statute the summons in any action against a county may be served upon the clerk of the county court, and the officer's return in such an

action shows such a service, the county cannot maintain a bill in equity to restrain process of execution upon the judgment, on the ground that service was not made upon the clerk, or that he did not inform the county court thereof.

THIS was a bill in equity by the County of Knox, in the State of Missouri, against Harshman, a citizen of Ohio, in the Circuit Court of the United States for the Eastern District of Missouri, for a perpetual injunction against the prosecution of the peremptory writ of mandamus issued by that court, pursuant to the judgment and mandate of this court in *Harshman* v. *Knox County*, 122 U. S. 306, to compel the judges of the county court to levy a tax sufficient to pay a judgment recovered by Harshman in the Circuit Court of the United States for $77,374.46, on bonds issued by the county for a subscription to the capital stock of the Missouri and Mississippi Railroad Company.

The bill set forth that this judgment was rendered on default, upon a petition alleging that the subscription was authorized by a vote of two-thirds of the qualified voters of the county at a special election held under § 17 of c. 63 of the General Statutes of Missouri of 1866; and upon a return of the marshal that fifteen days before the return day he had made service upon the county by delivering a copy of the petition and summons to Frank P. Hall, the clerk of the county court, at Edina in the county and district aforesaid.

The bill averred that the allegations of the petition were false; and that the bonds were in fact issued without the assent of two-thirds of the voters, and under § 13 of the charter of the railroad company, by which the tax to be levied in payment of the bonds was limited to one-twentieth of one per cent upon the assessed value of taxable property for each year.

The bill further alleged that neither the county court, nor any of the judges thereof, nor the county attorney, had any notice or knowledge of the commencement of the suit until after the end of the term at which the judgment was rendered, when they were informed thereof by Harshman's attorney; that Hall, the county clerk, after the pretended service upon

him, never handed to the county court the copy of the petition and summons, or called the attention of the county court or its judges, or of the county attorney, to the fact of service, or said anything about it until, upon being inquired of by them after they had been informed of it as aforesaid, he denied that a copy of the petition or summons had been served upon him, or that he had any knowledge or notice thereof; and the bill alleged, and charged the fact to be, "that neither a copy of said summons and petition, nor either of them, was served upon said Frank P. Hall, as stated by the marshal in his return to said summons, and that said return was and is false."

The bill also alleged that "said judgment on default was rendered on a false allegation of facts, and as the record stands it is a gross fraud upon your orator to the extent and in the particulars herein mentioned."

The answer averred that the allegations of the petition and the statements in the return were true, and that the county had full notice of the commencement of the action; and denied that the judgment was rendered upon a false allegation of facts, or was a fraud upon the plaintiff. The plaintiff filed a general replication.

At a hearing upon pleadings and proofs, the bill was dismissed, and the plaintiff appealed to this court.

Mr. James Carr for appellant.

Mr. T. K. Skinker for appellee.

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

A court of equity does not interfere with judgments at law, unless the complainant has an equitable defence of which he could not avail himself at law, or had a good defence at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents. *Marine Ins. Co.* v. *Hodgson*, 7 Cranch, 332, 336; *Hendrickson* v. *Hinckley*, 17 How. 443, 445; *Crim* v. *Handley*, 94 U. S. 652; *Phillips* v. *Negley*, 117 U. S. 665, 675.

Opinion of the Court.

In the case before us, the bill in equity of the judgment debtor contains no allegation of any fraud on the part of the judgment creditor or his agents. The allegation that the record of the judgment as it stands is a gross fraud upon the judgment debtor, is in terms, as it must be in legal effect, limited to the particulars specified in the bill. *United States* v. *Atherton*, 102 U. S. 372; *Ambler* v. *Choteau*, 107 U. S. 586, 590, 591. The grounds assigned for the interposition of equity reduce themselves to two.

The first ground is that the allegations in the petition on which the judgment was recovered were false, especially in that they alleged that the subscription was made under the General Statutes of Missouri, authorizing the levy of a tax sufficient to pay the amount of the bonds and coupons. But this ground is fully met and disposed of by the opinion delivered by Mr. Justice Matthews in *Harshman* v. *Knox County*, 122 U. S. 306, in which it was said: "By the terms of the judgment in favor of the relator it was determined that the bonds sued on were issued under the authority of a statute which prescribed no limit to the rate of taxation for their payment. In such cases, the law which authorizes the issue of bonds gives also the means of payment by taxation. The findings in the judgment on that point are conclusive. They bind the respondents in their official capacity, as well as the county itself." 122 U. S. 319, 320.

The other ground relied on is that the county had no notice of the commencement of the action against it. The bill of the county and the argument of its counsel proceed on two hardly consistent suppositions — that the clerk of the county court was never served with process; and that he was negligent in not seasonably informing the county court or county attorney that service had been made upon him. But in either aspect of the case the bill cannot be maintained.

The statutes of Missouri provide that "where any action shall be commenced against any county, a copy of the original summons shall be left with the clerk of the county court fifteen days, at least, before the return day thereof." Missouri Rev. Stat. of 1879, § 3489. The clerk is thus made the agent of the

county for the purpose of receiving service of process against it, and service upon him is legal and sufficient service upon the county. *Commissioners* v. *Sellew*, 99 U. S. 624; *Thompson* v. *United States*, 103 U. S. 480; *Weil* v. *Greene County*, 69 Missouri, 281. The officer's return stated that he served a copy of the summons upon the clerk. If that return were false, yet no fraud being charged or proved against the petitioner, redress could be sought at law only, and not by this bill. *Walker* v. *Robbins*, 14 How. 584. But if the question of the truth of the return could be considered as open in this suit, the proofs given at the hearing clearly show that such service was in fact made. Any neglect of the clerk in communicating the fact to the county court was neglect of an agent of the county, and did not affect the validity of the service or of the judgment.

Decree affirmed.

FARMERS' LOAN AND TRUST COMPANY *v.* GALESBURG.

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

No. 887. Submitted January 9, 1890. — Decided January 27, 1890.

The city of Galesburg, Illinois, by an ordinance, granted to one Shelton, and his assigns, in May, 1883, a franchise for thirty years, to construct and maintain water works for supplying the city and its inhabitants with water for public and private uses, the city to pay a specified rent for fire hydrants, and a tariff being fixed for charges for water to consumers. In December, 1883, the water works were completed by a water company to which Shelton had assigned the franchise, and a test required by the ordinance was satisfactorily made, and the city, by a resolution, accepted the works. The water furnished by the company for nine months was unfit for domestic purposes. After November, 1884, the supply of water was inadequate for the protection of the city from fire, and its quality was no better than before. During eighteen months after December, 1883, the company had ample time to comply with the contract. The city, by a resolution passed June 1, 1885, repealed the ordinance, and then gave notice to the company that it claimed title to certain old water mains which it had conditionally agreed to sell to Shelton, and of

Statement of the Case.

which the company had taken possession. The city then took possession of the old mains, and, in June, 1885, filed a bill in equity against the water company to set aside the contract contained in the ordinance and the agreement for the sale of the old mains. In August, 1883, the company executed a mortgage to a trustee on the franchise and works, to secure sundry bonds, which were sold to various purchasers in 1884 and 1885. The interest on them being in default, the trustee foreclosed the mortgage by a suit brought in November, 1885, and the property was bought by a committee of the bondholders, in November, 1886. In February, 1886, the trustee had been made a party to the suit of the city. After their purchase, the members of the committee were also made parties and they filed a cross-bill, praying for a decree for the amount due by the city for water rents, and for the restoration to them of the old mains, and for an injunction against the city from interfering with the operation of the works. After issue, proofs were taken; *Held*,

(1) The supply of water was not in compliance with the contract, in quantity or quality;

(2) The taking possession by the city of the old mains was necessary for the protection of the city from fire;

(3) The contract of the city for the sale of the old mains was conditional and was not executed;

(4) The city was not estopped, as against the bondholders, from refusing to pay the rent for the hydrants, which, by the mortgage, was to be applied to pay the interest on the bonds, or from having the contract cancelled;

(5) The obligation of Shelton and his assigns was a continuing one, and their right to the continued enjoyment of the consideration for it was dependent on their continuing to perform it;

(6) The bondholders were bound to take notice of the contents of the ordinance before purchasing their bonds, and purchased and held them subject to the continuing compliance of the company with the terms of the ordinance;

(7) In regard to the old mains, the lien of the mortgage was subject to the conditions of the agreement for the sale of them by the city to Shelton;

(8) A suit by the city for a specific performance of the contract, or one to recover damages for its non-performance, would be a wholly inadequate remedy in the case;

(9) A decree was proper annulling the ordinance and the agreement; dismissing the cross-bill; directing the city to pay into court, for the use of the cross-plaintiffs, $3000, as the value of the use of the water by the city from December, 1883, to June, 1885; and dividing the costs of the suit equally between the city and the cross-plaintiffs.

IN EQUITY. The case is stated in the opinion.

Mr. Herbert B. Turner, *Mr. David McClure* and *Mr. Arthur Ryerson* for appellants.

Mr. Frederick A. Willoughby for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

The city of Galesburg, Illinois, a municipal corporation, by an ordinance of its city council, passed May 12, 1883, and approved by its mayor May 17, 1883, entitled "An ordinance providing for a supply of water to the city of Galesburg and its inhabitants, authorizing Nathan Shelton or assigns to construct and maintain water works, securing protection to said works, contracting with said Nathan Shelton or assigns for a supply of water for public use, and giving said city an option to purchase said works," granted a franchise to Shelton and his successors or assigns, for thirty years from the passage of the ordinance, to construct and maintain, within and near the city, water works for supplying it and its inhabitants and those of the adjacent territory "with water for public and private uses, and to use the streets, alleys, sidewalks, public grounds, streams, and bridges of the City of Galesburg, within its present and future corporate limits, for placing, taking up and repairing mains, hydrants, and other structures and devices for the service of water."

Section 2 of the ordinance provided that there should be two pumping engines, having a specified capacity, a standpipe, and not less than eight miles of mains for the distribution of water, of a sufficient size to furnish all the water required for the wants of the city and its inhabitants, and limited the range in size of the mains. It also provided for a specified test of the mains at their place of manufacture, and for the character of the fire hydrants to be rented by the city, and that there should be a test of the capacity of the water works on their completion, when Shelton or his assigns should "cause to be thrown from any six hydrants six simultaneous streams, each through fifty feet of two-and-one-half inch hose and a one-inch nozzle, to a height of one hundred feet."

Section 4 provided that "the water supplied by said works shall be good, clear water, and the source of supply shall not be contaminated by the sewerage of said city."

Maximum rates for charges for water to consumers by Shelton or his assigns were specified.

Section 7 reserved to the city the right to purchase the water works, on certain conditions, at any time after the expiration of fifteen years from the passage and approval of the ordinance.

By section 8 it was provided that in consideration of the benefits which would be derived by the city and its inhabitants from the construction and operation of the water works, and in further consideration of the water supply thereby secured for public uses, and as the inducement to Shelton or his assigns to accept the provisions of the ordinance and contract and to enter upon the construction of the water works, the franchises thereby granted to and vested in Shelton or his assigns should remain in force and effect for thirty years from the passage of the ordinance; and that, for the same consideration and as the same inducement, the city thereby rented of Shelton or his assigns, for the uses thereinafter stated, eighty fire hydrants of the character thereinbefore described, for the term of thirty years from the passage of the ordinance, and agreed to locate them promptly along the lines of the first eight miles of mains within the city limits, under direction of the city council, as soon as Shelton or his assigns should have located the line of the mains under the direction of the city engineer. The city further agreed to pay rent for the eighty hydrants, to Shelton or his assigns, at the rate of $100 each per year, and to pay rent at the same rate for any additional fire hydrants, up to one hundred, directed by the city council to be erected, and certain specified rates for additional hydrants over one hundred, such rent to be paid in half-yearly instalments, in January and July of each year, beginning from the date when each of the hydrants should be in successful operation, and to continue during the thirty years, unless the city should sooner become the owner of the water works, provided that it should not be liable for any hydrant rents for such

time as the works should not be able to supply the required amount of water.

It was also provided, by section 13, that the ordinance should become binding, as a contract, upon the city, on the filing with the mayor of Shelton's written acceptance of its terms and conditions, and that, after such acceptance, the ordinance should constitute a contract, and should be the measure of the rights and liabilities of the city and of Shelton or his assigns.

On the 16th of May, 1883, Shelton and John C. Stewart, then mayor of the city, executed the following contract: "It is agreed that Nathan Shelton shall purchase of the city of Galesburg all the ten and six-inch water mains now laid in the streets of said city that he can use in the water works he proposes to build in said city, at the price that it will cost him to buy and lay new mains, less the depreciation in value of said pipes, which depreciation is to be determined by Mr. Shelton and the finance and water committee of the council of said city, and less the cost of relaying, recaulking and repairing said mains, should they have to be taken up, relaid, recaulked or repaired, and less the cost of recutting for cross-connections, and the city agrees to sell to Mr. Shelton, in case he shall erect his proposed water works as above, and deduct the pay for the same from the first hydrant water works rent accruing from said city to said Shelton. This agreement for the sale of water mains does not include any mains that are imperfect. It is further agreed that said mains now in use shall not be disturbed further than shall be necessary to cut and make connections with said pipes, until the pipes are laid and ready for use in the adjacent streets."

On the 17th of May, 1883, the mayor signed the ordinance, and on the 19th of May, 1883, at the meeting of the city council, the following communication from Shelton was received and ordered to be filed: "Hon. John C. Stewart, mayor of the city of Galesburg: I hereby accept the terms and conditions of the ordinance of said city, entitled 'An ordinance providing for a supply of water to the city of Galesburg and its inhabitants, authorizing Nathan Shelton or assigns to

construct and maintain water works, securing protection to said works, contracting with said Nathan Shelton or assigns for a supply of water for public use, and giving said city the option to purchase said works,' passed by the city council of said city May 12th, 1883, to all intents and for the purposes as by the 13th section of said ordinance I am to do. Nathan Shelton." The contract between Shelton and the mayor for the purchase by Shelton of the water mains from the city was thereupon approved by the city council.

Shelton then organized a joint-stock corporation, under the general law of the State of Illinois, under the name of the Galesburg Water Company, with a capital stock of $150,000, of which stock Shelton owned the amount of $147,500. Shelton became its president, and on the 20th of July, 1883, by an instrument in writing, assigned to it all the franchises, rights, privileges, contracts and agreements granted to or made with him by the city by the aforesaid ordinance, and authorized the company to receive all rentals to become due from the city for fire hydrants pursuant to the ordinance, as well as all other profits which might accrue from the erection of water works thereunder.

On the 20th of June, 1885, the city of Galesburg filed a bill in equity against the Galesburg Water Company in the Circuit Court of Knox County, Illinois, making the following averments: Prior to the 30th of April, 1883, the city had established a system of water works for its protection from fire, and for that purpose had purchased and laid down water mains in certain specified streets, which mains were supplied with water for fire purposes by two manufacturing companies, each of which had its pumps and machinery for furnishing water connected with the mains. Such system was at that date in full operation and able at all times to supply ample protection for the city in case of fire. The ordinance before mentioned was passed and approved, the contract of May 16, 1883, was made, and the acceptance of the ordinance by Shelton was received and filed. The Galesburg Water Company was created and organized, and Shelton assigned to it his rights under the ordinance. The company erected engine-houses,

placed boilers and engines therein, erected a stand-pipe and sunk a well. On the 1st of December, 1883, the city received notice from Shelton of his assignment to the company of his rights under the ordinance, and also a like notice from the company, with a further notice that the hydrants were in successful operation and ready for use; and the city council thereupon ordered a test to be made of the water works on the 6th of December, 1883. On that day Shelton caused to be turned on six streams of water simultaneously, each through fifty feet of hose with a nozzle attached thereto, to a considerable height in the main street of the city. Afterwards, and on the same day, the city council passed the following resolution: "Whereas the water works have been completed according to contract, and the test required by the ordinance concerning water works, passed May 12, 1883, has this day been satisfactorily made by the Galesburg Water Company: Therefore, resolved, that the city accept said water works from said company." The company thereafter made various efforts to supply the city with water in the quantity and of the quality called for by the ordinance, but failed to do so, although full opportunity therefor was afforded by the city. The water furnished was filthy in character, polluted by drainage from slaughter-houses and other offal, stagnant and wholly unfit for use, unhealthy and dangerous to life. On the 1st of June, 1885, an ordinance was passed by the city council in the following terms: "Section 1. That the ordinance entitled 'An ordinance providing for a supply of water to the city of Galesburg and its inhabitants, authorizing Nathan Shelton, or assigns, to construct and maintain water works, securing protection to said works, contracting with said Nathan Shelton, or assigns, for a supply of water for public use, and giving said city an option to purchase said works,' passed May 12th, 1883, be, and hereby is, repealed. All rights and privileges therein granted or thereby permitted are null. This ordinance shall take effect and be in force from and after its passage." That ordinance was approved by the mayor on the 10th of June, 1885, and on the next day a copy of it was served on the company, with a notice that all privilege of purchasing the water mains be-

longing to the city was considered by the city to be at an end, and that it claimed the right and title to the mains.

The bill waived an answer on oath, and prayed for a decree that the contract contained in the ordinance of May 12, 1883, and the agreement of May 16, 1883, be set aside; that all rights conferred by the ordinance and contract upon Shelton, his assigns, or the company, be decreed to be annulled; and that all right to purchase the water mains from the city be cancelled.

The company answered the bill, setting up facts in justification of its acts and denying the right of the city to relief. The answer also set up that, on the 1st of August, 1883, the company executed to the Farmers' Loan and Trust Company of the city of New York, a New York corporation, a mortgage to that company, as trustee for the holders of one hundred and twenty-five bonds of the water company, each for $1000 bearing that date, the principal payable in thirty years, with semi-annual interest at the rate of six per cent per annum, covering all the water works, franchise, contract, machinery, mains, and appurtenances belonging to the water company; that the mortgage was duly recorded in the proper county; that the bonds were bought by parties on the faith of the mortgage and the acceptance of the works by the city, subsequently to such acceptance; that such mortgage was a valid and subsisting lien on the contract between the city and the water company; and that the Farmers' Loan and Trust Company and the bondholders were necessary parties to the suit.

Under a petition filed in the court February 12, 1886, by the Farmers' Loan and Trust Company, an order was made allowing it to be made a party; and on the 24th of February, 1886, it filed a petition for the removal of the cause into the Circuit Court of the United States for the Northern District of Illinois. The cause was removed and thereafter proceeded in the said Circuit Court.

On the 22d of April, 1886, the Farmers' Loan and Trust Company filed an answer to the bill, setting up, among other things, that the amount found to be due to the city for the water mains sold by it was duly fixed and settled between the

city and the water company, and the balance found due from the water company was credited to the city upon its indebtedness to the water company for water rents under the ordinance, and the mains were transferred to and taken possession of by the water company, and operated by it as a part of its water system. It also set up that the property mortgaged to it by the water company, to secure the bonds, included the franchises and rights granted by the city to the water company and covered by the ordinance passed May 12, 1883, and also the water mains which had been bought by the water company from the city prior to the execution of the mortgage and the bonds; that the holders of the bonds were ignorant of the nature and quality of the water supply of the water works, except as the same were represented to the bondholders by the city and the water company at the time of the execution of the mortgage and the sale of the bonds, and supposed, from such representations, that the water supply was ample and that the water works were satisfactory and in successful operation; that, before the negotiation and sale of any of the bonds, the purchasers of them were furnished with certified copies of the ordinance and of all the resolutions of the common council regarding the same, and with copies of the contracts and resolutions between the city and Shelton and the water company in regard to the purchase of the water mains, and with copies of the acceptance and assignment by Shelton of all his rights in the ordinance and mains to the water company; that it was represented to the bondholders by the city and its officials that the ordinance constituted a valid and binding contract between the city and the water company, according to its terms, and that the company had become the owner of all the water mains; that it was further represented to the bondholders, by the city and its officials and by the water company, that that company was in successful operation and furnishing water to the city and its inhabitants under the terms of the ordinance; that, on the faith of such representations and statements, the owners of the bonds up to the amount of $125,000 purchased the same in good faith and for a valuable consideration, in and about January, 1884; that the bonds were outstanding and

unpaid; that the water company had failed to pay the interest on the bonds, and it was in default, and the Farmers' Loan and Trust Company had filed a bill in the Circuit Court of the United States for the Northern District of Illinois against the water company, to foreclose the mortgage; that the city, in June, 1885, had forcibly taken possession of the water mains; that it had repudiated its liabilities under the ordinance and refused to pay the water rent under the same, whereby the mortgaged property was made almost valueless; that the city, by reason of such statements and representations, was estopped, as against the Farmers' Loan and Trust Company, from denying the validity of the ordinance or the sale of the water mains; that, by reason of the mortgage and the bonds secured under it, the Farmers' Loan and Trust Company had a valid lien upon the ordinance and franchise, and upon the water mains as well as all other property of the water company; and that it denied the right of the city to rescind the ordinance, to repudiate the sale of the water mains, and to have any of the relief claimed in the bill, as against the Farmers' Loan and Trust Company.

A replication was filed to his answer on the 3d of May, 1886, and on a petition filed November 29, 1886, by Hardin Parrish, Ephraim W. Bond and R. Dale Benson, to be made parties defendant, an order was that day entered making them parties and giving leave to them to file a cross-bill. On the same day they filed an answer to the bill, adopting all the statements of the answer of the Farmers' Loan and Trust Company, and also filed a supplemental and cross-bill against the city, two of them being citizens of Pennsylvania and one of them a citizen of Massachusetts.

That bill averred, among other things, as follows: A foreclosure suit by the Farmers' Loan and Trust Company was brought November 4, 1885, a decree of foreclosure and sale was made in it June 21, 1886, and thereunder all the rights, property and franchises of the water company were purchased by the plaintiffs for $100,000, and, after a confirmation of the sale by the court, a deed of the property was executed by the master to them, November 8, 1886, so that they became its

owners. They adopted, as a part of their supplemental and cross-bill, the answer of the Farmers' Loan and Trust Company to the bill filed by the city. Among the property sold to them under the foreclosure sale were the water mains which, when the mortgage was executed, were connected with and a part of the system of the water company and operated by it, the same having been before that time sold by the city to the water company. In June, 1885, the city took forcible possession of the water mains and cut and destroyed the connection of the same with the other mains of the water company, and took up and carried away the hydrants and faucets of the water company connected therewith, and entirely deprived that company of the use of the same, and had ever since retained possession thereof, and deprived the water company and the Farmers' Loan and Trust Company and the plaintiffs of the use and possession of them. Without such mains the property purchased by the plaintiffs is almost, if not entirely, valueless, and cannot be operated, because the connection of the water mains had been cut and destroyed and the hydrants removed, and thus the plaintiffs were prevented from using and operating any of the property so purchased by them, and from furnishing water to private consumers and also to the city. The plaintiffs are ready and willing to operate the works and furnish water to the city or to private consumers, and would do so were they not prevented by the acts of the city. It is the intention of the plaintiffs, and they have the right, to extend the operation of the water system of the city and the mains thereof so as to cover the entire limits of the city, and also to extend the base of water supply so as to furnish always an abundant supply of good water for the needs of the city and of the private consumers therein, and there is an abundant supply of good water accessible for the water works and procurable by the plaintiffs, which it is their intention and they are ready to procure and supply. There is a large amount of money owing to the plaintiffs from the city for water rents earned by the water company, or its receiver, up to the time of the purchase by the plaintiffs, the claims for which passed to the plaintiffs by virtue of the sale, and also on account

of the contract and water rents since the sale, and also on account of the acts of the city in cutting and destroying the water mains and taking possession of the same and preventing the plaintiffs from using them and from operating the water works.

The prayer of the supplemental and cross-bill, which waives an answer on oath, is that an accounting be had between the plaintiffs and the city to ascertain the amount due to the former; that a decree be made for its payment; and that the city restore to the plaintiffs the water mains, hydrants, faucets and other property, and be enjoined from interfering with the plaintiffs in the possession thereof and in connecting the water mains with any of the other water mains belonging to them, and from violating any of the provisions of the ordinance passed May 12, 1883, and from interfering with the plaintiffs in the use of any of the property so purchased by them, and from collecting the water rents, or extending the water mains through any of the streets of the city, or extending the source of supply for the water works.

The city, on the 21st of December, 1886, answered the supplemental and cross-bill, denying the right of the plaintiffs in it to relief. A replication was filed to the answer of Parrish and others, and the court, on the 2d of April, 1887, made an order referring the case to John I. Bennett as master, to take proofs and report the evidence with his findings and conclusions thereon.

Voluminous proofs were taken before a special examiner and also some before the master, and the case was argued before the latter. On the 13th of May, 1887, he filed his report. It stated that some of the water works bonds were sold at various times from the spring of 1884 to May, 1885, those bonds being represented in the litigation principally by the cross-plaintiffs Parrish, Bond and Benson. The master arrived at the following conclusions:

(1) The city had express authority by its charter to pass the ordinance of May 12, 1883, and to fix the rates of water rents for a period not exceeding thirty years; and it became binding on the city and on Shelton, and was duly assigned by the latter to the water company.

(2) In view of the provisions of the ordinance, that the object for which the franchise was granted was expressed to be "for supplying the said city and the inhabitants thereof and of the adjacent territory with water for public and private uses;" that "the works shall be increased in capacity as the growth of the city and its needs require;" that "there shall be not less than eight miles of mains for the distribution of water in said city, of a sufficient size to furnish all the water required for the wants of said city and its inhabitants;" that "the water supplied by said works shall be good, clear water, and the source of supply shall not be contaminated by the sewerage of said city;" that Shelton or his assigns "shall, with due diligence, increase the steam and furnish fire pressure so long as needed for the extinguishment of any fire;" it was manifest that the purpose of the ordinance was to furnish a fire protection to the city and its inhabitants, and to furnish water for other public uses, for the flushing of sewers, for the use of the city hall and its offices, for public schools, churches and public fountains, and also for the use of the inhabitants, upon rates fixed in the ordinance, for mechanical and domestic purposes.

(3) The contract of Shelton as to the quantity and quality of the water was in the nature of a condition precedent to a performance on the part of the city, except as to the opportunity to Shelton and his assigns to construct the works.

(4) The contract on the part of the city was a grant of the right to maintain the works for thirty years; the right to use the public property of the city in constructing or repairing the works; the right to collect maximum annual rates for water used for private purposes; an agreement to pay for the use of hydrants, of a defined number, a fixed rate per hydrant, as rent, for thirty years; and the right to adopt rules for the supply of water and to enforce their conditions when not contrary to law; such rights acquired by Shelton and his assigns being dependent upon performance by Shelton and his assigns of his agreements. There was added the mutual agreement that after the expiration of fifteen years the city might purchase the water works.

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(5) The contract contained in the ordinance was an entire one, and was not executed by a partial performance or by a performance as to one of the several essential undertakings on the part of Shelton and his assigns; and they assumed all the risk of obtaining a water supply sufficient in quantity and quality to comply with their contract.

(6) Although the water company constructed the building, machinery for pumping, stand-pipe, and water mains and their attachments, within the time limited and in compliance with the terms of the ordinance, prior to December 6, 1883, it failed to furnish a water supply which complied with the requirements of the ordinance either in quantity or quality, either before or after the expiration of the limit prescribed in the contract for the construction and successful completion of the works. The details of this failure, as founded on the evidence, are given at length by the master, his conclusion being, that the fact is established that the waters furnished by the water company were never pure, clear waters, nor furnished in the required quantity, but were always more or less contaminated by substances injurious to health and comfort, and which would naturally be derived from the sources from which the water supply was shown to have been obtained. Therefore, waiving the legal effect which the resolution of December 6, 1883, might have had as an estoppel upon the city, the water company, at no time, either before or after the fifteen months following May 17, 1883, furnished water to the city and its inhabitants in the quantity and of the quality required by the ordinance, and at no time complied with the ordinance and the contract.

(7) The resolutions passed by the common council on the 6th of December, 1883, were an estoppel against the city to deny the facts alleged in those resolutions, and the city was bound to know that the water company might execute a mortgage upon its property and franchises to secure the bonds; and the council intended by the resolutions, so far as Shelton and the water company were concerned, to foreclose the question as to the amount of water mains which the latter had placed in the streets, the character of the struc-

tures which they had erected, the machinery which they had put in place, and generally the mechanical execution of the contract, and also the question that they had complied with the test provided in the ordinance, so far as related to throwing fire-streams of the number and character required; but the test provided for in the ordinance was merely a test of sufficiency for fire service, and was designed to determine the time when the water rents for the use of the hydrants should commence, and could not be a test as to the quantity of water capable of being supplied by the works every twenty-four hours, much less a test of the goodness and purity of the water. Whether or not the water company was able to furnish the required quantity of water every twenty-four hours, and whether or not its quality as to purity and goodness for domestic and other uses was in compliance with the ordinance, must rest upon facts as proved to exist. Moreover the estoppel, so far as it did exist, was not a continuing one. The obligation of the water company to furnish the quantity and quality of water required by the contract was a continuing obligation, and was not met once for all by a compliance with the fire test of December 6, 1883. The right of the company to enjoy the consideration of the contract was thereafter to depend upon its continuing to perform it. There was not and could not be, a final and absolute acceptance of the water works by the city, without regard to a future compliance on the part of the water company with the requirements of the contract. The case was not one of works constructed for the city and to become its property upon acceptance; and the acceptance related merely to the sufficiency of the structures for fire service at the time.

(8) The agreement in regard to the purchase from the city of the water mains, and the contract formed by the ordinance and its acceptance, must be considered as one contract and construed together, and the agreement in regard to the water mains did not constitute an absolute sale of them, except on the compliance on the part of Shelton and his assigns with the conditions contained in the agreement itself in regard to the water mains. The city was not at any time to be de-

prived of the fire service of which the mains were a part, and they were not to be disturbed until Shelton or the water company were able to connect their works with those mains and continue the efficiency of the service by the new works when in successful operation; and the successful erection of those works and the accomplishment of the things required by the ordinance were a condition to the sale of the mains. The agreement as to the mains was therefore a conditional contract, and such delivery as was made under it was a conditional delivery. The city's mains were never disturbed in its streets, except to the extent of making connections with the mains subsequently laid by the water company and the attachment of some new hydrants. The valuation of the mains and the adoption of such valuation by the council amounted to no more than if their value had been stated at a definite sum in the agreement in regard to them. The letter of the mayor, written, in fact, after his term of office had expired, and antedated, stating that the mains had been delivered by the city to the water company, was of no effect; and, even if it had been written by him during his term of office, it was simply the expression of a legal opinion, and was not within the line of his official duty, without a special authority from the council.

(9) After the passage of the ordinance of June 1, 1885, rescinding the contract between the city and the water company, the city forcibly disconnected its mains from the system of mains laid by the water company, and restored the system of fire protection which it had enjoyed before the water company constructed its works.

(10) The period within which the water company was required to complete its works and put them in successful operation expired in August, 1884. It failed to comply with its contract, and acknowledged that failure. It then resorted to the sinking of gang wells, which it completed in November, 1884; but they also failed as a source of supply. The city showed great patience and forbearance, and waited more than eight months after August, 1884, and then passed the repealing ordinance of June 1, 1885.

(11) The recaption of the mains, which were only conditionally in the possession of the water company under a conditional sale, and which conditions had not been complied with by Shelton and his assigns, was therefore rightful; and the water company can have no right to restitution, nor had it any legal right to a further extension of time, for further experiments in respect to a new source of water supply.

(12) As to the question whether the plaintiffs in the cross-suit are entitled to any relief which could not be granted to the water company, the effect of the decree, sale and deed in the foreclosure suit was to vest in the purchasers at the sale the equitable interest of the trustee and of the bondholders, and all the legal interest of the water company. Before the decree, the bill of foreclosure had been dismissed as against the city, and its interests were in no manner affected by the foreclosure. The foreclosure suit, having been initiated and brought to a conclusion while the present suit of the city against the water company was pending, was, as to this suit, a proceeding *pendente lite;* but the plaintiffs in the cross-suit stand as the representatives of the bondholders, and the equities of the latter should be considered in fixing the terms of the decree. The bondholders, as between them and the water company, were *bona fide* purchasers of the bonds. The water company and its agents holding the bonds for sale in 1884 and 1885, prior to May 20th, 1885, represented that the works of the water company were in successful operation, and that it had complied, when the bonds were sold, with all the conditions of its contract with the city; and, the bonds being negotiable, there was no proof of any notice to any of their purchasers which would affect their validity. The bonds and the mortgage, however, were in no sense obligations of the city, nor was it a party to their issue; and it did not become in any manner responsible for any part of the debt created by the bonds. The letters written by the city engineer, the city attorney, the chairman of the water committee, the mayor of the city and perhaps other officers, cannot operate as an estoppel on the city, because they were not written in pursuance of direct authority and were not within the

official duty of those officers. They tend, however, to show the *bona fides* of the purchases made by the bondholders; and the plaintiffs in the cross-suit cannot have imputed to them the actual bad faith which may be inferred as against Shelton and the water company in regard to the construction of the works, the water supply and the management of the affairs of the water company. They can have, however, no greater right than the water company would have had, to be restored to the possession of the city's mains, and to be permitted by the city to further experiment in regard to securing a supply of water and complying with the contract.

(13) The city never paid any interest upon the bonds. The first payment of interest was made by the water company, and the fact of such payment was made known to some of the purchasers before they would purchase the bonds. The mortgage provided for the direct payment of hydrant rents to the trustee, to be applied in payment of interest; but no payment was ever thus made by the city to the trustee. That fact was known to the trustee, and, it being the agent of the bondholders, such knowledge was imputable to them.

The water company afterwards defaulted in the payment of interest, and the foreclosure proceedings were had upon the basis of a default made in the payment of interest due February 1, 1885. The bondholders knew or were chargeable with knowledge that there was a default in the payment of interest early in 1885 and a long time before June 1, 1885; and they also had knowledge of the existence of trouble between the city and the water company.

(14) There was a clause in the mortgage providing that if the water company should fail to perform any of its agreements contained in the mortgage it should be lawful for the trustee to take possession of the mortgaged property, and operate it as a mortgagee in possession, for the benefit of the bondholders, and during such possession to make all needful repairs and replacements in the mortgaged property, and to receive the rents and profits therefrom until foreclosure. This could have been done at least as early as February, 1885, when there was a default in the payment of interest. The trustee,

and the bondholders for whom it was acting, failed to take such possession; and the plaintiffs in the cross-suit are not entitled to the relief prayed in their cross-bill, while the city is entitled to have the ordinance of May 12, 1883, annulled.

(15) The decree cancelling the franchise ought not to be unconditional, however, but should be conditioned that the city, or some person or corporation authorized by it, should pay into court, for the use of the plaintiffs in the cross-suit, the reasonable cash value of the mains constructed by the water company, the machinery, the stand-pipe, the engine-house, the land on which the same are located, and perhaps other property, to be ascertained by a master, and also an equitable amount in satisfaction of water rents.

The city excepted to this report, and the trustee also excepted to it. The case was heard before Judge Gresham, and his opinion is reported in 34 Fed. Rep. 675. He concurred generally with the master in his views of the case, and said: "The purchasers of the bonds knew that, unless water was furnished in quantity and quality as called for by the contract, nothing would be due from the city for water rents. A different ruling would be equivalent to holding that by adopting the resolution of December 6, 1883, the city guaranteed the payment of interest which would thereafter accrue on the bonds. The city did nothing of the kind, nor is it believed that the purchasers of the bonds invested their money believing that this resolution amounted to such guaranty. By the trust deed or mortgage the Farmers' Loan and Trust Company and the bondholders succeeded to the rights of the water company. If this were a suit between the city and the water-works company I should grant the relief prayed for without allowing anything for water furnished, for none was furnished in compliance with the contract. But the controversy now is between the city and persons representing the bondholders, and I think it equitable that the city should pay them a reasonable compensation for the water which was furnished up to the time it resumed possession of the old mains. I do not think the bondholders' committee is entitled to the old mains. They were not sold to Shelton unconditionally and absolutely.

They were sold to him to be used in a particular way and for a particular purpose, and to be paid for by water furnished under the terms of the contract. Shelton and his successor, the water company, having failed to comply with the contract, although afforded ample time to do so, the city was authorized to resume possession of its old mains and protect its inhabitants as best it could against fire."

On the 2d of May, 1888, the court entered a decree adjudging that the contracts granting the franchise to Shelton and his assigns and providing for the sale of the water mains, and the ordinance of May 12, 1883, and all rights, franchises and privileges granted thereunder, were annulled and cancelled, and the property in the water mains was revested and confirmed in the city; dismissing the supplemental and cross-bill of Parrish, Bond and Benson; ordering the city to pay to them a reasonable sum for water used from December 1, 1883, to June 1, 1885, and referring it to a master to ascertain such sum; and dividing the costs of the suit equally between the city and the plaintiffs in the cross-suit. The Farmers' Loan and Trust Company and the plaintiffs in the cross-suit prayed an appeal to this court from that decree.

The master, on the 13th of June, 1888, reported the sum to be paid, as the value of the use of the water, at $3000. The plaintiffs in the cross-suit excepted to this report, and on the 13th of June, 1888, the court overruled their exceptions, confirmed the report, and directed the city to pay into court for the use of the plaintiffs in the cross-suit the sum of $3000. From that decree, and from the prior decree of May 2, 1888, the plaintiffs in the cross-suit and the Farmers' Loan and Trust Company prayed an appeal to this court.

The appellants urge that the Circuit Court erred (1) in not dismissing the bill for want of equity, because the conditions of the contract were conditions subsequent; (2) in not holding that the city was estopped by the resolution of December 6, 1883; (3) in not dismissing the bill on the merits, on the ground that the water company was not in default; (4) in holding that the city had a right to repossess itself of the old mains which it had sold to Shelton and through him to the

water company; (5) in not granting the prayer of the cross-bill; and (6) in not sustaining the exceptions of the appellants to the first report of the master, and particularly those to his findings respecting the nature and scope of the contract.

It is quite clear, on the proofs, that the water furnished by the water company for the period of about nine months during which its works were operated was unfit for domestic purposes; that the course of the city was entirely forbearing and generous towards the water company; and that after the gang wells were completed in November, 1884, the supply of water was inadequate for the protection of the city from fire, and its quality was but little better than it was before the construction of the gang wells. After they were constructed the water distributed to the customers of the company was surface water mixed with water from the gang wells. The company was at no time able to furnish even bad water in the quantity required by the contract, or needed by the city for fire protection or for flushing the sewers. During the eighteen months which elapsed after the completion of the works, the company had ample time to comply with the contract, and the city was under no obligation to give it further time to experiment. The taking possession by the city of the old water mains, after the passage of the resolution of June 1, 1885, was necessary for the protection of the city from fire. It could not continue, after annulling the contract, to receive from the water company water for fire purposes. The contract for the sale of the old mains was a part of the contract with the city in relation to the water works. The two agreements constituted one contract. The contract for the sale was merely a contract to sell, and not an executed contract of sale. The delivery of the old water mains was conditional, and made for a special purpose; and, the conditions not having been performed, no title to them passed either to the water company or to the trustee under the mortgage, and the recaption of them by the city was lawful. By the contract for their purchase, both what mains were to be purchased and the price to be paid for them remained to be determined, and so the agreement was executory. It was also by its terms con-

ditional; and the delivery, too, was conditional, for a specific purpose, and without any intention that the city should, by the making of the agreement, part with its title to the mains.

In regard to the rights of the bondholders, although the purchasers of the bonds may have been influenced to purchase them by the terms of the resolution of December 6, 1883, and by the letters from the officers and citizens of the city introduced in evidence, the city was not thereby estopped from refusing to pay the rental for the hydrants, which by the terms of the mortgage was to be applied in payment of the interest on the bonds, or from having the contract cancelled. Although the bondholders exercised good faith in purchasing the bonds, they bought them knowing that the city was not a party to them, and that the payment of water rents by the city for the hydrants depended upon a continued compliance by the water company with the terms of the contract. The letters of the private citizens could not affect the city; and the letters from the officers of the city could not affect its rights, because they were not written by its authority or within the scope of their powers as its officers.

The scope of the resolution of December 6, 1883, accepting the works, extended only to the fact that the provisions of the ordinance respecting their construction had been complied with and the test required by the ordinance had been satisfactorily made. It covered only the physical existence and condition of the artificial structures. The contract extended, however, to the amount of water which the works should be able actually and permanently to supply, and the character of the water to be supplied, all of which was uncertain, and the risk of which was assumed by Shelton and his assigns, their obligation being a continuing obligation, and their right to the continued enjoyment of the consideration for it being dependent upon their continuing to perform it. There was in the resolution of December 6, 1883, no guaranty that the water company could or would in the future comply with its contract. The liability of the city to pay in future the hydrant rents depended upon the future compliance of the water company with its contract; and in case of its failure the city would

have the right to ask for the rescission of the contract. This the bondholders knew when they purchased the bonds. The city entered into no contract with them, and the passage of the resolution of December 6, 1883, could not deprive the city of the relief to which it would otherwise be entitled, on the failure of the water company to comply with its contract. The provisions of the ordinance requiring the water company to furnish the amount of water called for by it, and that the water supplied by the works should be good, clear water, and the source of supply not be contaminated by the sewerage of the city, were known to the bondholders when they purchased the bonds, and they also knew that the payment of the hydrant rents which would go to pay the interest on the bonds must depend upon the furnishing of water by the water company according to the contract.

Nor could the test required by the ordinance and satisfactorily made by the water company be a test of anything but the pressure power of the works. It could not be a test of the quantity of water which would thereafter be supplied by the works, nor of its continuing quality for domestic purposes. The resolution of acceptance cannot be considered as a guaranty to the bondholders that the water company would thereafter perform its contract for furnishing water in the quantity and of the quality called for by the ordinance. The bondholders were bound to take notice of the contents of the ordinance before purchasing their bonds, and purchased and held them subject to the continuing compliance of the water company with the terms of the ordinance. They bought the bonds as obligations of the water company, and not as evidences of indebtedness of the city; and they had information from the ordinance that the city would not be liable for hydrant rents if the water company failed to furnish water as agreed, and that if the water company neglected to comply with its contract the city would have the right to invoke the aid of a court of equity to enforce a cancellation of the contract.

As to the old water mains, the trustee and the bondholders took the lien of the mortgage subject to the conditions of the agreement for the sale of them by the city to Shelton. Imme-

diately after the passage of the rescinding resolution of June 1, 1885, the city proceeded to resume possession of the old mains, and its bill against the water company was filed immediately thereafter, and on the 20th of June, 1885. The water company never credited the city with any money due on account of rent for the hydrants, applying it as payment on account of the old water mains; nor did the city ever apply any money due by it to the water company for hydrant rents towards paying itself for the old mains.

The principal contention on the part of the appellants is that, on the acceptance of the ordinance by Shelton, a right in the franchise vested in him, which could not be defeated even though he afterwards failed to comply with its terms; that the failure of the water company to furnish water in the quantity and of the quality called for by the ordinance was only a breach of a condition subsequent; and that a court of equity will not lend its aid to divest an estate for such a breach. But it seems to us that in respect to a contract of the character of the present one, the ability of the water company to continue to furnish water according to the terms of the ordinance was a condition precedent to the continuing right of Shelton and his assigns to use the streets of the city and to furnish water for a period of thirty years; and that when, after a reasonable time, Shelton and his assigns had failed to comply with the condition as to the quantity and quality of the water, the city had a right to treat the contract as terminated, and to invoke the aid of a court of equity to enforce its rescission. A suit for a specific performance of the contract, or a suit to recover damages for its non-performance, would be a wholly inadequate remedy in a case like the present. The danger to the health and lives of the inhabitants of the city from impure water, and the continued exposure of the property in the city to destruction by fire from an inadequate supply of water, were public questions peculiarly under the care of the municipality; and it was entitled and bound to act with the highest regard for the public interests, and at the same time, as it did, with due consideration for the rights of the other parties to the contract.

We see no error in the decree of the Circuit Court, and it is

Affirmed.

WALLACE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 855. Submitted January 10, 1890. — Decided January 27, 1890.

An envoy extraordinary and minister plenipotentiary of the United States to Turkey was never appointed before July 13, 1882. On that day, the claimant, being minister resident and consul general of the United States to Turkey, at a salary of $7500 a year, was appointed to the higher grade. By each of the diplomatic appropriation bills of 1882, 1883 and 1884, $7500 was appropriated for the salary of an envoy extraordinary and minister plenipotentiary to Turkey. The claimant, having been paid the $7500 salary for each of those years, sued in the Court of Claims to recover the difference between that amount and an annual salary of $10,000, claiming the latter under § 1675 of the Revised Statutes, as amended by the act of March 3, 1875, c. 153, 18 Stat. 483; *Held*, that as, under the amendment of 1875, the salary was to be $10,000, "unless where a different compensation is prescribed by law," and the office did not exist before July 1, 1882, and the first provision made by Congress for a salary for it was made by the act of July 1, 1882, and was for $7500, and the same provision was continued while the claimant thereafter held the office, and he was paid the $7500, he had no further claim.

The case distinguished from that of *United States* v. *Langston*, 118 U. S. 389.

APPEAL from the Court of Claims. Judgment there against the claimant.

Mr. George A. King for appellant.

Mr. Assistant Attorney General Cotton and *Mr. Robert A. Howard* for appellees.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims, dismissing the petition, in a suit brought by Lewis Wallace against the United States. The findings of fact were as follows:

"1. The claimant was, on the 13th day of July, in the year 1882, appointed envoy extraordinary and minister plenipoten-

tiary of the United States to Turkey, and held that office continuously from the time of said appointment till and including the 24th day of August, 1885. (Commission of claimant and letter of Secretary of State.)

"2. The Secretary of State, in the estimate of the appropriations for the diplomatic and consular service for the following fiscal years made the following specific estimate for the salary of the representative in Turkey as follows, to wit:

"'Turkey.

"'Ministers resident in . . . Turkey at $7500 each (for fiscal year ending June 30, 1883).

"'Envoys extraordinary and ministers plenipotentiary to . . . and to Turkey, $7500 (for the fiscal year ending June 30, 1884).

"'Envoys extraordinary and ministers plenipotentiary to . . . and to Turkey, $7500 (for the fiscal year ending June 30, 1885).

"'Envoys extraordinary and ministers plenipotentiary to Turkey, $7500; additional submitted, $2500 (for fiscal year ending June 30, 1886).'

"3. With his appointment or commission claimant also received the following notice from the Secretary of State:

"'Department of State,
"'Washington, *July* 21, 1882.

"'Lewis Wallace, Esquire, etc., etc., etc.,

"'Sir: Congress having recently raised the grade of the legation at Constantinople to a plenipotentiary mission, and the President, by and with the advice and consent of the Senate, having appointed you to be envoy extraordinary and minister plenipotentiary of the United States of America to Turkey, I beg to transmit herewith the following papers: . . .

"'The act of Congress does not increase your compensation or contemplate other changes than as herein mentioned. You are referred to the personal instructions given you as minister resident, June 4, 1882, for the conduct of the business of the

mission under your present appointment, and for the necessary expenditures incident to the maintenance of the legation at Constantinople.'

"4. Claimant, in his first account with the Treasury Department, stated the same as follows:

"'United States Government in acc't with Lew. Wallace, minister plenipotentiary at Constantinople.

"'To am't of my salary from July 1st, 1882, to 30th September 1882, — months, at the rate of $7500 per annum.'

"The claimant charged and was allowed as said minister plenipotentiary, from July 13, 1882, to June 30, 1885, at the rate of $7500 per annum, as shown above, by copy of first account.

"5. The compensation paid to the claimant, from the time of his appointment till and including the 30th of June, 1885, was at the rate stated in his accounts, to wit, at the rate of $7500 per annum, and claimant's account stands closed upon the books of the Treasury by payment in full.

"6. Claimant was minister resident and consul general of the United States to Turkey at the date of his appointment as envoy extraordinary and minister plenipotentiary."

On the foregoing findings, the court decided, as matter of law, that the petition should be dismissed, under the decision of that court in the case of *Francis* v. *United States*, 22 C. Cl. 403.

On the 13th of July, 1882, when the claimant entered upon his duties as envoy extraordinary and minister plenipotentiary of the United States to Turkey, section 1675 of the Revised Statutes, as amended by the act of March 3, 1875, c. 153, 18 Stat. 483, was in force, reading as follows:

"Sec. 1675. Ambassadors and envoys extraordinary and ministers plenipotentiary shall be entitled to compensation at the rates following, per annum, namely:

"Those to France, Germany, Great Britain and Russia, each, seventeen thousand five hundred dollars.

"Those to Austria, Brazil, China, Italy, Japan, Mexico and Spain, each, twelve thousand dollars.

"Those to all other countries, unless where a different compensation is prescribed by law, each, ten thousand dollars.

"And unless when otherwise provided by law, ministers resident and commissioners shall be entitled to compensation at the rate of seventy-five per centum, chargés d'affaires at the rate of fifty per centum and secretaries of legation at the rate fifteen per centum, of the amounts allowed to ambassadors, envoys extraordinary and ministers plenipotentiary to the said countries respectively; except that the secretary of legation to Japan shall be entitled to compensation at the rate of twenty-five hundred dollars per annum.

"The second secretaries of the legations to France, Germany and Great Britain shall be entitled to compensation at the rate of two thousand dollars each per annum."

Under the provision of that section, an envoy extraordinary and minister plenipotentiary to Turkey would be entitled to an annual compensation of $10,000, unless a different compensation was prescribed by law. Having received compensation at the rate of $7500 per annum, the claimant brought suit for the difference between that sum and $10,000 per annum, for the time from July 13, 1882, to June 30, 1885.

The office of envoy extraordinary and minister plenipotentiary to Turkey did not exist prior to July 1, 1882. Before that time, the diplomatic representative of the United States to Turkey was of the rank of a minister resident and consul general, and the claimant held that office, at an annual salary of $7500, when he was appointed envoy extraordinary and minister plenipotentiary.

By the act of July 1, 1882, c. 262, 22 Stat. 128, entitled "An act making appropriations for the consular and diplomatic service of the government for the fiscal year ending June thirtieth, eighteen hundred and eighty three, and for other purposes," it was provided "that the following sums be, and they are hereby, appropriated for the service of the fiscal year ending June thirtieth, eighteen hundred and eighty-three, out of any money in the Treasury not otherwise appropriated, for the objects hereinafter expressed, namely: . . .

"For salaries of envoys extraordinary and ministers plenipotentiary, as follows: To Chili and Peru, at ten thousand dollars each; to Turkey, seven thousand five hundred dollars; in all, twenty-seven thousand five hundred dollars."

By the act of February 26, 1883, c. 36, 22 Stat. 424, entitled "An act making appropriations for the consular and diplomatic service of the government for the fiscal year ending June thirtieth, eighteen hundred and eighty-four, and for other purposes," it was provided "that the following sums be, and they are hereby, appropriated for the service of the fiscal year ending June thirtieth, eighteen hundred and eighty-four, out of any money in the Treasury not otherwise appropriated, for the objects herein expressed, namely: . . .

"For salaries of envoys extraordinary and ministers plenipotentiary, as follows: To Chili and Peru, at ten thousand dollars each; to Turkey, seven thousand five hundred dollars; in all, twenty-seven thousand five hundred dollars."

By the act of July 7, 1884, c. 333, 23 Stat. 227, entitled "An act making appropriations for the consular and diplomatic service of the government for the fiscal year ending June thirtieth, eighteen hundred and eighty-five, and for other purposes," it was provided "that the following sums be, and they are hereby, severally appropriated for the consular and diplomatic service of the fiscal year ending June thirtieth, eighteen hundred and eighty-five, out of any money in the Treasury not otherwise appropriated, for the objects hereinafter expressed, namely: . . .

"For salaries of envoys extraordinary and ministers plenipotentiary to the United States of Colombia and Turkey, at seven thousand five hundred dollars each, fifteen thousand dollars."

No attempt was made by Congress, by those three statutes or by any other statute, to create the office of envoy extraordinary and minister plenipotentiary to Turkey; but, as Congress had, by the act of July 1, 1882, made an appropriation of $7500 to pay the salary of an envoy extraordinary and minister plenipotentiary to Turkey, at the sum of $7500 for the fiscal year ending June 30, 1883, and had thus left it to the President

to fill such office, if he chose to do so, under his constitutional power, the President exercised that power by appointing the claimant, on the 13th of July, 1882.

By such provision of the act of July 1, 1882, continued by the acts of February 26, 1883, and July 7, 1884, a different compensation per annum from that of $10,000 was prescribed by law for the envoy extraordinary and minister plenipotentiary to Turkey, within the meaning of section 1675 of the Revised Statutes, before quoted. In view of the fact that the office of envoy extraordinary and minister plenipotentiary to Turkey never had existed and never had been filled by any person prior to July 1, 1882, and of the fact that the first provision made by Congress for that office, in regard to its compensation, was for an annual salary of $7500, that sum must be considered as then having been prescribed by Congress as the compensation for the officer who might be appointed to fill it. It was, therefore, the compensation prescribed by law as the annual compensation for that officer, and was a different compensation from that prescribed by section 1675 of the Revised Statutes; and, according to that section, the compensation could not be $10,000 a year.

The President raised the grade of the legation at Constantinople to a plenipotentiary mission by his appointment of the claimant as envoy extraordinary and minister plenipotentiary to Turkey, on the 13th of July, 1882, and Congress provided for the office an annual salary of $7500. The claimant could have no larger salary, and can recover nothing in this suit.

His counsel seek to apply to this case the doctrine laid down by this court in *United States* v. *Langston*, 118 U. S. 389; but it has no application to the present case. In the Langston case a prior statute had fixed the annual salary of a diplomatic officer at a designated sum, without limitation as to time. A subsequent statute appropriated a less amount for the services of the officer for a particular fiscal year, but contained no words which expressly or by implication modified or repealed the prior statute. In the present case, as has been shown, the prior statute, namely, section 1675 of the Revised Statutes, has no application, because a different compensation for the

office was prescribed by law before the President ever appointed, under his constitutional power, any such officer.

The judgment of the Court of Claims is

Affirmed.

MANNING *v.* FRENCH.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 1188. Submitted January 13, 1890. — Decided January 27, 1890.

In an action brought in a state court against the judges of the Court of Commissioners of the Alabama Claims, by one who had been an attorney of that court, to recover damages caused by an order of the court disbarring him, the plaintiff averred and contended that the court had not been legally organized, and that it did not act judicially in making the order complained of; *Held*, that a decision by the state court that the Court of Alabama Claims was legally organized and did act judicially in that matter, denied to the plaintiff no title, right, privilege or immunity claimed by him under the Constitution, or under a treaty or statute of the United States, or under a commission held or authority exercised under the United States.

The decision of a state court that a judge of a federal court acted judicially in disbarring an attorney of the court involves no federal question.

A petition for a writ of error forms no part of the record upon which action is taken here.

MOTION TO DISMISS OR AFFIRM. The case, as stated by the court in its opinion, was as follows.

Jerome F. Manning brought an action of tort in the Superior Court of Massachusetts against James Harlan of Iowa, Andrew S. Draper of New York, and Asa French of Massachusetts, to recover damages for being prevented from acting as an attorney and counsellor in or before the Court of Commissioners of Alabama Claims of the United States, or in relation to any matter of business pending therein, by the defendants, who "falsely pretended to be judges of said Court of Commissioners of Alabama Claims, and actually acted as judges thereof, though in truth and fact neither of them was a

judge thereof." Service was had upon the defendant French, but upon neither of the other defendants, and he, for answer, denied each and every allegation in the declaration. The following statement appears in the record, in the "plaintiff's exceptions," which were allowed by the presiding judge:

"At the trial, which was without a jury, it appeared that the plaintiff, in 1885, was and for many years had been an attorney and counsellor at law duly admitted to practice in the Supreme Court of the United States, in the Court of Claims of the United States, and in all the courts of this Commonwealth; that he acted as an attorney and counsellor before the Court of Commissioners of Alabama Claims, commencing in January, 1875, and ending July 29, 1885; that he presented and prosecuted before said Court of Commissioners about seven hundred and fifty petitions of the class known as 'Alabama Claims,' representing about fourteen hundred claimants and beneficiaries, and thereby became entitled to receive from said claimants and beneficiaries divers sums of money, amounting in all to many thousands of dollars; that the Court of Commissioners of Alabama Claims was established by act of Congress approved June 23, 1874, chapter 459; reëstablished by another act approved June 5, 1882, chapter 195, and continued by another act approved June 3, 1884, chapter 62; that in 1874 said Court of Commissioners adopted, among other rules, the following: 'Rule V. Any person of good moral character admitted to practice as attorney or counsellor in the Supreme Court of any State or Territory or the District of Columbia, or in any of the federal courts, on filing with the clerk a written statement of the date and place of such admission, with his name and post-office address in full, may, on motion, be admitted to practice in this court;' that on January 26, 1875, the plaintiff was, on motion of Robert M. Corwine, Esquire, admitted to practice in said Court of Commissioners; and that on October 5, 1882, said Court of Commissioners adopted certain additional rules, among which was the following: 'Rule XIV. All attorneys admitted to practice in the Court of Commissioners of Alabama Claims as created under the law of Congress approved

June 23, 1874, will be recognized as attorneys in this court, reëstablished under the law of Congress approved June 5, 1882;' but the plaintiff claimed that said rules five and fourteen were unauthorized and of no effect, and that the said Court of Commissioners had no power to create a bar or to admit attorneys thereto or to expel them therefrom."

The record of the proceedings in *In re Manning* in the said Court of Commissioners, duly attested, was put in evidence, which proceedings culminated in an order, made July 25, 1885, that "the said Jerome F. Manning be, and he hereby is, prohibited from appearing and acting in this court in relation to any matter or business therein pending, and from exercising in any way the functions of an attorney and counsellor of this court. This decree to stand until further order of the court." That record also contained a motion to rescind the foregoing order, and the action of the court denying the same.

The exceptions thus continue:

"It also appeared that on the twenty-ninth of July, 1885, said Court of Commissioners made the following order: 'Ordered, that the clerk of the court is hereby authorized to substitute the name of any attorney of this court in place of said Jerome F. Manning in any case upon the receipt of the request in writing from the claimant therein or from his legal representatives to that effect.'

"It also appeared that the defendant French was commissioned and qualified as a judge of said Court of Commissioners on or about July 5, 1882, and not otherwise; and that the defendant Harlan was commissioned and qualified about the same time, and not otherwise; and that the defendant Draper was commissioned and qualified in the year 1885, and not otherwise; and that each of said judges concurred in said orders of July 24, July 25, July 29 and October 15, 1885, touching the plaintiff.

"It also appeared that in addressing the court on July 25, as mentioned in the foregoing record, Robert Christy, Esq., as counsel for the plaintiff, read to said Court of Commissioners section 725 of the Revised Statutes of the United States and the decisions of the Supreme Court of the United States

in the cases of *Ex parte Robinson*, in 19 Wall. 505, and *Ex parte Bradley*, in 7 Wall. 364, and argued that said commissioners had no power to prohibit the plaintiff from practising before them.

"The defendant French admitted that he concurred with the other members of said Court of Commissioners in issuing and enforcing said orders of July 24 and 29, and that the plaintiff was thereby damaged, and claimed that the said Court of Commissioners had authority to issue and enforce the same, and that any loss sustained by the plaintiff thereby was *damnum absque injuria*.

"The plaintiff introduced evidence tending to show that each of the allegations in his declaration was true, and asked the court to make the following rulings:

"First. That the Court of Commissioners of Alabama Claims had no authority to make the order made by them touching the plaintiff on July 29, 1885, and that the same was unlawful.

"Second. That the defendant French having admitted that he concurred with the other defendants in issuing and enforcing said order of July 29, 1885, and that the plaintiff was thereby injured, the plaintiff is entitled to recover from said French compensation for all losses sustained by him as the direct result of said order of July 29, 1885, and of the enforcement thereof from thence to December 31, 1885.

"Third. That more than two years having elapsed after the reorganization of the Court of Commissioners of Alabama Claims, under the act of June 5, 1882, and after the appointment of the defendant French and the other defendants, but prior to July 24, 1885, the said French and the other defendants had, on said last-mentioned day and thereafter, no lawful authority to act as judges of said Court of Commissioners of Alabama Claims.

"But the court declined so to rule, found the facts to be as stated in said printed record, ruled that the action could not be maintained, and found for the defendants.

"The plaintiff, being aggrieved by the foregoing rulings and refusals to rule, excepts thereto, and prays that his exceptions may be allowed."

The exceptions having been entered in the Supreme Judicial Court of Massachusetts, the cause was there argued and the exceptions overruled on the 21st day of June, 1889, 149 Mass. 391. As to the contention of the plaintiff that the judges who in fact composed the court on July 25, 1885, were not lawfully in office, and particularly that the defendant French was not then lawfully in office, the court said: "It appears that French was commissioned and qualified as judge 'on or about July 5, 1882.' The argument is, that, as by the act of June 5, 1882, the existence of the court was limited to two years, the commission of Judge French had expired before July 25, 1885, when the court passed the order of which the plaintiff complains. It is contended that, when the existence of the court was continued beyond two years by the statute of June 3, 1884, it was necessary that the judges be reappointed in order lawfully to hold their office during the continued existence of the court." The court held that it was unnecessary to consider whether the plaintiff's right in the matter of his complaint would be greater against a judge *de facto* than against a judge *de jure;* that it did not appear that the judges were originally commissioned for any definite time; that they would continue to hold their office while the court continued to exist, unless they were lawfully removed; that it was within the power of Congress, by statute, to extend the existence of the court before the original term of its existence expired; and that the judges, by virtue of their original appointment, continued to be judges while the court continued to exist. It was also held that the Court of Commissioners of Alabama Claims had the powers which the statutes conferred upon it, and that under the acts of Congress it had the power to prescribe by rule the qualification of attorneys to be admitted to practice before it, and therefore, the power to determine whether the persons who asked to be admitted had the requisite qualifications, and whether the persons who had been admitted retained the requisite qualifications; and that "in the exercise of this power, after notice to the plaintiff and a hearing, that court prohibited the plaintiff from further exercising before it the functions of an attorney of the court. Congress had the right

to confer this power exclusively upon that court, to be exercised as a judicial power, and the judges of the court are not liable to individuals for judicial acts done within their jurisdiction. *Randall* v. *Brigham*, 7 Wall. 523; *Randall, Petitioner*, 11 Allen, 473."

On the first day of July, 1889, judgment for costs was entered for the defendant. The plaintiff, Manning, thereupon sued out a writ of error from this court, and a motion to dismiss or affirm was made by defendant in error.

Mr. John A. J. Creswell, on behalf of *Mr. Charles Theodore Russell, Jr.*, for the motion, submitted on *Mr. Russell's* brief.

Mr. Charles Cowley, for plaintiff in error, opposing, submitted on his brief.

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

Jurisdiction to review the final judgment rendered in this case cannot be maintained upon the ground of the denial by the state courts of any title, right, privilege, or immunity claimed under the Constitution, or some treaty, or statute of, or commission held or authority exercised under, the United States, as the plaintiff in error set up and claimed none such. *Spies* v. *Illinois*, 123 U. S. 131, 181; *Chappell* v. *Bradshaw*, 128 U. S. 132. And the decision that the defendant was not liable in damages, because in concurring in the order complained of he acted in his judicial capacity, in itself involved no Federal question. *Lange* v. *Benedict*, 99 U. S. 68, 71. Nor can the plaintiff object that the validity of a statute of, or an authority exercised under, the United States was drawn in question, or that a title, right, privilege, or immunity was claimed under the Constitution, or a statute of, or a commission held, or an authority exercised under, the United States, on the ground that the defendant claimed to exercise an authority under acts of Congress, or under a commission held under the United States, since this was not the plaintiff's con-

tention, but the defendants'; and the state courts decided not against but in favor of the authority, title, right, privilege, or immunity so claimed.

The three rulings asked by the plaintiff and refused by the court, were:

First. That the Court of Commissioners of Alabama Claims had no authority to make the order entered by them, touching the plaintiff.

Second. That, the defendant French having admitted that he concurred with the other defendants in issuing and enforcing said order, the plaintiff was entitled to recover from him compensation for all loss sustained by him, as the direct result of its entry and enforcement.

Third. That more than two years having elapsed after the reorganization of the Court of Commissioners of Alabama Claims, under the act of Congress of June 5, 1882, and after the appointment of the defendants, but prior to the date of the order, the defendants had no lawful authority to act as judges of said Court of Commissioners.

The court held that the term of the judges had not expired, and that they had authority to make the order, and, therefore, that the plaintiff could not recover, and in so holding decided in favor of the validity of the authority exercised by the defendant under the United States, and of the right he claimed under the statutes of the United States, and the commission held by him.

The petition for the writ of error avers "that said action involves divers Federal questions, one of which is whether said acts of Congress authorized said defendants to promulgate or enforce said order, and another of which is whether so much of said acts of Congress as undertakes (if any part thereof undertakes) to authorize the defendants to make such order was not in violation of articles V and VIII of the amendments of the Constitution of the United States, and the decision of said state court was adverse to the plaintiff's contention upon all of said Federal questions."

The grounds thus suggested have been disposed of by what has been said, and it may be added that the petition for a writ

of error forms no part of the record upon which action here is taken. *Clark* v. *Pennsylvania*, 128 U. S. 395; *Warfield* v. *Chaffe*, 91 U. S. 690.

The writ of error must be dismissed for want of jurisdiction.

UNITED STATES *v.* HANCOCK.

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

No. 688. Submitted January 8, 1890. — Decided January 27, 1890.

When a decree in equity in a suit relating to public land gives the boundaries of the tract, the claim to which is confirmed, with precision, and has become final by stipulation of the United States and the withdrawal of their appeal therefrom, it is conclusive, not only on the question of title, but also as to the boundaries which it specifies.

Proof that a surveyor of public land, who in the course of his official duty surveyed a tract which had been confirmed under a Mexican land-grant, accepted from the grantee some years after the survey a deed of a portion of the tract, which he subsequently sold for $1500, though it may be the subject of criticism, is not the "clear, convincing and unambiguous" proof of fraud which is required to set aside a patent of public land.

Doubts respecting the correctness of a survey of public land, which was made in good faith and passed unchallenged for fifteen years, should be resolved in favor of the title as patented.

This was a bill filed to set aside a patent. The facts were these:

In 1843 Michael White petitioned for a tract of land at the mouth of the Cajon de los Mejicanos. This petition was sustained and a grant made by Governor Manuel Micheltorena, the Mexican governor of the Californias, which read:

"Whereas Don Michael White, a Mexican by naturalization, has petitioned for his own benefit and that of his family for the place known by the name of 'Muscupiabe,' bounded on the north by the foot of the mountain, on the south by Agua Caliente, and on the west by the 'Alisos,' (sycamores,) which are on the other side of the creek called 'De los Negros,' having practised the proceedings and relative observation, according to the direction of the laws and regulations; exer-

cising the authority conferred upon me in the name of the Mexican nation, I have concluded to grant him the aforesaid land, declaring it to be his property, by the present letters, subject to the approval of the most excellent departmental assembly, in and under the following conditions.

* * * * *

"3d. The land of which grant is hereby made consists of one league, (*un sitio de ganado mayor*,) a little more or less, according to the explanation of the diagram which is attached to the respective 'expediente.'

"The judge that shall give the possession shall cause it to be measured in conformity with the ordinance, reserving the overplus that may result to the nation for convenient uses."

On February 8, 1853, a petition for confirmation was presented in the name of the original grantee to the board of commissioners appointed to ascertain and settle private land claims, and on March 6, 1855, the grant was confirmed by an order in these words:

"In this case, on hearing the proofs and allegations, it is adjudged by the commission that the claim of the petitioner is valid, and it is therefore decreed that his application for a confirmation be allowed, with the following boundaries, to wit: On north and east by the foot of the mountains, on the south by the Agua Caliente, and on the west by the cottonwoods, which are on the other side of the creek, reference being had to the map accompanying the expediente."

An appeal was taken from this order of confirmation, but was dismissed on June 8, 1857. This confirmation was not challenged.

In 1867 instructions were issued by the surveyor general of California for the survey; and the survey as made and returned to the surveyor general's office was by him approved, and, on July 11, 1868, forwarded to Washington. This survey in January, 1871, was disapproved by the Secretary of the Interior as not conforming to the decree of confirmation, and a new survey ordered. On June 10, 1872, the surveyor general reported that he had examined the original title papers and had compared them with the calls of the decree of confir-

mation, and had caused an examination to be made of the premises, and that therefrom he found that a survey made in strict accordance with the boundary calls of the decree of confirmation would include something like a league more of land than the present survey, and that the owners of the grant were satisfied with the present survey, and therefore suggested the propriety of accepting it. This report was returned to the Secretary of the Interior, by him approved, and, on June 22, 1872, the patent was issued. This bill was filed on May 29, 1885. The bill charged that the surveyor, Henry Hancock, who made the survey was the real owner of a large interest in the grant, although the title was nominally in another party; that concealing his interest he secured his appointment as deputy surveyor, and in making the survey fraudulently included within its limits about twenty-six thousand acres more of land than justly belonged therein; that without any knowledge of the fraudulent acts of Hancock in the premises the surveyor general thereafter published the required notice of the survey in a newspaper published in the city of Los Angeles, a city of another county and over fifty miles from the land; whereas, at the time, there was a newspaper published within the county and within two miles of the land. It also charged that after the survey had been disapproved by the Secretary of the Interior, Hancock fraudulently represented to the surveyor general that a correct survey would include about one league in addition to what was embraced within the present survey, but that the owners were content to take the survey as it stood; and that, induced by and relying upon these fraudulent representations, the surveyor general made the report and recommendation heretofore mentioned. The Circuit Court, on final hearing, dismissed the bill, and the United States appealed to this court.

Mr. Assistant Attorney General Maury, for appellant.

Mr. A. T. Britton and *Mr. A. B. Browne*, for appellees.

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

It is obvious that the confirmation was of a tract with specified boundaries, and as such covered all the land within those boundaries, irrespective of quantity, and this, notwithstanding there appeared in the prior proceedings statements that the tract contained a certain amount, "a little more or less," which amount was very much less than that included within the boundaries. "When a decree gives the boundaries of the tract to which the claim is confirmed, with precision, and has become final by stipulation of the United States and the withdrawal of their appeal therefrom, it is conclusive, not only on the question of title, but also as to the boundaries which it specifies." *United States* v. *Halleck*, 1 Wall. 439; *United States* v. *Billing*, 2 Wall. 444; *Higueras* v. *United States*, 5 Wall. 827. And the act of Congress of July 1, 1864, 13 Stat. 334, § 7, requires the surveyor general, "in making surveys of the private land claims finally confirmed, to follow the decree of confirmation as closely as practicable whenever such decree designates the specific boundaries of the claim."

The charge of fraudulent misconduct on the part of the surveyor, Hancock, is not substantiated. Mr. Hancock was not appointed surveyor with reference to this survey. He was the regular deputy surveyor for this district, having been appointed more than ten years prior thereto. While at one time he had owned an interest in the grant, he had more than eight years before the survey sold and conveyed it for a full consideration to his brother, and from that time forward, during all these proceedings, was without any interest in the premises. It is true that during these years Mr. Hancock acted as the general agent of his brother, and that is all the ground there is to suspect wrong on his part. There is not a syllable of testimony that, after the Secretary had ordered the new survey, Mr. Hancock had anything to do with the matter, either in suggestion, recommendation or otherwise, so that the report of the surveyor general was not made by virtue of anything that Hancock had said or done. The examination referred to by the surveyor general in his report was made by one R. C. Hopkins, under the direction of the surveyor general, a person who was at the time, so far as the testimony discloses, entirely disinterested.

It is true there is testimony furnished by Mr. Hopkins himself that some time after the patent had been issued he accepted a deed of a portion of this grant as a present from the owners — a tract which he subsequently sold for $1500. Whatever criticism may be placed upon the acceptance of this gift — a gift made long after his relations to the survey had ceased — it certainly does not establish dereliction in his discharge of prior official duty.

These matters, together with the failure to publish notice in the nearest paper, are all the evidences of fraud in the transaction. Not only are they not "the clear, convincing and unambiguous" proofs of fraud required to set aside a patent, as declared by this court in the case of *Colorado Coal Company* v. *United States*, 123 U. S. 307, 317, but they, all combined, create nothing more than a suspicion. They may leave a doubt, but they do not bring the assurance of certain wrong.

Some question is made as to the correctness of the survey, and that turns as a question of fact upon what is meant by the expression "Agua Caliente" in the various descriptions. If it means a stream known as Agua Caliente, then the government has no cause to challenge the survey, for it includes less than was really confirmed, but if it means a district of country known by that name in the northwestern portion of the San Bernardino rancho, a neighboring tract, then the survey was excessive. If it were necessary for us to determine this question, we think the evidence in the case indicates that the stream and not the district was intended, but it is not the province of this court to correct a mere matter of survey like that. If made in good faith and unchallenged as this has been for over fifteen years, whatever doubts may exist as to its correctness must be resolved in favor of the title as patented.

We see no error in the decree, and it is

Affirmed.

Mr. Justice Field takes no part in this decision.

COMANCHE COUNTY *v.* LEWIS.

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

No. 1022. Submitted January 7, 1890. — Decided January 27, 1890.

Full control over the matter of the organization of new counties in the State of Kansas is, by its constitution, article 9, § 1, given to the legislature of the State, which has power, not only to organize a county in any manner it sees fit, but also to validate by recognition any organization already existing, no matter how fraudulent the proceedings therefor were.

When a legislature has full power to create corporations, its act recognizing as valid a *de facto* corporation, whether private or municipal, operates to cure all defects in steps leading up to an organization, and makes a *de jure* out of what was before only a *de facto* corporation.

When both the executive and legislative departments of the State have given notice to the world that a county within the territorial limits of the State of Kansas has been duly organized, and exists, with full power of contracting, it is not open to the county to dispute those facts in an action brought against it by a holder of its bonds, who bought them in good faith in open market.

The debts of a county, contracted during a valid organization, remain the obligations of the county, although, for a time, the organization be abandoned, and there are no officers to be reached by the process of the court.

A recital in the bond of a municipal corporation in Kansas that it was issued in accordance with authority conferred by the act of March 2, 1872, Kansas Laws of 1872, 110, c. 68, and in accordance with a vote of a majority of the qualified voters, is sufficient to validate the bonds in the hands of a *bona fide* holder; and the certificate of the auditor of the State thereon that the bond was regularly issued, that the signatures were genuine, and that the bond had been duly registered, is conclusive upon the municipality.

A recital in a bond issued by a county in Kansas for the purpose of building a bridge, need not necessarily refer to the particular bridge for the construction of which it was issued.

In Kansas a county has power to borrow money for the erection of county buildings, and to issue its bonds therefor.

AT LAW, to recover on coupons of bonds issued by a municipal corporation in Kansas. Judgment for plaintiff. Defendant sued out this writ of error. The case is stated in the opinion.

Opinion of the Court.

Mr. G. C. Clemens and *Mr. A. H. Smith* for plaintiff in error.

Mr. W. H. Rossington for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

This is an action on coupons. There were three classes of bonds, namely, court-house, bridge and current expense bonds. The Circuit Court held the latter void, the others valid, and judgment was rendered accordingly. *Lewis* v. *Comanche County*, 35 Fed. Rep. 343. The county alleges error. Our inquiry, therefore, is limited to the bridge and court-house bonds.

The first and principal contention of the plaintiff in error is that at the time of the issue of these bonds there was no valid county organization, no corporate entity capable of contracting, that the pretended organization in 1873 was fraudulent and void, and shortly thereafter abandoned, the county remaining unorganized until 1885, when, upon memorial presented and census taken, it was organized anew as in the case of an unorganized county.

In order to fully understand the question here presented, a brief retrospect of the condition, the legislation and judicial decisions of the State is necessary.

At the time of its admission into the Union, in 1861, the settlements were confined to the eastern portion of the State, the west being wholly unoccupied. The territory of the State was divided into counties, those in the eastern portion being organized, and those in the western unorganized, the legislation as to the latter being limited to the matter of names and boundaries. Of course there were no courts in these unorganized counties, for the machinery was wanting; there were no county buildings, county officers or jurors. So they were by statute attached to the organized counties for judicial purposes. It was foreseen that they would, in course of time, become occupied, and that provision must be made for their organization as political subdivisions of the State. So, by the constitu-

tion, in section 1 of article 9, power was given to the legislature in these words: "The legislature shall provide for organizing new counties, locating county-seats, and changing county lines."

The first legislature, on the fourth day of June, 1861, passed an act entitled, "An act relating to the organization of new counties." This was amended in 1872, and under the act as so amended the county of Comanche was organized. Section 1 of this chapter prescribes the proceedings, and is as follows:

"SECTION 1. Section 1 of an act relating to the organization of new counties is hereby amended so as to read; Section 1. When there shall be presented to the governor a memorial, signed by forty householders who are legal electors of the State, of any unorganized county, showing that there are six hundred inhabitants in such county, and praying that such county may be organized, accompanied by an affidavit attached to such memorial, of at least three householders of such county, showing that the signatures to such memorial are the genuine signatures of householders of such unorganized county, and that the affiants have reason to and do believe that there are six hundred inhabitants in such county as stated in the memorial, it shall be the duty of the governor to appoint some competent person, who is a *bona fide* resident of the county, to take the census and ascertain the number of *bona fide* inhabitants of such unorganized county, who shall, after being duly sworn to faithfully discharge the duties of his office, proceed to take the census of such county, by ascertaining the name and age of each of the *bona fide* inhabitants of such unorganized county, who shall receive for services rendered under this section pay at the rate of three dollars per day, from the state treasurer, upon an itemized account, verified by affidavit. The person who shall take the census as required, shall return to the governor, upon appropriate schedules, the census authorized to be taken herein, certified to be correct and true, and if it appear by such return that there are in such unorganized county at least six hundred *bona fide* inhabitants, he shall appoint three persons, who shall be recommended in the memorial hereinbefore provided for, to act as county commissioners, and a proper person to act as county clerk, to be recommended in

like manner as the commissioners, and shall designate such place as he may select, centrally located, as a temporary county-seat for such county, and shall commission such persons as such officers, and declare such place the temporary county-seat of such county; and from and after qualification of the officers appointed under this section, the said county seat shall be deemed duly organized." Laws of Kansas of 1872, p. 243.

Obviously, full control over the matter of organization of new counties was, by the constitutional provision quoted, given to the legislature, as was held by the Supreme Court of the State in the case of the *State ex rel. Attorney General* v. *Commissioners of Pawnee County*, 12 Kansas, 426, 438, in which case the court says:

"The whole power of organizing new counties belongs in this State to the legislature. It may provide for their organization by general laws and through the intervention of the governor, or of any other officer, agent, commissioner or person it may choose; or it may directly organize a new county itself by special act. The provision of article 12 of the constitution has no application to counties as counties. *Beach* v. *Leahy*, 11 Kansas, 23. It may organize a county with six hundred inhabitants, or with any number more or less than six hundred. It may organize a county whenever there shall be a sufficient number of persons to hold the county offices, and the legislature may provide for a less number of county officers than the usual number. *Borton* v. *Buck*, 8 Kansas, 308; *Leavenworth* v. *State*, 5 Kansas, 688."

In the fall of 1873 proceedings looking to the organization of Comanche County were had, which were in form in full compliance with the requirements of section 1, above quoted. These proceedings closed, as required, with the proclamation of the governor, and upon the face of the papers was presented a clear case of a regular and valid organization. But while these proceedings were regular on their face, the agreed statement of facts shows that "said organization was effected solely for purposes of plunder by a set of men intending to secure a *de facto* organization and issue the bonds of said county, register and sell them to distant purchasers ignorant

of the facts, and enrich the schemers, while plundering the future inhabitants and taxpayers of the county; and upon the consummation of said scheme, in the spring or early summer of 1874, all of said schemers, together with those who were the said *de facto* officers of the said county, left said county and never returned, and said county remained with said organization totally abandoned until, in February, 1885, when said county was, upon memorial presented and census taken, organized as in cases of unorganized counties."

If these were all the facts, a very interesting inquiry would arise as to how far an organization fraudulent in fact but regular in form, and duly approved by the executive, could bind the county by an issue of bonds *prima facie* valid, and passing into the hands of a *bona fide* holder. But that inquiry is not before us. The ample power delegated by the constitution to the legislature enabled it not only to organize a county in any manner it saw fit, but also to validate by recognition any organization already existing, no matter how fraudulent the proceedings therefor had been.

This proposition has been distinctly ruled by the Supreme Court of the State. See the case in 12 Kansas, *supra;* see also *State ex rel. Atty. Gen.* v. *Stevens* (Harper County), 21 Kansas, 210; and *State ex rel. Atty. Gen.* v. *Hamilton; Same* v. *Yoxall* (Wallace County), 40 Kansas, 323.

Nor is this ruling peculiar to the jurisdiction of Kansas. It is universally affirmed that when a legislature has full power to create corporations, its act recognizing as valid a *de facto* corporation whether private or municipal, operates to cure all defects in steps leading up to the organization and makes a *de jure* out of what before was only a *de facto* corporation. It is true that there must be a *de facto* organization upon which this recognition may act, as was held in *State ex rel. Atty. Gen.* v. *Ford County*, 12 Kansas, 441, 446; and in this case it appears from the findings, as well as from the testimony, that there was such *de facto* organization. There being this *de facto* organization, there was ample recognition by the legislature. The very matter appears which, in the Harper County case, was, by the Supreme Court of Kansas, declared a legislative

recognition sufficient to cure all defects, namely, an act detaching the county from an organized county to which, for judicial purposes, it had theretofore been attached, and establishing courts therein. This act was approved March 9, 1874, the day before these bonds were signed. But this, which, by the Supreme Court of Kansas, was adjudged alone sufficient, is not all. Chapter 24 of the General Statutes of 1868, creating some new counties, divided the State into seventy-nine counties, numbered, named and described, among which was the unorganized county of Comanche; and provided that no county should be entitled to representation in the legislature until it should have been organized. During the session of 1874, the session immediately succeeding this attempted organization, and before the issue of these bonds, A. J. Mowry represented Comanche County in the legislature, taking active part in its proceedings, voting for senator, introducing bills and otherwise. His right to a seat was challenged, examined by the committee on elections, and, after report therefrom, he was admitted and acted as a member during the entire session. Further than that, this organization having become a matter of discussion and challenge, the legislature passed a joint resolution, which recited that it appears from the report of the secretary of State that there were but 634 inhabitants in the county of Comanche, and from the report of the auditor of the State that the bonded indebtedness of the county was $72,000; that the interests of the people and the honor of the State required an investigation; and directed that a committee of two should be appointed, one from each house, who, together with the attorney general, should make an investigation and report to the succeeding legislature. By that report, in January, 1875, the character of the organization was disclosed, and from that time on the county was, as stated, treated as an unorganized county until 1885. It also appears that in December, 1873, not only was a member of the legislature elected, but, in addition, a new commissioner and a new county clerk, in the places of those temporarily appointed by the governor. There thus appears ample recognition, on the part of the legislature, of the validity of the organization, and,

under repeated adjudications, its validity cannot now in this collateral way be challenged. And this is no mere technical ruling. It rests on foundations of substantial justice. It is true that the present inhabitants have been wronged by the fraudulent acts of these conspirators in 1873–74, and it is a hardship for them to be bound for debts they did not contract and from which they received no benefit; but, on the other hand, it would be an equal hardship to the plaintiff to lose the money he has invested in securities placed on the market, whose validity was attested to the fullest extent by both the executive and legislative departments of the State. When both of those departments give notice to the world that a county within the territorial limits of the State has been duly organized and exists with full power of contracting, can it be that a purchaser cannot in open market safely purchase the securities of that county? Does the duty rest on him to traverse the limits of the county and make personal inspection of the number of the inhabitants? If any wrong has been done to the county through the want of attention on the part of the state authorities, equity would suggest that the State should bear the burden, and not cast it upon an innocent party residing far from the State and acting in reliance upon what it has done.

But it is urged that whatever may be said as to the organization in 1873–74, and its temporary validity, that organization was in 1874 abandoned, the county deserted, and a new organization made in 1885, and, it being a new organization there is no responsibility on its part for debts fraudulently contracted more than a decade before, by a confessedly fraudulent organization. Why should honest and industrious citizens, who have recently moved into hitherto unoccupied territory, be held responsible for debts fraudulently contracted years before by a set of rascals who stopped but for a day, and then decamped with the proceeds of their rascality? But it must be borne in mind that the county, as a territorial subdivision of the State, has been in existence and unchallenged for more than a score of years. It matters not how many political organizations there may have been, or what changes in the form of

organization, the county has been ever the same, and, although the name of the political community given by the statutes is the "board of county commissioners" of the county, it is, after all, the county, with its property and population, which is the debtor. No one would for a moment suppose that when a county has contracted a valid obligation, the fact, if it could be made to appear, that all its inhabitants had removed and their places been supplied by others, would affect that obligation. There has been no subdivision of the original territory; no addition to or subtraction from it. The only change has been in the continuity of political organization, and that, neither by municipal law nor the law of nations, destroys the territorial responsibility for legal obligations. Even a change in form does not destroy responsibility. The republic of France recognizes as valid the debts of the empire. A town whose growth enables it to cast off its village organization and assume the habiliments of a city continues liable for all debts theretofore contracted. And so the debts of a county, contracted during a valid organization, remain the obligations of the county, although for a time the organization be abandoned and there be no officers to be reached by the process of the courts. *State ex rel.* v. *Yoxall*, 40 Kansas, 323; *The Sapphire*, 11 Wall. 164; *Broughton* v. *Pensacola*, 93 U. S. 266; *Mount Pleasant* v. *Beckwith*, 100 U. S. 514.

Passing to the question of the bonds themselves, the first to be considered are the bridge bonds. The recital is in these words:

"This bond is executed and issued in pursuance of and in accordance with an act of the legislature of the State of Kansas, entitled 'An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-power or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith,' approved March 2, 1872, and also in accordance with the vote of a majority of the qualified electors of said county of Comanche, at a special election duly and regularly held therefor on the 31st day of January, 1884 [1874]."

The act referred to therein gave to counties full power to issue bonds for the building of bridges and prescribed the proceedings, including therein a vote of the people, essential to the vesting of authority in the county commissioners. The recital that the bond was executed and issued in pursuance of and in accordance with that act, and also in accordance with the vote of the majority of the qualified electors, is, within repeated rulings of this court, sufficient to validate the bonds in the hands of a *bona fide* holder. It shows, in the language of *School District v. Stone*, 106 U. S. 183, "a compliance in all substantial respects with the statute giving authority to issue the bonds," and does not come within the limitations noticed in that case. Further than that, the bonds are endorsed with the official certificate of the auditor of the State that the bonds had been regularly and legally issued; that the signatures were genuine; and that the bonds had been duly registered in his office in accordance with the act of the legislature of March 2, 1872. Inasmuch as these bonds were issued after the act of 1872 went into effect, they fall within the decision in the case of *Lewis* v. *Commissioners*, 105 U. S. 739, rather than within that in the case of *Bissell* v. *Spring Valley Township*, 110 U. S. 162, as to the conclusiveness of the certificate of the auditor.

The suggestion that the recitals are not sufficient because the particular bridge, for the building of which the bonds were to be issued, is not specified, carries no weight. Power is given by the first section of the act of 1872 to issue bonds for building bridges, and while the subsequent sections providing for a vote and other preliminaries seem to contemplate that a particular bridge should be the subject of consideration, yet it has never been held by this court, and ought not to be, that a full and minute detail of all the proceedings is essential to the validity of a recital. The main thing is that the county has promised to pay, and that the people by their vote have authorized such a promise for one of the purposes for which, under the statute, they may bind themselves.

The other series of bonds is what is known as "court-house bonds," so named on the face of the bonds themselves. The

recital in this bond is as follows: "This bond is executed and issued for the purpose of erecting county buildings in pursuance of and in accordance with an act of the legislature of the State of Kansas, entitled, 'An act relating to counties and county officers,' approved February 29, 1868, and 'An act to authorize counties,'" etc., reciting the title of the act referred to in the bridge bonds, as well as a vote similar thereto. On the back of each bond appears the auditor's certificate as in the bridge bonds.

But it is insisted that county buildings are not works of internal improvement within the meaning of the act last referred to. Be that as it may — and it is unnecessary to decide this question, although in considering it reference may well be had to the opinion of the Supreme Court of Kansas in the case of *Leavenworth County* v. *Miller*, 7 Kansas, 479 — the act first referred to, the act of February 29, 1868, gave ample authority. That act, section 16, provides: "The board of county commissioners of each county shall have power, at any meeting: . . . *Fourth*, . . . *to borrow*, upon the credit of the county, *a sum* sufficient for the erection of county buildings, or to meet the current expenses of the county in case of a deficit in the county revenue."

Prior to the issue of these bonds the Supreme Court of the State had held, in the case of *Doty* v. *Ellsbree*, 11 Kansas, 209, that the power to borrow money carries with it the power to issue the ordinary evidences and security of a loan, and, among them, county bonds. So that, by that act, the county had power to borrow money for the erection of county buildings and issue bonds therefor. There is no force in the suggestion that the purpose expressed in the recital is that of erecting county buildings, instead of borrowing money for the erection of county buildings. A general statement of the purpose, with direct reference to the act granting authority, and a recital that the bond is issued in pursuance of and in accordance with the act, is sufficient. The case of *Scipio* v. *Wright*, 101 U. S. 665, rested entirely on the fact of the uniform and continuous ruling on the part of the highest court in the State of New York, in which the bonds were issued, and was a case aris-

ing between a municipality and a purchaser who took with notice of the manner in which the bonds had been disposed of. So that this cannot be considered an authority in the case before us.

These are all the matters we deem necessary to notice, and, there appearing no error in the ruling of the Circuit Court, its judgment is

Affirmed.

UNITED STATES *v.* WATERS.

APPEAL FROM THE COURT OF CLAIMS.

No. 95. Submitted November 11, 1889.— Decided January 27, 1890.

The amount of counsel fee to be allowed to a district attorney, under Rev. Stat. § 824, for trial before a jury of a person indicted for crime, is discretionary with the court, within the limits of the statute; and the action of the court in this respect is not subject to review by the Attorney General, or by the accounting officers of the treasury.

The supervisory powers of the Attorney General over the accounts of district attorneys, marshals, clerks and other officers of the courts of the United States under Rev. Stat. § 368, are the same which were vested in the Secretary of the Interior before the creation of the Department of Justice.

The powers of an Auditor in the Treasury Department are limited to the examination and auditing of accounts, to the certification of balances, and to their transmission to the comptroller; and do not extend to the allowance or disallowance of the same.

A comptroller in the Treasury Department has no power to review, revise or alter items in accounts expressly allowed by statute, or items of expenditures or allowances made upon the judgment or discretion of officers charged by law with the duty of expending the money or making the allowances.

This was an action against the United States to recover an allowance to a district attorney by the trial court under Rev. Stat. § 824, disallowed by the Attorney General and by the accounting officers of the Treasury. Judgment for claimant, from which the defendants appealed. The case is stated in the opinion.

Mr. Attorney General and *Mr. B. Wilson* for appellants.

Mr. Charles C. Lancaster for appellee.

Mr. Justice Lamar delivered the opinion of the court.

This is an action brought in the Court of Claims on the 18th of February, 1885, by a district attorney of the United States to recover a balance of $320, alleged to be due him for services performed under section 824 of the Revised Statutes, and withheld from him by the accounting officers of the Treasury Department, under instructions from the Attorney General.

The material facts in the case, as found by the court below, are substantially as follows: The claimant, Charles C. Waters, for six years immediately preceding the commencement of the action, had been United States district attorney for the Eastern District of Arkansas, and in his official capacity, during that period, had tried twenty-two indictments for crimes, before a jury, securing a conviction in each case. The District Court before which those causes were tried allowed him $30 counsel fee in each case, in addition to the fees otherwise provided for, in accordance, as is claimed, with the provisions of section 824 of the Revised Statutes. When his accounts were forwarded to the accounting officers of the Treasury Department they were submitted to the Attorney General for his supervision, Rev. Stat. § 368, who reduced the amounts, allowed claimant $10 in five, $15 in fourteen, and $20 in three of the cases — in all $320. The accounting officers of the Treasury Department followed the action of the Attorney General and passed the accounts as reduced.

The practice of reducing the allowances made to district attorneys for counsel fees first began about 1878, when Attorney General Devens issued the following circular:

"Department of Justice, Washington, ———, 1878,

"———— ————, Esq.,

"*United States Attorney, District of* ————:

"Sir: Your attention is invited to the concluding clause of section 824 of the Revised Statutes of the United States, permitting an allowance not exceeding $30, in addition to the

other legal fees of the United States attorney, in proportion to the importance and difficulty of the cause, when a conviction is had before a jury on an indictment for crime. Whenever you have obtained the approval of the court to a special fee under this clause, you will forward with your account of the same to the First Auditor a brief statement of the points and circumstances in each case, which render it one of the importance and difficulty contemplated by the statutes. Your account, together with the statement, will be submitted by the First Auditor (in such cases as he deems necessary) to the Attorney General, in order to determine from the means afforded whether such special counsel fees should be allowed in the final settlement.

"Very respectfully, CHARLES DEVENS,
"*Attorney General.*"

Previous to that time such allowances by the court were accepted without alteration. The claimant's whole counsel fees would not exceed the maximum of $6000 in any one year.

It is to recover this balance of $320 that the suit is brought. The Court of Claims, upon the foregoing facts, rendered judgment in favor of claimant for the amount in dispute 21 C. Cl. 30. The assignment of errors is a general one, and is merely to the effect that the court below erred, upon the facts found, in its conclusion of law, that the appellee was entitled to recover from the United States the sum of $320.

The fees in question were allowed by the court under sections 823 and 824 of the Revised Statutes. Section 823 provides that "the following and no other compensation shall be taxed and allowed to attorneys, solicitors and proctors in the courts of the United States, to district attorneys, clerks, etc., . . . except in cases otherwise expressly provided for by law." Section 824, after limiting the fees to the district attorneys for their official services therein named, each at a specific amount, irrespective of the labor and responsibility involved, provides in its concluding clause that, "When an indictment for crime is tried before a jury and a conviction is

had, the district attorney may be allowed, in addition to the attorney's fees herein provided, a counsel fee, in proportion to the importance and difficulty of the cause, not exceeding thirty dollars."

The exact amount of the allowance, within the prescribed limit, thus authorized, is left discretionary; but the section does not, in so many words, designate the person or tribunal by whom that discretion shall be exercised. The contention of the United States is, that this discretionary power is vested in the Attorney General; and that the fixing of the amount of a special counsel fee, in the absence of express legislative provision, is not a judicial but an executive act, to be exercised by the Attorney General, as the chief of the department to which district attorneys belong. The view on which the court below rested its decision was, that this discretionary power pertains to the judicial functions of the court before which the cause was tried, and by which Congress manifestly intended that its importance and difficulty should be determined; and that, therefore, the allowance by the District Court of the fees in question was conclusive upon the Attorney General and the accounting officers of the Treasury Department.

It will be observed that none of the provisions of these sections have any reference whatever to the matter of rendering or revising accounts, or to the powers and duties of the Attorney General, or of the accounting officers of the Treasury Department, in relation to the accounts of district attorneys. They relate exclusively to the compensation or fees to be taxed and allowed those officers; and the concluding paragraph applies alone to the allowance of the additional fee to the district attorney, for services rendered within the court on the trial of a cause, all the steps and incidents of which, including the taxation of costs arising in the course of the proceedings, are within the knowledge and under the jurisdiction of the court. They, in express terms, require the district attorney's fees to be taxed, and no other tribunal can tax them, except the court having jurisdiction. In the case of *The Baltimore*, 8 Wall. 377, referring to the provision of the statute of February 26, 1853, 10 Stat. 161, part of the first section of which

was incorporated *in haec verba* into these two sections of the Revised Statutes, it was held that fees and costs allowed to attorneys, solicitors and proctors in admiralty cases were taxable as costs, as an incident to the trial and judgment. Say the court in that case, page 392:

"Fees and costs, allowed to the officers therein named, are now regulated by the act of the 26th of February, 1853, which provides in its first section, that in lieu of the compensation now allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners and printers, the following and no other compensation shall be allowed. Attorneys, solicitors and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed as costs against the opposite party, as an incident to the judgment, for their services, except the costs and fees therein described and enumerated."

No distinction is made by the court or by the statutes between the fees prescribed in admiralty cases as an incident to the judgment and those so incident in other cases. All the costs and fees "therein described and enumerated" are put on the same footing, as taxable costs, incident to the judgment. The discretionary fee that "may be allowed" to a district attorney for securing a conviction in a case of indictment for a crime tried by a jury, is none the less an incident to the trial and judgment because its allowance is contingent upon a conviction. Both before and since the enactment of the statute of 1853, courts in the exercise of their discretion have allowed counsel fees in many cases without question when reviewed by this court. In *The Apollon*, 9 Wheat. 362, 379, and in *Canter* v. *The American and Ocean Insurance Companies*, 3 Pet. 307, 319, the allowance of counsel fees by the court below was affirmed by this court as a matter within the sound discretion of the court before whom the cause was tried; and those decisions were cited with approval in *Elastic Fabrics Co.* v. *Smith*, 100 U. S. 110, and *Paper Bag Cases*, 105 U. S. 766, 772. In *United States* v. *Ingersoll*, 1 Crabbe, 135, suit was brought by the United States against a United

States district attorney, for money had and received. He pleaded, as a set-off, among other items, $5083.20 for costs taxed and allowed in criminal cases, payment of which had been withheld by the Treasury Department. It was held that those costs (which were attorney's fees) constituted a fair and legal set-off; and the court laid down the principle, as concisely stated in the syllabus, that "the allowance of costs to a district attorney is altogether in the jurisdiction of the judge, and not within the power of the officers of the Treasury."

In harmony with those decisions, and in accordance with the practical construction placed by the courts, by the Attorney General himself, and by the accounting officers of the Treasury Department, upon the act of February 26, 1853, (now sections 823 and 824, Revised Statutes,) the judge before whom the case was tried always exercised the discretion of allowing an additional counsel fee to district attorneys, in the specified cases, without the revision of any executive officer, from the passage of that act until 1878.

But in 1878 the Attorney General, in the circular letter hereinbefore set forth, assumed the authority to change the uniform practice, and to revise and alter the allowances of those counsel fees made by the judge. In our opinion this attempted change was not warranted by law. In allowing the counsel fee to the district attorney the court acted in its judicial capacity, and such allowance, being a judicial act of a court of competent jurisdiction, was not subject to the re-examination and reversal of the Attorney General. *United States* v. *O'Grady*, 22 Wall. 641; *Butterworth* v. *Hoe*, 112 U. S. 50, 67; *Hayburn's Case*, 2 Dall. 409, 410, note *a*.

If the Attorney General has the right, upon information derived from a statement made to him by a district attorney as to the facts and circumstances of a trial in court, to reduce a fee allowed by the court, he may with equal right and propriety increase such fee should he determine that the judge had underestimated the importance and difficulty of the cause tried before him, and had undervalued the services of such district attorney.

It is contended that the power of the Attorney General to make the reduction in question is vested in him by virtue of section 368 of the Revised Statutes, which provides as follows:

"The Attorney General shall exercise general supervisory powers over the accounts of district attorneys, marshals, clerks and other officers of the courts of the United States."

The supervisory powers given in this section are precisely those which were exercised by the Secretary of the Interior before the Department of Justice was established, and which were transferred from the Secretary of the Interior to the Attorney General by the 15th section of the act of June 22, 1870, c. 150, 16 Stat. 164. That section provides that, "the supervisory powers now exercised by the Secretary of the Interior over the accounts of the district attorneys, marshals, clerks and other officers of the courts of the United States, shall be exercised by the Attorney General, who shall sign all requisitions for the advance or payment of moneys out of the treasury, on estimates or accounts, subject to the same control now exercised on like estimates or accounts by the first auditor or first comptroller of the treasury."

It was never claimed by the Secretary of the Interior, nor considered by the officers of the Treasury Department, that those supervisory powers over accounts gave him any authority to make an allowance of fees under section 824 of the Revised Statutes, or to review and reverse a judicial order allowing such fees.

A close examination of the statutes by which these supervisory powers are defined shows, as well stated in the opinion of the court below, that they extend to seeing that the accounts are in due form, in accordance with the law and regulations; that all receipts are properly credited; that all items of payments and allowances are authorized by law; that nothing is retained beyond the maximum fixed by the statute; and that in every respect the law relating to the same has been fully complied with; and does not include the power of reviewing the discretion of a judge in making allowances, or of altering his orders, and decrees therein.

We are unable to perceive the pertinence and force of the

argument drawn from the authority of the Attorney General, as chief of the Department of Justice exercising the power of superintendence and direction over the district attorneys as subordinate officers belonging to that department. This authority is purely of an executive character, analogous to that of all the other chiefs of their respective departments. The superintendence and direction which he exercises, however comprehensive and minute it may be, over the duties of those officers which are purely administrative and executive, cannot by any stretch of construction be made to extend over the proceedings, the judgments, or the orders of the courts under whose jurisdiction the district attorneys, under the law, are required to perform their duties.

With regard to the supervisory power of the accounting officers of the Treasury Department in this connection, it is to be observed that, according to the record in the present case, those officers simply "followed the action of the Attorney General," which, as we have already seen, was unauthorized by law. The counsel for the United States, while insisting that the discretion in question is vested in the Attorney General, concedes in his brief that it was not meant to be given to the accounting officers. In this connection he says:

"The accounting officers of the Treasury could never have been given this discretion in fixing an additional allowance, for, from the nature of the case, they know nothing about the difficulty and importance of the work done by a district attorney, and because fixing compensation for services is foreign to their ordinary business. The discretion is of a kind they never exercise, and, moreover, when exercised by another, they cannot alter or amend what is done."

Further discussion of this point is not necessary. The powers and duties of the accounting officers are well described by the court below in the following language, with which we agree:

"Those powers and duties are well understood. The auditor merely examines and audits accounts, neither allowing nor disallowing the same, certifies balances and transmits the same to the comptroller for his decision thereon. The comptroller decides whether or not the items are authorized by statute,

and are legally chargeable. He has no power to review, revise and alter items expressly allowed by statute, nor items of expenditures or allowances made upon the judgment and discretion of other officers charged with the duty of expending the money or of making the allowances. His duty extends no further than to see that the officers charged with that duty have authorized the expenditures or have made the allowances." 21 C. Cl., 37, 38.

For the foregoing reasons, the judgment of the Court of Claims is

Affirmed.

COULAM *v.* DOULL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 124. Submitted November 18, 1889. — Decided January 27, 1890.

Under the statute of Utah, enacting that when a testator omits to provide in his will for any of his children or the issue of any deceased child, such child or issue of a child shall have the same share in the estate it would have had had the testator died intestate, "unless it shall appear that such omission was intentional," the intention of the testator is not necessarily to be gathered from the will alone, but extrinsic evidence is admissible to prove it.

A statute of Massachusetts, touching wills in which the testator fails to make provision for a child or children or issue of a deceased child in being when the will was made, was substantially followed by the legislature of California; and, as enacted in California, was followed in Utah. In Massachusetts it received a construction by the Supreme Judicial Court of the State which the Supreme Court of California had, before the adoption of the statute in Utah, declined to follow. In a case arising under the statute of Utah; *Held*, that the court was at liberty to adopt the construction which was in accordance with its own judgment, and that it was not obliged to follow the construction given to it by the Supreme Court of California.

John Coulam of Salt Lake City, in the county of Salt Lake and Territory of Utah, died at that place on the 20th day of May, A.D. 1877, leaving him surviving, his widow, now Ann Doull, (she having since his death intermarried with one George Doull,) and John Coulam, George Coulam, Henry Coulam, Fanny Baker and Sarah J. Heiner, his children and

Statement of the Case.

only heirs-at-law. At the time of his death, the said John Coulam was seized in fee simple, and in possession, of the following described real property, to wit: "All of lot No. six (6), in block fifty-nine (59), in plot 'B,' Salt Lake City survey, in the city and county of Salt Lake and Territory aforesaid, with the tenements and appurtenances thereunto belonging." He left a last will and testament, which was duly admitted to probate, and was as follows:

"I, John Coulam, being of sound mind and memory, do make and publish this my last will and testament in manner and form following: I give and bequeath unto my beloved wife, Ann Coulam, all my personal property and real estate, to wit, the sum of one thousand and twenty-five ($1025) dollars, held in trust by Wells, Fargo & Co., and now due me from the Hon. William A. Hamill by note now in my possession; and I also give and bequeath unto my said beloved wife Ann my freehold estate known and recorded as lot six (6), block fifty-nine (59), plot 'B,' Salt Lake City survey, with all the messuages, tenements and appurtenances thereunto belonging; and all the rest, residue and remainder, and all the debts accruing to me, of my personal estate, goods and chattels of what kind and nature soever I give and bequeath the same to my said beloved wife, and I hereby revoke all former wills by me made."

Upon the 2d of November, 1885, the children of the testator and one Zera Snow brought an action in the District Court of the Third Judicial District of the Territory to recover an undivided interest in the real estate above described, the children claiming, as heirs-at-law, three-quarters of the estate, real and personal, of Coulam, deceased, and Zera Snow, as owner by conveyance from said heirs-at-law made since the death of John Coulam, an undivided one-fourth part of the real estate in question, the plaintiffs together averring title to an undivided three-quarters thereof.

The complaint set up the will, and alleged "that in or by said will said John Coulam, testator, omitted to provide for any of his said children, the said plaintiffs: that it does not appear that said omission was intentional." The defendant answered,

and denied "that the omission of said decedent testator to provide in his said will for his said children was not intentional on the part of said testator, and, on the contrary, alleges that said omission was intentional on the part of said testator and so appears." A jury having been expressly waived, the cause was heard by the court.

Upon the trial evidence was offered on behalf of the defendant, and admitted over the objection of the plaintiffs, tending to show that before and after and at the time of the execution and publication of the will, and up to the time of his death, the testator was in full possession of his faculties, and of sound and perfect memory; that he had no other property when the will was executed or at his death, than that mentioned in the will; that he had previously personally prepared the drafts of two other wills, which he called for and which were before him when the will in question was drawn, both of those prior wills being in his own handwriting and signed by him, and omitting to provide for his children; that the instrument in question was drawn by a Mr. Campbell, to whom the testator gave instructions as to what it should contain; that the testator's wife, the defendant in this action, had lived with him for nearly thirty years, had raised his children, the youngest from babyhood, and had worked hard and helped to make the money with which the houses upon the lot were built; that the children had all attained maturity, were married, and had homes of their own, (chiefly bestowed on them by the testator and his wife,) and were in comfortable circumstances; and that his daughters and sons were in daily attendance upon him during his last illness, and when the will was drawn up and executed. None of the evidence was offered for the purpose of showing advancements.

The court thereupon rendered its decision in writing, and made and filed the following finding of fact:

"That the omission and failure of John Coulam, senior, the testator, to provide for any of his children, the said plaintiffs, in his last will and testament, was intentional on his part."

And the conclusion of law: "That the defendant is entitled to recover herein."

Argument for Appellants.

Judgment was accordingly entered for the defendant, and the cause was brought here on appeal.

Mr. William C. Hall and *Mr. John A. Marshall* for appellants.

The appellants and the appellee claim under a common source of title, viz.: one John Coulam, who died testate in 1877. His will is set out in the complaint, and purports to give his entire estate to his wife, the appellee, entirely ignoring the appellants, his children.

(694) Section 10, Compiled Laws of Utah of 1876, p. 272, is as follows: "When any testator shall omit to provide in his or her will for any of his or her children, or for the issue of any deceased child, unless it shall appear that such omission was intentional, such child, or the issue of such child, shall have the same share in the estate of the testator as if he or she had died intestate, to be assigned as provided in the preceding section."

(703) Sec. 19, Compiled Laws of 1876, p. 273, provides that if the decedent leave a husband or a wife and more than one child, the estate of the decedent goes one-fourth to the surviving husband or wife for life, and the remainder with the other three-fourths to the children.

Two issues are raised by the pleadings: but the second, having been abandoned below, there remains in this court for discussion only the question: Was the omission of the testator to provide in his will for his children intentional? The question of law raised by the assignment of errors relates to the admission of parol testimony, tending to prove that the testator intentionally omitted to provide for his children: a part of such testimony being the contents of two drafts of former wills, not published or witnessed.

On the part of the appellants it is contended that the omission of the testator to provide in his will for his children, by virtue of the statute, annexes to the will the condition that the will shall be void, *quoad* the children, unless a contrary intention appears by intrinsic evidence, and that the operation

of this rule of law is altogether independent of the intention of the testator except as that intention may be expressed in the will.

It is a general rule that the intent of a testator must be found on the face of the will, and that extrinsic evidence is inadmissible to show it, the exception being where such evidence is needed to remove a latent ambiguity. *Mann* v. *Mann*, 1 Johns. Ch. 231; *Tucker* v. *Seaman's Aid Society*, 7 Met. 188; *Spencer* v. *Higgins*, 22 Connecticut, 526; *Kurtz* v. *Hibner*, 55 Illinois, 514.

To this general rule and its limitations as stated we find no opposing authority, but it is contended in behalf of the appellee that this rule is not applicable to the case at bar.

Our statute on the subject of pretermitted children is but an outgrowth of the common law doctrine of the implied revocation of a will by a subsequent marriage and birth of issue, and the authorities defining that doctrine of the common law will assist in arriving at the proper construction of the statute in question.

Under the doctrine above referred to, it was well settled that no revocation would be implied by law if the testator in his will made any provision, however small, for the future wife and children; such provision furnishing intrinsic evidence that he did not intend the future alteration in his circumstances to work a revocation of his will. *Kenebel* v. *Scrafton*, 2 East, 530, 541.

It was then contended, as it is claimed by appellee in this case, that the entire doctrine was one of presumption raised by the parol proof of extrinsic circumstances, viz.: the subsequent marriage and birth of issue, and that a presumption so raised could be rebutted by like parol evidence.

This contention received serious consideration in *Marston* v. *Roe*, 8 Ad. & El. 14, decided in 1838; the case having been argued in the presence of all the judges of England, with the exception of Lord Denman, as stated in the opinion; and it was in that case decided that no extrinsic evidence would be admissible to prove an intention against revocation, but that the revocation took place by virtue of a condition tacitly an-

nexed to the will by the law, independent of the intention of the testator, except as such intention was expressed in the will. A portion of the evidence so excluded was, as in the case at bar, the drafts of two former wills.

And the reason for the exclusion of such evidence is stated to be, that the statute required wills of real estate to be in writing, and that the object of the statute was to prevent the title to real property from being dependent on "the perplexity and uncertainty of such conflicting evidence."

The same reason exists in this Territory. See sec. (654), p. 265, and sec. (686), p. 271, Compiled Laws of Utah, 1876.

The case of *Marston* v. *Roe* has been always followed in this country. 2 Greenl. Ev. §§ 684, 685; *C. B. & Q. Railroad* v. *Wasserman*, 22 Fed. Rep. 872.

In Massachusetts in 1783, a statute was passed containing the following provision, viz.: "That any child or children, . . . not having a legacy given them in the will of their father or mother, shall have a proportion of the estate of their parent assigned to him, her or them, as though such parent had died intestate. . . ." Stat. of 1783, c. 24, § 8. It was the well settled construction of this statute by the Supreme Court of said State, that although the child had no legacy left him in the will of the parent, yet if an intention to omit him appeared, he would not be entitled to any portion of the estate. *Tucker* v. *Boston*, 18 Pick. 162, 167; *Wilson* v. *Fosket*, 6 Met. 400; *S. C.* 39 Am. Dec. 736. But it was equally well settled that such intention could only be made to appear by intrinsic evidence, and that all extrinsic evidence of such intent was inadmissible. See cases above cited.

After this statute was thus judicially construed the laws of Massachusetts were revised. Sec. 21 of c. 62, Rev. Stats., provided that an heir for whom an ancestor omits to provide in his will, is entitled to a distributive share of the ancestor's estate, unless he shall have "been provided for by the testator in his lifetime, or unless it shall appear that such omission was intentional, *and not occasioned by any mistake or accident.*" It is stated by the Commissioners for revising the statutes, in their note to the section last quoted, that it was taken from

Stat. 1783, c. 24, "adopting the construction which has been given to it by the Supreme Court." See brief of counsel for appellee in *Wilson* v. *Fosket*, cited *ante*.

Under this last statute *Wilson* v. *Fosket* was decided in 1843. That case, without overruling the prior cases in Massachusetts under the statute of 1783, or intimating a doubt of their correctness, decided that the commissioners "had builded better than they knew," and that under the new statute parol evidence, including evidence of the parol declarations of the testator, was admissible to show that the testator intended to omit to provide for his child. That case has ever since been followed in Massachusetts under the same statute.

Iowa adopted the Massachusetts statute, last cited, and adopted with it the judicial construction placed thereon by the Massachusetts courts. *Lorieux* v. *Keller*, 5 Iowa, 196; *S. C.* 68 Am. Dec. 696.

We submit that unless the Massachusetts cases under the new statute find their warrant for the admission of extrinsic evidence in the words, "and not occasioned by any mistake or accident," they are opposed to both principle and the weight of authority. It is difficult to conceive how a mistake or accident can be shown except by extrinsic evidence, and such mistake or accident as will permit the child to inherit has been held in Massachusetts to be perfectly consistent with an intentional omission of the child's name from the will. *Ramsdill* v. *Wentworth*, 101 Mass. 125.

In Missouri the statute is substantially the same as the Massachusetts statute of 1783, and has uniformly received the same construction, viz.: that to disinherit a child it is not necessary that he should be named or provided for in the will of the parent, if the omission to do so appears to be intentional; but that such intention can only be proved by intrinsic evidence. *Bradley* v. *Bradley*, 24 Missouri, 311; *Burch* v. *Brown*, 46 Missouri, 441; *Pounds* v. *Dale*, 48 Missouri, 270; *Wetherall* v. *Harris*, 51 Missouri, 65. See, also, *Chace* v. *Chace*, 6 R. I. 407; *S. C.* 78 Am. Dec. 446.

The Utah statute in question is precisely similar, it seems to us, to the Massachusetts statute of 1783 and to the Missouri statute as they were judicially construed.

Argument for Appellants.

In California in 1868, in the case of *Estate of Garraud*, 35 California, 336, section 17 of the Stat. of Wills of that State, of which (694) sec. 10, Comp. Laws of Utah, 1876, is an exact copy, first received a judicial construction by the Supreme Court. In that case it was held that the intention of the testator to omit to provide for his children can only be gathered from the face of the will; that it can only be proved by evidence competent to prove any other testamentary intention, and that evidence of the acts and declarations of the testator is inadmissible to prove such intention.

Suppose at the time of the actual execution of the will, the testator unintentionally omits to provide for his children, but that afterwards he changes his mind and declares his intention not to provide for them, is the will ambulatory in the meantime? and where are such changes to stop?

If there be any doubt as to the true construction of the statute in question, it would be settled by the consideration, that in adopting the California statute, we adopted its received construction in California, which must be considered as accompanying the statute to this Territory, and forming an integral part of it. *Cathcart* v. *Robinson*, 5 Pet. 264; *Bemis* v. *Becker*, 1 Kansas, 226.

The leading case of *Estate of Garraud*, 35 California, 336, was decided in 1868. In the case of *Estate of Utz*, 43 California, 200, decided in 1872, and in *Pearson* v. *Pearson*, 46 California, 609, decided in 1873, the leading case was admitted by counsel to be controlling in California, and its authority has never been questioned in that State.

In 1876, the legislature of Utah Territory enacted a statute of wills, seven sections of which were literally copied from the California act, as it was when the *Estate of Garraud* was decided. See sections, 6–12 inclusive, Compiled Laws of Utah, p. 271. One of these sections, section 10, is the one invoked by appellants in this case. It is to be presumed, then, that the legislature of Utah Territory was familiar with the judicial construction of the California statute placed thereon by the highest court of that State, and that they intended to adopt that construction when they adopted the statute.

Although evidence of all the circumstances which surrounded the author of a written instrument will be received for the purpose of ascertaining his intentions, yet those intentions must ultimately be determined by the *language* of the instrument. No proof, however conclusive in its nature, can be admitted with the view of setting up an intention inconsistent with the known meaning of the writing itself. For the duty of the court in all these cases is to ascertain, not what the parties may have really intended, as distinguished from what their words express, but simply what is the meaning of the words they have used. It is merely a duty of interpretation, and evidence of surrounding circumstances cannot change the legal effect of clear and unambiguous words. *Reynolds* v. *Fire Ins. Co.*, 47 N. Y. 597, 606; *Partridge* v. *Ins. Co.*, 15 Wall. 573; *Maryland* v. *Railroad Co.*, 22 Wall. 105; *Kurtz* v. *Hibner*, 55 Illinois, 514; *Waldron* v. *Waldron*, 45 Michigan, 350. There is no pretence made in this case that the language of the will is not clear and unambiguous.

The uniform language of the authorities is to the effect that no intention to omit to provide for the children appears by reason of the absolute devise to the appellee. *C. B. & Q. Railroad* v. *Wasserman*, 22 Fed. Rep. 874; *Pounds* v. *Dale*, 48 Missouri, 270; *Ramsdill* v. *Wentworth*, 106 Mass. 320; *Bush* v. *Lindsay*, 44 California, 121.

Mr. Benjamin Sheeks and *Mr. Joseph L. Rawlins* for appellee.

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

Accepting the finding of fact that the testator intentionally excluded his children from any share of the property disposed of by the will, respecting which, upon this record, there could be no doubt, the only question in the case is as to whether the court erred in admitting extrinsic evidence to establish that the omission to provide for the children was intentional. The solution of this question depends upon the proper construction of the statutes of Utah bearing upon the subject.

Under those statutes a will or codicil to "pass the estate of the devisor" must be in writing; and by section one of "An Act relative to the Estates of Decedents," approved February 18, 1876, which is section 685 of the Compiled Statutes of Utah of that year, "every devise purporting to convey all the real estate of the testator" carried that subsequently acquired, "unless it shall clearly appear by his or her will that he or she intended otherwise."

Sections 9, 10 and 12 are as follows:

(693) "SEC. 9. When any child shall have been born, after the making of its parent's will, and no provision shall have been made for him or her therein, such child shall have the same share in the estate of the testator, as if the testator had died intestate; and the share of such child shall be assigned as provided by law, in case of intestate estates, unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child.

(694) "SEC. 10. When any testator shall omit to provide in his or her will for any of his or her children or for the issue of any deceased child, unless it shall appear that such omission was intentional, such child, or the issue of such child, shall have the same share in the estate of the testator as if he or she had died intestate, to be assigned as provided in the preceding section."

(696) "SEC. 12. If such child, or children, or their descendants, so unprovided for, shall have had an equal proportion of the testator's estate bestowed on them in the testator's lifetime, by way of advancement, they shall take nothing in virtue of the provisions of the three preceding sections." Compiled Laws of Utah, 1876, 262, c. 2, tit. 14.

Section 19 provides that, in case of intestacy, if the decedent left a husband or a wife and more than one child, the estate of the decedent shall go, one-fourth to the surviving husband or wife for life and the remainder with the other three-fourths to the children.

It will be seen that section 12 applies to advancements during the lifetime of the testator, and section 9 to a child born after the execution of the will, no provision having been made

for it therein. The child is to take its share as provided by law in case of intestacy, "unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child." And section 10 relates to children in being, or the issue of any deceased child, at the time of the execution of the will, who are to take as in case of intestacy, "unless it shall appear that such omission was intentional."

As to a child born after the making of the will, the intention to omit must be apparent from the will; as to children in being when the will is made, the statute does not say how it shall appear that the omission was intentional. But it is insisted on behalf of appellants that such intention is required in the latter case also to appear from the will, and cannot be shown by evidence *aliunde*.

The source of the statute under consideration was undoubtedly that of Massachusetts upon the same subject, though it is said that this particular statute was taken from a similar one in California.

The first and second sections of an act of the Province of Massachusetts, passed in the year 1700, (12 Wm. 3,) with their preambles, read as follows: "Forasmuch as it often happens that children are not borne till after the death of their fathers, and also have no provision made for them in their wills,

"*Be it therefore enacted, etc.*, That as often as any child shall happen to be borne after the death of the father, without having any provision made in his will, every such posthumous child shall have right and interest in the estate of his or her father, in like manner as if he had died intestate, and the same shall accordingly be assigned and set out as the law directs for the distribution of the estates of intestates.

"*And whereas*, through the anguish of the diseased [deceased] testator, or through his solicitous intention though in health, or through the oversight of the scribe, some of the testator's children are omitted and not mentioned in the will, many children also being borne after the makeing of the will, thô in the lifetime of their parents,

"*Be it therefore enacted, etc.*, That any child or children not

having a legacy given them in the will of their father or mother, every such child shall have a proportion of the estate of their parents given and set out unto them as the law directs for the distribution of the estates of intestates; *provided* such child or children have not had an equal proportion of his estate bestowed on them by the father in his lifetime." 1 Mass. Province Laws, 429, 430.

This provincial act was in effect repealed by an act of the Commonwealth of Massachusetts, passed February 6th, 1784, by which it was revised, the phraseology somewhat changed, and the preambles omitted. Mass. Stat. 1783, c. 24, §§ 1, 8.

By the first section of this latter act any person seized in fee simple of any estate is authorized to devise the same to and among his children or others, as he shall think fit, without any limitation of persons whatsoever. By the eighth section it is provided "that any child or children, or their legal representatives in case of their death, not having a legacy given him, her or them in the will of their father or mother, shall have a proportion of the estate of their parents assigned unto him, her or them, as though such parent had died intestate; provided such child, children or grandchildren have not had an equal proportion of the deceased's estate bestowed on him, her or them in the deceased's lifetime."

The Supreme Judicial Court held that the object of the statute was to furnish a remedy solely for those cases, where, from accident or other causes, the children or grandchildren might be supposed to have been forgotten by the testator in making his will; and that, whenever from the tenor of the will or any part of it, sufficient evidence appeared to indicate that the testator had not forgotten his children or grandchildren, as the case might be, when he made his will, they should not be entitled to a distributive share of his estate, although no legacy was given them by the will. *Terry* v. *Foster*, 1 Mass. 146; *Wild* v. *Brewer*, 2 Mass. 570; *Church* v. *Crocker*, 3 Mass. 17; *Wilder* v. *Goss*, 14 Mass. 357.

Thus, although the statute provided that a child should take, notwithstanding its name was omitted, the court ruled that if on the face of the will it appeared that such omission was in-

tentional, the child could not take; hence, whenever the will was silent the child took, and to prevent that result, where such silence was by design, the statute was amended, so as to read as follows:

"When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child; they shall take the same share of his estate, both real and personal, that they would have been entitled to if he had died intestate; unless they shall have been provided for by the testator in his lifetime; or unless it shall appear that such omission was intentional, and not occasioned by any mistake or accident." Rev. Stat. Mass. 1836, c. 62, § 21.

How appear? Evidently *aliunde* the will. If it must appear upon the face of the will that the omission was intentional, the words inserted in the statute were superfluous, for if it did so appear the child could not take, notwithstanding the provision that in case of omission it should take, inasmuch as the latter provision was only inserted to give the omitted child a share, not against the intention of the testator, but because of the presumption of an oversight. Hence in *Wilson* v. *Fosket*, 6 Met. 400, the court held that under the statute as amended, evidence *dehors* the will was admissible to establish that the omission was intentional; and such is the settled law of Massachusetts. *Converse* v. *Wales*, 4 Allen, 512; *Buckley* v. *Gerard*, 123 Mass. 8; *Ramsdill* v. *Wentworth*, 101 Mass. 125. In the latter case the court said: "The operation of the statute is peculiar, but there is no violation under it of the rules of evidence. The only issue is, whether provision was omitted in the will by design, and without mistake or accident. Parol evidence is admitted, although the result may change or modify the disposition of the testator's estate. The will is used to show that there is no legacy under it; and however the issue may be established, there is no conflict with its terms."

In *Bancroft* v. *Ives*, 3 Gray, 367, the statute of Massachusetts was held to apply to children born after the making of the will and before the death of their father. The argument was pressed that the language "omit to provide in his will" neces-

sarily meant and should be confined to children living at the time of making the will. This argument was regarded by Chief Justice Shaw as plausible but not sound, because as a man's will is ambulatory until his decease, the time to which the omission applied was the time of the testator's death. If, therefore, he had then made no provision by his will, the case of the statute arose, for he had made a will, but left a child without having made any provision for such child.

By the Utah statute, however, specific provision is made for children born after the making of the will, and also for children in being but omitted when the will is made. Children born after the making of the will but before the decease, inherit, unless it appears from the will that the testator intended that they should not. And this applies to posthumous children.

Mr. Jarman lays it down that marriage and the birth of a child, conjointly, revoked a man's will, whether of personal or real estate, these circumstances producing such a total change in the testator's situation as to lead to a presumption that he could not have intended a disposition of property previously made to continue unchanged. But this effect is not produced where there is a provision made for both wife and children by the will itself, *Kenebel* v. *Scrafton*, 2 East, 530; or by a previous settlement providing for both. 1 Jarman on Wills, 4th Eng. ed.; 5th Am. ed. *123, *125.

Revocation, treated as matter of presumption merely, was thought, in *Brady* v. *Cubitt*, 1 Doug. 31, open to be rebutted by parol evidence, and this is guardedly conceded by Chancellor Kent in *Brush* v. *Wilkins*, 4 Johns. Ch. 506, and by Mr. Greenleaf, vol. 2, § 684. But, as is stated in a note to that section, the doctrine that the presumption is not conclusive has been overruled, upon great consideration, in the cases of *Marston* v. *Roe*, 8 Ad. & El. 14, and *Israell* v. *Rodon*, 2 Moore P. C. 51, in the former of which it was, among other things, resolved, that, "where an unmarried man, without children by a former marriage, devises all the estate he has at the time of making his will, and leaves no provision for any child of a future marriage, *the law annexes to such will the tacit condition* that if he afterwards marries, and has a child born of such

marriage, the will shall be revoked;" and that "evidence not amounting to proof of publication, cannot be received in a court of law, to show that the testator intended that his will should stand good, notwithstanding his subsequent marriage and the birth of issue; because these events operate as a revocation by force of a *rule of law*, and independent of the testator."

The subject is regulated in this country by the statutes of the several States and Territories, marriage alone working revocation under some, and both marriage and birth of issue being required under others, while subsequently born children, unprovided for, are allowed to take unless a contrary intention appears.

But the provision we are considering concerns children in being when the will is made. As to children born after death or the making of the will, the reason why the intention to omit them should appear on the face of the will is obvious. It is the same as that upon which the doctrine of revocation rests — the change in the testator's situation. But this reason loses its force so far as children living when the will is made are concerned; and this explains the marked difference between the sections of the statute before us applicable to the two classes.

The statute raises a presumption that the omission to provide for children or grandchildren living when a will is made is the result of forgetfulness, infirmity or misapprehension, and not of design; but this is a rebuttable presumption, in view of the language employed, which negatives a taking contrary to an intentional omission, and at the same time leaves undefined the mode by which the affirmative purpose is to be established.

Legal presumptions drawn by the courts independently of or against the words of an instrument may be, in some instances, repelled by extrinsic evidence, and this statutory presumption of an unexpressed intention to provide may be rebutted in the same way.

Under section 12, a pretermitted child is entitled to no share if it has had an equal proportion by way of advancement, but it is not contended that this fact must necessarily appear from

the will when that is not required by statute, yet proof of advancements and of intentional omission alike defeat the claimant.

The rule as to patent and latent ambiguities, so far as analogous, sustains the same conclusion. Where a devise is, on the face of it, clear and intelligible, yet from external circumstances an ambiguity arises as to which of two or more things, or of two or more persons, the testator referred to, it being legally certain that he intended one or the other, evidence of his declarations, of the instructions given for his will, and of other circumstances of the like nature, is admissible to determine his intention.

The will in this case is entirely unambiguous. The testator's intention was that his wife should have the property. There being children at the time of the execution of the will, an ambiguity may be said to have been created by operation of the statute, as to their having been intentionally omitted, which ambiguity evidence of the character named at once removed.

Children so situated do not set up title under the will but under the statute. The will is used to establish that they have no legacy or devise under it. Then the inquiry arises whether the testator intended to omit them. Evidence that he did does not conflict with the tenor of the will. It simply proves that he meant what he said. Instead of tending to show the testator's real purpose to have been other than is apparent upon the face of the will, it confirms the purpose there indicated. The fact of the existence of children when a will is made is proven *dehors* the instrument, and since under the statute that evidence opens up a question as to the testator's intention, which but for the statute could not have arisen, and which by the statute is not required to be determined by the will, we cannot perceive why the disposal of it should be so limited.

It is contended that the statutory provision in question was copied from that of California, and that we are bound by the construction previously put upon it by the courts of the latter State. The California act declared that in case of the omission

of the testator to provide in his will for his children, they should be entitled to the same share as in case of intestacy, "unless it shall appear that such omission was intentional." Laws of California, 1850, c. 52, § 17.

In *Payne* v. *Payne*, 18 California, 291, 302, the Supreme Court of California, speaking through its then Chief Justice, Mr. Justice Field, said: "The only object of the statute is to protect the children against omission or oversight, which not unfrequently arises from sickness, old age, or other infirmity, or the peculiar circumstances under which the will is executed. When, however, the children are present to the mind of the testator, and the fact that they are mentioned by him is conclusive evidence of this, the statute affords no protection, if provision is not made for them. The inference follows that no provision was intended;" and *Terry* v. *Foster*, *Wild* v. *Brewer*, *Church* v. *Crocker*, and *Wilder* v. *Goss*, *supra*, were cited.

But in the *Matter of the Estate of Garraud*, 35 California, 336, it was held that evidence *aliunde* the will was not admissible to show that the omission to make provision for children was intentional, and, in respect to the Massachusetts decisions, the court was of opinion that the words "and not occasioned by any mistake or accident," found in the statute of Massachusetts but not in that of California, were very material, and furnished the real ground for the admission of extrinsic evidence. We do not think so. While those words may strengthen the argument in favor of the admissibility of the evidence, it by no means follows that the construction of the statute should be otherwise in their absence. The evidence which shows that the omission was intentional establishes that it was not through accident or mistake. Action purposely taken by one in the sufficient possession of his faculties, and not induced by fraud or undue influence, excludes in itself the idea of casualty or error.

We are satisfied that this particular phraseology was used out of abundant caution, as serving to render the proper construction somewhat plainer, and that the construction must be the same, although those words are not used.

Syllabus.

The rule ordinarily followed in construing statutes is to adopt the construction of the courts of the country by whose legislature the statute was originally adopted, but we are not constrained to apply that rule in this instance. The original source of the statute is to be found in the legislation of Massachusetts. The Supreme Court of California declined to treat the received construction in Massachusetts as accompanying the statute and forming an integral part of it, upon a distinction which we do not regard as well drawn. That construction commends itself to our judgment, and we hold that the Supreme Court of the Territory properly applied it.

The evidence was competent, and the judgment must be

Affirmed.

Mr. Justice Brewer not having been a member of the court at the time this case was considered took no part in its decision.

CHRISTIAN *v.* ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY.

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

No. 46. Argued October 30, 1889. — Decided January 27, 1890.

A State is an indispensable party to any proceeding in equity in which its property is sought to be taken and subjected to the payment of its obligations.

The State of North Carolina subscribed in 1856 for capital stock in a railway company which had been incorporated by its legislature, issued its bonds with thirty years to run, sold them, and with the proceeds paid its subscription, and received certificates of stock therefor, which certificates it never parted with and still holds. In the act incorporating the company and authorizing the issue of the bonds it was provided that as security for their redemption "the public faith of the State" "is hereby pledged to the holders," "and in addition thereto all the stock held by the State" in the railroad company "shall be pledged for that purpose" and that "any dividend" on the stock "shall be applied to the payment of the interest accruing on said coupon bonds." The State being in default in the payment of the interest due on the bonds since 1868, a

Citations for Appellants.

bondholder, who was a citizen of Virginia, brought suit in the Circuit Court of the United States in the Eastern District of North Carolina against the Railroad Company, its president and directors, the person holding the proxy of the State upon the stock held by it, and the treasurer of the State, praying to have the complainant's bonds decreed to be a lien upon the stock owned by the State and upon any dividends that might be declared thereon, and that such dividends might be paid to complainant and to such bondholders as might join in the suit, and for the sale of the stock if the dividends should prove insufficient, and for an account, and for the appointment of a receiver, and for an injunction; *Held*, that, as the State was an indispensable party to the suit, the bill must be dismissed.

In equity. Decree dismissing the bill, from which the complainants appealed. The case is stated in the opinion.

Mr. Joseph B. Batchelor and *Mr. Samuel F. Phillips*, (with whom were *Mr. W. H. Lamar* and *Mr. J. G. Zachry* on the brief,) for appellants, cited: *Beale* v. *White*, 94 U. S. 382; *Wilson* v. *Boyce*, 92 U. S. 320; *White Water Valley Canal Co.* v. *Vallette*, 21 How. 414; *Barings* v. *Dabney*, 19 Wall. 1; *Woodson* v. *Murdock*, 22 Wall. 351; *United States* v. *Union Pacific Railroad*, 91 U. S. 72; *Ketchum* v. *St. Louis*, 101 U. S. 306; *Whitehead* v. *Vineyard*, 50 Missouri, 30; *Collins* v. *Central Bank of Georgia*, 1 Georgia, 435; *Swasey* v. *North Carolina Railroad*, 1 Hughes, 17; *S. C.* 71 North Carolina, 571; *Ingram* v. *Kirkpatrick*, 6 Iredell Eq. 463; *S. C.* 51 Am. Dec. 428; *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *United States* v. *Peters*, 5 Cranch, 115; *Curran* v. *Arkansas*, 15 How. 304; *Woodruff* v. *Trapnall*, 10 How. 190, 206; *Furman* v. *Nichols*, 8 Wall. 44; *Bank of the United States* v. *Planters' Bank*, 9 Wheat. 904; *Briscoe* v. *Bank of Kentucky*, 11 Pet. 257; *Darrington* v. *Bank of Alabama*, 13 How. 9; *State* v. *Stoll*, 17 Wall. 425; *Elliott* v. *Vanvoorst*, 3 Wall. Jr. C. Ct. 299; *Wabash & Erie Canal* v. *Beers*, 2 Black, 448; *United States* v. *Wilder*, 3 Sumner, 308; *Davis* v. *Gray*, 16 Wall. 203; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Louisiana* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446; *United States* v. *Lee*, 106 U. S. 196; *Vase* v. *Grant*, 15 Mass. 505; *Wood* v. *Dummer*, 3 Mason, 308; *Upton* v. *Tribilcock*, 91

U. S. 45; *Union Bank of Tennessee* v. *The State*, 9 Yerger, 490; *Slaymaker* v. *Gettysburg Bank*, 10 Penn. St. 373; *Hutchins* v. *State Bank*, 12 Met. 421; *Palmer* v. *Merrill*, 6 Cush. 282; *S. C.* 52 Am. Dec. 782; *Chester Glass Co.* v. *Dewey*, 16 Mass. 94; *S. C.* 8 Am. Dec. 128; *Boston Music Hall Association* v. *Cory*, 129 Mass. 435; *Telegraph Co.* v. *Davenport*, 97 U. S. 369; *Mechanic's Bank* v. *Seton*, 1 Pet. 299; *Morehead* v. *Western Railroad Co.*, 96 N. C. 362; *Androscoggin Railroad* v. *Auburn Bank*, 48 Maine, 335; *Winslow* v. *Mitchell*, 2 Story, 630; *Cameron* v. *McRoberts*, 3 Wheat. 591; *Hogan* v. *Walker*, 14 How. 29, 36; *Payne* v. *Hook*, 7 Wall. 425; *Hagood* v. *Southern*, 117 U. S. 52.

Mr. R. H. Battle, for appellees, cited: *Robinson* v. *Hurley*, 11 Iowa, 410; *S. C.* 79 Am. Dec. 497; *Kemp* v. *Westbrook*, 1 Ves. Sen. 278; *Vanderzee* v. *Willis*, 3 Bro. Ch. 21; *Greither* v. *Alexander*, 15 Iowa, 470; *Terrell* v. *Allison*, 21 Wall. 289; *Robertson* v. *Carson*, 19 Wall. 94; *Shields* v. *Barrow*, 17 How. 130; *Russell* v. *Clarke*, 7 Cranch, 59, 98; *Ribon* v. *Railroad Companies*, 16 Wall. 446; *Bank* v. *Carrollton Railroad*, 11 Wall. 624; *Williams* v. *Bankhead*, 19 Wall. 563; *Poindexter* v. *Greenhow*, 114 U. S. 270; *In re Ayers*, 123 U. S. 443; *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446; *The Siren*, 7 Wall. 152; *Levey* v. *Stockslager*, 129 U. S. 470; *Briggs* v. *Light Boats*, 11 Allen, 157.

Mr. Justice Bradley delivered the opinion of the court.

The State of North Carolina, by virtue of an act of its legislature, passed 12th February, 1855, and through its board of internal improvement, subscribed for $1,066,600 of the capital stock of The Atlantic and North Carolina Railroad Company, a corporation created by act of the legislature of said State for the purpose of building a railroad from Beaufort to Goldsborough. In order to raise money to pay for this stock, the board of internal improvement, by virtue of the same act, issued the bonds of the State, signed by the governor and countersigned by the public treasurer, each for the sum of five hundred dollars, and in the following form, to wit:

"$500.00. UNITED STATES OF AMERICA. $500.00.

"It is hereby certified that the State of North Carolina is justly indebted to —— —— or bearer five hundred dollars, redeemable in good and lawful money of the United States, at the Bank of the Republic, in the city of New York, on the first day of January, eighteen hundred and eighty-six, with interest thereon at the rate of six per cent per annum, payable half-yearly, at the said bank, on the first days of July and January in each year from the date of this bond until the principal be paid, on surrendering the proper coupon hereto annexed. In witness whereof the governor of the said state, in virtue of power conferred by law, hath signed this bond and caused the great seal of the state to be hereunto affixed, and her public treasurer hath countersigned the same at the seat of government of the said state, this first day of January, eighteen hundred and fifty-six.

[The great seal of the State of North Carolina.]

"(Signed) THOMAS BRAGG, *Governor.*

"Countersigned:

D. W. COURTS, *Public Treasurer.*"

"Issued under an act to amend an act entitled An Act to incorporate the Atlantic & North Carolina Railroad Company and the North Carolina & Western Railroad Company, chapter 232."

The act which authorized the issue of these bonds contained the following guaranty of their payment (sect. 10):

"*Be it further enacted*, That as security for the redemption of said certificates of debt the public faith of the State of North Carolina is hereby pledged to the holders thereof, and in addition thereto all the stock held by the State in the 'Atlantic and North Carolina Railroad Company' hereby created shall be pledged for that purpose, and any dividend of profit, which may from time to time be declared on the stock held by the State as aforesaid, shall be applied to the payment of the interest accruing on said coupon bonds; but until such dividends of profit may be declared, it shall be the

duty of the treasurer, and he is hereby authorized and directed, to pay all such interest as may accrue out of any moneys in the treasury, not otherwise appropriated." Laws N. C. 1854–5, 301, c. 232, § 10.

The State received certificates for the stock subscribed and still holds the same, which stock is represented in the meetings of the stockholders of the railroad company by a proxy appointed by the governor of the State, by virtue of the charter of the railroad company.

William E. Christian, a citizen of Virginia, the complainant in this suit, is the holder of ten of the bonds issued as aforesaid; and as no interest had been paid thereon since the year 1868, he filed this bill in July, 1883, in behalf of himself and all other holders of the bonds referred to who should come in and contribute to the expenses of the suit; and he made defendants to the suit the Atlantic and North Carolina Railroad Company, the president and directors of said company, personally, F. M. Simmons, the proxy representing the stock owned by the State, and J. M. Worth, treasurer of the State. The bill sets forth the material parts of the acts in question; which acts created the company and authorized the board of internal improvements, on behalf of the State, to subscribe for two-thirds of the capital stock of the company; and, for that purpose, to borrow money on the credit of the State and issue bonds therefor. It particularly sets forth the section before referred to, which guaranteed the payment of the bonds, and thereto pledged the stock held by the State. It states the fact of the subscription of the stock and the issue of the bonds, and alleges that the complainant is the *bona fide* holder for value of ten of the bonds, whose numbers are given, all having interest coupons attached, the first payable January 1, 1869, and one on each bond for every six months thereafter. The bill then avers that, ever since the year 1868, the State has neglected and refused to make any provision for the payment of the interest, and that all interest accruing since that time remains due. As the next averment indicates the legal view on which the bill seems to be founded, we quote it in full. It alleges as follows, to wit:

"That the aforesaid certificates of debt or bonds are, by virtue of the act of the general assembly of the said State of North Carolina hereinbefore recited, and of the pledges therein made by the said State, a lien upon the 10,666 shares of stock owned and held by said State in the said The Atlantic and North Carolina Railroad Company, in payment for which the said bonds or certificates of debt were issued, and upon all dividends of profits that have been and that may hereafter be declared upon said stock, and that the holders of said certificates, among whom is your orator, are in equity and good conscience entitled to have and receive all such dividends of profits as the same are paid for and upon account of the interest due and accruing on said certificates."

The bill then states that it appears from the report of the officers of the railroad company made to the annual meeting of stockholders in June, 1881, that for the preceding fiscal year the company had received more money than was expended in running and operating the road; and that, on the 1st of July, 1881, the company leased all its property to The Midland North Carolina Railroad Company for the sum of $40,000 per year, the lessee to keep the same in good repair; and then adds:

"That these sums not being required for the necessary expenses of said company, or a large part thereof, should have been distributed to and among the stockholders of said company by way of dividends, and that the holders of the coupons of said bonds or certificates, among whom is your orator, are entitled in equity and good conscience to have whatever sum may be received by the State as and for dividends on the stock owned by said State in said company appropriated to the payment of the interest due and in arrears on said bonds."

The bill further states that the Midland Company having failed to comply with its contract, the lease has been declared forfeited and rescinded, and the property has been restored to the management of the Atlantic and North Carolina Railroad Company.

The bill then states on information and belief that it is the purpose and intent of the directors to again lease the road and

property of the company, to which the complainant objects for reasons set forth in the bill, and asks for an injunction to prevent the same being done; but as this part of the bill and the relief sought in relation thereto was abandoned at the hearing in the court below, and is not urged on this appeal, it is unnecessary to notice it further, except to quote the concluding paragraph which states the nature of the claim of the bondholders upon the stock owned by the State in the railroad company, and is apposite to a full understanding of complainant's position. It is as follows, to wit:

"XXII. That the holders of said bonds, having a lien on the said stock for the payment of the principal and interest of their said debt, are in equity the real owners of said stock, and that the same should be applied by said State, through its proper officers, to the payment of said debt, and that the State should do nothing herself nor allow anything to be done by her officers or by her associates in said company which would destroy or impair the value of this security to her said creditors, and he insists, being so advised, that it is contrary to equity and good conscience for the proxy of the State to give his consent and thereby the consent of the State to any contract of lease to be made by said company, without the consent and concurrence of the holders of said bonds, until the State shall have made adequate provisions for the payment of said debt, both principal and interest."

The prayer of the bill, so far as relates to the stock held by the State in the railroad company, and to the dividends thereon, is substantially as follows, to wit:

1st. That the bonds or certificates of debt held by the complainant and others may be decreed to be a lien upon the said stock and dividends until paid or redeemed.

2d. That all dividends on said stock may be paid to the complainant and the other bondholders who may join him in the suit.

3d. That if said dividends prove insufficient for this purpose, a sale of said stock, or so much thereof as may be necessary to pay said certificates, may be made under the decree of the court.

4th. That an account may be taken of the amount due for interest, etc.

5th. That a receiver may be appointed to take possession of the dividends hereafter payable to the State.

6th. That the officers of the railroad company may be enjoined from paying to the state treasurer, or to any other person on behalf of the State, any dividends which may accrue to the State, and that the treasurer may be enjoined from receiving the same.

To this bill, Simmons, the proxy of the state stock, and Worth, the state treasurer, filed a joint answer, separate from the other defendants, admitting the material statements of the bill, so far as relates to the origin and character of the stock and bonds referred to, but denying that any dividends were or could be made on the stock, in consequence of the expenses and legitimate obligations of the railroad company. The concluding averment of their answer is as follows, to wit:

"VII. These defendants, further answering, say that two certificates of stock, one for one thousand and sixty-six shares, and the other for two hundred shares, have been issued to the State of North Carolina by the defendant company, which certificates, together with the stock represented thereby, are the property of the State and are in her possession, and have been for a long time before the commencement of this suit, with authority in no one to part with the same except by the direction of the general assembly of the State; and these defendants are advised that, so being the property of the State and in her actual possession, they cannot be taken therefrom or in anywise be affected by any decree rendered in a cause to which the State is not a party; and these defendants rely upon the fact that the State is not a party to this suit as if the same had been specially pleaded."

The other defendants also filed answers to the bill, but it is unnecessary to refer to them, or to other incidental proceedings which took place in the cause. The important facts on which relief is claimed are as above recited from the statements of the pleadings. The bill was dismissed by the court below, and from that decree the present appeal was taken.

From the foregoing summary of the statements and prayer of the bill we see that its object and purpose is to obtain, in behalf of the complainant and other bondholders, the adjudication of a lien upon the stock held by the State of North Carolina in the Atlantic and North Carolina Railroad Company, and upon the dividends on said stock; and the enforcement of that lien by requiring said dividends to be paid to the bondholders, in satisfaction of the amount due on their bonds; and, if these are insufficient, by a sale of said stock, or so much thereof as may be necessary; aided by the appointment of a receiver to take possession of said dividends; and an injunction to restrain the railroad company, and its officers, from paying to the state treasurer, or to any other person on behalf of the State, and to restrain said treasurer from receiving any moneys accruing and payable as dividends on said stock.

How the dividends due to the State can be seized and appropriated to the payment of the bonds, or how the stock held and owned by the State can be sold and transferred, through the medium of a suit in equity, without making the State a party to the suit, it is difficult to comprehend. The general rule certainly is, that all persons whose interests are directly to be affected by a suit in chancery must be made parties. *Russell* v. *Clarke's Executors*, 7 Cranch, 68, 98; *Shields* v. *Barrow*, 17 How. 130, 139; *Ribon* v. *Railroad Cos.*, 16 Wall. 446; *Williams* v. *Bankhead*, 19 Wall. 563; *McArthur* v. *Scott*, 113 U. S. 340. The exceptions to the rule are pointed out in these cases, and do not touch the present case. The State has a direct interest to be affected by such a proceeding. The proposal is to take the property of the State and apply it to the payment of its debts due to the plaintiffs, and to do it through the instrumentality of a court of equity.

The ground on which it is contended that this may be done is, that the property is affected by a pledge, and may, therefore, be dealt with *in rem*. But a pledge, in the legal sense, requires to be delivered to the pledgee. He must have the possession of it. He may then, in default of payment of the debt for which the thing is pledged, sell it for the purpose of raising the amount, by merely giving proper notice to the

pledgor. In the case of stocks and other choses in action, the pledgee must have possession of the certificate or other documentary title, with a transfer executed to himself, or in blank, (unless payable to bearer,) so as to give him the control and power of disposal of it. Such things are then called pledges, but more generally collaterals: and they may be used in the same manner as pledges properly so called. If there is no transfer attached to, or accompanying the document, it is imperfect as a pledge, and requires a resort to a court of equity to give it effect.

These propositions are so elementary that they hardly need a citation of authorities to support them. Reference may be made, however, to Story on Bailments, § 297, *et seq.*; *Casey* v. *Cavaroc*, 96 U. S. 467.

The stock and dividends of the State of North Carolina, now in question, have nothing about them in the nature of a pledge. The 10th section of the act of 1855, relied on by the complainant for creating a pledge, must be understood as using the word in a popular and not in a technical sense. That section declares, first, that as security for the redemption of said certificates of debt the public faith of the State is hereby pledged to the holders thereof. This is no more than a solemn promise on the part of the State, to redeem the certificates. The section next, in addition to the pledge of the public faith, declares that all the stock held by the State in the Atlantic and North Carolina Railroad Company shall be pledged for the same purpose, and any dividend of profit declared thereon shall be applied to the payment of the interest on said bonds. This was nothing more than a promise that the stock should be held and set apart for the payment of the bonds, and that the dividends should be applied to the interest. There was no actual pledge. It was no more of a pledge than is made by a farmer when he pledges his growing crop, or his stock of cattle, for the payment of a debt, without any delivery thereof. He does not use the word in its technical, but in its popular sense. His language may amount to a parol mortgage, if such a mortgage can be created; but that is all. So in this case, the pledge given by the State in a statute may have amounted

to a mortgage, but it could amount to nothing more; and if a mortgage, it did not place the mortgagee in possession, but gave him merely a naked right to have the property appropriated and applied to the payment of his debt. But how is that right to be asserted? If the mortgagor be a private person, the mortgagee may cite him into court and have a decree for the foreclosure and sale of the property. The mortgagor, or his assignee, would be a necessary party in such a proceeding. Even when absent, beyond the reach of process, he must still be made a party and at least constructively cited by publication or otherwise. This is established by the authorities before referred to, and many more might be cited to the same effect. The proceeding is a suit against the party to obtain, by decree of court, the benefit of the mortgage right. But where the mortgagor in possession is a sovereign state, no such proceeding can be maintained. The mortgagee's right against the State may be just as good and valid, in a moral point of view, as if it were against an individual. But the State cannot be brought into court or sued by a private party without its consent. It was at first held by this court that, under the Constitution of the United States, a State might be sued in it by a citizen of another State, or of a foreign State; but it was declared by the 11th amendment that the judicial power of the United States shall not be construed to extend to such suits. *New Hampshire* v. *Louisiana*, 108 U. S. 76; *Louisiana* v. *Jumel*, 107 U. S. 711; *Parsons* v. *Marye*, 114 U. S. 325; *Hagood* v. *Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443.

There is a class of cases, undoubtedly, in which the interests of the State may be indirectly affected by a judicial proceeding without making it a party. Cases of this sort may arise in courts of equity where property is brought under its jurisdiction for foreclosure or some other proceeding, and the State, not having the title in fee or the possession of the property, has some lien upon it, or claim against it, as a judgment against the mortgagor, subsequent to the mortgage. In such a case the foreclosure and sale of the property will not be prevented by the interest which the State has in it; but its

right of redemption will remain the same as before. Such cases do not affect the present, in which the object is to take and appropriate the State's property for the purpose of satisfying its obligations. *The Siren*, 7 Wall. 152, 157; *Briggs* v. *Light Boats*, 11 Allen, 157, 173.

It remains true, therefore, that a bill will not lie to effect a foreclosure and sale, or to obtain possession of property belonging to the State; and for the very plain reason that, in such a case, the State is a necessary party and cannot be sued. This was distinctly held by this court in the case of *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446. In that case the State of Georgia had endorsed the bonds of a railroad company, taking a lien upon the railroad as security. The company failed to pay the interest of the endorsed bonds, and the governor of the State, under the power vested in him, took possession of the road, and put it into the hands of a receiver, who sold it to the State of Georgia and made a conveyance to the State accordingly. Thereupon the State, by the governor and other officers and directors, took possession of and operated the road. The holders of a second mortgage on the same property filed a bill to foreclose their mortgage and to set aside the sale made by the receiver as invalid, and to have priority of lien for reasons stated in the bill. They made the governor, the state treasurer, and the state directors of the road parties defendant. This court held that the bill would not lie, because the State was an indispensable party. Mr. Justice Miller, delivering the opinion of the court, said: "Whenever it can be clearly seen that the State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction." Again: "In the case now under consideration the State of Georgia is an indispensable party. It is, in fact, the only proper defendant in the case. No one sued has any personal interest in the matter, or any official authority to grant the relief asked. No foreclosure suit can be sustained without the State, because she has the legal title to the property, and the purchaser under a foreclosure decree would get no title in the absence of the State. The

State is in the actual possession of the property, and the court can deliver no possession to the purchaser. The entire interest adverse to the plaintiff in this suit is the interest of the State of Georgia in the property, of which she has both the title and possession."

These remarks are strikingly applicable to the present case. The State of North Carolina is the only party really concerned. The whole proceeding is virtually against her. The object of the suit is to get possession of her property; to sequester her dividends (if any there may be) and to compel the payment of them to the complainants; to seize and sell her stock in the railroad, stock of which she is in sole possession. Be it true that the bondholders have a lien on said dividends and stock, it is not a lien that can be enforced without suit; and that a suit against the State.

We are referred to a decision made at the circuit by Chief Justice Waite in the case of *Swasey* v. *North Carolina Railroad Company*, 1 Hughes C. Ct. 17, in which, in a case similar to the present, it was held that, inasmuch as the shares of stock belonging to the State were pledged for the payment of the complainants' bonds, they were held by the railroad company as trustee for the bondholders as well as the State; and that if the trustee was a party to the suit, it was not necessary that the State should be a party. We are not certain that we are fully in possession of the facts of that case; but if they were the same as in the present case, with the highest respect for the opinions of the lamented Chief Justice, we cannot assent to the conclusions to which he arrived. In the general principles, that a State cannot be sued; that its property, in the possession of its own officers and agents, cannot be reached by its creditors by means of judicial process; and that in any such proceeding the State is an indispensable party; Chief Justice Waite certainly did express his emphatic concurrence, in the able opinion delivered by him on behalf of the court, in the case of *Louisiana* v. *Jumel*, 107 U. S. 711. His views in the Swasey case seem to have been based on the notion that the stock of the State was lodged in the hands of the railroad company as a trustee for the parties concerned, and was not

in the hands of the State itself, or of its immediate officers and agents. But if the facts in that case were as he supposed them to be, the facts in the present case are certainly different from that. No stockholder of any company ever had more perfect possession and ownership of his stock than the State of North Carolina has of the stock in question. There may be contract claims against it; but they are claims against the State, because based solely on the contract of the State, and not on possession.

We think that the State is an indispensable party to any proceeding in equity in which its property is sought to be taken and subjected to the payment of its obligations; and that the present suit is of that character, and cannot be sustained.

The decree of the Circuit Court is *Affirmed.*

GEILINGER *v.* PHILIPPI.

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

No. 367. Submitted January 8, 1890. — Decided February 3, 1890.

An insolvent debtor of Louisiana, under the insolvent laws of that State, surrendered his property for the benefit of his creditors, the surrender was duly accepted, and the creditors elected a syndic who qualified and was commissioned as such. On his schedules the debtor returned the house in which he resided and the furniture therein as the property of his wife to which he had no claim. The syndic did not take possession of it and laid no claim to it until a foreign creditor, who was not a party to the proceedings in insolvency, and who had obtained a judgment against the debtor in the Circuit Court of the United States after the insolvency, levied upon the house as the property of the debtor. The syndic then filed in the creditor's suit a third opposition, setting up claim to the property, and praying that the seizure under the execution be set aside, and that the marshal be enjoined from levying upon it. A decree in accordance with the prayer was entered, conditioned upon the syndic's paying cost of seizure and filing in the Circuit Court an order from the state court to the syndic to take possession of the property, and to administer it as part of the insolvent's estate; *Held*, that there was no error in this decree, but that it was eminently judicious and proper.

Statement of the Case.

This was a suit by way of third opposition, brought in the Circuit Court of the United States for the Eastern District of Louisiana, by Cæsar Philippi, syndic of the creditors of Gilbert H. Green individually, and as a member of the late commercial firm and partnership of Gilbert H. Green & Co., of New Orleans, and also of Green, Stewart & Co., of Liverpool, England, in the suits of *Bank in Winterthur* v. *Gilbert H. Green*, and *Geilinger & Blum* v. *Gilbert H. Green*, on the docket of said Circuit Court. After the answers were filed, the two causes were consolidated and tried by the court as one case.

The submission, findings of fact and judgment were as follows:

"This cause came on this day for trial, and the parties having filed a stipulation in writing waiving the intervention of a jury and submitting the cause to the court on the issues of law and of fact, with the request that the court do make a special finding of the facts —

"Whereupon the court makes the following finding of fact:

"Geilinger & Blum, a commercial firm, domiciled and doing business at Winterthur, in Switzerland, filed their action against the defendant, Gilbert H. Green, on November 25th, 1886, and on the 31st day of January, 1887, recovered a verdict and judgment in this court against Gilbert H. Green for the sum of ten thousand five hundred and nine $\frac{68}{100}$ dollars, with interest. The Bank in Winterthur, a corporation organized under the laws of the Canton of Zurich, in the Swiss Republic, filed its action against Gilbert H. Green on the 25th day of November, 1886, and on the 31st day of January, 1887, recovered a verdict and judgment in this court against Gilbert H. Green for the sum of forty thousand three hundred and six $\frac{64}{100}$ dollars, with interest. On December 26th, 1886, Gilbert H. Green made a surrender under the insolvent law of the State of Louisiana, individually and as a member of the commercial copartnership of Gilbert H. Green & Company, of New Orleans, Green, Stewart & Co., of Liverpool, England, in the form and manner set forth in the certified copy of the record of said insolvent proceedings, No. 19,734 of the docket of the Civil District Court, parish of Orleans, which said record is made part of the

finding of facts in this cause to show the character and contents of the proceedings had in said cause; that on or about the 20th of May, 1887, under writs of *alias fi. fa.* issued in the case of *Geilinger & Blum* v. *Gilbert H. Green* and in the case of the *Bank in Winterthur* v. *Gilbert H. Green*, the marshal of this court levied upon certain real estate described in the petition of Cæsar Philippi, syndic. This property was acquired by act before Theodore Guyol, notary public, of date May 19th, 1882, and said deed is hereto annexed and made part of this statement of facts to show the form, purport and contents thereof.

"At the time that this levy was made the said property was in possession of Gilbert H. Green and his wife and was their matrimonial domicile, and the said property had been continuously in possession of the said Green and wife from the date of the purchase thereof down to the date of the seizure thereof under writs of *fi. fa.* in these causes. Up to the time that this seizure was made no demand had been made upon Green and wife by Cæsar Philippi, syndic, for the said property, and no claim of title or possession had been set up by the said Philippi, syndic, for the said property.

"And thereupon the court, upon these facts, finds the issues of law in favor of the said Cæsar Philippi, syndic, and it is thereupon ordered, adjudged and decreed that the seizure of the said property above described under the *alias* writ of *fi. fa.* issued in these causes, dated May 20th, 1887, be set aside and the property released by the marshal, and that R. B. Pleasants, United States marshal for the Eastern District of Louisiana, be restrained and enjoined from proceeding to advertise and sell the property herein claimed, upon this condition, however, that said Philippi shall pay all the costs which have been incurred in the making of said seizure, and shall also present and file in this cause an order from the Civil District Court for the parish of Orleans, division E, authorizing and directing him to take possession of said property from the said Green and wife, and to administer the same as part of the insolvent estate of the said Gilbert H. Green committed to the charge of the said court and the said syndic.

Statement of the Case.

"It is further ordered, adjudged and decreed that Geilinger & Blum and the bank in Winterthur be condemned jointly to pay the costs of this suit.

"Judgment rendered June 13, 1887. Judgment signed June 17, 1887."

Annexed to the findings was a certified copy of the insolvency proceedings and of the deed to Mrs. Green.

The schedule of his assets showed this entry therein by Green:

"The house in which I reside on St. Charles Street, and the furniture therein, is the individual property of my wife, and I have no claim thereto."

From the *procès-verbal* of the meeting of the creditors, it appeared that Philippi was unanimously elected syndic, and letters issued to him accordingly; that nineteen out of twenty-seven local creditors of Green & Co. appeared and took part in the proceedings, accepted the surrender of property made by the insolvent, and voted to grant him a full discharge; and that the court appointed an attorney to represent the absent creditors, who declared that he had taken full cognizance of the meeting.

The deed was dated May 19, 1882, and purported to grant, bargain, sell, assign, convey, transfer and deliver with full warranty to Mrs. Green, wife of Gilbert H. Green, "by whom she is herein assisted and authorized," the property therein described. The notes for the deferred payments were signed by her, but it did not appear in the deed that the purchase price was paid for with the paraphernal or separate estate of Mrs. Green.

Upon the trial a bill of exceptions was taken, which stated that Geilinger & Blum and the bank in Winterthur "placed Gilbert H. Green upon the witness stand and offered to prove by the said Gilbert H. Green that in making the surrender of his property, as set forth in the record No. 19,734, division E, Civil District Court, referred to in the statement of facts in this cause, he did not intend to include in that surrender the property seized in this cause, for the reason that he was informed and advised by his counsel that the said property was

the property of his wife and was not liable for his debts or covered by the said surrender; to the introduction of which testimony the said Cæsar Philippi, syndic, then and there objected, on the ground that the said testimony was irrelevant and that Green's intention in making his surrender would not affect the issue in this cause; which objections the court sustained, and refused to allow said testimony to be adduced. To which ruling Geilinger & Blum and the bank in Winterthur then and there excepted." To the judgment rendered as above, the pending writ of error was sued out from this court.

The errors assigned were:

1. That the court erred in refusing plaintiffs in error the right to prove the facts set forth in the bill of exceptions herein filed.

2. That the court erred in concluding as a matter of law that Gilbert H. Green had surrendered the property seized in this cause under and by virtue of the insolvent proceedings No. 19,734, of the Civil District Court.

3. That the court erred in ordering the release of the property herein sued for.

Mr. Edgar H. Farrar, *Mr. B. F. Jonas*, and *Mr. Ernest B. Kruttschnitt* for plaintiffs in error.

The point in this case is a very narrow one. Was the seized St. Charles Street property either actively or constructively *in gremio legis*, so as to exclude the Circuit Court of the United States from levying on it?

We concede that Green ought to have surrendered the St. Charles Street property; because, under the law of Louisiana, it was community property and liable for his debts. The purchase of the property in the name of the wife did not make it her property.

We concede further that if he had casually omitted it from his schedules it would have passed under the control of the syndic of the creditors, and under the doctrine of *Bank of Tennessee* v. *Horn*, 17 How. 517, would not have been liable to seizure.

Argument for Plaintiffs in Error.

We concede further that if he had fraudulently omitted this property from his schedule, and put the title in the name of his wife before his cession, an action would lie by his syndic to recover it.

But we contend that, as Green expressly declared, under oath, in his schedule that the property was not his, but his wife's, and as he not only did not actually surrender it, but did not intend that his insolvent proceedings should have such an effect, and, as his surrender, *in the form and manner as made*, was accepted by the court and by the controlling majority of his local creditors, and as the syndic made no pretence of claim of title or possession until after the seizure by the marshal, the property remaining thus in Green's actual possession was not *in gremio legis* so as to exclude his foreign creditors, who were in no manner bound by his insolvent proceedings, from levying their writs upon it.

1. Under the *cessio bonorum* of the civil law, whether voluntary or forced, the legal title to the property ceded by the insolvent remains in him, and does not pass to the creditors or to the syndic. *Rivas* v. *Hunstock*, 2 Rob. La. 187; *Smalley* v. *His Creditors*, 3 La. Ann. 386; *Walling* v. *Morefield*, 33 La. Ann. 1174, 1177; *Jaquet* v. *His Creditors*, 38 La. Ann. 863.

2. The law of Louisiana requires the application of an insolvent to make surrender of his property to be laid before the court to which the application is made, and the acceptance of the surrender, in the form and manner as made, is submitted to the judicial discretion of the judge. *State ex rel. Boyd* v. *Green*, 34 La. Ann. 1020.

3. The insolvent proceedings in the state court, and the insolvent laws of Louisiana have no extra-territorial effect, and do not affect or control non-resident creditors, unless they voluntarily make themselves parties to the proceedings. *Ogden* v. *Saunders*, 12 Wheat. 213; *Baldwin* v. *Hale*, 1 Wall. 223; *Gilman* v. *Lockwood*, 4 Wall. 411; *Towne* v. *Smith*, 1 Woodb. & Min. 115, 136; *Poe* v. *Duck*, 5 Maryland, 1. We respectfully submit that, under the circumstances which are found as facts in this case, the courts of the United States will not surrender their jurisdiction of the property, and allow it to be

distributed among local creditors, to the exclusion of all foreign creditors who are unwilling to submit themselves to the state insolvent law.

The case thus presents nothing but a question of a conflict of jurisdiction between two tribunals of concurrent jurisdiction, each having power to bind the goods of the defendant by its process. The rule in such cases is that where *the parties are not the same, nor the cause of action the same in both courts*, that court holds the property which first obtained physical custody of it. In other words, in such cases there is no such thing as constructive possession of property which is capable of actual possession — of physical prehension. *Payne* v. *Drewe*, 4 East, 523; *Taylor* v. *Carryl*, 20 How. 583, 594; *Freeman* v. *Howe*, 24 How. 450; *Wilmer* v. *Atlantic &c. Air Line Railroad*, 2 Woods, 409.

4. All of Green's local creditors who appeared at the creditors' meeting, who voted to accept his surrender and to grant him a discharge, are estopped from saying that the St. Charles Street property is part of Green's estate.

The local creditors who did not so appear might, by proper proceeding, have compelled the syndic to institute an action to recover this property; and this is the reason why the judge imposed upon the syndic, as a condition of the release of the seizure made by the marshal, that he should pay all the costs which have been incurred in the making of the seizure, and that he should also present and file in this cause an order from the Civil District Court, authorizing and directing him to take possession of said property from Green and wife, and to administer the same as part of the insolvent estate of Green committed to the charge of the court and the syndic.

The necessity the judge found himself under of putting this proviso in the judgment, ought to have furnished him a conclusive reason for rejecting the syndic's claim.

Mr. Thomas J. Semmes and *Mr. Alfred Goldthwaite* for defendant in error.

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

Opinion of the Court.

It is conceded by counsel for the plaintiffs in error that the St. Charles Street property was, under the law of Louisiana, community property, and liable for Green's debts, and should have been surrendered to the syndic; that if Green had casually omitted it from his schedules it would have passed under the control of the syndic; and that if he had fraudulently omitted the property from his schedules and put the title in the name of his wife before the insolvency proceedings, an action would lie by the syndic to recover it. But it is contended that as Green declared the property to be his wife's, and did not intend it to go under his insolvent proceedings, and as his surrender in the form and manner as made was accepted, and the syndic set up no claim of title or possession until after the seizure by the marshal, "the property remaining thus in Green's actual possession was not *in gremio legis* so as to exclude his foreign creditors, who were in no manner bound, by his insolvent proceedings, from levying their writs upon it."

The Louisiana Code contains these articles (Rev. Civil Code La. 1875, 473):

"Art. 2175 [2171]. The surrender does not give the property to the creditors; it only gives them the right of selling it for their benefit and receiving the income of it, till sold.

"Art. 2178 [2174]. As the debtor preserves his ownership of the property surrendered, he may divest the creditors of their possession of the same, at any time before they have sold it, by paying the amount of his debts, with the expenses attending the cession."

Sections 1781 to 1822, inclusive, of the Revised Statutes of Louisiana constitute a system of insolvent laws. Rev. Stat. La. 1870, 353 *et seq.*

Section 1791 reads: "From and after such cession and acceptance, all the property of the insolvent debtor mentioned in the schedule, shall be fully vested in his creditors; and the syndic shall take possession of, and be entitled to claim and recover, all the property, and to administer and sell the same according to law."

These provisions have formed part of the laws of Louisiana for many years, and the Supreme Court of that State has

repeatedly held in respect to them, that when a *cessio bonorum* has been accepted by the court and the creditors, and a syndic has been appointed and qualified, all the property and rights of property of the insolvent are vested in his creditors, represented by the syndic as their trustee, and pass to the creditors by the cession, whether included in his schedule or not. *Dwight* v. *Simon*, 4 La. Ann. 490; *Muse* v. *Yarborough*, 11 La. 521; *West* v. *His Creditors*, 8 Rob. La. 123; *Dwight* v. *Smith*, 9 Rob. La. 32. These cases sustain and are therefore cited to the proposition by Chief Justice Taney, delivering the opinion of this court in *Bank of Tennessee* v. *Horn*, 17 How. 157, 160. The rule relates to possession and disposition, and it has been frequently decided that the surrender of the insolvent does not divest him of the title to the property surrendered, though it strips him of the power to control, alienate or dispose of the same during the administration of his estate, and so vests it in the creditors or in the syndic for them, that it is no longer liable to seizure, attachment or execution, but is held to be administered and disposed of according to law for the benefit of the creditors. *Rivas* v. *Hunstock*, 2 Rob. La. 187; *Jaquet* v. *His Creditors*, 38 La. Ann. 863; *Walling's Heirs* v. *Morefield*, 33 La. Ann. 1174, 1177; *Nimick* v. *Ingram*, 17 La. Ann. 85.

It is therefore immaterial that title may not vest absolutely in the syndic or creditors. It is enough that the surrender operates as a transfer for the specific purpose of the disposal of the property and the distribution of the proceeds in concurso among the creditors, and is protected accordingly. *Laforest* v. *His Creditors*, 18 La. Ann. 292; *West* v. *His Creditors*, *ubi supra*.

In *Nimick* v. *Ingram*, 17 La. Ann. 85, Nimick & Co., judgment creditors of Ingram, issued execution against him from the Fourth District Court of New Orleans, where they had recovered their judgment, and caused property to be seized thereunder after Ingram had gone into insolvency and made a surrender in the Fifth District Court. The proceedings in Nimick & Co.'s suit were transferred to the Fifth District Court and cumulated with the insolvent proceedings. Thereupon, Ingram took out of the latter court a rule on Nimick &

Co. to show cause why all further action under the writ of *fi. fa.* should not be stayed and set aside, which rule was made absolute; and from that order an appeal was taken to the Supreme Court of Louisiana. There Nimick & Co. urged that by their diligence they had discovered the property seized by them, and that Ingram having fraudulently attempted to screen the property, it was legally incompetent for him to take any steps in relation to it to affect their rights; but the Supreme Court said:

"What these rights are it is not necessary for us to decide, . . . being satisfied, as we are, that they can only be determined contradictorily with the mass of the insolvent's creditors, before the court seized of the *concurso*, as the whole proceedings in the suit pending originally in the Fourth District Court were . . . properly ordered to be cumulated with the insolvent proceedings in the Fifth District Court. . . .

"Any informality in the proceedings, when questioned, must be by direct action. No creditor will be permitted to disregard and treat as an absolute nullity a judgment accepting a surrender made by his debtor, and granting a stay of proceedings.

"The acceptance for the creditors by the court of the ceded estate, vests in them all the rights and property of the insolvent, whether placed on the schedule or not; and the syndic may sue to recover them.

"But any creditor may show, provided it be contradictorily with the mass of the creditors, or their legal representative, that any particular object or fund is not embraced in the surrendered estate, but is subject exclusively to his individual claim. And this is the remedy of the plaintiffs, if any they have."

Nimick v. *Ingram* is quoted from and approved in *Tua* v. *Carriere*, 117 U. S. 201, 207.

In the case in hand, the order of the court in insolvency stayed all judicial proceedings against the insolvent and his property, and, by the acceptance of the cession, passed all the insolvent's assets to the syndic for the benefit of creditors; but its operation was not confined to the property specifically named, nor did the acceptance by the creditors have that effect.

If property be omitted by mistake or with fraudulent intention, it is the duty of the syndic to have the schedule amended so as to include it, and to take possession and administer upon it, *Chaffe* v. *Scheen*, 34 La. Ann. 686; and it is the duty of the creditors to bring it to his attention, that he may do so. The evidence offered by appellants that Green did not intend to include this property because advised by counsel that it was not liable for his debts was properly excluded, as his intention could not control the operation of the law, or defeat the rights of his creditors.

The property was named in the schedule as belonging to the wife individually and therefore not claimed by the debtor; but any creditor, by inquiry, could have ascertained the circumstances and been informed of its liability under the law. There is nothing to impugn the good faith of the syndic; and if there were, he could have been compelled to act and was liable to removal. Rev. Stats. La. § 1814. Nor was there any element of estoppel involved in the action of the creditors who signed the consents to Green's discharge. The surrender which they accepted covered all the insolvent's assets, and even if they were laboring under the erroneous belief that this particular property was not subject to their claims, they would be entitled, so far as appears from this record, to share in its proceeds when the mistake was discovered. No other creditor was misled to his injury by their action, and no adjudication foreclosed their rights.

And in addition to this, as Geilinger & Blum and the bank in Winterthur recovered their judgments after the insolvency proceedings were commenced and the surrender made by Green, if they wished to attack those proceedings they should have done so, as we have seen, "contradictorily with the mass of the insolvent's creditors, before the court seized of the *concurso*."

It is said, however, that insolvency proceedings and laws can have no extra-territorial effect, and do not affect or control non-resident creditors, unless they voluntarily make themselves parties to the proceedings.

And it is argued that as these were foreign creditors, who

had not made themselves such parties, and had sought relief through the United States Circuit Court, that placed them on different ground as to the property of an insolvent from that occupied by the creditors of his domicil. But so far as the property of an insolvent is concerned in the jurisdiction within which proceedings against him are taken, its destination is fixed (existing priorities being of course respected) by the laws of that jurisdiction. The insolvency decree is in the nature of an execution, and though it cannot by its own force attach assets in another State, it takes the assets within its own. And, while non-resident creditors are entitled to come in *pari passu* with domestic, if they do not do so they cannot participate in the distribution.

By the insolvency proceedings Green's assets were placed *in gremio legis*, and could not be seized by process from another court. *Peale* v. *Phipps*, 14 How. 368, 375; *Tua* v. *Carriere*, 117 U. S. 201, 208. What the rights of the appellants might be if they declined to prove their claims or intervene in the state court, upon the termination of the administration there, it is not necessary to consider. *Williams* v. *Benedict*, 8 How. 107, 112; *Union Bank* v. *Jolly's Administrators*, 18 How. 503; *Green's Administratrix* v. *Creighton*, 23 How. 90, 107. The conclusion that under the particular circumstances disclosed, this property formed part of the assets belonging to an administration pending when the writs of *fi. fa.* were issued, determines the invalidity of the seizure under them. *Rio Grande Railroad Company* v. *Gomila*, 132 U. S. 478.

The judgment of the Circuit Court released the property upon condition that the costs in the making of the seizure be paid by the syndic, and that he present and file an order from the State District Court authorizing and directing him to take possession of the property and administer the same as part of the insolvent estate of Green. This was an eminently judicious and proper order apparently effectual to secure the appropriation of the property to the claims to which it was subject, while these judgment creditors were absolved from the expense incurred in emphasizing the fact of its liability.

We see no error in the record and the judgment is therefore

 Affirmed.

GEOFROY *v.* RIGGS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 1431. Submitted December 23, 1889. — Decided February 3, 1890.

A citizen of France can take land in the District of Columbia by descent from a citizen of the United States.

The treaty power of the United States extends to the protection to be afforded to citizens of a foreign country owning property in this country and to the manner in which that property may be transferred, devised or inherited.

The District of Columbia, as a political community, is one of "the States of the Union," within the meaning of that term as used in article 7 of the Consular Convention of February 23, 1853, with France.

Article 7 of the Convention with France of September 30, 1800, construed.

Article 7 of the Consular Convention with France of February 23, 1853, construed.

IN EQUITY. The bill alleged that the suit was "a purely friendly suit." The defendants demurred to the bill, and it was dismissed. The complainants appealed. The court stated the case as follows:

On the 19th day of January, 1888, T. Lawrason Riggs, a citizen of the United States and a resident of the District of Columbia, died at Washington, intestate, seized in fee of real estate of great value in the District. The complainants are citizens and residents of France and nephews of the deceased. On the 12th of March, 1872, the sister of the deceased, then named Kate S. Riggs, intermarried with Louis de Geofroy, of France. She was at the time a resident of the District of Columbia and a citizen of the United States. He was then and always has been a citizen of France. The complainants are the children of this marriage, and are infants now residing with their father in France. One of them was born July 14, 1873, at Pekin, in China, whilst his father was the French minister plenipotentiary to that country, and was there only as such minister. The other was born October 18, 1875, at Cannes, in France. Their mother, who was a sister of all the defendants except Medora, wife of the defendant E. Francis Riggs, died February 7, 1881. The deceased, T. Lawrason

Riggs, left one brother, E. Francis Riggs, and three sisters, Alice L. Riggs, Jane A. Riggs and Cecilia Howard, surviving him, but no descendants of any deceased brother or deceased sister, except the complainants.

The defendants, with the exception of Cecilia Howard, are, and always have been, citizens of the United States and residents of the District of Columbia. Cecilia Howard, in 1867, intermarried with Henry Howard, a British subject, and since that time has resided with him in England.

The real property described in the bill of complaint cannot be divided without actual loss and injury, and the interest of the complainants, if they have any, as well as of the defendants, in the property, would be promoted by its sale and a division of the proceeds.

To the bill of complaint setting up these facts and praying a sale of the premises described and a division of the proceeds among the parties to the suit according to their respective rights and interests, the defendants demurred, on the ground that the complainants were incapable of inheriting from their uncle any interest in the real estate. The Supreme Court of the District of Columbia sustained the demurrer and dismissed the bill. From the decree the case is brought to this court on appeal.

Mr. J. Hubley Ashton for appellants.

Mr. John Selden for appellees.

As the Treaty of Amity and Commerce concluded between the Thirteen United States of North America and France, on February 6, 1778, was annulled by act of Congress, July 1, 1798, 1 Stat. 578, c. 67, and as the Convention of Peace, Commerce and Navigation concluded between the United States and France, on September 30, 1800, expired by its own limitation, eight years afterwards, in pursuance of an additional article, (Pub. Treaties, ed. 1875, p. 232,) inserted by the Senate, on February 4, 1801: *Chirac* v. *Chirac*, 2 Wheat. 259, 272, 277; *Carneal* v. *Banks*, 10 Wheat. 181, 189; *Buchanan* v. *Deshon*, 1 Har. & G. 280; the single *treaty stipulation*

which can be supposed to operate upon the capacity of French citizens to inherit lands in the United States, must be found in article 7 of the Consular Convention concluded between this country and France, on the 23d day of February, 1853.[1]

But the operation prescribed for this article, (so far as the same becomes material in the present controversy,) is limited, by the terms of the article, to "*the States* of the Union." By this language, the members of the Union become distinguished, at once, from the republic they compose. And that neither the District of Columbia, nor a Territory of the United States, falls within the definition of a *State*, as that term is employed in the Constitution, or in the Acts of Congress, has long been familiar to all. *Hepburn* v. *Ellzey*, 2 Cranch, 445; *New Orleans* v. *Winter*, 1 Wheat. 94; *Barney* v. *Baltimore*, 6 Wall. 287; *Jost* v. *Jost*, 1 Mackey, 487.

Between the *United States*, as an integral government, country, or nation, and the *several States* constituting our Union, a distinction is admitted and maintained throughout our convention with France. If the parties to the convention have actually limited the operation of this article to the *States* of the Union, it cannot be necessary to investigate their reasons for establishing that restriction.

The concessions, on the part of the United States, expressed in this article of the convention are: (1) The adoption, as part of the supreme law of the land, of certain existing *state* laws, so long as they may remain in operation; and (2) the engagement of the President, to recommend to those States, by whose laws aliens are not permitted to hold real estate, the passage of enabling enactments.

They are not the obligations that would be assumed by the United States, when entering into treaty engagements affecting either the *Territories*, respecting which Congress may make all needful rules and regulations, or the *District of Columbia*, over which Congress may, in all cases whatsoever, exercise exclusive legislation.

They are the stipulations of the United States in relation to subjects over which the laws of the several States are recog-

[1] This article will be found in the opinion of the court, *post*, 268.

nized as supreme. And these stipulations cease to be applicable or operative, where the legislative power of the Union becomes, under the Constitution, paramount and peculiar.

That such was the contemporaneous construction placed by the United States upon this article of the treaty, is shown from the Circular Letter addressed by Secretary Marcy,[1] October 19, 1853, to the governors of the several States, and the omission of the President to recommend to Congress any legislation on the subject. The laws of the several States, as those laws existed at the date of the convention, may be supposed to have been susceptible, in general, of easy ascertainment and comparison.

Before proceeding, in the next branch of the argument, to examine the local law on the subject, certain positions taken by the appellants may be noticed here.

An ingenious interpretation is sought to be given to the treaty, by so transposing its terms, as to require the word "it," where first occurring in the 1st clause of the 7th article, to refer and apply to the whole of the next following clause in the same article.

But as the language of the article remains free from ambiguity, when read in the order in which the two clauses are actually found to occur, they cannot be dislocated or inverted for the purpose of creating a meaning for that language. *Doe* v. *Considine*, 6 Wall. 458.

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[1] DEPARTMENT OF STATE.
WASHINGTON. *October* 19, 1853.

To his Excellency the Governor of ——

Sir: I have the honor to transmit to your Excellency a copy of the Consular Convention of the 23rd February last between the United States and France, and to invite your Excellency's attention to the second paragraph of the seventh article. Pursuant to the stipulation therein contained, the President engages to recommend to those States of the Union, by whose laws aliens are not permitted to hold real estate, the passage of such laws as may be necessary for the purpose of conferring that right. In accordance with the stipulation adverted to, the President directs me to communicate to your Excellency his recommendation that if, pursuant to existing laws, French subjects shall not be allowed to hold real estate in , that right may by law be conferred upon them.

I have the honor to be, etc., W. L. MARCY.

It is insisted that upon the construction placed by the appellees upon this article of the treaty, the citizens of France were left without benefit from the compact. But if France received no advantage from the article, she at least yielded nothing by adopting it.

Under the provisions of the Code Napoleon, the citizen of another country had been exempted from the *droit d'aubaine*, in France, only when by treaty between the two nations, the French citizen had been thus relieved in the foreign country.

By the law of July 14, 1819, however, these provisions were abolished, and the capacity of aliens to acquire, hold and transmit real and personal estate was rendered — as it still remains — that of French citizens.

The privileges conferred by the 7th article of the treaty upon citizens of the United States were, therefore, no greater than those which were conceded under the general law of France, at the date of the treaty.

"The ulterior right of establishing reciprocity," reserved in the third clause of the article, enabled the government of France to impose, at its discretion, upon citizens of the United States, such incapacities as might be laid, in our own country, upon citizens of France, under the laws of the States, Territories or District of Columbia.

Hence, if, by reason of those laws, the citizens of France derived no advantage from the article, none could continue to accrue — except by the sufferance of that country — to citizens of the United States.

Were it conceded that the words, "States of the Union," as employed in article 7 of the convention, properly embrace the District of Columbia, it would still be essential for the appellants, in order to entitle them to the protection of the article, to establish the existence within the district, both at the date of the convention and at the time of the death of their ancestor, of some law whereby French citizens or subjects, residing in France, had been rendered competent to take lands, by descent, from a citizen of the United States.

By the common law, as the same was transplanted into Maryland, the alien was excluded from the acquisition of land

by descent. *Buchanan* v. *Deshon*, 1 Har. & G. 280, 289; *Guyer's Lessee* v. *Smith*, 22 Maryland, 239; *S. C.* 85 Am. Dec. 650.

The act of Maryland of December 19, 1791, ratifying her cession to the United States, provides, in effect, in its 6th section, that "*any foreigner*" may, by *deed* or *will*, take and hold lands within the ceded territory, and such land may be conveyed by him, and be transmitted to and inherited by his heirs and relations, as if he and they were citizens of Maryland. It has long been settled, however, that these provisions do not remove the disability, arising from common law principles, of an alien to *inherit* lands lying in this District *from a citizen* thereof. *Spratt* v. *Spratt*, 1 Pet. 343; *Spratt* v. *Spratt*, 4 Pet. 393; *Jost* v. *Jost*, 1 Mackey, 493.

Nor are the restrictions and disabilities removed by the act of March 3, 1887, 24 Stat. 476, c. 340.

A later statute which does not expressly repeal, in whole or in part, any previous legislation upon the subject to which it relates, cannot be viewed as wholly superseding such legislation by substitution, revision or otherwise, unless the new statute either embraces, in itself, the entire field covered by former enactments, or manifests a plain intention to furnish, *per se*, a new and exclusive system upon the subject to which they refer. *United States* v. *Tynen*, 11 Wall. 88, 92; *Henderson's Tobacco*, 11 Wall. 652; *Murdock* v. *Memphis*, 20 Wall. 590, 617; *King* v. *Cornell*, 106 U. S. 395; *Red Rock* v. *Henry*, 106 U. S. 596; *Cook County Nat. Bank* v. *United States*, 107 U. S. 445; *Pana* v. *Bowler*, 107 U. S. 529.

The basis, it is evident, of this proposition, is that repeals by implication are not to be favored; that they are founded upon the repugnance which arises between the new law and the old; and that the extent of such repugnance is the measure of such repeals. *Arthur* v. *Homer*, 96 U. S. 137; *Ex parte Crow Dog*, 109 U. S. 556; *Chew Heong* v. *United States*, 112 U. S. 536; *United States* v. *Langston*, 118 U. S. 389; *Chicago Railway Co.* v. *United States*, 127 U. S. 406.

The act, in its title, is "An Act to *restrict* the ownership of

real estate in the Territories to American citizens, and so forth." It contains no repealing clause.

The language of the first three sections is the language of *prohibition*. It is to the "violation of the provisions" in those sections that the penal clauses of the fourth section apply.

And as titles by *inheritance* are excepted from its prohibitions, the act, as to such titles, is neither penal nor inhibitory. Titles by inheritance being thus exempted from the prohibitions of the section, to such titles the act is without application; and they are to be regulated by the laws in force at the time of the passage of the act.

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

The complainants are both citizens of France. The fact that one of them was born in Pekin, China, does not change his citizenship. His father was a Frenchman, and by the law of France a child of a Frenchman, though born in a foreign country, retains the citizenship of his father. In this case, also, his father was engaged, at the time of the son's birth, in the diplomatic service of France, being its minister plenipotentiary to China, and by public law the children of ambassadors and ministers accredited to another country retain the citizenship of their father.

The question presented for solution, therefore, is whether the complainants, being citizens and residents of France, inherit an interest in the real estate in the District of Columbia of which their uncle, a citizen of the United States and a resident of the District, died seized. In more general terms the question is: can citizens of France take land in the District of Columbia by descent from citizens of the United States?

The complainants contend that they inherit an estate in the property described, by force of the stipulation of article 7 of the convention between the United States and France, concluded February 23, 1853, and the provisions of the act of Congress of March 3, 1887, to restrict the ownership of real estate in the Territories to American citizens. Before consid-

ering the effect of this article and of the act of 1887, a brief reference will be had to the laws of Maryland in force on the 27th of February, 1801, which were on that day declared by act of Congress to be in force in the District of Columbia. The language of the act is "that the laws of the State of Maryland *as they now exist* shall be and continue in force in that part of the said District which was ceded by that State to the United States, and by them accepted." 2 Stat. 103, c. 15, § 1.

A part of these laws was the common law, and two acts of Maryland, one passed in March, 1780, "to declare and ascertain the privileges of the subjects of France" within that State; the other, passed December 19, 1791, to ratify her cession to the United States, entitled "An Act concerning the Territory of Columbia and the City of Washington." The common law, unmodified by statute or treaty, would have excluded aliens from inheriting lands in the United States from a citizen thereof. Its doctrine is that aliens have no inheritable blood through which a title can be transferred by operation of law. The act of Maryland of 1780 modified that law so far as to allow a subject of France who had settled in that State, and given assurances of allegiance and attachment to it as required of citizens, to devise to French subjects, who for that purpose were to be deemed citizens of the State. Act of March, 1780, c. 8, § 5, 1 Dorsey's Laws of Maryland, 158. It also provided that if the decedent died intestate his natural kindred, whether residing in France or elsewhere, should inherit his real estate in like manner as if such decedent and his kindred were citizens of the United States. It had no bearing, however, upon the inheritance of a subject of France, except from a Frenchman domiciled in the State. The act of Maryland of December 19, 1791, which provided in its sixth section that any foreigner might, by deed or will thereafter made, take and hold lands within the State in the same manner as if he were a citizen thereof, and that the lands might be conveyed by him, and transmitted to and inherited by his heirs and relations as if he and they were citizens of the State, did not do away with the disability of foreigners to take real

property within that State by inheritance from a citizen of the United States. It was so held in effect in *Spratt* v. *Spratt*, 1 Pet. 343; *S. C.* 4 Pet. 393.

On the 30th of September, 1800, a convention of peace, commerce and navigation was concluded between France and the United States, the 7th article of which provided that "the citizens and inhabitants of the United States shall be at liberty to dispose by testament, donation or otherwise, of their goods, movable and immovable, holden in the territory of the French Republic in Europe, and the citizens of the French Republic shall have the same liberty with regard to goods movable and immovable, holden in the territory of the United States, in favor of such persons as they shall think proper. The citizens and inhabitants of either of the two countries, who shall be heirs of goods, movable or immovable, in the other, shall be able to succeed *ab intestato*, without being obliged to obtain letters of naturalization, and without having the effect of this provision contested or impeded under any pretext whatever." 8 Stat. 182.

This article, by its terms, suspended, during the existence of the treaty, the provisions of the common law of Maryland and of the statutes of that State of 1780 and of 1791, so far as they prevented citizens of France from taking by inheritance from citizens of the United States, property, real or personal, situated therein.

That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations. Such removal has

been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U. S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. *Ware* v. *Hylton*, 3 Dall. 199; *Chirac* v. *Chirac*, 2 Wheat. 259; *Hauenstein* v. *Lynham*, 100 U. S. 483; 8 Opinions Attys. Gen. 417; *The People* v. *Gerke*, 5 California, 381.

Article 7 of the convention of 1800 was in force when the act of Congress adopting the laws of Maryland, February 27, 1801, was passed. That law adopted and continued in force the law of Maryland as it then existed. It did not adopt the law of Maryland as it existed previous to the treaty; for that would have been in effect to repeal the treaty so far as the District of Columbia was affected. In adopting it as it *then existed*, it adopted the law with its provisions suspended during the continuance of the treaty so far as they conflicted with it — in other words, the treaty, being part of the supreme law of the land, controlled the statute and common law of Maryland whenever it differed from them. The treaty expired by its own limitation in eight years, pursuant to an article inserted by the Senate. 8 Stat. 192. During its continuance citizens of France could take property in the District of Columbia by inheritance from citizens of the United States. But after its expiration that right was limited as provided by the statute and common law of Maryland, as adopted by Congress on the 27th of February, 1801, until the convention between the United States and France was concluded, February 23, 1853. The 7th article of that convention is as follows:

"In all the States of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament, or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfer, inheritance, or any others different from those paid by the latter, or to taxes which shall not be equally imposed.

"As to the States of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right.

"In like manner, but with the reservation of the ulterior right of establishing reciprocity in regard to possession and inheritance, the government of France accords to the citizens of the United States the same rights within its territory in respect to real and personal property, and to inheritance, as are enjoyed there by its own citizens." 10 Stat. 996.

This article is not happily drawn. It leaves in doubt what is meant by "States of the Union." Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet separate communities, with an independent local government, are often described as states, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. Halleck on Int. Law, c. 3, §§ 5, 6, 7. The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government. Within this definition the District of Columbia, under the government of the United States, is as much a State as any of those political communities which compose the United States. Were there no other territory under the government of the United States, it would

not be questioned that the District of Columbia would be a State within the meaning of international law; and it is not perceived that it is any less a State within that meaning because other States and other territory are also under the same government. In *Hepburn* v. *Ellzey*, 2 Cranch, 445, 452, the question arose whether a resident and a citizen of the District of Columbia could sue a citizen of Virginia in the Circuit Court of the United States. The court, by Chief Justice Marshall, in deciding the question, conceded that the District of Columbia was a distinct political society, and therefore a State according to the definition of writers on general law; but held that the act of Congress in providing for controversies between citizens of different States in the Circuit Courts, referred to that term as used in the Constitution, and therefore to one of the States composing the United States. A similar concession, that the District of Columbia, being a separate political community, is, in a certain sense, a State, is made by this court in the recent case of *Metropolitan Railroad Co.* v. *District of Columbia*, 132 U. S. 1, 9, decided at the present term.

Aside from the question in which of these significations the terms are used in the convention of 1853, we think the construction of article 7 is free from difficulty. In some States aliens were permitted to hold real estate, but not to take by inheritance. To this right to hold real estate in some States reference is had by the words "permit it" in the first clause, and it is alluded to in the second clause as not permitted in others. This will be manifest if we read the second clause before the first. This construction, as well observed by counsel, gives consistency and harmony to all the provisions of the article, and comports with its character as an agreement intended to confer reciprocal rights on the citizens of each country with respect to property held by them within the territory of the other. To construe the first clause as providing that Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as citizens of the United States, in States, so long as their laws permit such enjoyment, is to give a meaning to the article by

which nothing is conferred not already possessed, and leaves no adequate reason for the concession by France of rights to citizens of the United States, made in the third clause. We do not think this construction admissible. It is a rule, in construing treaties as well as laws, to give a sensible meaning to all their provisions if that be practicable. "The interpretation, therefore," says Vattel, "which would render a treaty null and inefficient cannot be admitted;" and again, "it ought to be interpreted in such a manner as that it may have its effect, and not prove vain and nugatory."[1] Vattel, Book II, c. 17. As we read the article it declares that in all the States of the Union by whose laws aliens are permitted to hold real estate, so long as such laws remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as citizens of the United States. They shall be free to dispose of it as they may please — by donation, testament, or otherwise — just as those citizens themselves. But as to the States by whose existing laws aliens are not permitted to hold real estate, the treaty engages that the President shall recommend to them the passage of such laws as may be necessary for the purpose of conferring that right.

In determining the question in what sense the terms "States of the Union" are used, it is to be borne in mind that the laws of the District and of some of the Territories, existing at the time the convention was concluded in 1853, allowed aliens to hold real estate. If, therefore, these terms are held to exclude those political communities, our government is placed in a very inconsistent position — stipulating that citizens of France shall enjoy the right of holding, disposing of, and inheriting, in like manner as citizens of the United States, property, real and personal, in those States whose laws permit aliens to hold real estate; that is, that in those States citizens of France, in holding, disposing of, and inheriting property, shall be free

[1] "L'interprétation qui rendrait un acte nul et sans effet, ne peut donc être admise. . . . Il faut l'interpréter de manière qu'il puisse avoir son effet, qu'il ne se trouve pas vain et illusoire." 2 Droit des Gens, 265, édition Paris, 1863, par Pradier-Fodéré.

from the disability of alienage; and, in order that they may in like manner be free from such disability in those States whose existing laws do not permit aliens to hold real estate, engaging that the President shall recommend the passage of laws conferring that right; while, at the same time, refusing to citizens of France holding property in the District and in some of the Territories, where the power of the United States is in that respect unlimited, a like release from the disability of alienage, thus discriminating against them in favor of citizens of France holding property in States having similar legislation. No plausible motive can be assigned for such discrimination. A right which the government of the United States apparently desires that citizens of France should enjoy in all the States, it would hardly refuse to them in the District embracing its capital, or in any of its own territorial dependencies. By the last clause of the article the government of France accords to the citizens of the United States the same rights within its territory in respect to real and personal property and to inheritance as are enjoyed there by its own citizens. There is no limitation as to the territory of France in which the right of inheritance is conceded. And it declares that this right is given in like manner as the right is given by the government of the United States to citizens of France. To ensure reciprocity in the terms of the treaty, it would be necessary to hold that by "States of the Union" is meant all the political communities exercising legislative powers in the country, embracing not only those political communities which constitute the United States, but also those communities which constitute the political bodies known as Territories and the District of Columbia. It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that

where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. *Hauenstein* v. *Lynham*, 100 U. S. 483, 487. The stipulation that the government of France in like manner accords to the citizens of the United States the same rights within its territory in respect to real and personal property and inheritance as are enjoyed there by its own citizens, indicates that that government considered that similar rights were extended to its citizens within the territory of the United States, whatever the designation given to their different political communities.

We are, therefore, of opinion that this is the meaning of the article in question—that there shall be reciprocity in respect to the acquisition and inheritance of property in one country by the citizens of the other, that is, in all political communities in the United States where legislation permits aliens to hold real estate, the disability of Frenchmen from alienage in disposing and inheriting property, real and personal, is removed, and the same right, of disposition and inheritance of property, in France, is accorded to citizens of the United States, as are there enjoyed by its own citizens. This construction finds support in the first section of the act of March 3d, 1887. 24 Stat. 476, c. 340. That section declares that it shall be unlawful for any person or persons not citizens of the United States, or who have not declared their intention to become citizens, to thereafter acquire, hold or own real estate, or any interest therein, in any of the Territories of the United States or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts previously created. There is here a plain implication that property in the District of Columbia and in the Territories may be acquired by aliens by inheritance under existing laws; and no property could be acquired by them in the District by inheritance except by virtue of the law of Maryland as it existed when adopted by the United States during the existence of the convention of 1800 or under the 7th article of the convention of 1853. Our conclusion is, that the complainants are entitled to take by

Syllabus.

inheritance an interest in the real property in the District of Columbia of which their uncle died seized. The decree of the court below will, therefore, be

Reversed and the cause remanded, with direction to overrule the demurrer of the defendants; and it is so ordered.

UNITED STATES *v.* MOSBY.

MOSBY *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 1112, 1420. Argued January 17, 1890. — Decided February 3, 1890.

The question considered, as to what are "official services" performed by consuls, under the consular regulations of 1874 and 1881, prescribed by the President by virtue of the provisions of § 1745 of the Revised Statutes.

Fees collected by a consul for the examination of Chinese emigrants going to the United States on foreign vessels; and fees for certificates of shipment of merchandise in transit through the United States to other countries; and fees for recording instruments which are not official documents recorded in the record books required to be kept by the consul, but relate to private transactions for individuals not requiring the use of the consul's title or seal of office; and fees for cattle-disease certificates; and fees for acknowledgments and authentications of instruments certifying the official character and signature of notaries public; and fees for settling private estates; and fees for shipping and discharging seamen on foreign-built vessels sailing on the China coast under the United States flag; are not moneys which he is required to account for to the United States.

Fees collected by him for certifying extra copies of quadruplicate invoices of goods shipped to the United States; and money received for interest on public moneys deposited in bank; and fees collected for certificates of shipments or extra invoices; and fees for certifying invoices for free goods imported into the United States; are moneys which he is required to account for to the United States.

The practice of consuls to do acts which are not official is recognized by the statutes and the consular regulations.

The claimant had a judgment in the Court of Claims against the United States for $13,839.21. Both parties appealed. The items of the disallowance of which the claimant complained did not amount to more than $3000. But it was held that he could avail himself of anything in the case

which properly showed that the judgment was not for too large a sum; and this court, disallowing one of the items allowed to him, allowed one of the items disallowed, and rendered a judgment in his favor for a less amount than that rendered below.

THESE were appeals from a judgment in the Court of Claims in favor of Mosby against the United States. The case is stated in the opinion.

Mr. John S. Mosby, in person.

Mr. Assistant Attorney General Maury for the United States.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit brought in the Court of Claims by John S. Mosby against the United States, claiming to recover the sum of $29,180.01, moneys which he had received while he was consul of the United States at Hong-Kong, from February 4, 1879, to July 21, 1885, and had paid into the treasury, the items composing the above sum being as follows: (1) For examining Chinese emigrants departing on foreign vessels for the United States, $5147; (2) for certifying extra copies or quadruplicate invoices, about $2000; (3) for certifying invoices for goods in transit through the United States to other countries, $5805; (4) for notarial and clerical work, $644.01; (5) for services to foreign-built vessels carrying the American flag, $584; and (6) for certifying invoices for goods exported to the United States which were on the free list, and for which no invoice was required by law as a condition of entry, about $15,000.

The petition alleged that those fees were paid voluntarily to the claimant by persons at whose request the services were performed, and were turned by him into the treasury, because he did not wish to involve himself in a controversy with the Department as long as he held a subordinate position in it, and because he was compelled to obey its orders or be dismissed from office and subjected to the imputation of appropriating money which did not belong to him; and that he credited the

fees to the treasury, relying on the good faith of the government to restore to him whatever belonged to him on a final settlement of his accounts.

The Court of Claims found the facts as follows:

"1. The claimant was consul of the United States at Hong-Kong from February, 1879, until July, 1885, and remained at his post until the latter date, when he returned to the United States.

"2. During his term he turned into the treasury the sum of $5147.00 on account of fees collected for examining Chinese emigrants going to the United States on foreign vessels; of this sum $3923.50 were collected prior to September 1, 1881, and $1223.50 were collected between September 1 and December 31, 1881. Said fees were voluntarily paid by the masters and charterers of said vessels at whose solicitation the service was rendered, and were collected in good faith by the consul.

"3. Soon after assuming charge of the consulate, to wit, February 21 and March 19, 1879, claimant informed the Department of State that, since the enactment of the law of February 19, 1862, prohibiting the coolie trade in which American vessels had been engaged, it had been the practice at Hong-Kong to procure for American and foreign vessels carrying Chinese passengers to the United States a consular certificate of the fact that they were free and voluntary emigrants. The claimant addressed said communications to the State Department to establish that the fees belonged to him, but paid into the treasury, before receiving a reply, the sum of $731.75. In reply to a claim that he, the consul, was entitled to such fees, the Secretary of State replied, in substance, that the fee is an official fee, and must be accounted for to the treasury.

"4. He gave written advice to the agent of the O. & O. S. S. Co., at Hong-Kong, to send steamships which were under the English flag without a consular certificate for the Chinese emigrants, as no law required it, and the agent declined to do so. A copy of his letter to the said agent was forwarded to the State Department. It does not appear that the Department replied to his communication accompanying said letter.

"5. The Bothwell Castle, an English steamship, sailed from Hong-Kong about January 6, 1882, carrying Chinese emigrants without the usual consular certificate of examination, but with a letter from the United States consul addressed to the collector at San Francisco, explaining why the master did not have it. Said vessel entered the port of San Francisco without trouble about February 1, 1882; all other foreign vessels after that time ceased to procure the said consular certificate. A copy of said letter to the collector at San Francisco was forwarded to the State Department; but claimant did not receive a reply. All emigration fees collected up to December 31, 1881, were turned into the Treasury.

"6. The sum of $633.25 was collected in January, 1882, for examination of Chinese on foreign vessels, which was first credited and then charged back to the Treasury; and a letter was written by the claimant to the First Comptroller explaining that item in his accounts. The Comptroller allowed the item as a proper charge.

"7. The charterers of foreign vessels who had paid these fees to the consul afterwards applied to the Treasury to have them refunded, which was refused by the Comptroller on the ground 'that the collection of said fees was proper and they should not be refunded.'

"8. The claimant, after his removal from office, claimed the emigration fees from foreign vessels. His claim was also disallowed. The fees collected subsequently to January 3, 1882, were refunded by the consul to the parties who paid them. The consul was not charged with the fees so refunded, or those he might have collected if he had not declined to continue the practice of examining Chinese emigrants on foreign vessels. The claimant refused to collect fees after receiving from the State Department notice that such fees must thereafter be accounted for as official fees. Said notice, in the form of a letter from the Department, was dated on said date, and reached claimant in due course of mail.

"9. The claimant paid into the Treasury the sum of $5805 on account of fees received by him for certificates of shipment

of merchandise in transit through the United States to other countries.

"10. The claimant paid into the Treasury the sum of $1592 for certifying extra copies or quadruplicate invoices of goods shipped to the United States. The said sum was collected by claimant before the 1st day of September, 1881.

"11. He credited and paid to the Treasury $584 on account of fees collected for shipping and discharging seamen on foreign-built vessels sailing on the China coast under the United States flag. He credited and paid into the Treasury $2095 on account of invoices certified by him for free goods imported into the United States.

"12. The claimant credited and paid into the Treasury fees aggregating $644.01, accruing as follows:

(*a*) Recording instruments at various times, between February 4, 1879, and December 31, 1880	$39 29
(*b*) Cattle-disease certificates, collected in small items from time to time, between February 4, 1879, and September 30, 1880	152 00
(*c*) Interest on deposits at the bank (public moneys deposited between February 4, 1879, and June 30, 1882)	104 51
(*d*) Acknowledgments and authentications of instruments, collected from time to time in small quantities, between February 4, 1879, and December 31, 1879, certifying official character and signature of notary public	48 00
(*e*) Certificates of shipments, or extra invoices, collected during the December quarter, 1881, $2.50 each	292 00
(*f*) Five per cent commission on the estate of Alice Evans, May, 1881	8 21
	$644 01

"13. The payment by the claimant of these several sums of money into the Treasury was for the purpose of avoiding a controversy with the Department. Soon after the claimant was removed from office, and before a final settlement of his accounts, he made a demand that all fees now claimed be credited to him.

"14. At the request of claimant's counsel, the following facts are also found: Said claimant wrote to the State Department, March 19, 1879, as stated in finding 3, in which communication he informed said Department that it had been

the habit of his predecessors to retain said fees as unofficial, and asked to be instructed whether he, the claimant, was not entitled to same. The said Department replied as follows: 'It is now deemed to be the more advisable course to prescribe the fee as an official one to be accounted for to the Treasury.' In instructions to said claimant, dated August 26, 1879, the said Department instructed claimant that the fees for acts which the consul is empowered but not required by law to perform and which relate only to private transactions are unofficial."

As conclusions of law, the court held that the claimant was entitled to recover, for item (1) in the petition, $5147; for item (3), $5805; for items *b*, *d*, and *f* in finding 12, being part of item (4), $208.21; for item (5), $584; and, as a part of item (6), $2095. It rejected the claim of $1592 for certifying extra copies or quadruplicate invoices of goods shipped to the United States, being the amount proved and found as to item (2); and also items *a*, *c*, and *e*, in finding 12, amounting to $435.80, being a part of the $644.01 in item (4). A judgment was rendered for the claimant for $13,839.21, from which both parties appealed. The opinion of the Court of Claims, disposing of the various matters involved, is reported in 24 C. Cl. 1.

It is provided as follows by section 1745 of the Revised Statutes: "The President is authorized to prescribe, from time to time, the rates or tariffs of fees to be charged for official services, and to designate what shall be regarded as official services, besides such as are expressly declared by law, in the business of the several legations, consulates, and commercial agencies, and to adapt the same, by such differences as may be necessary or proper, to each legation, consulate, or commercial agency; and it shall be the duty of all officers and persons connected with such legations, consulates, or commercial agencies to collect for such official services such and only such fees as may be prescribed for their respective legations, consulates, and commercial agencies, and such rates or tariffs shall be reported annually to Congress."

This section concerns itself wholly with "official services." The tariffs of fees to be prescribed by the President from time

to time are those to be charged for "official services." The President is to designate what are to be regarded as "official services," in addition to such as are expressly declared by law. The inhibition on consular officers, as to the collection of fees, is only against the collection, for "such official services," of other fees than the prescribed fees. It is not claimed by the United States in this case that the fees sued for by the claimant fall within the class mentioned in section 1745, of "such as are expressly declared by law." The question for determination is, whether the fees collected by the claimant, and paid into the Treasury, were fees for official services, within the regulations prescribed by the President nder section 1745.

The claimant acted with propriety, and with a high sense of honor, in paying the fees into the Treasury, in order to avoid a controversy with the Department; and he asserted his right to have the fees refunded to him, by making a demand that they should be credited to him in his accounts, before such accounts were finally settled. He did not concede the right of the government to retain the fees; and his action was equivalent to a formal protest made at the time of paying them over. As is said by Judge Weldon, speaking for the Court of Claims in its opinion: "Public officers (upon the question of their compensation and the payment of money into the Treasury) are not bound, in order to save their rights, to place themselves in antagonism to the accounting officers of the Department, suffer themselves to be sued, and incur the odium, for the time, of being in default; but have the right to pay into the Treasury the disputed moneys, and then seek the courts to adjust and determine their claims against their superior and sovereign." Nothing done in the present case can amount to an estoppel against the claimant.

Part of the fees in question accrued while the consular regulations of 1874 were in force, and part under those of 1881. These regulations must be considered in regard to each specific item.

1. As to item (1), $5147, the facts relating to that item are in findings 2 to 8, both inclusive. The consular regulations of

1874 were prescribed by the President on September 1, 1874, and those of 1881 on May 1, 1881.

Paragraph 321 of the regulations of 1874 is as follows: "321. All acts are to be regarded as 'official services,' when the consul is required to use his seal and title officially, or either of them; and the fees received therefor are to be accounted for to the Treasury of the United States." It is to be observed that this paragraph uses the word "required," and does not say that all acts are to be regarded as official services when the consul uses his seal and title officially, or either of them.

Paragraph 333 of those regulations contains a tariff of fees for 107 different services; but none of them specifies the fee for an examination of Chinese emigrants going to the United States on foreign vessels.

Paragraph 489 of the regulations of 1881 reads as follows: "489. All acts or services for which a fee is prescribed in the tariff of fees are to be regarded as *official* services, and the fees received therefor are to be reported and accounted for to the Treasury of the United States, except when otherwise expressly stated therein."

Paragraph 496 in those regulations says: "The following is the revised tariff of official fees, prescribed by order of the President, and to be observed by all consular officers." Among 106 items contained in that tariff, item 35 prescribes a fee of 25 cents for a certificate "to the examination required by section 2162 of the Revised Statutes, for each emigrant. (Art. 21.)" Section 2162 of the Revised Statutes, in connection with section 2158, provides for a certificate to be signed by the consul of the United States residing at the port from which any vessel registered, enrolled or licensed in the United States may take her departure, carrying a subject of China, Japan or any other Oriental country, known as a coolie, containing his name, and setting forth the fact of his voluntary emigration from such port, such certificate to be given to the master of the vessel, and not to be given until the consul is first personally satisfied by evidence of the truth of the facts therein contained. These provisions do not refer to

foreign vessels. Article 21 of the regulations of 1881, referred to in item 35 of paragraph 496, embraces seven paragraphs, and is headed: "Duties as to American Vessels engaged in the Transportation of Chinese and other Emigrants;" and the article expressly states that the duties of the consul under it apply to vessels of the United States. Article 18 of the regulations of 1874 is to the same purport as article 21 of the regulations of 1881.

Neither in the regulations of 1874 nor in those of 1881 is there any designation, as an official service, of the examination of the subjects of China, Japan or any other Oriental country, known as coolies, carried as passengers on board of any vessel other than a vessel registered, enrolled or licensed in the United States. Therefore, the consul, in examining Chinese emigrants going to the United States on foreign vessels, did not perform a service required by law or by the regulations, or any service specified in any tariff of fees, or any official service. The fees received for such service, being paid voluntarily to the consul by the person to whom it was rendered, became the private property of the consul and not the money of the United States. This view is not varied by the fact that the person employed the consul to render the service because he was consul, or by the fact that the consul attached his seal as evidence of his official character; because he was not required by any law or regulation to use either his seal or his title of office officially, nor was any fee prescribed for the service in any tariff of fees.

The practice of consuls to do acts which are not official is recognized in several places in the consular regulations of 1874, as in paragraphs 296 and 297, where it is stated that consuls are at liberty to examine titles for their countrymen at home, "or to do other services for them in a foreign land," "for a private compensation, if it does not interfere with the performance of their official duties;" in paragraph 308, the performing of notarial acts; in paragraph 309, the taking the acknowledgment of deeds, and the taking of depositions and affidavits under the laws of the States and Territories of the Union, for use as evidence in such States and Territories,

respectively; in paragraph 310, the execution of a commission for taking testimony under the authority of a state or territorial tribunal, which function paragraph 311 states "is regarded as outside of the regular duties and responsibility of a consular officer," and in regard to which paragraph 312 states as follows: "It is to be understood that in such cases the consular officer does not act in his quality of an agent of the Federal Government, but simply as a citizen of the United States whose local position and character render him available to his fellow-citizens for such services as might have been rendered by a private individual. He should make himself as useful as he can to his fellow-citizens, without giving offence to the government which gives him his exequatur. But it must be understood in all such cases that he acts as a private citizen, and that the government cannot in any way be made responsible for his acts."

Like provisions are found in paragraphs 471 to 477 of the consular regulations of 1881; and paragraph 478 of the latter says: "The compensation or fee of a consular officer for performing a notarial service, executing a judicial commission, or letters rogatory, or the unofficial services referred to in paragraphs 471, 472 and 475, is not an official but a personal fee, for which he is not responsible to the government as for official fees, unless the service, or a part of it, is one for which a fee is prescribed in the Tariff of Fees. In that case he must account to the government for the fee prescribed in the tariff."

Section 1724 of the Revised Statutes makes a consul liable for the omission to collect any fees "which he is entitled to charge for any official service." By section 1726 it is made the duty of a consular officer to "give receipts for all fees collected for his official services;" by section 1727, to keep a fee-book for the registry of "all fees so received by him;" and by section 1728, to render with his account of fees received a full transcript of such register, and make oath that it contains "a full and accurate statement of all fees received by him, or for his use, for his official services as such consular officer, during the period for which it purports to be rendered."

It is quite clear, therefore, that the statutes and regulations make a distinction between official and unofficial services rendered by a consul.

The allowance to the claimant of the item of $5147 was, therefore, proper.

2. The next item, but which was disallowed, is $1592, for certifying extra copies of quadruplicate invoices of goods shipped to the United States, and which sum was collected by the claimant before the 1st of September, 1881, and is covered by finding 10. It is stated in the opinion of the Court of Claims that all such fees paid after the regulations of 1881 took effect have been refunded, and are not now in controversy.

Sections 2853 and 2855 of the Revised Statutes, as they stood prior to the 1st of July, 1880, when the act of June 10, 1880, c. 190 (21 Stat. 173), took effect, provided as follows: "Sec. 2853. All invoices of merchandise imported from any foreign country shall be made in triplicate, and signed by the person owning or shipping such merchandise, if the same has actually been purchased, or by the manufacturer or owner thereof, if the same has been procured otherwise than by purchase, or by the duly authorized agent of such purchaser, manufacturer or owner." "Sec. 2855. The person so producing such invoice shall at the same time declare to such consul, vice-consul or commercial agent the port in the United States at which it is intended to make entry of merchandise; whereupon the consul, vice-consul or commercial agent shall endorse upon each of the triplicates a certificate, under his hand and official seal, stating that the invoice has been produced to him, with the date of such production, and the name of the person by whom the same was produced, and the port in the United States at which it shall be the declared intention to make entry of the merchandise therein mentioned. The consul, vice-consul or commercial agent shall then deliver to the person producing the same, one of the triplicates, to be used in making entry of the merchandise; shall file another in his office, to be there carefully preserved; and shall, as soon as practicable, transmit the remaining one to the collector of the port of the

United States at which it shall be declared to be the intention to make entry of the merchandise."

Paragraph 491 of the consular regulations of 1874 reads as follows: "491. Consular officers will, on request of the proper collectors, supply them, free of charge, with copies of any such documents on file in their offices as they may need in the discharge of their official duties. Copies prepared by other persons for their own use will, on request, be certified on payment of two dollars. When, however, duplicates of originals are required, or the copy is prepared by the consul, the schedule fee will be exacted as for original service." A like provision is found in paragraph 668 of the regulations of 1881.

By section 4 of the act of June 10, 1880, before referred to, it was provided that sections 2853 and 2855 of the Revised Statutes should be so amended as to require that all invoices of merchandise imported from any foreign country and intended to be transported without appraisement to any of the ports mentioned in section 7 of that act, should be made in quadruplicate, and that the consul, vice-consul or commercial agent, to whom the same should be produced, should certify each of said quadruplicates under his hand and official seal in the manner required by section 2855, and should "then deliver to the person producing the same two of the quadruplicates, one to be used in making entry at the port of first arrival of the merchandise in the United States, and one to be used in making entry at the port of destination, file another in his office, there to be carefully preserved, and as soon as practicable, transmit the remaining one to the collector or surveyor of the port of final destination of the merchandise: *Provided, however*, That no additional fee shall be collected on account of any service performed under the requirements of this section."

By item 36 of the tariff of fees in paragraph 333 of the regulations of 1874, a fee of $2.50 is prescribed for a certificate "to invoice, including declaration, in triplicate." Nothing is there said as to a fee for a copy of an invoice, but in paragraph 491, before quoted, a fee of $2 is prescribed for a certificate to a copy of a document on file in the office of a consular officer, which would include an invoice. In the tariff of fees in para-

graph 496 of the regulations of 1881, in item 36, a like fee of $2.50 is prescribed for a certificate "to invoice, including declaration, in triplicate," and a like fee of $2 under paragraph 668 of the regulations of 1881.

The charges which make up the $1592 are manifestly for official services, which can be performed only under the hand of the consul and his seal of office to the certificate. As is said by the Court of Claims: "The act pertains to a duty specifically prescribed by the laws of the United States, and, upon a tender of the fee, the party making application is entitled to have a certificate attached to the instrument, if it is a copy of the document executed in triplicate. The party being entitled to the certificate, it is the duty of the officer to attach his official seal upon payment of the fees. This is an official duty, and the emolument becomes an official fee." The item of $1592 was, therefore, properly disallowed.

3. The item of $5805, which was allowed, is covered by finding 9, and is for fees received for certificates of shipment of merchandise in transit through the United States to other countries. These were not the invoices referred to in sections 2853 and 2855 of the Revised Statutes, either as they originally stood or as they were amended by the act of June 10, 1880. The law did not require the consul to issue those certificates; no provision was made for a fee for them in the regulations of 1874, or in those of 1881; and it does not appear that the regulations of the Treasury Department required a consul to perform any duty in relation to such goods. This item was, therefore, properly allowed.

4. The next item, $644.01, relates to fees "for notarial and clerical work," being six items covered by finding 12. Of these, item *a*, being fees collected for "recording instruments at various times, between February 4, 1879, and December 31, 1880, $39.29," was disallowed. This item was rejected by the Court of Claims because it did not appear, from the specification or proof, what was the character of the instruments recorded, and because it was, therefore, said to be impossible to determine whether the recording came within the regulations of 1874 or those of 1881, and because, for aught that

appeared, the instruments might have been those specially provided for by the tariff of fees in the regulations.

But we think the Court of Claims erred in rejecting that item. The fees accrued from February 4, 1879, to December 31,.1880, while the regulations of 1874 were in force. Article 25 of those regulations, headed "Record-Books and Archives," in paragraphs 398 to 414, requires that a consul shall keep various books of records. Of course, the fees in question were not for keeping such record books or for recording in them the instruments which were recorded in them, because such instruments were all of them official documents, and the fact that the item covers fees collected by the consul for recording instruments and paid into the Treasury shows that the recording did not relate to official instruments, or to official acts, but related to private transactions for individuals, not requiring the use of the consul's title or seal of office. This item should have been allowed.

Item *b* in finding 12, which was allowed, is for "Cattle-disease certificates, collected in small items from time to time, between February 4, 1879, and September 30, 1880, $152." It was properly allowed, as there is nothing in the statutes or in the regulations in relation to the duties or powers of a consul as to "cattle-disease" or certificates respecting the same.

Item *c*, in finding 12 is "Interest on deposits at the bank, (public moneys deposited between February 4, 1879, and June 30, 1882,) $104.51." This was disallowed, and we think properly. The moneys are stated to be "public moneys," in respect to which the consul was a trustee, and any interest which he received on the funds belonged to the United States. He was not required to put the funds out at interest, but if he did so, the accretion belonged to the government.

Item *d* in finding 12, which was allowed, is for "Acknowledgments and authentications of instruments, collected from time to time in small quantities, between February 4, 1879, and December 31, 1879, certifying official character and signature of notary public, $48." These were not official services required by statute or the regulations, and were rendered to

persons who requested their performance. The allowance of this item was proper.

Item *e* in finding 12, which was disallowed, is for "Certificates of shipments, or extra invoices, collected during the December quarter, 1881, $2.50 each, $292." This disallowance was proper, for the reasons stated in regard to the item of $1592.

Item *f* in finding 12 is for "Five per cent commission on the estate of Alice Evans, May, 1881, $8.21." This evidently was a fee in the settlement of a private estate, and was properly allowed.

Thus, of the $644.01 in finding 12, items *a*, *b*, *d* and *f* are allowable, amounting in all to $247.50, instead of $208.21 allowed by the Court of Claims.

5. The next item, and which was allowed, is $584 on account of fees collected for shipping and discharging seamen on foreign-built vessels sailing on the China coast under the United States flag, and is covered by finding 11. The claimant insists that, while he had authority to perform those services, he was not required to do so by any statute or regulation.

Paragraph 194 of the regulations of 1881 says: "194. In the case of American or foreign-built vessels purchased abroad and wholly owned by American citizens, it is known that the crews are usually made up of men who are not American citizens, and who have not acquired the character of American seamen under the law and as set forth in paragraph 199. Seamen of this class, when not serving under a contract made in the United States, are not regarded as within the jurisdiction of a consular officer as to their shipment or discharge."

In paragraph 131 of the regulations of 1874, it is said, that the statutory authority of a consul to act in respect to the discharge of seamen from a vessel of the United States clearing from a port of the United States, is limited to "1st. The sale in a foreign country of a ship or vessel belonging to a citizen of the United States. 2d. The discharge, with his own consent, of a seaman or mariner, being a citizen of the United States. 3d. A discharge after a survey of the vessel, and finding the same unseaworthy."

In the present case, what the consul did was to ship and discharge seamen on foreign-built vessels sailing on the China coast under the United States flag. It must be taken that these seamen were not American citizens, and that the vessel did not clear from a port of the United States, so as to come within the provisions of paragraphs 128, 129, 130 and 131 of the regulations of 1874. The item of $584 was therefore properly allowed.

6. The next item allowed was one of $2095, for certifying invoices "for free goods imported into the United States," and is covered by finding 11. This allowance seems to have proceeded upon the view that the law did not require an invoice of goods which were not subject to duty; that the consul had no official duty to perform in respect to an invoice of such goods; that the service was performed at the instance of the shipper, and for his convenience; that the matter was one purely personal between the consul and the party who paid the fee for the certificate; and that, as the government was not interested in the goods, the consul was under no obligation to account to the United States for the fees.

We think this view was erroneous. By section 2853 of the Revised Statutes, "all invoices of merchandise imported from any foreign country" are to be made in triplicate, whether the goods have actually been purchased or have been procured otherwise than by purchase. By section 2854 "all such invoices" are required, before the merchandise is shipped, to be produced to the proper consul. By section 2855, the person producing "such invoice" is to make a specified declaration, and the consul is to endorse upon each of the triplicates a specified certificate, and is to transmit one of the triplicates "to the collector of the port of the United States at which it shall be declared to be the intention to make entry of the merchandise." By section 2860, it is provided that, except as allowed in the four preceding sections, which do not apply to the present question, "no merchandise imported from any foreign place or country shall be admitted to an entry unless the invoice presented in all respects conforms to the requirements" of sections 2853, 2854 and 2855, and has thereon the certificate of the consul specified in those sections, nor unless the invoice is verified, at the time of making the entry, by a specified

oath, nor unless the triplicate transmitted by the consul to the collector has been received by him. By section 2851, a consul is entitled to demand and receive a fee of $2.50 for taking the verification of an invoice and making the certificate. It is quite clear, therefore, that there can be no entry without a properly certified invoice.

By paragraph 462 of the regulations of 1874 and paragraph 637 of those of 1881, "all invoices of importations from countries in which there are" consular officers, "must, before the shipment of the merchandise, be produced to and authenticated by the United States consular officer nearest the place of shipment for the United States."

In addition to this, it is entirely clear, that the question of determining whether goods to be shipped will, when imported into the United States, be free from duty, is a question which could not be left to the determination of a consul. It often involves intricate points of fact and of law, and must be as wholly cognizable by the proper officers and tribunals of the United States, appointed for the purpose, as the question of the proper rate of duty on dutiable goods.

The item of $2095 was, therefore, improperly allowed.

It results, therefore, that the items to be allowed are $5147, $5805, $247.50 and $584, being an aggregate of $11,783.50.

It is contended for the United States that the claimant has no right to appeal in regard to the items which he claims were improperly disallowed, because they do not in the aggregate amount to more than $3000. But we are of opinion that, as section 707 of the Revised Statutes authorizes an appeal to this court on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and as the appeal by the United States in this case is from the judgment of $13,839.21 in favor of the claimant, it is competent for the claimant, as he also has taken an appeal from that judgment, to avail himself of anything in the case which properly shows that that judgment was not for too large a sum.

The judgment of the Court of Claims is reversed, and the case is remanded to that court with a direction to enter a judgment in favor of the claimant for $11,783.50.

BEALS *v.* ILLINOIS, MISSOURI AND TEXAS RAILROAD COMPANY.

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

No. 111. Argued January 16, 17, 1890. — Decided February 3, 1890.

A decree in equity, cancelling bonds of one railroad corporation and a mortgage by a second railroad corporation of its property to secure their payment, upon a bill filed by the latter against the former and the trustee under the mortgage, binds all the bondholders, unless obtained by fraud. And a bill afterwards filed by bondholders not personally made parties to that suit against those two corporations and a third railroad corporation alleged to claim a right in the property, by purchase or otherwise, prior to the lien of the bondholders, charging fraud and collusion in obtaining that decree, cannot be maintained without proof of the charges, if the second and third corporations, by pleas and answers under oath, fully and explicitly deny them, and aver that the third corporation had since purchased the property in good faith and without knowledge or notice of any fraud or irregularity in obtaining the decree.

This was a suit in equity by Beals, a citizen of New York, against the Illinois, Missouri and Texas Railway Company, the Cape Girardeau and State Line Railroad, and the Cape Girardeau Southwestern Railway Company, all three corporations of Missouri, and Thilenius and Blow, trustees of the Cape Girardeau and State Line Railroad, and Fletcher, all three citizens of Missouri.

The amended bill (which was the only one copied in the transcript of the record) alleged that in April, 1871, the Cape Girardeau and State Line Railroad, pursuant to a contract with Fletcher, executed a deed conveying all its property and franchises in its road, as then existing or afterwards to be constructed, from the shore of the Mississippi River in the city of Cape Girardeau in the State of Missouri to the boundary line between the States of Missouri and Arkansas, to Thilenius and Blow in trust, and directing them as trustees and Thilenius, the president of that company, to join with the Illinois, Missouri and Texas Railway Company (which had

been organized under the general laws of Missouri for the purpose of completing the road) in the execution of a mortgage of all the said property and franchises to secure the payment of bonds issued by the last named company; that in May, 1871, such a mortgage, afterwards duly recorded, was executed by those two companies and by Thilenius and Blow, trustees as aforesaid, to Winston and Hoadley in trust to secure the payment of 1500 bonds of $1000 each of the company last named, which were afterwards issued; that the plaintiff was the *bona fide* owner and holder for value of sixty-eight of those bonds; that by default in payment of interest on these bonds there had been a breach of condition of the mortgage; that most or all of the rest of such bonds had come into the possession of the defendants, or of one or more of them, and thereby the defendants had controlled the action of Winston, the surviving trustee named in the mortgage, to the prejudice of the plaintiff; that Winston was now dead and no other trustee had been appointed; that the Cape Girardeau Southwestern Railway Company for several years had had the sole use and possession of the property and franchises, and claimed a right therein, by purchase or otherwise, prior to the plaintiff's lien; that a systematic, fraudulent and continuous effort had been made by the defendants, or some of them, to prevent the collection of interest or principal on the plaintiff's bonds; that the judgment set up in bar in the defendant's plea to the bill of complaint in this suit, and alleged to have been obtained on or about March 30, 1876, in the Circuit Court of Cape Girardeau County, Missouri, by the Cape Girardeau and State Line Railroad, one of the defendants in this cause, was obtained by the said defendants in fraud against the bondholders, in that Winston was served and appeared in person only and not as trustee, and allowed the judgment to be entered by default, without notice to the bondholders, and by collusion with Houck, then attorney for the petitioners and now president of the Cape Girardeau Southwestern Railway Company, both Winston and Houck knowing that the allegations of the petition were false and fictitious, and intending to defraud the bondholders; and that the plaintiff

was not a party to the action and had no knowledge of it until his counsel examined the record on August 22, 1884.

The bill prayed for answers under oath, an injunction and a decree declaring the mortgage and the plaintiff's bonds to be valid, and applying the mortgaged property to the payment of the bonds, and for further relief.

To the amended bill the three defendant corporations severally filed pleas, and two of them filed answers under oath in support of their pleas.

The plea of the Cape Girardeau and State Line Railroad specifically denied all the allegations of the bill as to fraud and collusion; and alleged that on March 30, 1876, it brought an action in the Circuit Court of Cape Girardeau County, being a court of general jurisdiction and possessed of full chancery powers, (the principal office and place of business of that corporation, as well as the largest part of the real estate to be affected by that action, being in that county,) alleging that the conveyance and the mortgage made in its name were without authority and in fraud of its stockholders; that the property conveyed to Thilenius and Blow was reconveyed by them to the plaintiff in December, 1871, and before the mortgage was recorded; and that the bonds of the Illinois, Missouri and Texas Railway Company, pretended to be secured by the mortgage, were issued after that time, and were held by the defendants, but not as purchasers for value; and praying that the conveyance and mortgage, as well as the bonds, might be cancelled and declared void; that in that action said railway company, Winston, as sole surviving trustee under the mortgage, and a large number of corporations and individuals claiming to be holders of bonds secured by the mortgage, as well as all other persons whose names were unknown, but who might claim to be holders of such bonds, were made defendants; that said railway company, Winston, as surviving trustee, and various other defendants claiming to be holders of bonds, were actually served with process, and all nonresident bondholders who could be named, together with all unknown bondholders, were duly served by publication; that said railway company and Winston, as surviving trustee, as well as

many bondholders, appeared and pleaded, putting in issue the allegations of the petition; that on January 25, 1878, the court entered a decree (a certified copy of which was set forth in the plea) establishing the allegations and granting the prayer of the petition, which was the same decree described in the amended bill as a judgment entered March 30, 1876; and that that decree was obtained on due and legal service of process, and after appearance of the defendants and hearing of proofs, and without any fraud, covin or concealment of any kind, or any collusion, agreement or understanding between Winston and the plaintiff's attorney, and had never been appealed from, but remained in full force. Wherefore the Cape Girardeau and State Line Railroad pleaded that decree in bar. The plea was supported by an answer under oath, denying generally and specifically all fraud charged in the amended bill.

The Cape Girardeau Southwestern Railway Company, by plea, and answer under oath in support thereof, set up the same defence; and also, by permission of the court, the further defence that in August, 1880, the Cape Girardeau and State Line Railroad, claiming to be the owner and being in full possession of the property, conveyed it for valuable consideration to Houck by deed duly recorded; that Houck took the deed in good faith and without any knowledge or notice of any right of the plaintiff or any other bondholder, or of any incumbrance on the property, or defect in the decree; that afterwards the Cape Girardeau Southwestern Railway Company was incorporated and organized under the General Statutes of Missouri on August 10, 1880, and took from Houck a conveyance of the property for valuable consideration, in good faith, and without any knowledge or notice of any fraud or irregularity in obtaining the decree, and afterwards proceeded to construct the railroad.

The plea of the Illinois, Missouri and Texas Railway Company set up the decree of January 25, 1878, by which it was enjoined from making any claim to the property; and alleged that it had not since claimed any right in or exercised any control over the property, or received any income therefrom.

The plaintiff filed a general replication to "the answers" of

the three corporations. The Cape Girardeau and State Line Railroad and the Cape Girardeau Southwestern Railway Company moved the court for "judgment on the pleas and replication in this cause, for the reason that the plaintiff has not taken issue on the said pleas, nor is the alleged replication thereto any reply in law."

No separate ruling or order was made upon this motion. Nor were any proofs taken in the case. But the case was afterwards submitted and argued "upon the bill, pleas, answers and replication," and thereupon the court, being of opinion that the equities were with the defendants, dismissed the bill. 27 Fed. Rep. 721. The plaintiff appealed to this court.

Mr. A. G. Vanderpoel (with whom was *Mr. Henry W. Dennison* on the brief) for appellant.

Mr. George D. Reynolds for appellees.

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

The irregular form in which the plaintiff's case is presented need not be dwelt upon, because, in any possible aspect of the controversy between the parties, the result is not doubtful.

The former judgment, upon which the plaintiff anticipated that the defendants would rely, is not described in the amended bill otherwise than by reference to a plea to the original bill, neither of which is made part of the record transmitted to this court. But the pleas to the amended bill clearly identify the judgment drawn in issue.

The plaintiff's replication is, in terms, only to "the answers" of the three defendant corporations, and not to their pleas, although each of them had filed a plea, and the only answers in the cause were those filed by two of them in support of their pleas. But it is immaterial to consider whether the effect of the submission of the case to the court "upon the bill, pleas, answers and replication," after the defendants had moved for judgment for insufficiency of the replication, was, so far as the

pleas were concerned, to set down the case for hearing upon the bill and pleas, or to treat the replication as taking issue on the pleas as well as on the answers. In the one view, the facts relied on by the defendants were conclusively admitted to be true; in the other view, so far as they were responsive to the allegations of the bill, they were conclusively proved by the answers under oath, which the plaintiff introduced no evidence to control. Mitford Pl. (4th ed.) 301, 302; Rules 33 and 38 in Equity; *Farley* v. *Kittson*, 120 U. S. 303, 315; *Vigel* v. *Hopp*, 104 U. S. 441.

Upon the facts thus established, no ground is shown for maintaining the bill. The former judgment was rendered by a court of competent jurisdiction, to which not only the railroad company that issued the bonds, but the surviving trustee under the mortgage made in the name of another company to secure the payment of those bonds, were made parties. The bondholders were thus fully represented in that suit, and bound by the decree cancelling and annulling the bonds and mortgage, unless the decree was fraudulently obtained. *Kerrison* v. *Stewart*, 93 U. S. 155; *Shaw* v. *Railroad Co.*, 100 U. S. 605; *Richter* v. *Jerome*, 123 U. S. 233; *Knox County* v. *Harshman*, *ante*, 152. The bill alleges that that decree was obtained by fraud, and by collusion between the trustee and second company and Houck its attorney, and that the third company claimed a right in the property, by purchase or otherwise, prior to the plaintiff's supposed lien. The pleas and answers under oath of both these companies fully and explicitly deny the fraud and collusion charged; and those of the third company further aver that after the decree the property was conveyed by the second company to Houck and by him to the third company, and that both Houck and the third company purchased the property in good faith, for valuable consideration, and without knowledge or notice of any fraud or irregularity in obtaining the decree.

These averments being directly responsive to the allegations of the bill, and therefore conclusive in favor of the defendants' title to the property and against the plaintiff's claim, it is unnecessary to consider other grounds taken in argument.

Decree affirmed.

ADAMS *v.* CRITTENDEN.

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

No. 952. Submitted January 13, 1890. — Decided February 3, 1890.

A person in failing circumstances conveyed away his equity of redemption in mortgaged real estate, and then became bankrupt. His assignee in bankruptcy recovered the tract from the grantee in an action brought for that purpose, to which the mortgagee was not made party, and then conveyed it by deed to a purchaser. The mortgagee sued in the state court to foreclose his mortgage, making the bankrupt, his assignee, and the grantee of the assignee, parties; the land was sold under a decree of foreclosure; and the purchaser under it received a deed and was put into possession. Thereupon the grantee of the assignee in bankruptcy brought ejectment against him to recover possession; *Held*, that the state court had jurisdiction of the foreclosure suit, and had a right to hear and determine whether the mortgage debt was still a lien, and whether the mortgagee's claim was upon the land or upon the fund in the hands of the assignee in bankruptcy.

This was an action of ejectment, and was submitted to the trial court upon an agreed statement of facts, which appears in the record. The contest was between a purchaser from an assignee in bankruptcy and a purchaser at subsequent foreclosure proceedings in a state court. The land was encumbered with liens at the time the bankruptcy proceedings were commenced. The title was not in the bankrupt, nor was the property surrendered by him to the assignee. Subsequently, however, the assignee sued the party in whose name the title stood and recovered the land. Thereafter, it was sold by the assignee, and the plaintiff in error became the purchaser. Such sale was for one-third cash, the balance on time, a lien being retained for the deferred payments. Upon this sale a deed was made, and the purchaser put in possession. The lien holders were not made parties to any proceedings in the bankrupt court. They never proved their claims there. After the conveyance by the assignee to the plaintiff in error, these lien owners commenced proceedings in the chancery court of the State to

Argument for Plaintiff in Error.

foreclose their liens, making the bankrupt, the assignee in bankruptcy, and the purchaser, among others, parties defendant. The assignee and the purchaser defended on the ground that the state court had no jurisdiction to ascertain and enforce liens upon property of a bankrupt which had passed into the jurisdiction of the bankrupt court and by it been disposed of; but this defence was overruled, the liens declared and the land ordered to be sold. An appeal was taken to the Supreme Court of the State, but it affirmed the decree. Pending the proceedings in the state chancery court, a bill was filed in the United States Circuit Court to enjoin those proceedings, but after hearing that bill was dismissed. After the affirmance by the Supreme Court of the decree of the chancery court, the land was sold, and the defendants in error became the purchasers. Upon such purchase they received the ordinary deed and were put in possession. Thereupon this action of ejectment was brought.

Mr. S. Watson, *Mr. H. E. Jones* and *Mr. Lawrence Cooper* for plaintiff in error.

I. The bankrupt court, having absolute and exclusive jurisdiction of the property, had the power to sell it and make a good title. There is no question concerning the regularity of the proceedings in bankruptcy. The land was sold absolutely, and free from all liens, by the bankrupt court, deed made in regular form, and the plaintiff, the purchaser, was put in possession. This gave him absolute title, and entitles him to a recovery.

II. The plaintiff was in possession of the land under a deed made to him by the officer of the bankrupt court, in pursuance of a sale, made under the order of that court, having absolute and exclusive jurisdiction over the land. He was ousted by the defendants under subsequent proceedings in a state court having no jurisdiction over the subject matter. The proceedings in the state court were therefore void, and the plaintiff, for this reason, ought to recover.

III. It is agreed that the land in question was worth

$7000; that the annual rents were worth $500 for each year; and that the plaintiff was ousted by the defendants on the 4th of April, 1883. Therefore the plaintiff ought to have a judgment for possession of the land, and a judgment against the defendants for the rentals of the land, at the rate of $500 a year, from April 4, 1883.

Mr. Milton Humes and *Mr. R. C. Brickell* for defendants in error.

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

The regularity of the proceedings of the state court is not challenged. They were all subsequent to the proceedings in the bankrupt court, and were not commenced until after the title had passed away from the assignee in bankruptcy. The general jurisdiction of the state court is conceded. The purchaser, the plaintiff in error, was a party to that suit, and the claim of the plaintiff in error can only be sustained upon the theory that by reason of the bankrupt proceedings the state court was prevented from taking jurisdiction.

But the truth is, the question is one of error and not of jurisdiction. The state court had jurisdiction of the parties, and they were served with process and appeared. It had jurisdiction of the foreclosure of liens, and it had a right to hear and determine whether the alleged liens still existed, and whether there was any valid defence to their enforcement. The property upon which the liens were claimed was not in the possession of the bankrupt court, but only in the possession of the party purchasing from it. So, whether it erred in deciding that the lien holders had a claim upon the land rather than upon the fund in the hands of the assignee in bankruptcy, is immaterial. It presented simply a matter of error. An error in its ruling did not oust it of jurisdiction. The error, if error it was, could be corrected only by appeal. The failure of the party to exhaust his remedy in that direction does not now entitle him to disregard the entire proceed-

ing as without jurisdiction. *Winchester* v. *Heiskell*, 119 U. S. 450.

We see no error in the ruling of the Circuit Court and its judgment is

Affirmed.

STREET *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 1123. Submitted January 10, 1890. — Decided February 3, 1890.

It was the purpose of Congress by the 12th and 13th sections of the army appropriation act of July 15, 1870, 16 Stat. 318, 319, to reduce the number of officers in the army, and to that end § 11 authorized the President to eliminate from it officers who were unfit for the discharge of their duties by reason of a cause which had no meritorious claim upon the consideration of the government, while § 12 made a general grant of power to the President to make the reduction by selecting the best, and mustering out the residue; and the President, being empowered to proceed under either grant, could commence proceedings under § 11, and abandon them, and then proceed under § 12.

The 12th section of the army appropriation act of July 15, 1870, 16 Stat. 318, authorized the President to fill vacancies in the army then existing, or which might occur prior to the 1st day of January then next. The 1st day of January, 1871, fell on Sunday; *Held*, that, in the exercise of the power thus conferred, an order made on the 2d day of January, 1871, was valid.

The executive action, under the army appropriation act of July 15, 1870, reducing the army, was recognized by Congress in 18 Stat. 497, c. 159, § 2; 20 Stat. 35, c. 50; 20 Stat. 321, c. 100; 20 Stat. 354, c. 175; 21 Stat. 510, c. 151, and was thereby validated, even if otherwise invalid.

THE court stated the case, in its opinion, as follows:

This is an appeal from a judgment of the Court of Claims. 24 C. Cl. 230. Appellant brought his action in that court to recover, not for services actually rendered, but for sixteen years' salary as first lieutenant, claiming that this was due by reason of an alleged illegality in the order of January 2, 1871, discharging him from the service. That order is, therefore, the matter of inquiry.

Statement of the Case.

In 1869 and 1870 acts of Congress were passed looking to a reduction in the army, and the order in question was made in pursuance of the last of these acts. The intent of Congress is obvious, and all proceedings had to carry such intent into effect should be liberally construed, and not subjected to any such technical limitations as will thwart such obvious purpose. The act of July 13, 1866, 14 Stat. 92, has no bearing on the case at bar, for, as held by this court in *Blake* v. *United States*, 103 U. S. 227, it simply placed a limitation on the personal power of the President, as commander-in-chief in time of peace, to dismiss from the service. It was not intended to have — as it could not have — any effect on the power of a subsequent Congress to reduce the army by appropriate legislation in respect to either its officers or enlisted men.

The act of March 3, 1869, 15 Stat. 315, c. 124, §§ 2–7 inclusive, is significant only as indicating the intent of Congress that the army should be reduced, for the method of reduction there provided is simply the cessation of enlistments and appointments. Evidently the reduction by this method was not as rapid as was desired, for on July 15, 1870, an act was passed making provision for a direct reduction. 16 Stat. 315, c. 294. Section 2 authorizes and directs the President to reduce on or before the first day of July, 1871, the number of enlisted men to thirty thousand. With respect to the officers there were several sections aimed at reduction; some abolishing certain offices; others providing that no appointments to particular offices should be made until the number of incumbents was reduced below a prescribed limit. In addition, there were four provisions having general application. Section 3 authorized the President to grant an honorable discharge to all officers applying on or before the first of January, 1871, and giving the officers so discharged an additional year's pay and allowances. Sections 4 and 5 increased the retired list to 300, and authorized the President to place on such list, on their own application, officers with thirty years' service. The other provisions are found in sections 11 and 12, which, as being the sections specially bearing on the questions in this case, are quoted as follows:

Statement of the Case.

"SEC. 11. *And be it further enacted*, That the general of the army and commanding officers of the several military departments of the army shall, as soon as practicable after the passage of this act, forward to the Secretary of War a list of officers serving in their respective commands deemed by them unfit for the proper discharge of their duties from any cause except injuries incurred or disease contracted in the line of their duty, setting forth specifically in each case the cause of such unfitness. The Secretary of War is hereby authorized and directed to constitute a board to consist of one major general, one brigadier general and three colonels, three of the said officers to be selected from among those appointed to the regular army on account of distinguished services in the volunteer force during the late war, and on recommendation of such board, the President shall muster out of the service any of the said officers so reported, with one year's pay; but such muster-out shall not be ordered without allowing such officer a hearing before such board to show cause against it.

"SEC. 12. *And be it further enacted*, That the President is hereby authorized to transfer officers from the regiments of cavalry, artillery and infantry to the list of supernumeraries; and all vacancies now existing, or which may occur prior to the first day of January next, in the cavalry, artillery, or infantry, by reason of transfer, or from other causes, shall be filled in due proportion by the supernumerary officers, having reference to rank, seniority and fitness, as provided in existing law regulating promotions in the army. And if any supernumerary officers shall remain after the first day of January next they shall be honorably mustered out of the service with one year's pay and allowances: *Provided*, That vacancies now existing in the grade of second lieutenants, or which may occur prior to said date, may be filled by the assignment of supernumerary first lieutenants, or officers of higher grades, who, when so assigned shall rank as second lieutenants, *providing* [provided] such officer shall prefer to be assigned, instead of being mustered out under the provisions of this section; and officers so assigned shall take rank from the date of their original entry into the service: *And provided further*,

That no chaplain be appointed to posts or regiments until those on waiting orders are assigned."

It appears from the findings that on October 27, 1870, the claimant, who was on active duty at Fort Bidwell, California, was reported by the Department Commander, Lieutenant Colonel George Crook, as unfit for the proper discharge of his duties from other causes than injuries incurred or disease contracted in the line of his duties. His name was submitted to the board organized in pursuance of the 11th section quoted *supra*. On the 17th of November the board requested that he, with others named, be given a hearing, as required by that section. On November 19th the Adjutant General informed the board that the stations of these officers were so remote that it was impossible for it to consider their cases, and that the Secretary of War had directed that they be not ordered to appear. In compliance with this order, on November 22, the papers in these cases were returned to the Secretary of War. In other words, the proceedings initiated in section 11 were abandoned. No inquiry was ever made as to the alleged unfitness for the proper discharge of his duties from causes other than injuries incurred or disease contracted in the line of duty. It appears further, that on January 2, 1871, January 1st being Sunday, an order was issued by the Secretary of War, which, so far as it affects this claimant, reads as follows:

(*General Orders, No.* 1.)

War Department, Adjutant General's Office.
Washington, *January* 2, 1871.

By direction of the President, the following officers of the army are transferred, assigned, or mustered out of the service, to take effect from the 1st instant:

I. — *Transfers to the List of Supernumeraries, under Section 12 of the Act Approved July* 15, 1870.

* * * * *

First Lieutenant Harlow L. Street, First Cavalry.

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Argument for Appellant.

II. — *Transfers and Assignments to Fill Vacancies to the Present Date.*

* * * * *

First Lieutenant Max Wessendorff, unassigned, to the First Cavalry, *vice* Street, transferred to the list of supernumeraries.

* * * * *

III. — *Unassigned Officers whose Commissions have expired under Section* 12 *of the Act of Congress approved July* 15, 1870, *and who are Honorably Mustered out of the Service.*

* * * * *

First Lieutenant Harlow L. Street.

* * * * *

By order of the Secretary of War:

E. D. Townsend,
Adjutant General.

Subsequently, on September 18, 1871, he received the year's pay provided for in section 12, and still later, on the 18th of February, 1881, he was paid the sum of $117.95 upon treasury settlement, on account of some errors in the previous payment.

Mr. J. M. Vale for appellant.

I. Being reported as unfit for the proper discharge of his duty for cause other than injuries incurred or disease contracted in the line of his duty, by the commanding officer of a military department and by the general of the army, on the 10th of November, 1870, under the provisions of section 11 of the act of July 15, 1870, 16 Stat. 315, appellant, then an officer in the military service of the United States, could not be legally mustered out of the service under the said act of July 15, 1870, without being allowed a hearing before the board provided for in that section, to show cause against such muster out. 13 Opinions Attys. Gen. 353; 13 Opinions Attys. Gen. 412; *United States* v. *Freeman*, 3 How. 556, 565.

II. Section 12 of that act authorized the President to transfer officers from active duty to the list of supernumeraries, and, prior to January 1, 1871, to fill vacancies on the active list by

supernumerary officers. This authority expired January 1, 1871, and after that time no disposition could legally be made of a supernumerary officer, except to honorably muster him out of the service, and pay him in accordance with the provisions of the act. The list ceased on that date, except as a designation for honorable muster out, and no transfers could legally be made to it on the 2d day of January, 1871. *Brown* v. *Barry*, 3 Dall. 365; *Minor* v. *Mechanics' Bank*, 1 Pet. 46; *Thornley* v. *United States*, 113 U. S. 310.

III. The acceptance or non-acceptance by appellant of the discharge and year's pay, provided for officers discharged under the act of July 15, 1870, with or without protest, did not alter his legal status, if notified of his discharge as a supernumerary officer under the erroneous construction of the law. *Brant* v. *Virginia Coal & Iron Co.*, 93 U. S. 326; *Ketchum* v. *Duncan*, 96 U. S. 659; *Morgan* v. *Railroad Co.*, 96 U. S. 716; *United States* v. *Redgrave*, 116 U. S. 474.

IV. The nomination of Wainwright by the President *vice* Wessendorff promoted, and his confirmation by the Senate, did not operate to supersede appellant, who was a stranger to the record of nomination and confirmation, and was not a nomination by the President of Wainwright and his confirmation by the Senate, to the office held by appellant, Harlow L. Street. Official Army Register 1871; *Blake* v. *United States*, 103 U. S. 227; Army Regulations 1863, paragraph 20; *Lapeyre* v. *United States*, 17 Wall. 191; *Runkle* v. *United States*, 122 U. S. 543.

Mr. Assistant Attorney General Cotton and *Mr. F. P. Dewees* for appellees.

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

The principal contention of the appellant is that, proceedings having been commenced under section 11, they should have been carried to a close, and that he could be mustered out of the service only upon an adjudication by that board of

unfitness. But this view cannot be sustained. It arises from a misconception of the scope of the two sections. The first aims to eliminate from the army those officers who are unfit for the discharge of their duties, and whose unfitness springs from no cause of meritorious claim upon the consideration of the government; while the other is a grant of general power to the President to reduce the number of officers by selecting the best and mustering out the residue. It is comprehensive in its scope, and not at all dependent upon the failure to accomplish the requisite reduction through proceedings under section 11. It is in no manner subordinated to or dependent upon that section, and grants a power which can be exercised irrespective of all other proceedings.

The appellant had no vested right to an adjudication upon the matter reported against him. In the absence of express limitation, the government may always withdraw charges which it has made. There is nothing in the words of either section, nothing in the scope and purpose of their provisions, or in any general rule of law, which prevented the government from abandoning the proceedings initiated under section 11, and proceeding to muster out the appellant under section 12.

The other proposition of the appellant is that the authority given by section 12 was not strictly pursued. While it is conceded that the President might add to or take from the list of supernumerary officers, it is urged that he could muster out only those who were supernumerary officers at the close of the first day of January, 1879, the language being: "And if any supernumerary officers shall remain after the first day of January next they shall be honorably mustered out," etc., whereas, by the order actually made, he was transferred to the supernumerary list only on the second day of January. Concede the irregularity, and it is not such as vitiates the order. The purpose of the act is obvious. The direction of Congress was clear and distinct, and it would be strange if any executive officer could, by irregularity in executing the mandate of Congress, thwart this purpose. The matter of time was not vital. The purpose was reduction, and a reduction to be accomplished by selecting the best and mustering out the poorer element;

and while Congress prescribed the time within which this mandate was to be executed, there is neither in terms nor by implication any subordination of the power to the matter of time.

Again, it must be noticed that the first day of January was Sunday, that is, a *dies non*, and a power that may be exercised up to and including a given day of the month may generally, when that day happens to be Sunday, be exercised on the succeeding day. So that it is a matter worthy at least of consideration whether the power was not exercised within the very limits of time prescribed by the act.

It is well in this respect to compare this section with section 3. By that the President was authorized to honorably discharge, with pay and allowances, officers who should apply on or before January 1, 1871. By that section a reduction through the voluntary act of army officers was contemplated, and such voluntary action was authorized and invited to be had on the first day of January. While section 12 was not dependent upon section 3, yet it is obvious that action so voluntarily taken by any army officer would limit the amount of enforced reduction, and to that extent relieve the President from embarrassment in the selection authorized by section 12; and there was a propriety, if nothing else, in waiting until the close of the first day of January before exercising the power of selection and mustering out.

It will also be noticed that section 12 places no limitation on the time within which the President is authorized to transfer officers to the list of supernumeraries. If voluntary resignation by the close of the first day of January made sufficient reduction, there would be no necessity of transferring any to the list of supernumeraries, and it was only the supernumerary officers remaining after the 1st of January — that is, the officers then found not to be needed for the service — who were to be mustered out under that section. There was, therefore, no requirement that the President should transfer to the supernumerary list before the close of the first of January; the number which it was necessary to transfer could not be absolutely determined until the close of that day, and it was only those who, at the close of that day, were not needed

in the service, that the President could muster out. All these matters justified the action of the President taken on the 2d of January, and if they do not establish that it was in full and literal compliance with the exact provisions of section 12, they certainly leave so slight a departure as scarcely to be worthy of mention. It is certainly no such deviation from the prescribed course as to vitiate the order and thus nullify the express direction of Congress.

But we are not limited to this. Full power of legislation in the matter of increase and reduction of the army is with Congress. It prescribed in this act the proceedings by which that reduction was to be accomplished. In pursuance of that act certain proceedings were had. The power which can direct what proceedings shall be had can approve and make valid any proceedings which are actually taken. The power which can give authority to act can ratify any act that is taken, and generally legislative recognition of an act or a corporation validates the act or the corporation, although neither one nor the other may have had full prior legal authority. *Comanche County* v. *Lewis*, *ante*, 198.

There was but one order issued under section 12 for the mustering out of supernumerary officers. In that order were many names besides that of the appellant, and the act of March 3, 1875, 18 Stat. 497, c. 159, § 2, refers to "any person who was mustered out as a supernumerary officer of the army with one year's pay and allowances," under the act of 1870, that we have been considering. Further, on April 8, 1878, 20 Stat. 35, c. 50; 25th of February, 1879, 20 Stat. 321, c. 100; March 3, 1879, 20 Stat. 354, c. 175; and March 3, 1881, 21 Stat. 510, c. 151, acts were severally passed authorizing the restoration to the army of John A. Darling, Michael O'Brien, Philip W. Stanhope and Redmond Tully, who had been mustered out by this order of January 2, 1871, and those acts all assume the validity of that order. There has been thus full legislative recognition of its validity. It is too late, therefore, now to enquire as to whether it was in technical compliance with the procedure prescribed by the act of 1870.

We see no errors in the ruling of the Court of Claims, and its judgment is *Affirmed.*

CORBIN *v.* GOULD.

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

No. 131. Argued November 22, 1889. — Decided February 3, 1890.

The trade-mark for tea (No. 9952) registered in the Patent Office by Ingraham, Corbin & May December 27, 1881, was for the combination of the figure of a diamond and the words "The Tycoon Tea" enclosed in it; and its registration conferred no exclusive right to the use of the word "Tycoon" considered by itself.

THIS was a suit in equity brought in the court below by Calvin R. Corbin and Horatio N. May, copartners as Corbin, May & Company, doing business in Chicago, against Walter J. Gould, Edward Telfer, David D. Cady and L. F. Thompson, copartners as W. J. Gould & Company, doing business in Detroit, for the alleged infringement of a trade-mark.

The bill filed on the 24th of September, 1885, alleged substantially as follows: That for over six years complainants had been engaged in manufacturing, preparing and shipping to the United States, and selling in the United States and elsewhere, a particular quality of tea, of which their immediate predecessors in business, Ingraham, Corbin & May, were the first and exclusive manufacturers, importers and wholesale dealers in this country; that during this period they had imported large quantities of such tea, which, by reason of its superior quality and because of the advertising they gave it, became well and favorably known, and was sold extensively in the chief cities and towns of the United States, particularly in Michigan; that said particular tea was known as "Tycoon Tea," the word "Tycoon" being properly attached to the cases and coverings in which the tea was imported; that this name "Tycoon" was given by them to their tea in 1879 in order to more clearly identify it, and had since been used as their adopted trade-mark for it; that having complied with the act of Congress in such case made and provided, and with

Statement of the Case.

the regulations prescribed by the Commissioner of Patents, they procured the registration and recording of said trade-mark in the Patent Office on the 27th of December, 1881, and received from the Commissioner of Patents a certificate, [No. 9952], showing such record; that since the word "Tycoon" was first applied by them as a trade-mark, and since the date of such registration, the defendants, confederating with divers other persons in different parts of the United States, with full knowledge of complainants' rights under and by virtue of their trade-mark, in violation thereof, without complainants' consent, and with the intent fraudulently to divert to themselves complainants' trade in such tea, put upon the market in Detroit and elsewhere large quantities of tea in packages or cases of the same size and general appearance as those used by complainants, with the word "Tycoon" stamped thereon in imitation of complainants' trade-mark — all of which was intended to deceive and mislead the public into buying defendants' tea, which is of an inferior quality, greatly to the injury of the reputation of complainants' tea; that by reason of such fraudulent acts and practices on the part of defendants, complainants had been deprived of great gains and profits in the sale of their tea, and had been damaged more than $10,000; and that defendants were still using the aforesaid facings or labels with the word "Tycoon" stamped thereon upon tea, and threaten to continue to do so, to the great injury and damage of plaintiffs. The bill prayed for an injunction to restrain the defendants and their agents from the further use of complainants' trade-mark, for an accounting, and for damages.

Upon the filing of this bill, supported by a number of affidavits corroborating its allegations, the court issued a temporary restraining order as prayed for, and the defendants thereupon filed their answer denying specifically all the material allegations of the bill. The answer further alleged that the word "Tycoon" could not have been lawfully adopted and used as a trade-mark, because it had been a word in common use in trade as a brand or name for various kinds of tea imported from Japan, for many years prior to the time when complain-

ants claim to have adopted it as a trade-mark. It further set forth that the defendants had been using the word "Tycoon" on the facings or labels of their tea in connection with the word "chop;" but it denied that these labels bore any more similarity to those of complainants than is usually the case with tea labels, and alleged that except in the word "Tycoon" there was no resemblance whatever between them. It, therefore, prayed that the bill be dismissed.

Considerable testimony was taken in the case, and the court below, on the 14th of June, 1886, rendered a decree dismissing the bill, without delivering any opinion. An appeal from that decree brought the case here.

Mr. Lewis L. Coburn for appellants.

I. The complainants, having acquired a valuable interest in the good will of their trade in a specially prepared, pure, uncolored and unadulterated tea, and having adopted a particular trade-mark indicating to their customers that the article which was made by their authority and sold by them possessed those superior qualities, are entitled to protection against any one who attempts to deprive them of their trade or customers by using substantially the same name, or such devices and representations as would deceive the trade. *McLean* v. *Fleming*, 96 U. S. 245.

II. Where a firm has adopted and used a trade-mark for a number of years to denote a special kind of tea and built up a large trade, the firm should be protected in the use of its trade-mark as against imitations, even though it be proven that said trade-mark had previously been used as a trade-mark for the same class of goods, provided the first user had abandoned it. *Symons* v. *Greene*, 28 Fed. Rep. 834. The plaintiff in that case adopted the word "Eureka" to denote a special kind of cement. He was held to be entitled to an injunction even though another firm had used it for several years before to designate a certain kind of cement, but had discontinued its use.

III. The prior use must be either such continued use as to

cause the word to become descriptive of kind or quality, or a continued use of the word as a trade-mark by some one having the prior right to its use. Liebig's Extract became descriptive of a kind of extract put up under a certain formula. In *Manufacturing Co.* v. *Trainer*, 101 U. S. 51, it was held that "A. C. A." designated ticking of a particular quality. Fairbanks' scales and Singer's sewing machine had by long use become descriptive of the particular kind of machines; for that reason they could not be held as trade-marks.

IV. The word "Tycoon" as used on teas prior to its adoption by the complainants as a trade-mark had no significance whatever. It was not used as a trade-mark by any one, neither had it become descriptive of any kind or quality of tea. Its prior use, therefore, was not of such a character as would deprive the complainants of the right to protection in its use as a trade-mark.

Mr. Don M. Dickinson and *Mr. Elliott G. Stevenson*, for appellees, cited: *Carroll* v. *Ertheiler*, 1 Fed. Rep. 688; *Collins Company* v. *Oliver Ames & Sons Corporation*, 20 Blatchford, 542; *S. C.* 18 Fed. Rep. 561; *Amoskeag M'fg Co.* v. *Garner*, 54 How. Pr. 214; *Bardou* v. *Lacroix*, 29 Annales, (Cour de Cassation, France,) 226.

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

We are of opinion that the decree below must be affirmed. The material allegations of the bill are not sustained by the evidence, and the one which presents the entire foundation for the claim of relief is disproved by the exhibit which the complainants append to their bill. After alleging that complainants had adopted as their trade-mark the word "Tycoon," and stamped it upon packages of a particular kind of tea, manufactured and imported by themselves alone into the American market in 1879, and that the said word "Tycoon," having never before been adopted as a trade-mark, had become known to the trade as exclusively designating a particular kind of tea dealt in by the complainants, the bill states that, for the pur-

pose of obtaining protection for their exclusive right to the said word "Tycoon" as a trade-mark, they deposited it as above described in the Patent Office at Washington; and that in 1881 the same was registered and recorded by the Commissioner of Patents of the United States, and a certificate was issued therefor, securing to the complainants protection for the said trade-mark. The exhibits A and B, appended to the bill, and other exhibits attached to Corbin's deposition, show that the trade-mark adopted by the complainants, deposited and registered in the Patent Office, is not the word "Tycoon," as stated in the bill, but a transverse diamond-shaped symbol inclosing the word "The" at the top, and "Tea" at the bottom, between which, lengthwise the diamond, is the word "Tycoon." A fac-simile is as follows:

The claim of the complainants, filed in the Patent Office for the registration of the trade-mark in question, is in these words: "Our trade-mark consists of the letters and words and arbitrary symbols 'The Tycoon Tea, I. C. & M., C., Japan Tea,' ornamental scroll border, transverse diamond shape. . . . The letters or words 'I. C. & M., C., Japan Tea,' may be omitted or they may be partly omitted and partly changed as to their position within the square without materially altering the character of our trade-mark, *the essential features of which are* the symbol of a diamond and the arbitrarily selected word 'Tycoon.'"

It is not pretended that this combination, claimed and registered as the trade-mark of complainants, has ever been used by the defendants either in the identical form, or in a form having such resemblance thereto as might be calculated to deceive. A comparison of the label of defendants with that of the complainants, as given in the exhibit to the bill, shows many striking points of difference, and but few, if any, points of

similarity, except that the word "Tycoon" is found in both. In the complainants' label, the diamond figure, the words "The Tycoon Tea," "Choicest," and "Spring Leaf" are printed in blue ink; and the other words are printed in black ink, all in different kinds of ornamental letters — the whole surrounded by an ornamental black scroll border. The defendants' label is water-marked in red and pink colors, surrounded by a heavy blue border, with black decorations. The words are printed in various styles of letters of different colors — the words "Tycoon Chop," for instance, being in large white letters with red facings, on a solid black ground; and "Japan Tea," in large black letters, some of which are plain and some ornamental. On the complainants' label the proprietorship of the tea is indicated by the letters "I., C. & M.," representing Ingraham, Corbin & May, the predecessors of the present firm; while on the defendants' label the name of their firm and their place of business appear prominently near the bottom of it.

These labels are so entirely dissimilar that it is difficult to perceive how they could be mistaken the one for the other. A mere glance is sufficient to distinguish them. There are certainly no more points of similarity between them than are to be found ordinarily between tea labels or facings; and were it not for the fact that the word "Tycoon" is found in both of them there would be no semblance of a case of infringement.

With respect to the word "Tycoon," the evidence shows beyond question that it has been used as a name or brand for Japan tea for many years. Invoices of "Tycoon Tea" were received at the custom house in San Francisco as early as May 15, 1873, as shown by a copy of the official records of that office filed in this case; and the evidence of dealers and merchants of California is all to the effect that the word was in common use as a brand for Japan tea for several years prior to that date. It is unnecessary to go into this evidence in detail; but it is conclusive as to the long use of the word prior to the alleged adoption of it as a part of the trade-mark of the complainants.

The authorities cited by complainants' counsel, to show that the prior use of a word as a trade-mark by another party who

had abandoned it is not sufficient to debar the present owner of it from protection, do not apply to this case. At the time complainants claim to have adopted the word "Tycoon" as their trade-mark, for the particular species of tea dealt in by them, it was not an abandoned trade-mark, previously used by some other person or firm to designate a particular quality of tea; but it was, and had been for many years, in general and common use as a term descriptive of a class of teas introduced into the American market — a term which all men engaged in the tea business had an equal right to use, and which belonged to no one individual either as a trade-mark or a trade label. It belonged to the public, as the common property of the trade, and, therefore, was not subject to appropriation by any one person. The following language used in *The Amoskeag Manufacturing Company* v. *Spear*, 2 Sandford, Sup. Ct. N. Y. 599, quoted with approval by this court in *Canal Company* v. *Clark*, 13 Wall. 311, 324, is applicable to the claim of the complainant in this case: "He has no right to appropriate a sign or a symbol [or a name] which, from the nature of the fact it is used to signify, others may employ with equal truth and, therefore, have an equal right to employ for the same purpose." See also *Goodyear Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598; *Liggett & Myers Tobacco Co.* v. *Finzer*, 128 U. S. 182; *Stachelberg* v. *Ponce*, 128 U. S. 686; *Menendez* v. *Holt*, 128 U. S. 514.

Even conceding that the complainants may claim a trade-mark for the combination of the diamond and the words inclosed in it, as described in their application to the Patent Office, there was, upon the authorities above cited, clearly no trade-mark in the word "Tycoon" considered by itself.

The decree of the court below dismissing the bill should be, and it hereby is,

Affirmed.

SMITH *v.* LYON.

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

No. 1164. Submitted January 6, 1890. — Decided February 3, 1890.

Under the act of March 3, 1887, 24 Stat. 552, c. 373, as amended by the act of August 13, 1888, 25 Stat. 433, c. 866, a Circuit Court of the United States has not jurisdiction, on the ground of diverse citizenship, if there are two plaintiffs to the action, who are citizens of and residents in different States, and the defendant is a citizen of and resident in a third State, and the action is brought in the State in which one of the plaintiffs resides.

THIS action was dismissed by the court below for want of jurisdiction, to which judgment the plaintiffs below sued out this writ of error. The case is stated in the opinion.

Mr. Jefferson Chandler for plaintiffs in error.

Mr. R. C. Foster for defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to the Circuit Court for the Eastern District of Missouri. It was dismissed in that court for want of jurisdiction, and judgment rendered accordingly; to which this writ of error is prosecuted. 38 Fed. Rep. 53.

The facts out of which the controversy arises are found in the first few lines of plaintiffs' petition. In this they allege that they are partners doing business under the firm name of C. H. Smith & Co.; that the said C. H. Smith is a resident and citizen of St. Louis, in the State of Missouri, and Benjamin Fordyce is a resident and citizen of Hot Springs, in the State of Arkansas; and that the defendant O. T. Lyon is a resident and citizen of Sherman, in the State of Texas.

To this petition, which set out a cause of action otherwise sufficient, the defendant Lyon, who was served with the summons in the Eastern District of Missouri, filed a plea to the

jurisdiction of the court, appearing by attorney especially for that purpose, the ground of which is, that one of the plaintiffs, Benjamin Fordyce, is and was at the time of the institution of this suit a resident and citizen of Hot Springs, in the State of Arkansas, and the defendant was a resident and citizen of Sherman, in the State of Texas, and that the suit was not brought in the district of the residence of either the plaintiff Fordyce, or of the defendant.

The motion to dismiss for want of jurisdiction was sustained by the Circuit Court, and the soundness of that decision is the question which we are called upon to decide.

The decision of it depends upon the proper construction of the first section of the act of Congress approved March 3, 1887, 24 Stat. 552, c. 373, as amended by the act of August 13, 1888, 25 Stat. 433, c. 866. That statute professes to be an act to amend the act of March 3, 1875, and its object is "to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from the state courts, and for other purposes." The first section of the act confers upon the Circuit Courts of the United States original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds the sum of $2000, and arising under the Constitution or laws of the United States or treaties made or which shall be made under their authority. It then proceeds to establish a jurisdiction in reference to the parties to the suit. These are controversies in which the United States are plaintiffs, or in which there shall be a controversy between citizens of different States, with a like limitation upon the amount in dispute, and other controversies between parties which are described in the statute. This first clause of the act describes the jurisdiction common to all the Circuit Courts of the United States, as regards the subject matter of the suit, and as regards the character of the parties who by reason of such character may, either as plaintiffs or defendants, sustain suits in Circuit Courts. But the next sentence in the same section undertakes to define the jurisdiction of each one of the several Circuit Courts of the United States with reference to its terri-

torial limits, and this clause declares "that no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

In the case before us, one of the plaintiffs is a citizen of the State where the suit is brought, namely, the State of Missouri, and the defendant is a citizen of the State of Texas. But one of the plaintiffs is a citizen of the State of Arkansas. The suit, so far as he is concerned, is not brought in the State of which he is a citizen. Neither as plaintiff nor as defendant is he a citizen of the district where the suit is brought. The argument in support of the error assigned is that it is sufficient if the suit is brought in a State where one of the defendants or one of the plaintiffs is a citizen. This would be true if there were but one plaintiff or one defendant. But the statute makes no provision, in terms, for the case of two defendants or two plaintiffs who are citizens of different States. In the present case, there being two plaintiffs, citizens of different States, there does not seem to be, in the language of the statute, any provision that both plaintiffs may unite in one suit in a State of which either of them is a citizen.

It may be conceded that the question thus presented, if merely a naked one of construction of language in a statute, introduced for the first time, would be one of very considerable doubt. But there are other considerations which must influence our judgment, and which solve this doubt in favor of the proposition that such a suit cannot be sustained.

The original judiciary act of 1789, which established the courts of the United States and defined their jurisdiction, declared in reference to the Circuit Courts, in section 11 of that act, 1 Stat. 78, that "the Circuit Courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity,

where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State." The construction of this phrase, "where the suit is between a citizen of the State where the suit is brought and a citizen of another State," came before the Supreme Court at an early day in the case of *Strawbridge* v. *Curtiss*, 3 Cranch, 267; and Chief Justice Marshall delivered the opinion of the court, which was without dissent, in the following language:

"The court understands these expressions" [referring to the words "suit between a citizen of the State where the suit is brought and a citizen of another State"] "to mean that each distinct interest should be represented by persons, all of whom are entitled to sue or may be sued in the federal courts. That is, that where the interest is joint each of the persons concerned in that interest must be competent to sue, or liable to be sued, in the courts of the United States."

This construction has been adhered to from that day to this, and, although the statutes have modified the jurisdiction of the court as regards the amount in controversy and in many other particulars, the language construed by the court in *Strawbridge* v. *Curtiss* has been found in all of them. This statute, conferring and defining the jurisdiction of Circuit Courts of the United States, has been reënacted and recast several times since the original decision of *Strawbridge* v. *Curtiss*. The first of these was the general revision of the statutes of the United States, passed in 1874, in which the language of the statute of 1789 is supposed to be reproduced accurately. But an act of March 3, 1875, 18 Stat. 470, c. 137, undertook to recast the jurisdiction of the Circuit Courts, and its first section, the important one in this connection, contains the same language in regard to the jurisdiction of the court in controversies between citizens of different States, and also the provision that no civil suit shall be brought in either of said courts by any original process or proceeding in any other district than that whereof he is an inhabitant or in which he

shall be found at the time of serving process. The statute remained in this condition until the act of 1887, which we are now considering, as amended by the act of August 13, 1888, 25 Stat. 433.

During this period, and since the case of *Strawbridge* v. *Curtiss*, this jurisdictional clause has been frequently construed by this court, and that case has been followed. In the case of *New Orleans* v. *Winter*, 1 Wheat. 91, the same question arose, and was decided in the same way. In the case of *Coal Company* v. *Blatchford*, 11 Wall. 172, Mr. Justice Field, referring to these decisions, states the effect of them in the following language:

"In other words, if there are several coplaintiffs, the intention of the act is that each plaintiff must be competent to sue, and if there are several codefendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained."

The question was very fully considered in the case of *The Sewing Machine Companies*, 18 Wall. 553, where the same proposition is stated in almost identical language. And in the case of *Peninsular Iron Company* v. *Stone*, 121 U. S. 631, the Chief Justice reviews all these cases and reaffirms the doctrine as applicable to cases arising under the act of 1875.

The statute which we are now construing leaves out the provision that if the party has the diverse citizenship required by the statute he may be sued in any district where he may be found at the time of the service of process. The omission of these words, and the increase of the amount in controversy necessary to the jurisdiction of the Circuit Court, and the repeal of so much of the former act as allowed plaintiffs to remove causes from the state courts to those of the United States, and many other features of the new statute, show the purpose of the legislature to restrict rather than to enlarge the jurisdiction of the Circuit Courts, while, at the same time, a suit is permitted to be brought in any district where either plaintiff or defendant resides.

We do not think, in the light of this long-continued construction of the statute by this court during a period of nearly a hundred years, in which the statute has been the subject of

renewed legislative consideration and of many changes, it has always retained the language which was construed in the case of *Strawbridge* v. *Curtiss*, that we are at liberty to give that language a new meaning, when it is used in reference to the same subject matter. It is not readily to be conceived that the Congress of the United States, in a statute mainly designed for the purpose of restricting the jurisdiction of the Circuit Courts of the United States, using language which has been construed in a uniform manner for over ninety years by this court, intended that that language should be given a construction which would enlarge the jurisdiction of those courts, and which would be directly contrary to that heretofore placed upon it by this court.

These considerations require the affirmance of the judgment of the Circuit Court, and it is so ordered.

BUFORD *v.* HOUTZ.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 711. Submitted January 6, 1890. — Decided February 3, 1890.

There is an implied license, growing out of the custom of nearly one hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them, where they are left open and unenclosed, and no act of the government forbids their use.

During the progress of the settlement of the newer parts of the country the rule that the owner of domestic animals should keep them confined within his own grounds, and should be liable for their trespasses upon unenclosed land of his neighbor, has nowhere prevailed; but, on the contrary, his right to permit them, when not dangerous, to run at large, without responsibility for their getting upon such land of his neighbor, has been universally conceded, and is a part of the statute law of Utah. Comp. Laws, § 2234.

In equity. The bill was dismissed and the plaintiffs appealed. The case is stated in the opinion.

Mr. M. Kirkpatrick for appellants.

Mr. Joseph L. Rawlins (with whom were *Mr. James N. Kimball* and *Mr. Ogden Hiles*) for appellees.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from the Supreme Court of the Territory of Utah.

The bill was originally filed by the appellants in the Third Judicial District Court of Utah Territory in and for Salt Lake County, and in that court a demurrer was filed setting forth two grounds of objection to the bill; first, that it does not state facts sufficient to constitute a cause of action, and, second, that several causes of action have been improperly united in this, that said complaint states a separate cause of action against each individual defendant, and nowhere states or attempts to state a cause of action against all of the defendants. This demurrer was sustained, and a decree rendered dismissing the bill at the costs of plaintiffs, and on appeal to the Supreme Court of the Territory that decree was affirmed.

The case is here on an appeal from that judgment. The complainants were M. B. Buford, J. W. Taylor, Charles Crocker and George Crocker, copartners under the firm name and style of the Promontory Stock Ranch Company. The defendants were John S. Houtz and Henry and Edward Conant, under the firm name and style of Houtz & Conant, the Box Elder Stock and Mercantile Company, a corporation, and twenty individuals whose names are given in the bill.

The plaintiffs allege that they are the owners of certain sections and parts of sections of land in the Territory of Utah, which they describe specifically by the numbers and the style of their Congressional subdivisions, very much of which is derived from the Central Pacific Railroad Company, to which they were granted by the Congress of the United States. These lands were alternate sections of odd numbers according to the Congressional grant to the railroad company, and they with the other tracts mentioned in the plaintiffs' bill are said

to amount to over 350,000 acres, "and extend over an area of forty miles in a northerly and a southerly direction, by about thirty-six miles in an easterly and westerly direction."

The allegation is, that these lands are very valuable for pasturage and the grazing of stock, and are of little or no value for any other purpose, and were held by the plaintiffs, and are now held by them, for that purpose solely. That owing to their character, the scarcity of water and the aridity of the climate where these lands are situated, they can never be subjected to any beneficial use other than the grazing of stock. That plaintiffs own and are possessed of large numbers of horned cattle, to wit, 20,000 head, of the value of $100,000, and are engaged in the sole business of stock raising. That for a long time they have had and now have all said cattle running and grazing upon these lands. That all the even numbered sections in each and all of the townships and fractional townships above mentioned belong to and are part of the public domain of the United States. That the defendants have not, nor has either of them, any right, title, interest or possession or right of possession, of or to any of the lands embraced in any of the townships or fractional townships above mentioned, nor have they ever had any such right, title, interest or possession. That none of the lands included within said townships or fractional townships are fenced or enclosed, except a small portion owned by plaintiffs, which they have heretofore enclosed with fences for use as corrals, within which to gather from time to time their cattle in order to brand the young thereof. They allege that for various reasons they cannot fence and enclose their lands without enclosing large portions of the lands of the United States, and without rendering large and valuable portions of their own of no value, by reason of the shutting off and preventing their own cattle from obtaining necessary water. That the defendants, Houtz and Conant, now and for a long time past, have owned a large number, to wit, 15,000 head of sheep, and each of the other defendants to this action is now and for a long time past has been the owner of a large flock or herd of sheep. The smallest number owned by any one party exceeds, as plaintiffs believe,

five thousand, and the aggregate number of sheep so held exceeds two hundred thousand.

It is then alleged that the official survey of the United States has been extended over all land within the townships and fractional townships mentioned in the bill, and that there are seven well-defined and well-known travelled highways over those lands, four of which run in a northerly and southerly direction, and three in an easterly and westerly direction, entirely across the lands embraced in said townships and fractional townships, along which the sheep of the defendants may be driven without injury to plaintiffs' lands, notwithstanding which each of said defendants claims and asserts that he has the lawful right and is entitled to drive all sheep owned by him over and across any of said lands of these plaintiffs, and to pasture and graze his sheep thereon whenever and wherever he may desire so to do. That all of said defendants respectively rely upon and set up a common, though not a joint, pretended right to drive, graze and pasture his sheep thereon, and each of said defendants bases his pretended right to drive, graze and pasture his sheep upon the lands of the plaintiffs upon precisely the same state of facts as that relied upon by each of the other defendants. That is to say, each of said defendants claims that all the even numbered sections in each of said townships and fractional townships being unoccupied public domain of the United States, he has an implied license from the government of the United States to drive, graze and pasture his sheep thereon, and that he cannot do this without having them run, graze and pasture upon the lands of the plaintiffs. Therefore each of said defendants claims and asserts that he is entitled to have his said sheep run, graze and pasture upon the lands of the plaintiffs as aforesaid; and that during the year past each of said defendants did repeatedly drive large bands and herds of sheep over, upon and across the lands of these plaintiffs, and graze and pasture the same thereon, to the great injury and damage of the said plaintiffs, and that they and each of them threaten to continue to do this and will do it unless restrained by order of the court.

It is then alleged that the sheep, in grazing upon the lands,

do it a permanent injury, and drive away the cattle from such lands, whereby, if the defendants are permitted to drive and pasture their sheep on the lands of the plaintiffs, those lands will be greatly damaged, and, for a long period of time in the future, rendered valueless for the purpose of grazing and pasturing their cattle. They then allege that they have no adequate way of estimating the damage which they will suffer should defendants, or either of them, do as they have threatened to do as herein stated, for the reason, among others, that the destruction of the food grasses and herbage on plaintiffs' lands will result in depriving plaintiffs' cattle of necessary food, thereby causing great deterioration in flesh and consequent value, which loss and deterioration cannot be adequately determined by witnesses; which will result in the destruction of plaintiffs' business, will waste and impair their freehold, and obstruct them and each of them in the use of their said property. They allege, therefore, that they have no plain, adequate and speedy remedy at law; and that it will be impossible to establish the amount of damages which said plaintiffs will suffer by the wrong or trespass of any particular one of said defendants.

The prayer of the plaintiffs is for a judgment and decree of the court:

1st. That said defendants have not, nor has either of them, any right of way for any of his or their sheep over said lands of plaintiffs or any part thereof, except over and along the highways aforesaid; that they have not, nor has either of them, any right to graze or pasture any of his or their sheep thereon or on any part thereof.

2nd. That, pending this action, said defendants and each of them, their and each of their agents, servants and employés, be enjoined from driving any of his or their sheep upon any of said lands, except over and along said highways, or permitting any of them to go, graze or pasture thereon, and that upon the final decree herein said injunction be made perpetual.

3rd. For such other and further relief as may be just and equitable, together with their costs in this behalf incurred.

The Supreme Court of the Territory, in affirming the judg-

ment of the court of the Third Judicial District, did not consider the question of the misjoinder of defendants, but rested its judgment upon the want of equity in the bill. It might be difficult to sustain a bill which, like this, united fifteen or twenty different defendants, to restrain them from committing a trespass where, if the parties are guilty or should attempt to commit the trespass, they do it without concert of action, at different times, in different parts of a large district of country such as here described, and each in his own way and by his own action, or that of his servants. But, waiving this question, we are of opinion that the bill has no equity in it.

The appellants being stock-raisers, like the defendants, whose stock are raised and fattened on the unoccupied public lands of the United States mainly, seek by the purchase and ownership of parts of these lands, detached through a large body of the public domain, to exclude the defendants from the use of this public domain as a grazing ground, while they themselves appropriate all of it to their own exclusive use. This they propose to do, not by any act of Congress or of any legislative body whatever, but by means of this bill in chancery, obtaining an injunction against the defendants, whom they allege to be the owners of 200,000 sheep grazing upon these public lands, which shall exclude defendants from the use of them, and thereby secure to themselves the exclusive right to pasture their 20,000 head of cattle upon the same lands.

If we look at the condition of the ownership of these lands, on which the plaintiffs rely for relief, we are still more impressed with the injustice of this attempt. A calculation of the area from which it is proposed to exclude the defendants by this injunction under the allegation that it is forty miles in one direction and thirty-six in another, shows that it embraces 1440 square miles, or 921,000 acres, all of which, as averred by the bill, is unenclosed and unoccupied except for grazing purposes. Of this 921,000 acres of land the plaintiffs only assert title to 350,000 acres; that is to say, being the owners of one-third of this entire body of land, which ownership attaches to different sections and quarter-sections scattered through the whole body of it, they propose by excluding the

defendants to obtain a monopoly of the whole tract, while two-thirds of it is public land belonging to the United States, in which the right of all parties to use it for grazing purposes, if any such right exists, is equal. The equity of this proceeding is something which we are not able to perceive.

It seems to be founded upon the proposition that while they, as the owners of the 350,000 acres thus scattered through the whole area, are to be permitted for that reason to exercise the right of grazing their own cattle upon all of the land embraced within these 1440 square miles, the defendants cannot be permitted to use even the lands belonging to the United States, because in doing this their cattle will trespass upon the unenclosed lands of plaintiffs. In other words, they seek to introduce into the vast regions of the public domain, which have been open to the use of the herds of stock-raisers for nearly a century without objection, the principle of law derived from England and applicable to highly cultivated regions of country, that every man must restrain his stock within his own grounds, and if he does not do so, and they get upon the unenclosed grounds of his neighbor, it is a trespass for which their owner is responsible.

We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use. For many years past a very large proportion of the beef which has been used by the people of the United States is the meat of cattle thus raised upon the public lands without charge, without let or hindrance or obstruction. The government of the United States, in all its branches, has known of this use, has never forbidden it, nor taken any steps to arrest it. No doubt it may be safely stated that this has been done with the consent of all branches of the government, and, as we shall attempt to show, with its direct encouragement.

The whole system of the control of the public lands of the

United States as it had been conducted by the government, under acts of Congress, shows a liberality in regard to their use which has been uniform and remarkable. They have always been open to sale at very cheap prices. Laws have been enacted authorizing persons to settle upon them, and to cultivate them, before they acquire any title to them. While in the incipiency of the settlement of these lands, by persons entering upon them, the permission to do so was a tacit one, the exercise of this permission became so important that Congress, by a system of laws, called the preëmption laws, recognized this right so far as to confer a priority of the right of purchase on the persons who settled upon and cultivated any part of this public domain. During the time that the settler was perfecting his title, by making the improvements which that statute required and paying, by instalments or otherwise, the money necessary to purchase it, both he and all other persons who desired to do so had full liberty to graze their stock upon the grasses of the prairies and upon other nutritious substances found upon the soil.

The value of this privilege grew as the population increased, and it became a custom for persons to make a business or pursuit of gathering herds of cattle or sheep, and raising them and fattening them for market upon these unenclosed lands of the government of the United States. Of course the instances became numerous in which persons purchasing land from the United States put only a small part of it in cultivation, and permitted the balance to remain unenclosed and in no way separated from the lands owned by the United States. All the neighbors who had settled near one of these prairies or on it, and all the people who had cattle that they wished to graze upon the public lands, permitted them to run at large over the whole region, fattening upon the public lands of the United States, and upon the unenclosed lands of the private individual, without let or hindrance. The owner of a piece of land, who had built a house or enclosed twenty or forty acres of it, had the benefit of this universal custom, as well as the party who owned no land. Everybody used the open unenclosed country, which produced nutritious grasses, as a public common on

which their horses, cattle, hogs and sheep could run and graze.

It has never been understood that in those regions and in this country, in the progress of its settlement, the principle prevailed that a man was bound to keep his cattle confined within his own grounds, or else would be liable for their trespasses upon the unenclosed grounds of his neighbors. Such a principle was ill-adapted to the nature and condition of the country at that time. Owing to the scarcity of means for enclosing lands, and the great value of the use of the public domain for pasturage, it was never adopted or recognized as the law of the country, except as it might refer to animals known to be dangerous, and permitted to go where their dangerous character might produce evil results. Indeed, it is only within a few years past, as the country has been settled and become highly cultivated, all the land nearly being so used by its owners or by their tenants, that the question of compelling the owner of cattle to keep them confined has been the subject of agitation.

Nearly all the States in early days had what was called the fence law, a law by which a kind of fence, sufficient in a general way to protect the cultivated ground from cattle and other domestic animals which were permitted to run at large, was prescribed. The character of this fence in most of the statutes was laid down with great particularity, and unless it was in strict conformity to the statute there was no liability on the part of the owner of cattle if they invaded the enclosure of a party and inflicted injury on him. If the owner of the enclosed ground had his fence constructed in accordance with the requirements of the statute, the law presumed then that an animal which invaded this enclosure was what was called a *breachy* animal, was not such animal as should be permitted to go at large, and the owner was liable for the damages done by him. Otherwise the right of the owner of all domestic animals, to permit them to run at large, without responsibility for their getting upon the lands of his neighbor, was conceded.

The Territory of Utah has now, and has always had, a similar statute, section 2234 of the compiled laws of Utah,

1888, Vol. I. p. 789. It is now a matter of occasional legislation in the States which have been created out of this public domain, to permit certain counties, or parts of the State, or the whole of the State, by a vote of the people within such subdivisions, to determine whether cattle shall longer be permitted to run at large and the owners of the soil compelled to rely upon their fences for protection, or whether the cattle-owner shall keep them confined, and in that manner protect his neighbor without the necessity on the part of the latter of relying upon fences which he may make for such protection.

Whatever policy may be the result of this current agitation can have no effect upon the present case, as the law of Utah and its customs in this regard remain such as we have described it to be in the general region of the Northwest; and the privileges accorded by the United States for grazing upon her public lands are subject alone to their control.

These principles were very clearly enunciated by the Supreme Court of Ohio in 1854 in the case of *Kerwhacker* v. *The C. C. & C. Railroad Company*, 3 Ohio St. 172, 178–9. In discussing this question, the court expresses so well the principle which we are considering that we venture to make an extensive quotation from the opinion.

"Admitting the rule of the common law of England in relation to cattle and other live stock running at large to be such as stated, the question arises whether it is applicable to the condition and circumstances of the people of this State, and in accordance with their habits, understandings and necessities. If this be the law in Ohio now it has been so since the first settlement of the State, and every person who has allowed his stock to run at large and go upon the uninclosed grounds of others has been a wrong-doer, and liable to an action for damages by every person on whose lands his creatures may have wandered. What has been the actual situation of affairs, and the habits, understandings and necessities of the people of this State from its first settlement up to the present period in this respect? Cattle, hogs and other kinds of live stock not known to be breachy and unruly, or dangerous, have been allowed at all times and in all parts of the State to run at

large and graze on the range of uncultivated and uninclosed lands. . . . So that it has been the general custom of the people of this State, since its first settlement, to allow their cattle, hogs, horses, etc., to run at large, and range upon the uninclosed lands of the neighborhood in which they are kept; and it has never been understood by them that they were tort-feasors, and liable in damages for letting their stock thus run at large. The existence or enforcement of such a law would have greatly retarded the settlement of the country, and have been against the policy of both the general and the state governments.

"The common understanding upon which the people of this State have acted since its first settlement has been that the owner of land was obliged to inclose it with a view to its cultivation; that without a lawful fence he could not, as a general thing, maintain an action for a trespass thereon by the cattle of his neighbor running at large; and that to leave uncultivated lands uninclosed was an implied license to cattle and other stock at large to traverse and graze them. Not only, therefore, was this alleged rule of the common law inapplicable to the circumstances and condition of the people of this State, but inconsistent with the habits, the interests, necessities and understanding of the people."

In the case of *Seeley* v. *Peters*, 10 Illinois (5 Gilman), 130, 142, in the Supreme Court of Illinois in 1848, six years earlier than the Ohio case, the court in reference to the same subject by Judge Trumbull uses the following language:

"Perhaps there is no principle of the common law so inapplicable to the condition of our country and people as the one which is sought to be enforced now for the first time since the settlement of the State. It has been the custom in Illinois, so long that the memory of man runneth not to the contrary, for the owners of stock to suffer them to run at large. Settlers have located themselves contiguous to prairies for the very purpose of getting the benefit of the range. The right of all to pasture their cattle upon uninclosed ground is universally conceded. No man has questioned this right, although hundreds of cases must have occurred where the owners of cattle

have escaped the payment of damages on account of the insufficiency of the fences through which their stock have broken, and never till now has the common law rule, that the owner of cattle is bound to fence them up, been supposed to prevail or to be applicable to our condition. The universal understanding of all classes of the community, upon which they have acted by inclosing their crops and letting their cattle run at large, is entitled to no little consideration in determining what the law is, and we should feel inclined to hold, independent of any statutes upon the subject, on account of the inapplicability of the common law rule to the condition and circumstances of our people, that it does not and never has prevailed in Illinois. But it is unnecessary to assume that ground in this case. The legislature [legislation] upon this subject, from the time when we were a part of the Indiana Territory down to the last law contained in the Revised Statutes, clearly shows that the legislature never supposed that this rule of the common law prevailed in Illinois, or intended that it should."

The same principle is asserted in the case of *Comerford* v. *Dupuy*, 17 California, 308, 310; and in the case of *Logan* v. *Gedney*, 38 California, 579, the court distinctly held that "the rule of the law of England, that every man is bound to keep his beasts in his own close under the penalty of answering in damages for all injuries resulting from their being permitted to range at large, never was the law in California." This decision is the more in point, as California, like Utah, was acquired from Mexico by the same treaty. See also *Studwell* v. *Ritch*, 14 Connecticut, 292.

As evidence of the liberality with which the government of the United States has treated the entire region of country acquired from Mexico by the treaty of Guadalupe Hidalgo, it is only necessary to refer to the fact that while by the laws of Mexico every discoverer of a mine of the precious metals was compelled to pay a certain royalty to the government for the use of the mine in extracting its minerals, as soon as the country came under the control of the United States, an unlimited right of mining by every person who chose to enter

upon and take the risks of the business was permitted without objection and without compensation to the government; and while this remained for many years as a right resting upon the tacit assent of the government, the principle has been since incorporated into the positive legislation of Congress, and to-day the larger part of the valuable mines of the United States are held by individuals under the claim of discovery, without patent or any other instrument from the government of the United States granting this right, and without tax or compensation paid to the government for the use of the precious metals.

As showing this extreme liberality on the part of the general government, reference may be had to the case of *Forbes* v. *Gracey*, 94 U. S. 762. In that case a mining company which had no title whatever from the United States, and which was taking out mineral ore of immense value from the lands of the United States, sought to enjoin the State of Nevada from taxing the ore thus taken, on the ground that it was the property of the United States, and not taxable by the State of Nevada. But this court, reverting to the liberality of the government in that regard, decided that the moment the ore became detached from the main vein in which it was embedded in the mine, it became the property of the miner, the United States having no interest in it, and was therefore subject to state taxation.

Upon the whole, we see no equity in the relief sought by the appellants in this case, which undertakes to deprive the defendants of this recognized right to permit their cattle to run at large over the lands of the United States and feed upon the grasses found in them, while, under pretence of owning a small proportion of the land which is the subject of controversy, they themselves obtain the monopoly of this valuable privilege.

The decree of the Supreme Court of Utah is therefore

Affirmed.

DAVIS *v.* BEASON.

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF THE TERRITORY OF IDAHO.

No. 1261. Argued December 9, 10, 1889. — Decided February 3, 1890.

The provision in § 501, Rev. Stats. Idaho, that "no person who is a bigamist or polygamist, or who teaches, advises, counsels or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization or association which teaches, advises, counsels or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization or association, or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust or profit within this Territory" is an exercise of the legislative power conferred upon Territories by Rev. Stat. §§ 1851, 1859, and is not open to any constitutional or legal objection.

Bigamy and polygamy are crimes by the laws of the United States, by the laws of Idaho, and by the laws of all civilized and Christian countries; and to call their advocacy a tenet of religion is to offend the common sense of mankind.

A crime is none the less so, nor less odious, because sanctioned by what any particular sect may designate as religion.

It was never intended that the first Article of Amendment to the Constitution, that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof," should be a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society.

The second subdivision of § 504 Rev. Stats. Idaho, requiring every person desiring to have his name registered as a voter to take an oath that he does not belong to an order that advises a disregard of the criminal law of the Territory, is not open to any valid legal objection.

The act of Congress of March 22, 1882, 22 Stat. 31, c. 47, "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," does not restrict the legislation of the Territories over kindred offences or over the means for their ascertainment and prevention.

The cases in which the legislation of Congress will supersede the legislation of a State or Territory, without specific provisions to that effect, are those in which the same matter is the subject of legislation by both.

Statement of the Case.

In April, 1889, the appellant, Samuel D. Davis, was indicted in the District Court of the Third Judicial District of the Territory of Idaho, in the county of Oneida, in connection with divers persons named, and divers other persons whose names were unknown to the grand jury, for a conspiracy to unlawfully pervert and obstruct the due administration of the laws of the Territory, in this that they would unlawfully procure themselves to be admitted to registration as electors of said county of Oneida for the general election then next to occur in that county, when they were not entitled to be admitted to such registration, by appearing before the respective registrars of the election precincts in which they resided, and taking the oath prescribed by the statute of the State, in substance as follows: "I do swear (or affirm) that I am a male citizen of the United States of the age of twenty-one years (or will be on the 6th day of November, 1888); that I have (or will have) actually resided in this Territory four months and in this county for thirty days next preceding the day of the next ensuing election; that I have never been convicted of treason, felony or bribery; that I am not registered or entitled to vote at any other place in this Territory; and I do further swear that I am not a bigamist or polygamist; that I am not a member of any order, organization or association which teaches, advises, counsels or encourages its members, devotees or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization or association, or which practises bigamy, polygamy or plural or celestial marriage as a doctrinal rite of such organization; that I do not and will not, publicly or privately, or in any manner whatever teach, advise, counsel or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty or otherwise; that I do regard the Constitution of the United States and the laws thereof and the laws of this Territory, as interpreted by the courts, as the supreme laws of the land, the teachings of any order, organization or association to the contrary notwithstanding, so help me God," when, in truth, each of the defendants was

a member of an order, organization and association, namely, the Church of Jesus Christ of Latter-Day Saints, commonly known as the Mormon Church, which they knew taught, advised, counselled and encouraged its members and devotees to commit the crimes of bigamy and polygamy as duties arising and resulting from membership in said order, organization and association, and which order, organization and association, as they all knew, practised bigamy and polygamy, and plural and celestial marriage as doctrinal rites of said organization; and that in pursuance of said conspiracy the said defendants went before the registrars of different precincts of the county (which are designated) and took and had administered to them respectively the oath aforesaid.

The defendants demurred to the indictment, and the demurrer being overruled they pleaded separately not guilty. On the trial which followed on the 12th of September, 1889, the jury found the defendant, Samuel D. Davis, guilty as charged in the indictment. The defendant was thereupon sentenced to pay a fine of $500, and in default of its payment to be confined in the county jail of Oneida County for a term not exceeding 250 days, and was remanded to the custody of the sheriff until the judgment should be satisfied.

Soon afterwards, on the same day, the defendant applied to the court before which the trial was had, and obtained a writ of *habeas corpus*, alleging that he was imprisoned and restrained of his liberty by the sheriff of the county; that his imprisonment was by virtue of his conviction and the judgment mentioned and the warrant issued thereon; that such imprisonment was illegal; and that such illegality consisted in this: 1, that the facts in the indictment and record did not constitute a public offence, and the acts charged were not criminal or punishable under any statute or law of the territory; and, 2, that so much of the statute of the territory as[1]

[1] "No person under guardianship, *non compos mentis* or insane, nor any person convicted of treason, felony, or bribery in this Territory or in any other State or Territory in the Union, unless restored to civil rights; nor any person who is a bigamist or polygamist or who teaches, advises, counsels, or encourages any person or persons to become bigamists or polyga

provides that no person is entitled to register or vote at any election who is "a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practises bigamy or polygamy or plural or celestial marriage as a doctrinal rite of such organization" is a "law respecting an establishment of re-

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mists, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization, or association which teaches, advises, counsels, or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization, or association, or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this Territory. Rev. Stats. Idaho, § 501.

"The registrar must, before he registers any applicant, require him to take and subscribe the oath, to be known as the 'elector oath,' which is as follows:

"I do swear (or affirm) that I am a male citizen of the United States of the age of twenty-one (21) years (or will be on the day of , 18—, naming date of next succeeding election). That I have (or will have) actually resided in this Territory for four (4) months and in this county for thirty (30) days next preceding the day of the next ensuing election (in case of any election requiring different time of residence so make it). That I have never been convicted of treason, felony, or bribery; that I am not now registered or entitled to vote at any other place in this Territory; and I do further swear that I am not a bigamist or polygamist; that I am not a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practises bigamy or polygamy or plural or celestial marriage as a doctrinal rite of such organization; that I do not, and will not, publicly or privately, or in any manner whatever, teach, advise, counsel, or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty or otherwise; that I do regard the Constitution of the United States and the laws thereof, and of this Territory, as interpreted by the courts, as the supreme law of the land, the teachings of any order, organization, or association to the contrary notwithstanding (when made before a judge of election add 'and I have not previously voted at this election'), so help me God." Id. § 504.

ligion," in violation of the first Amendment to the Constitution and void.

The court ordered the writ to issue, directed to the sheriff, returnable before it, at three o'clock in the afternoon of that day, commanding the sheriff to have the body of the defendant before the court at the hour designated, with the time and cause of his imprisonment, and to do and receive what should then be considered concerning him. On the return of the writ, the sheriff produced the body of the defendant and also the warrant of commitment under which he was held, and the record of the case showing his conviction for the conspiracy mentioned and the judgment thereon. To this return, the defendant, admitting the facts stated therein, excepted to their sufficiency to justify his detention. The court, holding that sufficient cause was not shown for the discharge of the defendant, ordered him to be remanded to the custody of the sheriff. From this judgment the defendant appealed to this court. Rev. Stat. § 1909.

Mr. Jeremiah M. Wilson and *Mr. Franklin S. Richards* (with whom was *Mr. Samuel Shellabarger* on the brief) for appellant.

The power of Congress (or the legislative assembly of a Territory) 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 if the want of power appears, the court which has authority to issue the writ is bound to release him. *Hans Nielsen, Petitioner*, 131 U. S. 176, 183; *In re Coy*, 127 U. S. 731; *Ex parte Siebold*, 100 U. S. 371; *In re Snow*, 120 U. S. 274; *Ex parte Lange*, 18 Wall. 163.

The legislature of Idaho could not legally prescribe that a man who has never committed any crime should not have the right to register and vote, or hold office, because he belonged to a church organization that holds or teaches bigamy and polygamy as a doctrine of the church, membership in such organization not having been by law made a crime.

Argument for Appellant.

I. The statute disfranchising and disqualifying citizens from holding office for that reason is unconstitutional and void, because it prohibits "the free exercise of religion," and conflicts with the first amendment to the Constitution — that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." *Reynolds* v. *United States*, 98 U. S. 145, 162; *Dred Scott* v. *Sandford*, 19 How. 393, 450.

Religious liberty is a right embracing more than mere opinion, sentiment, faith, or belief. It includes all "*human conduct*" that gives expression to the relation between man and God; it includes "all frames of feeling, all forms of faith, and *acts* of worship" to which man is impelled by his hopes or fears; it includes the "*cultus*" or "outward expression of the religious sentiment;" it means "entire freedom of creed, thought and worship," with a restriction upon the government that it "cannot go behind the *overt act;*" in other words, it includes all acts of manifestation or exercise of religion which are not in violation of "peace and good order." *United States* v. *Reynolds*, 98 U. S. 163. That the term "free exercise of religion" was intended by the promoters of the first article of amendment to the Constitution to have this broad and comprehensive signification is apparent from an examination of the history of that period, to which this court said we should look for the meaning of the term, and in the *Reynolds case*, *supra*, pages 162, 163, 164, it gave an epitome thereof, in which it adopted the definition of religious freedom given in the preamble of the Virginia act, drafted by Mr. Jefferson, "for establishing religious freedom." 12 Henning's Statutes Virginia, 84, 85, 86. See also 1 Jefferson's Works, 45 (N. Y. 1853); 8 Sparks's Washington, 568; *Board of Education* v. *Minor*, 23 Ohio St. 211; *Attorney General* v. *Detroit*, 58 Michigan, 213; and state constitutions as follows: Georgia, 1777, Article 56; Maryland, Declaration of Rights, 1776, Article 33; Massachusetts, Declaration of Rights, 1780, Article 3; New Jersey, 1776, Article 18; North Carolina, 1776, Article 34; New York, 1777, Article 38; New Hampshire, Bill of Rights, 1784, Article 5; Pennsylvania, Declaration of Rights, 1776, Article 11; Virginia, Bill

of Rights, 1776 § 16; 3 Elliot's Debates, 659; 4 Elliot's Debates, 244; 2 Kent Com. 35; 2 Tucker's Blackstone, App. 4, 6, 10; 2 Story Const. § 1876, § 1879; Cooley's Const. Lim. 469, 470.

II. This Idaho statute violates the provision in the Fourteenth Article of Amendment to the Constitution of the United States that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

For the scope of this amendment see *Sinking Fund Cases*, 99 U. S. 700, 718; *Cummings* v. *Missouri*, 4 Wall. 277, 320; *Strauder* v. *West Virginia*, 100 U. S. 303, 307, 308; *Ex parte Virginia*, 100 U. S. 339, 347; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369; *United States* v. *Cruikshank*, 1 Woods, 308; *S. C.* 92 U. S. 542, 555; *Murphy* v. *Ramsey*, 114 U. S. 15, 44.

III. This Idaho statute violates the provision in article 6 of the Constitution of the United States, that "No religious test shall ever be required as a qualification to any office or public trust under the United States."

That this statute requires a religious test is apparent upon its face. The ground of disfranchisement is membership in an organization which encourages its members to commit bigamy or polygamy "*as a duty resulting from membership*," or which *practices* bigamy or polygamy, or celestial marriage, "*as a doctrinal rite of such order.*" Simple encouragement to commit crime by an organization of which the citizen is a member does not disqualify him from voting, because, by the language of the act, the encouragement must be offered upon the ground of duty, or religious obligation arising from membership in the organization, or the latter must teach the commission of these acts from religious motives, otherwise the exclusion does not operate. And so also the practice must be "as a doctrinal rite," or the member is not excluded. In other words the practice must be as a tenet of faith, sanctified by a religious ceremony; and the language of the statute does not admit of such an interpretation as will disfranchise the

members of an organization existing solely for the promotion of crime, however heinous their acts may be, even though the primary and sole object of the organization be to commit murder, theft, arson, rape and other crimes which are *malum in se;* unless their acts are the promptings of duty, or are performed "as doctrinal rites" or religious ceremonies, the members are not disqualified by this statute from voting or holding office.

Webster defines a "rite" as: "The act of performing divine or solemn service, as established by law, precept or custom; formal act of religion, or other solemn duty; a religious ceremony of usage."

The object of this legislation was not only to deprive citizens of the elective franchise because of their membership in a religious organization, the Mormon Church, but to confine the exclusion provided for to members of that religious organization.

IV. The Idaho statute is void because Congress has exercised its power on the same subject.

While denying the power of both Congress and the legislative assembly of Idaho to prescribe the test it has, as a qualification for voting and holding office, if in error as to the power of Congress in this regard, we still maintain that the territorial legislature could not prescribe it, for the reason that Congress had already legislated upon the subject, and its action is "the supreme law of the land."

Undoubtedly Congress has the right to legislate for the Territories, and the most that can be said for the territorial legislature is that it may legislate upon the same subjects if Congress has not already legislated thereon, and in that respect it stands in the same attitude towards Congress as a State, which may legislate if Congress does not, but if Congress does legislate a State cannot, or if the state has legislated and Congress afterwards does so, the state legislation is superseded.

The authorities on this subject are numerous and familiar.

It is now settled that when powers are exercised by Congress, the concurrent power in the inferior legislature ceases or is in abeyance; that the two legislative wills cannot be exercised

at the same time upon the same subject matter, and that of Congress, within its sphere, is "the supreme law of the land." *Ex parte McNiel*, 13 Wall. 236, 240; *Gilman* v. *Philadelphia*, 3 Wall. 713, 727; *Pennsylvania* v. *Wheeling Bridge*, 18 How. 421, 430; *Railroad Co.* v. *Fuller*, 17 Wall. 560, 568.

Mr. H. W. Smith for appellee.

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

On this appeal our only inquiry is whether the District Court of the Territory had jurisdiction of the offence charged in the indictment of which the defendant was found guilty. If it had jurisdiction, we can go no farther. We cannot look into any alleged errors in its rulings on the trial of the defendant. The writ of *habeas corpus* cannot be turned into a writ of error to review the action of that court. Nor can we inquire whether the evidence established the fact alleged, that the defendant was a member of an order or organization known as the Mormon Church, called the Church of Jesus Christ of Latter-Day Saints, or the fact that the order or organization taught and counselled its members and devotees to commit the crimes of bigamy and polygamy as duties arising from membership therein. On this hearing we can only consider whether, these allegations being taken as true, an offence was committed of which the territorial court had jurisdiction to try the defendant. And on this point there can be no serious discussion or difference of opinion. Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their

advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counselling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases.

The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The first amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. The oppressive measures adopted, and the cruelties and punishments inflicted by the governments of Europe for many ages, to compel parties to conform, in their religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons, and enforce an outward conformity to a prescribed standard, led to the adoption of the amendment in question. It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may

be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes as prompted by the passions of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretence that, as religious beliefs, their supporters could be protected in their exercise by the Constitution of the United States. Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.

On this subject the observations of this court through the late Chief Justice Waite, in *Reynolds* v. *United States*, are pertinent. 98 U. S. 145, 165, 166. In that case the defendant was indicted and convicted under section 5352 of the Revised Statutes, which declared that "every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than five hundred dollars, and by imprisonment for a term not more than five years." The case being brought here, the court, after referring to a law passed in December, 1788, by the State of Virginia, punishing bigamy and polygamy with death, said that from that day there never had been a time in any State of the Union when polygamy had not been an offence against society cognizable by the civil courts and punished with more or less severity; and added: "Marriage, while from its very nature a sacred obligation, is, nevertheless, in most civilized nations a

civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests." And, referring to the statute cited, he said: "It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question that remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or, if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." And in *Murphy* v. *Ramsey*, 114 U. S. 15, 45, referring to the act of Congress excluding polygamists and bigamists from voting or holding office, the court, speaking by Mr. Justice Matthews, said: "Certainly no legislation can be supposed more wholesome and necessary in the founding of a

free, self-governing commonwealth, fit to take rank as one of the coördinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment."

It is assumed by counsel of the petitioner, that because no mode of worship can be established or religious tenets enforced in this country, therefore any form of worship may be followed and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practising them. But nothing is further from the truth. Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as religion.

It only remains to refer to the laws which authorized the legislature of the Territory of Idaho to prescribe the qualifications of voters and the oath they were required to take. The Revised Statutes provide that "the legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents." Rev. Stat. § 1851.

Under this general authority it would seem that the territorial legislature was authorized to prescribe any qualifications for voters calculated to secure obedience to its laws. But, in addition to the above laws, § 1859 of the Revised Statutes

provides that "every male citizen above the age of twenty-one, including persons who have legally declared their intention to become citizens in any Territory hereafter organized, and who are actual residents of such Territory at the time of the organization thereof, shall be entitled to vote at the first election in such Territory, and to hold any office therein; subject, nevertheless, to the limitations specified in the next section," namely, that at all elections in any Territory subsequently organized by Congress, as well as at all elections in Territories already organized, the qualifications of voters and for holding office shall be such as may be prescribed by the legislative assembly of each Territory, subject, nevertheless, to the following restrictions:

First. That the right of suffrage and of holding office shall be exercised only by citizens of the United States above the age of twenty-one or persons above that age who have declared their intention to become such citizens;

Second. That the elective franchise or the right of holding office shall not be denied to any citizen on account of race, color, or previous condition of servitude;

Third. That no soldier or sailor or other person in the army or navy, or attached to troops in the service of the United States, shall be allowed to vote unless he has made his permanent domicil in the Territory for six months; and,

Fourth. That no person belonging to the army or navy shall be elected to or hold a civil office or appointment in the Territory.

These limitations are the only ones placed upon the authority of territorial legislatures against granting the right of suffrage or of holding office. They have the power, therefore, to prescribe any reasonable qualifications of voters and for holding office not inconsistent with the above limitations. In our judgment, § 501 of the Revised Statutes of Idaho Territory, which provides that "no person under guardianship, *non compos mentis* or insane, nor any person convicted of treason, felony, or bribery in this Territory, or in any other State or Territory in the Union, unless restored to civil rights; nor any person who is a bigamist or polygamist or who teaches, advises,

counsels, or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization or association which teaches, advises, counsels, or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization, or association or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this Territory," is not open to any constitutional or legal objection. With the exception of persons under guardianship or of unsound mind, it simply excludes from the privilege of voting, or of holding any office of honor, trust or profit, those who have been convicted of certain offences, and those who advocate a practical resistance to the laws of the Territory and justify and approve the commission of crimes forbidden by it. The second sub-division of § 504 of the Revised Statutes of Idaho, requiring every person desiring to have his name registered as a voter to take an oath that he does not belong to an order that advises a disregard of the criminal law of the Territory, is not open to any valid legal objection to which our attention has been called.

The position that Congress has, by its statute, covered the whole subject of punitive legislation against bigamy and polygamy, leaving nothing for territorial action on the subject, does not impress us as entitled to much weight. The statute of Congress of March 22, 1882, amending a previous section of the Revised Statutes in reference to bigamy, declares "that no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor or emolument in, under, or for any such Territory or place, or under the United States." 22 Stat. 31, c. 47, § 8.

This is a general law applicable to all Territories and other places under the exclusive jurisdiction of the United States. It does not purport to restrict the legislation of the Territories over kindred offences or over the means for their ascertainment and prevention. The cases in which the legislation of Congress will supersede the legislation of a State or Territory, without specific provisions to that effect, are those in which the same matter is the subject of legislation by both. There the action of Congress may well be considered as covering the entire ground. But here there is nothing of this kind. The act of Congress does not touch upon teaching, advising and counselling the practice of bigamy and polygamy, that is, upon aiding and abetting in the commission of those crimes, nor upon the mode adopted, by means of the oath required for registration, to prevent persons from being enabled by their votes to defeat the criminal laws of the country.

The judgment of the court below is therefore

Affirmed.

NOTE.—The constitutions of several States, in providing for religious freedom, have declared expressly that such freedom shall not be construed to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the State. Thus, the constitution of New York of 1777 provided as follows: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." Article xxxviii, 2 Charters and Constitutions, 1338. The same declaration is repeated in the constitution of 1821 (Article vii, Section 3, Id. 1347) and in that of 1846, (Article I, Section 3, Id. 1351,) except that for the words "hereby granted," the words "hereby secured" are substituted. The constitutions of California, Colorado, Connecticut, Florida, Georgia, Illinois, Maryland, Minnesota, Mississippi, Missouri, Nevada and South Carolina contain a similar declaration.

BURT *v.* EVORY.

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

No. 164. Argued December 16, 1889. — Decided February 3, 1890.

The claim in letters patent No. 59,375, granted to Alexander F. Evory and Alonzo Heston, November 6, 1866, for an "improvement in boots and shoes" was for a manufactured article, and not for the mode of producing it; and, as it was merely a carrying forward of the original idea of the earlier patents on the same subject — simply a change in form and arrangement of the constituent parts of the shoe, or an improvement in degree only — it was not a patentable invention.

Not every improvement in an article is patentable, but the improvement must be the product of an original conception; and if it is a mere carrying forward, or more extended application of, an original idea, an improvement in degree only, it is not an invention.

The combination of old devices into a new article, without producing any new mode of operation, is not invention.

In equity to restrain an infringement of letters patent. Decree in complainants' favor. Defendants appealed. The case is stated in the opinion.

Mr. George D. Noyes for appellants.

Mr. Frederic H. Betts for appellees.

Mr. Justice Lamar delivered the opinion of the court.

This is a suit in equity brought in the Circuit Court of the United States for the District of Massachusetts, by Alexander F. Evory, Alonzo Heston and J. B. Belcher against John W. Burt and Fred. Packard, composing the firm of Burt & Packard, for the alleged infringement of letters patent No. 59,375, issued to said Evory and Heston, November 6, 1866, for an "improvement in boots and shoes."

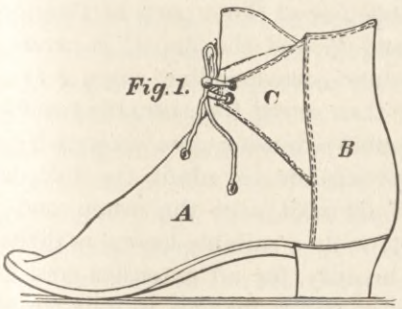
The bill filed December 9, 1880, alleged the issue of said letters patent to the plaintiffs Evory and Heston; the assignment of a one-half interest therein to the plaintiff Belcher;

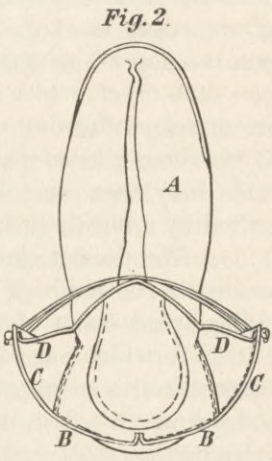
the granting of an exclusive license to the National Rubber Company to manufacture rubber goods containing the invention patented; and the infringement by the defendants, which was said to consist in their having made and sold shoes and gaiters constructed in accordance with the specification and drawings contained in letters patent No. 205,129, granted to the defendant Packard June 18, 1878, and also other shoes and gaiters, all of which contained the invention in the plaintiffs' patent. The bill prayed an injunction, an accounting and damages.

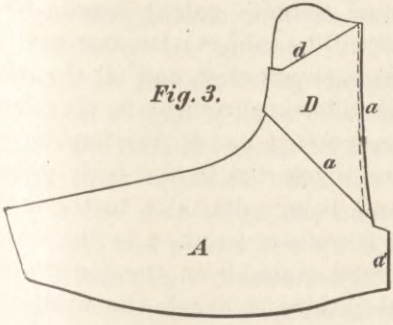
The defences pleaded in the answer were non-infringement; an anticipation of the plaintiffs' invention by certain English patents dated in 1856 and 1860, respectively; and want of novelty in the invention, because, long prior to the issue of plaintiffs' patent, one Jacob O. Patten of Philadelphia had manufactured and sold shoes constructed on the same plan as described in that patent. Issue was joined, proofs were taken, and on the 3d of February, 1883, the Circuit Court entered a decree sustaining the plaintiffs' patent, and adjudging that there had been an infringement of it by the defendants; and accordingly referred the case to a master for an account of profits, and for the determination of damages, if any, by reason of such infringement. *Evory* v. *Burt*, 15 Fed. Rep. 112. October 13, 1884, the master filed his report, in which he found that the defendants had made and sold 41,297 pairs of shoes which infringed the plaintiffs' patent, but that, as they made no difference in price between shoes containing the invention of the plaintiffs and those without it, they therefore made no profit from such infringement; that Belcher was the only one of the plaintiffs who was engaged in making or selling shoes, and, as he made and sold less than 1000 shoes containing the invention in the patent, he was not damaged by reason of defendants' infringement; but that, as the evidence showed that the plaintiffs had an established royalty of three cents a pair, for shoes made under that patent, and had issued licenses and sold stamps to persons desiring to use their patent, the licensees paying such royalty, the defendants should pay the plaintiffs that royalty on the number of shoes made by

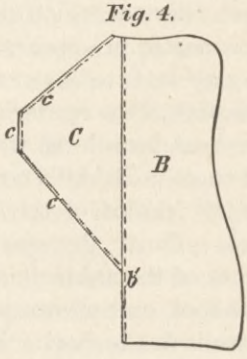
them containing the infringing device, to wit, 41,297 pairs, that is, the sum of three cents a pair, or $1238.91. Exceptions were filed to this report, but they were overruled by the court, and on the 29th of January, 1886, a final decree was entered confirming it and assessing damages in the sum of $1238.91, that being the amount of the royalty found due by the master. An appeal from that decree brings the case here.

The material parts of the specification of the plaintiffs' patent and the drawings are as follows: "Our said invention consists in a novel mode of constructing shoes and gaiters, whereby the ordinary elastic goring at the sides and the









tedious lacing up at the front are both dispensed with, while at the same time the tops will expand to receive the foot, and fit neatly and closely around the ankle when the shoe is on, being also water-tight to the extreme top of the shoe. . . . Figure 1 represents a side elevation of our invention; Fig. 2 a plan or top view of the same; and Figs. 3 and 4 represent detached views or patterns of the several parts. Similar letters of reference in the several figures indicate like parts of our invention. A represents the front of the shoe, and has attached to its rear edge *a*, as shown, a gore flap (marked D). B represents the back of the shoe, and has attached to its front edge *b*, as shown, a corresponding gore flap (marked C). The front and back are sewed together at those parts of their contiguous edges marked *a'* and *b'*, and the flap C is arranged upon the flap D, bringing their corresponding edges *c* and *d* upon each other, which are then sewed together, the two flaps thus arranged forming a double extension gore upon each side of the shoe, which readily expands to admit the foot, and which may then be folded forward over the instep, and be secured by a buckle or knot, or by a suitable lacing, as desired. . . . We do not claim broadly, for an extension-gore flap inserted in the ankle of gaiter shoes, for this is fully covered by the broad claim of Samuel Babbit's patent, issued March 7, 1865, to which our patent will be subject; but our mode of construction is an improvement upon that, and all the other modes since patented, in the following particulars, viz.: First, it requires less stock in its construction, and is therefore cheaper than those in which the gore is inserted in the heel; second, it is neater in appearance, and, being adjustable to the ankle, it may be fitted even where there is a variation in the size of the shoe, thus rendering it more available in the construction of shoes for sale at wholesale; third, it avoids the wrinkle in the heel in Babbit's construction of shoes, which, being exposed to the friction of the leg of the pantaloon, soon wears into a hole; fourth, by giving expansion forward to the vamp in front of the ankle it admits of the more easy introduction of the foot, and allows a neater fit than is attainable when the gore is in the heel. What we do claim as our invention, and

desire to secure by letters patent, is — A shoe when constructed with an expansion-gore flap, C D, the external fold, C, of which is attached to and in front of the quarter B, and the internal fold, D, of which is attached to and in rear of the vamp A, the said several parts and pieces being respectively constructed and the whole arranged for use substantially in the manner and for the purpose set forth."

In construing this patent the court below followed the decision of the Circuit Court of the United States for the District of Connecticut (Judge Shipman) in *Evory* v. *Candee*, 2 Fed. Rep. 542; and seemed to assume that no question was presented here touching its validity. After referring to the fact that the patent had been held valid in *Evory* v. *Candee*, *supra*, the court said: "Its validity is not now assailed, unless a wide construction is given to the claim; and this, as is most usual, is the difficult point."

The assignments of error are seven in number; but in the view we take of the case it is necessary to examine only the first three of them, which are, that the court erred (1) in holding that the patent is valid; (2) in holding that, in view of the antecedent state of the art, the patent had been infringed by the defendants; and (3) in construing the patent.

These assignments may be properly considered together. In construing the patent it will be necessary to consider the state of the art when the application for it was made. The object sought to be accomplished was to make improvements upon ordinary shoes so that they would be water-tight and would exclude dirt. It is shown by the record that long prior to the time when the application for the patent was made there had been a number of efforts made in the direction of accomplishing the same result. As early as 1856, Stephen Norris, of England, received a patent there for "improvements in the manufacture of boots and shoes and other coverings for the human feet;" and in 1860, Norris and Robert Rogers obtained another patent in England relating to the same subject matter, and intended to be an improvement upon the invention in the prior patent. These patents were broad in their claims, and were intended to cover any device by which

boots and shoes could be made water-tight by means of the cut of the various pieces composing them. Various designs were adopted and used by the patentees in those patents for the manufactured article to which the patents related.

In his specification to the patent of 1856, Norris says: "My improvements consist in adapting to boots, shoes and other coverings for the human feet, gussets of novel and improved construction, in combination with ordinary fastenings, for the purpose of enabling boots, etc., to be readily adapted and secured to and detached from the feet, and at the same time preserved water-tight at such parts when necessary. The following are a few examples of the mode of adapting my said improvements to certain descriptions of boots, shoes and other coverings for the human feet. First, as regards ladies' boots, I propose to employ side gussets of cloth or leather, so combined with elastic material as that the said gussets shall always be preserved flat, instead of wrinkling or overlapping, as heretofore. Another mode is to secure folding side gussets and fastenings, composed either by interlacing into two rows of hooks strips of elastic or eyelets. The openings for the gussets I propose to make at each side of the boot, and to extend it from the top in an ornamental direction, either towards the toe of the boot or the sole thereof, or towards the heel. And as regards gentlemen's boots and other similar coverings, I propose, in manufacturing boots known and distinguished as Bluchers, to form the side seams thereof, or close the 'fore' and 'back' parts, somewhat after the manner of Wellington boots, so as to resemble the same when on the feet, and to enable Blucher boots to be more readily put on and taken off than heretofore, by employing the aforesaid gussets in combination with boots of the above description. In order to explain my said invention as completely as possible, I now proceed to describe the best means I am acquainted with for carrying the same into practical effect, reference being had to the illustrative drawings hereunto annexed, and to the numeral figures and letters of reference marked thereon respectively, as follows." Then follows the description of the drawings relating to the patent, and, in conclusion, the speci-

fication says: "I would remark that the principal points to be attended to in these improvements are to have the gussets the proper size, and to connect them to the front and back parts of the boot, or to the back part only thereof, by sewing and stabbing, or other known means, so that they may, when necessary, be rendered water-proof; and this applies more particularly to men's boots. And as regards the fastenings for securing the boots on the feet, I employ any of the known means for that purpose." And again he says: "I hereby declare that I claim as my invention: Firstly, the modes above particularly described, set forth, and represented at figures 1, 2, 3, 4, 10, 11, 12, 13, 18, 19, of sheet 1, of manufacturing Blucher boots, and more particularly the cutting of the back part of such boots in the manner exhibited at figures 5, 6, 15, 16, 18, for the purpose set forth. Secondly, the inserting of the gusset at the back part of the boot, as at figure 14. And lastly, as regards the boots exhibited at the several other figures of the drawings, I claim the adapting thereto of two gussets, as above described."

In the patent of 1860 some minor changes were made, in the shape of several of the parts composing the boot or shoe, but the object of the invention remained the same, namely, to make the boots and shoes to which it related water-tight and capable of excluding dirt, etc.

An examination of the drawings accompanying the applications for those patents shows that several of their shoes differ very little, if any, in their essential features from those manufactured under the Evory and Heston patent. The shoes under the English patent, as do those under the Evory and Heston patent, consist of quarters, the vamp, and a folding gusset or gore flap uniting the vamp and the quarters. It is contended on behalf of the appellees, and the testimony of their expert, Mr. Brevoort, is to the same effect, that the material point of difference between their shoe and the Norris shoe is, that in the latter the gusset or gore flap folds in such a manner that it lies within the shoe proper next to the foot, while in their shoe the gore or gusset folds outside of the shoe, thus rendering their shoe more comfortable to the foot and

more easily worn than the English shoe. But we do not think it can be safely averred that the specifications and drawings of the English patents require the gore or gusset to be folded so that it will lie inside of the vamp, next to the foot. It is true that Norris does not say in so many words that the folds of the gore will lie wholly outside of the shoe proper; but neither does he say that they shall lie wholly within the shoe. We think a fair construction of Norris's patents leaves the question of where the folds of the gussets of his shoes shall lie, within the discretion of the manufacturer of them, who, if he be a skilful mechanic, will be enabled to so arrange the gores or gussets that they will accomplish their object without interfering with the comfort of the wearer of them.

On the 7th of March, 1865, Samuel Babbit of Kokomo, Indiana, obtained a patent, No. 46,622, for an "improvement in gaiter boots." In his specification Babbit says: "The object of this invention is to dispense with the use of the ordinary gore or elastic webbing in the manufacture of gaiter boots, and at the same time so construct the shoe as that the purposes of such webbing shall be subserved. To this end the invention consists in forming that part of the shoe which covers the ankle with an extension which enlarges the opening to such a degree as to permit the foot to be readily inserted, and which, after the shoe is on the foot, is folded and buckled or fastened against the ankle after the manner of a flap, and this shoe is made without the formation of a joint and is perfectly water-tight." Babbit's shoe had the quarters extended at the heel about one-half the width of the shoe at the ankle, thus enlarging the opening in the top of the shoe through which the foot is inserted to an extent commensurate with such extension. When the shoe was on the foot those elongated quarters were folded against the side of the shoe and buttoned to it, and the shoe was thus rendered water-tight clear to the top.

Another patent, No. 49,076, for the same sort of an invention, was granted to David Brown and William S. Wooton, of Kokomo, Indiana, on the 1st of August, 1865. That invention is thus described in the specification: "The present

invention consists in attaching to the back portion of the boot or shoe in which a vertical slit or opening has been made a folding flap or piece of sufficient size and shape that, when the boot or shoe is put on the foot, it can be folded or passed entirely around the instep, and there fastened by buckling, buttoning, or in any other proper manner, said flap being connected therewith by means of two wings or sectional pieces, each fastened by sewing, or in any other suitable way, at one edge to one side of opening or slit in the boot or shoe and at the other to the inner surface of the folding flap, and which wings, when the folding flap has been buttoned, as described, lie and are held between it and the exterior surface of the boot or shoe upper." The advantages claimed for the Brown and Wooton patent were the ease with which the shoe could be put on and taken off, the absence of eyelet holes or any kind of apertures communicating with the interior of the shoe, and the peculiar construction and arrangement of the flap, whereby the counter of the shoe was prevented from being broken down.

Such was the state of the art when Evory and Heston made their application for the patent in suit. Let us now carefully examine the Evory and Heston patent to see what patentable improvements are embraced by it. In the first part of the specification it would seem that they were seeking a patent for a *mode of constructing* a shoe, for they say: "Our said invention consists in a novel mode of constructing shoes and gaiters," etc. And in another part of their specification they say; "Our *mode of construction* is an improvement upon" the Babbit patent, etc. But the concluding part of their specification would seem to negative the idea that they were claiming a patent for a mode of construction, and not for a manufactured article; for they say; "What we do claim as our invention and desire to secure by letters patent is a shoe when constructed with an expansion-gore flap," etc. In the brief of counsel for appellees it is conceded that the patent is for a shoe, and not for a mode of constructing it. Counsel says, after quoting the concluding paragraph of the specification: "This is a claim *for a shoe* having on each side an expansion-gore flap," etc.

We think, therefore, the claim in this case must be regarded as being for a manufactured article, and not for a mode of producing it. This being true, it is difficult to see any patentable device or function in the Evory and Heston shoe. It is a mere aggregation of old parts with only such changes of form or arrangement as a skilful mechanic could readily devise — the natural outgrowth of the development of mechanical skill as distinguished from invention. The changes made by Evory and Heston in the construction of a water-tight shoe were changes of degree only, and did not involve any new principle. Their shoe performed no new function. In the construction of it the vamp, the quarters and the expansible gore flap were cut somewhat differently, it is true, from like parts of the shoes constructed under the earlier patents referred to, but they subserved the same purposes.

It is well settled that not every improvement in an article is patentable. The test is that the improvement must be the product of an original conception. *Pearce* v. *Mulford*, 102 U. S. 112, 118; *Slawson* v. *Grand Street Railroad*, 107 U. S. 649; *Munson* v. *New York City*, 124 U. S. 601, and many other cases. And a mere carrying forward or more extended application of an original idea — a mere improvement in degree — is not invention. In *Smith* v. *Nichols*, 21 Wall. 112, 118, 119, Mr. Justice Strong, delivering the opinion of the court, said: "A patentable invention is a mental result. It must be new and shown to be of practical utility. Everything within the domain of the conception belongs to him who conceived it. The machine, process, or product is but its material reflex and embodiment. A new idea may be ingrafted upon an old invention, be distinct from the conception which preceded it, and be an improvement. In such case it is patentable. The prior patentee cannot use it without the consent of the improver, and the latter cannot use the original invention without the consent of the former. But a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions or degree, the substitution of equivalents, doing substantially the same thing in the same way, by substantially the same means,

with better results, is not such invention as will sustain a patent. These rules apply alike, whether what preceded was covered by a patent or rested only in public knowledge and use. In neither case can there be an invasion of such domain and an appropriation of anything found there. In one case everything belongs to the prior patentee; in the other, to the public at large."

Neither is it invention to combine old devices into a new article without producing any new mode of operation. *Stimpson* v. *Woodman*, 10 Wall. 117; *Heald* v. *Rice*, 104 U. S. 737; *Hall* v. *Macneale*, 107 U. S. 90.

In the recent case of *Hill* v. *Wooster*, decided January 13 of this year, 132 U. S. 693, 700, it is said: "This court, however, has repeatedly held that, under the Constitution and the acts of Congress, a person, to be entitled to a patent, must have invented or discovered some new and useful art, machine, manufacture or composition of matter, or some new and useful improvement thereof, and that 'it is not enough that a thing shall be new, in the sense that in the shape or form in which it is produced it shall not have been before known, and that it shall be useful, but it must, under the Constitution and the statute, amount to an invention or discovery;'" citing a long list of authorities.

We are of the opinion that the patent in suit does not meet the requirements of the rules deduced from the decisions to which we have referred. We do not think there is any patentable invention in it; but, on the contrary, that it is merely a carrying forward of the original idea of the earlier patents on the same subject — simply a change in form and arrangement of the constituent parts of the shoe, or an improvement in degree only.

For these reasons the decree of the court below is reversed, with a direction to dismiss the bill.

PHŒNIX CASTER COMPANY *v.* SPIEGEL.

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

No. 150. Argued December 10, 1889.— Decided March 3, 1890.

The claim of letters patent No. 190,152, granted May 1, 1877, to Alexander C. Martin, for an "improvement in furniture casters," namely, "The floor-wheels EE, the anti-friction pivot wheel F, the housing B, the elliptical housing opening, or its mechanical equivalent, and the rocker-formed collar bearing, or its mechanical equivalent, all combined so as to allow the floor-wheel axis to oscillate horizontally, substantially as and for the purpose specified," being a claim selected by the patentee in obedience to the requirements of the Patent Office, after an extended construction of it had been rejected, and being a combination of specified elements, must be limited to a combination of all such elements.

In view of the state of the art, the words in the claim, "the rocker-formed collar bearing, or its mechanical equivalent," must be restricted to such a bearing resting on a collar beneath the floor-wheel housing, as is shown in the Martin patent; and the claim does not cover a caster which does not have the collar of that patent, or its rocker-formed collar bearing or an equivalent therefor.

IN EQUITY to restrain infringements of letters patent.

The case is stated in the opinion.

Mr. Charles P. Jacob for appellant.

No appearance for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the District of Indiana, by the Phœnix Caster Company, an Indiana corporation, against Augustus Spiegel, Henry Frank and Frederick Thoms, to recover for the alleged infringement of letters patent No. 190,152, granted May 1, 1877, on an application filed September 16, 1876, to Alexander C. Martin, for an "improvement in furniture casters."

Opinion of the Court.

The specification, claim and drawings of the patent are as follows: "This invention relates to swivelling casters, and the objects of the invention are to secure in such casters freedom from pivotal wear of carpet or floor and increased mobility in swivelling. The first object is attained by the use of two floor-wheels whose axes are coincident, in connection with devices which insure the contact of both wheels with the floor, regardless of ordinary irregularities of floor surface. The second object of the invention is a natural result of the suppression of floor friction. In the accompanying drawing, Fig. 1 is an elevation of my improved caster. Part of Fig. 1 is a vertical section. Fig. 2 is a side elevation, and Fig. 3 is a part elevation, exhibiting the portion cut away in Fig. 1. Common casters, in swivelling, pivot upon the floor. The point of pivot motion is the point of contact between wheel and floor. Such pucker and wear carpets, and are sluggish in their swivelling action. Two rollers side by side will, in swivelling, turn in opposite directions, and it will be found that they roll upon the floor instead of pivoting, as does the single wheel; but if the floor should be irregular, as is often the case, one wheel of the pair would not touch the floor, and the two-wheeled caster would become pratically a one-wheeled caster. My improvement consists in making the axis of the two wheels oscillatory with reference to the article to which the furniture caster is attached. The axis of oscillation, being at right angles to the floor-wheels' axis, allows the wheels to accommodate themselves to ordinary inequalities of floor. Referring to the drawing, A is a flange, from which depends the stem or boss C. This stem serves as a pivot for the swivelling motion, as a draft-pin for the wheel-housing, and as a means of uniting the parts. The housing B furnishes bearing supports for the two floor-wheels EE and the anti-friction pivot-wheel F. The latter wheel is situated centrally between and vertically above the floor-wheels. The housing swivels upon the stem in the usual manner. Were only a swivelling motion of the housing desired, its fit upon the central pivot might be close, allowing only looseness enough for the swivelling action; but the object sought by my improvement demands that the

housing should have a compound motion with reference to the central pivot. It must revolve upon a vertical axis and oscillate upon a horizontal axis. This compound bearing is formed by making the housing bearing slightly elliptical and the housing collar bearing in rocker form, as shown in Fig. 3. The rocker may be on the side of the hole nearest the anti-friction wheel or on the opposite side, and the axis of the rocker should be in line with, and a continuation of, the axis of the anti-friction wheel F, so that the anti-friction wheel may not impede the oscillating motion. By means of the relief resulting from the elliptic nature of the housing opening and the rocker bearing, freedom for oscillation is secured without interfering with the functions of the central pivot as a bearing of rotation, draft-pin and means of union. I claim

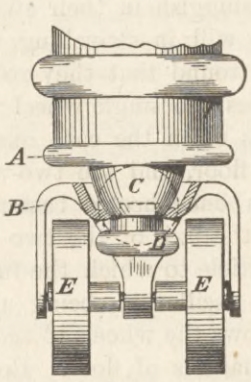


Fig. 1.

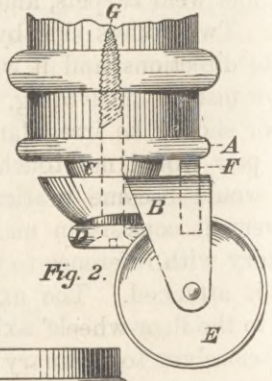


Fig. 2.

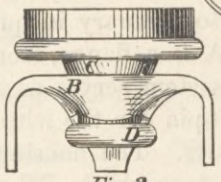


Fig. 3.

as my invention, a furniture caster composed of the following elements: The floor-wheels EE, the anti-friction pivot-wheel F, the housing B, the elliptical housing opening or its mechanical equivalent, and the rocker-formed collar bearing or its mechanical equivalent, all combined so as to allow the floor-

wheel axis to oscillate horizontally, substantially as and for the purpose specified."

The answer sets up as defences want of novelty and non-infringement. After a replication, proofs were taken on both sides. The case was heard before Judge Woods, and a decree was entered which stated that the court found that there had been no infringement of the patent, and that the bill was dismissed, with costs. From this decree the plaintiff has appealed. The opinion of the court is reported in 26 Fed. Rep. 272.

The caster used and sold by the defendants was known as "the Yale caster," and was made at New Haven, Connecticut. The opinion of the court stated that the prior art was shown by reference to numerous earlier patents, both American and English, "which, it is alleged, anticipated the Martin combination entirely, or, at least, in so far as to impose upon it a strict construction, limiting it to the particular arrangement of parts described and excluding any pretence of infringement by the defendants." The opinion then proceeds as follows: "After a painstaking consideration of the evidence and accompanying models, the opinions of the experts, and the arguments and briefs of counsel, which upon both sides have been quite exhaustive, I am compelled to the conclusion that infringement has not been shown, and consequently that the bill must be dismissed. The combination of the patent in question accomplished no new result in mechanics, and differed from previous known combinations, designed for the same and like purposes, only in the construction of one or two of the parts, whereby, perhaps, a better but certainly not a different kind of result was accomplished than had been before effected. More than this cannot be justly claimed, as it seems to me. Besides, it appears that Martin's application for a patent was rejected and withdrawn two or more times, the examiner insisting, upon certain references, 'that all applicant's novelty in entire device is only expressed by words "as specified."' In obedience to this ruling the claim, and perhaps the specification, was modified and the patent granted. It follows that the patent cannot now, by a liberal construction, be made to include anything

so denied by the Patent Office, and without this the device of the defendants cannot, I think, be said to infringe."

The claim of the patent is for a combination of the following elements: (1) the floor-wheels EE; (2) the anti-friction pivot-wheel F; (3) the housing B; (4) the elliptical housing opening, or its mechanical equivalent; (5) the collar; (6) the rocker-formed collar bearing, or its mechanical equivalent. All these are to be so combined as to allow the axis of the two floor-wheels to oscillate horizontally with reference to the article to which the caster is attached. The floor-wheels EE are mounted in a housing. This housing also furnishes bearing supports for an anti-friction pivot-wheel F, which latter wheel constitutes the principal bearing-surface between the floor-wheels' housing and the plate at the bottom of the piece of furniture, on which plate the anti-friction pivot-wheel travels in the swivelling movement of the caster. The collar, which is not referred to by letter in the specification, is marked D in figure 3 of the drawings. It sustains the downward pressure at the heel of the housing, which is that part most remote from the floor-wheels. The convex surface of the rocker-formed collar bearing, which is between the heel of the housing and the collar, is formed on the housing itself. There is an elliptical opening in the housing, in which the entire caster swivels, so as to permit its lateral oscillation. No one of the six elements above mentioned can be dispensed with, without departing from the invention specified in the claim of the patent. The collar is a necessary element in the combination specified in the claim, because there cannot be a rocker-formed collar bearing unless there be a collar.

A copy of the file wrapper and its contents, in the matter of the patent, is found in the record. The claims in the specification originally filed were as follows:

"First. The housing B, in combination with the anti-friction wheel F, and two or more floor-wheels, E, substantially as described.

"Second. The combination of the housing B, flange A, boss C, so arranged that the axis of rotation and oscillation of the housings shall intersect below the flange A, substantially as and for the purpose specified.

"Third. The combination of the flange A, boss C, and screw G, substantially as and for the purpose specified."

The application was rejected on the 27th of September, 1876, by a reference to four United States patents, the examiner saying that the invention claimed lacked apparently any element of patentable novelty, and adding, that, in view of those references, "and in the absence, as far as is perceived, of any new formation or showing of patentable improvement over them," the application was rejected.

The applicant then cancelled said three claims, and substituted for them the following, leaving the text of the specification to stand:

"In a furniture-caster, the combination of the above-described housing B with the anti-friction wheel F and floor-wheels EE, when the anti-friction wheel F is situated above and centrally between the floor-wheels EE, substantially as and for the purpose specified."

On the 5th of October, 1876, the Patent Office informed the applicant that it was not patentable to double the number of wheels which before existed, the examiner adding: "It would not, of course, be possible to re-patent all our devices used with a single wheel to every one who should put in two wheels instead of one."

The applicant then made amendments in his specification and drawings, and submitted his case again, with an argument, to which the Patent Office replied, on the 19th of October, 1876, that if the applicant would define, in his claim, his "housing B" as "having an elliptical opening bearing upon a point opposite to and farthest from the anti-friction wheel F," the case would pass all reference.

In reply to this, the applicant, on the 23d of October, 1876, substituted a new specification and claims for those already presented. The new claims were as follows:

"In a caster, the combination of the housing B, anti-friction wheel F, and floor-wheels EE, when the anti-friction wheel is located centrally between and vertically above the floor-wheels, for the purpose and substantially as specified.

"In a caster, the combination of the flange A, stem C,

housing B, and floor-wheels EE, so arranged that the axis of the floor-wheels may oscillate with reference to the plane of the flange A."

On the 26th of October, 1876, the examiner wrote to the applicant as follows: "The examiner, in official letter of 19th inst., suggested all he felt that he could possibly allow, considering the state of the art. Applicant's present amended first claim could not be allowed, as it is for just what in every letter the office has stated that it could not allow, viz., 'adding the usual friction roller in the usual way to two wheels, also old.' This is a mere double use. The second amended claim could not be allowed, even were applicant the first to use two wheels, for it is not for devices, but for a result or function (never patentable), applicant claims, 'so arranged that the axis may oscillate, etc.' A dozen inventions may do this, and yet not be equivalents of applicant's arrangement of devices, to which alone he is entitled. Just as stated in letter of 19th, the examiner thinks that in granting the claim there suggested he, if anything, errs on the liberal side."

In reply, the applicant, on the 31st of October, 1876, amended his specification and claim. The following paragraph was inserted in the specification: "It is also necessary that the housing should be capable of having a compound motion upon the central pivot. It must revolve upon a vertical axis and oscillate upon a horizontal axis. This compound bearing is formed by making the housing bearing slightly elliptical and making its collar bearing in rocker form, as shown in Fig. 3. The rocker may be on the side of the hole nearest the anti-friction wheel, or on the opposite side. By means of the described relief and rocker bearing, freedom for oscillation is secured, without interfering with the function of the pivot as a bearing of rotation, draft-pin, and means of union." The following claim was substituted for all previous claims: "In a caster, the floor-wheels, EE, and an anti-friction wheel, F, in the relative position specified, when combined with the housing B, having its pivot-bearing relieved as specified, or its mechanical equivalent, substantially as and for the purpose specified."

In reply, the examiner said, in a letter to the applicant dated November 15, 1876: "Part of applicant's claim reads as follows: 'having its pivot bearing relieved as specified, or its mechanical equivalent.' Applicant will see at once that all applicant's novelty in entire device is only expressed by words 'as specified.' This sort of claim has never been allowed, save through some error, since 1870. . . . Again, 'its mechanical equivalent' refers to no specified devices. One cannot say 'having a thing done so and so, or its mechanical equivalent.' Again, the specification says, 'One important feature of my invention is so and so,' and, 'a further improvement consists in,' etc. Applicant has one novelty only, and should be well aware that he should not still claim, in his nature of invention, the anti-friction wheel. Applicant should claim definitely his devices (which he includes in 'relieved as specified') and their equivalents, and change specification to correspond, as suggested. An appeal from the examiner, is, of course, proper at any time, but he can issue no patent unless the specification and claims, fairly and without ambiguity, only cover the novel device."

The applicant then, on the 17th of November, 1876, withdrew his existing specification and claim, and substituted those which are in the patent as issued, and it was granted.

It therefore appears, that while the applicant at first claimed a combination of merely three elements, namely, the housing, the anti-friction wheel, and the floor-wheels, he finally limited that combination by adding to those three elements the elliptical housing opening, the collar, and the rocker-formed collar bearing. When the applicant presented his original application, he evidently supposed that he was the first inventor of a two-wheeled caster in which the axis of the floor-wheels could oscillate relatively to the furniture leg. In his letter of October 26, 1876, the examiner criticised the second amended claim, namely, "in a caster, the combination of the flange A, stem C, housing B, and floor-wheels EE, so arranged that the axis of the floor-wheels may oscillate with reference to the plane of the flange A," as not being for devices, but for an arrangement so made that the axis of the

floor-wheels could oscillate, while the applicant was entitled only to his arrangement of devices. The combination of specified elements constituting such arrangement, selected by the applicant after all the correspondence between him and the Patent Office, is contained in the claim as granted.

It is well settled that where a patentee has modified his claim in obedience to the requirements of the Patent Office, he cannot have for it an extended construction which has been rejected by the Patent Office; and that, in a suit on his patent, his claim must be limited, where it is a combination of parts, to a combination of all the elements which he has included in his claim as necessarily constituting that combination. The authorities on the subject are collected in the case of *Roemer* v. *Peddie*, 132 U. S. 313, 317.

The defendants' caster is a two-wheeled caster, with two floor-wheels and two anti-friction wheels, one of the latter located on each side of the vertical plane of the axis of the floor-wheels, the attachment of the floor-wheel housing to the furniture-plate being through the medium of a pivot-pin which turns in the furniture-plate and is secured to the floor-wheel housing by the horizontal axis-pin of the anti-friction wheels, which axis-pin thus becomes the centre of oscillation for the caster. It is provided also with a hollow stud, formed in one piece with the furniture-plate and projecting downward therefrom, within which hollow stud the vertical swivelling-pin turns. It is wanting entirely in the collar of the Martin patent, at the bottom of the attaching stud, by which the caster-housing is secured to the furniture leg, to prevent its dropping when the furniture is lifted; and it is wanting also in Martin's "rocker-formed collar bearing," which rests upon the collar beneath it and forms one point of the axis of oscillation. The expert for the plaintiff concedes that he does not find in the Yale caster anything that in terms might be called a rocker-formed collar bearing, except so far as the pivot-pin, being permanent in the housing, might be said to be a part thereof.

In view of the state of the art, as shown by the various patents put in evidence, the words "the rocker-formed collar bearing,

or its mechanical equivalent," in the claim of the Martin patent, cannot embrace all modes of affording vertical support between the floor-wheel housing and the furniture-plate, whereby lateral oscillation of such housing is permitted; and those words must be restricted to such a bearing resting on a collar beneath the floor-wheel housing, as is shown in the Martin patent. The housing in the Yale caster is not of a construction similar to that described by Martin; and there is not in the Yale caster any equivalent for such "rocker-formed collar bearing;" nor is there any collar beneath the housing on which such collar bearing can rest. The housing of the Martin patent has an opening from top to bottom, through which the vertical swivelling-stud of the furniture-plate passes; while the Yale caster has no such opening, but only a recess or cavity in the top of the housing, an arrangement which results from the use in the Yale caster of a different mode from that of Martin, of attaching the housing to the furniture-plate, by the substitution for the Martin stud and screw, and a collar held by the screw beneath the housing, of a horizontal pin passing entirely through the swivelling pintle of the housing, which pintle is thus made to revolve with the housing, and turns in the fixed furniture-plate, the horizontal pintle of the anti-friction wheels being used for the attachment of the housing.

For these reasons we concur with the Circuit Court in its view that infringement has not been established.

It is to be regretted that while this case was orally argued on the part of the appellant, it was not so argued on the part of the appellees, nor have we been furnished with any brief on their part. This leads to the conclusion that, although the decree dismissing the bill states that the plaintiff claimed his appeal in open court and gave good and sufficient surety, and that the appeal was accordingly allowed, the defendants, for some reason, have not sufficient interest in the questions involved to endeavor to sustain the decree. Perhaps the case, as presented to us, is substantially a moot case; still, there is nothing to show it, and the appellant, on the record, has a right to have the questions he presents decided.

Decree affirmed.

COYNE *v.* UNION PACIFIC RAILWAY CO.

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

No. 8. Argued and submitted January 23, 24, 1890. — Decided March 3, 1890.

In this case, which was an action against a railroad company, by one of its employés, to recover damages for a personal injury, it was *Held*, that it was proper for the Circuit Court to direct the jury to find a verdict for the defendant.

The plaintiff was a laborer or construction hand, under a construction boss or foreman of the defendant. He was injured by the fall of a steel rail, which he and other laborers were trying to load from the ground upon a flat car, and which struck the side of the car and fell back. The negligence alleged was, that the foreman moved out the construction train to which the flat car belonged, in the face of an approaching regular freight train, to avoid which the laborers were hurrying to load the rails; and that he failed to give the customary word of command to lift the rail in concert, but, with the approaching freight train in sight, and with oaths and imprecations, ordered the men to get the rail on in any way they could, and they lifted it without concert; *Held*, that whatever negligence there was, was that of either the plaintiff himself or of his fellow servants who with him had hold of the rail.

THE case is stated in the opinion.

Mr. E. T. Wells (with whom was *Mr. Edward L. Johnson* for plaintiff in error) submitted on their brief.

Mr. John F. Dillon for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

James Coyne brought an action in the Circuit Court of the United States for the District of Colorado, against the Union Pacific Railway Company, to recover damages for a personal injury. After issue joined, the case was tried by a jury. The court instructed the jury to find the issues for the defendant, to which instruction the plaintiff excepted. The jury rendered a verdict for the defendant, and the plaintiff has brought a writ of error.

Opinion of the Court.

The bill of exceptions sets forth that the plaintiff gave evidence tending to show the following facts: On and before the 18th of May, 1882, the plaintiff was in the employ of the defendant as a laborer or construction hand, under one McCormick, construction boss or foreman of the defendant. McCormick had authority to control and direct, and compel obedience of, the plaintiff, and also, in his discretion, to discharge the plaintiff or any other servant of the defendant working under his direction and control. While employed by the orders of McCormick, the plaintiff, with the other servants and section men of the defendant, went upon its construction train, which was under the control and direction of McCormick, to a place between two stations on its railroad, known respectively as Byers' and River Bend, about two miles east from Byers' station, and at such place the plaintiff and the other servants were commanded by McCormick to load upon a certain flat car in the construction train about forty steel rails, which were then lying near the track of the railroad. The plaintiff and the other employés of the defendant proceeded to load the rails on the flat car, as directed by McCormick, and under his orders, he directing the labor of the plaintiff and the other servants. Each of the rails was from 24 to 29 feet long, and weighed from 400 to 600 pounds. To lift one of them, the labors of about ten men were required; and the plaintiff and the other servants under the command of McCormick were divided into two gangs, of ten or more men each. In loading the rails, each of the gangs was required and directed by McCormick to act in concert, and to lay hold of and lift the rail, and walk with it to the flat car, and there halt, dress, and, at the word of command given by McCormick, lift the rail, and cast it, with one motion, on the floor of the flat car. By reason of the length and great weight of the rails, it was necessary, in loading them upon flat cars, that, in order to avoid injury to the workmen engaged, care, deliberation and concert of action should be observed, and that some person should give the word of command in each of the several stages of progress in loading them, and particularly at the point when the rail was to be thrown upon the car. Prior to

the injury complained of, McCormick had controlled and directed the men in loading the rails, and the plaintiff supposed that, in loading the last rail, the one which hurt him, the same course would be pursued by McCormick. Neither at such place nor nearer than Byers' station was there any siding or switch. When all but three or four of the rails were loaded upon the flat car, the regular freight train of the defendant appeared rapidly approaching from the east. McCormick thereupon, with violent oaths and imprecations, urged the plaintiff and the other men of the party to make haste and complete the loading of the rails, so that he might move the construction train back to Byers' station and out of the way of the freight train. By reason of the great haste so commanded by McCormick, and the confusion resulting therefrom, the plaintiff, who had before been, and then was, working and lifting at the end of the rail seized by the gang to which he belonged, was crowded off from that rail. McCormick, who was then, as before, standing on the flat car, commanded the plaintiff with oaths and violent language, to lay hold of the other rail and not to stand idle. Thereupon, the plaintiff in obedience to the commands of McCormick, rushed to and seized upon the rail being lifted by the other gang of men and moved forward to the flat car. While the plaintiff and the other men so holding that rail were awaiting the word of command to lift it, McCormick, with further oaths, imprecations, and harsh and violent commands, ordered the party to get the rail on in any way they could, not giving to them any word of command. Thereupon, the party, hurried and agitated by the oaths, imprecations, and violent commands of McCormick, lifted without concert, some at one moment and some at another, and threw the rail at one end with force and at the other end with less force, so that it struck the side of the flat car at one end and fell backwards. The plaintiff, seeing that it was about to fall, endeavored to retreat out of the way of it, but was unable to avoid it, and it fell on him, bore him down, and broke and crushed his foot and leg. He had been in the service of the defendant only about seven days. At the time of his going with McCormick to the place of loading the rails,

the time at which the freight train of the defendant would approach the place was well known to McCormick and was unknown to the plaintiff. The freight train was overdue at Byers' station at the time the construction train left that station, and McCormick knew the fact of its being so overdue, and knew that the freight train was then coming towards Byers' station from the east; and the plaintiff knew nothing about the freight train. The injury so occasioned to the plaintiff, was probably due and owing to the haste and confusion occasioned by the oaths, violent commands and injunctions to make haste given by McCormick.

The only question to be considered in the case is whether it was proper for the court to instruct the jury to find for the defendant, or whether the case should have been left to the jury.

We are of opinion that it was proper to direct a verdict for the defendant. On the facts set forth, the injury to the plaintiff was not caused by any negligence on the part of McCormick. It is alleged that McCormick, knowing of the approach of the regular freight train, moved out his train in the face of it; but that does not show any negligence, for it does not appear that the approaching freight train was so near as to render it unsafe for McCormick to start the construction train. Whatever the distance away of the freight train, it would properly be called an approaching train; and it is very plain that the work of construction and repair must be done in the intervals between the running of regular trains. This latter fact was known as well to the plaintiff as to McCormick, and the plaintiff, being employed to do construction work with a construction train, must be held to have assumed the risk of doing it at the times at which it had to be done. The fact that all of the rails save three or four had been loaded at the time shows that there was no negligence in undertaking to load the rails upon the construction train at the time they were loaded. The negligence on the part of McCormick, if there was any, could have been only as to the manner of loading the particular rail whose fall injured the plaintiff.

It is clearly to be deduced from the evidence that the method

described, of lifting the rail, walking with it to the car, halting, dressing, and then, acting in concert, lifting the rail, at the word of command given by McCormick, and throwing it upon the floor of the flat car, was a proper and safe method of loading the rails, and that if, in the course of such action, the injury to the plaintiff had happened, no negligence could have been complained of. The negligence alleged consists in the fact that, after the men had lifted the rail in question and had carried it forward to the car and were there holding it, awaiting the word of command from McCormick to lift it further and throw it on the car, McCormick failed to give the word of command in such a way as to produce concert of action in the men, but, on the contrary, ordered them to get the rail on the car in any way they could. The fact that McCormick hurried the men does not show any negligence on his part, or excuse any negligence on theirs. The necessity of keeping the construction train out of the way of the freight train was one of the risks of the employment. The use of oaths and imprecations by McCormick was not an element of negligence. The fact that McCormick urged the men to hasten, even if, as a consequence, the plaintiff and his fellow-workmen became confused and failed to act in concert, cannot be regarded as a fault or negligence in McCormick. Whatever negligence there was, was the negligence either of the plaintiff himself or of his fellow-servants who with him had hold of the rail.

These views being conclusive in favor of the defendant, it is unnecessary to consider the broader grounds urged in support of the judgment below.

Judgment affirmed.

Mr. Justice Brewer concurs in the judgment.

Counsel for Plaintiff in Error.

QUEBEC STEAMSHIP CO. *v.* MERCHANT.

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

No. 30. Argued January 24, 1890. — Decided March 3, 1890.

The stewardess of a steam-vessel belonging to a corporation sued it to recover damages for personal injuries sustained by her. She came out of the cabin, which was on deck, to throw the contents of a pail over the side of the vessel, at a gangway facing the door of the cabin, and leaned over a railing at the gangway, composed of four horizontal rods, which gave way, because not properly secured, and she fell into the water, probably striking the side of a boat. The rods were movable, to make a gangway, and had been recently opened to take off some baggage of passengers, and not properly replaced. The porter and the carpenter had attempted to replace them, but left the work, knowing that it was unfinished. The persons composing the ship's company were divided into three classes of servants, called three departments — the deck department, containing the first and second officers, the purser, the carpenter and the sailors; the engineer's department, containing the engineers, the firemen and the coal-passers; and the steward's department, containing the steward, the waiters, the cooks, the porter and the stewardess. Every one on board, including the plaintiff, had signed the shipping articles, and she had participated in salvage given to the vessel. The master was in command of the whole vessel; *Held*, that the porter and the carpenter were fellow-servants with the plaintiff, and that the corporation was not liable to her for any damages.

The Circuit Court left it to the jury to determine, if they found there was negligence, whether the injury was occasioned by the careless act of a servant not employed in the same department with the plaintiff; *Held*, error, and that the court ought to have directed the jury, as requested, to find for the defendant, on the ground that the negligence was that of a fellow-servant, either the porter or the carpenter.

The verdict was for $5000, and the judgment was for that amount, and $306 interest for the time between verdict and judgment, and for $60.25 costs; *Held*, that the matter in dispute exceeded the sum or value of $5000, exclusive of costs, within the act of February 16, 1875, c. 77, § 3, 18 Stat. 316, even though, without the interest included in the judgment, the amount, exclusive of costs, would not be over $5000.

THE case is stated in the opinion.

Mr. William Allen Butler (with whom was *Mr. Wilhelmus Mynderse* on the brief) for the plaintiff in error.

Opinion of the Court.

Mr. A. J. Dittenhoefer for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This was an action to recover damages for personal injuries, brought by Barbara Merchant against the Quebec Steamship Company, a Canadian corporation, in the Superior Court of the city of New York, and removed by the plaintiff into the Circuit Court of the United States for the Southern District of New York. The case was tried by a jury, which found a verdict for the plaintiff for $5000, on which a judgment was entered in her favor for that amount, with $306 interest from the time of rendering the verdict to the time of entering judgment, and $60.25 costs, in all $5366.25.

The plaintiff was the stewardess of the steamship Bermuda, a vessel belonging to the defendant, and one of a line of vessels plying between the city of New York and the West Indies. She had been employed on the vessel for about eighteen months. It was her duty as stewardess to attend to the ladies' rooms in the cabin, and, in the course of that duty, to empty slops, as to which her orders were to throw them over the side of the vessel. The cabin was on deck. A railing extended around the vessel, and consisted of four horizontal iron rods, which were supported, at intervals of about $4\frac{1}{2}$ feet, by stanchions. In this railing there were openings or gangways, for receiving and discharging freight and passengers. Three of the gangways were for passengers. One of them faced one of the doors of the cabin which open on the deck. In order to use these openings or gangways, the four iron rods which formed the railing of the gangway, instead of being fixed immovably to the stanchions, were each of them fastened at one end to a stanchion by a ring or eyelet in which the rod could swing, the other end of each rod being formed into a hook which went into an eye fastened on another stanchion to receive it. This was a proper construction of the railing at the gangway.

On the 28th of December, 1883, the vessel was at anchor from a mile-and-a-half to two miles off the shore of the Island

of Trinidad, one of the islands at which she stopped in her trips. Some passengers from New York were to land at Trinidad, and their baggage was put off through the gangway on the starboard side aft into a boat from the shore. To do this, the four rods composing the railing in the gangway were raised, and the gangway was opened. After the baggage had been discharged, the carpenter and the porter of the vessel undertook, according to the testimony of a witness for the plaintiff, to replace the rods in their proper position. He says that the porter, one West, "was at one stanchion, pushing forward, while the carpenter stood at the other, where the hook fitted into the eye, trying to force it into the eye. It began raining, and the carpenter and West were beginning to get wet." Thereupon the carpenter left the gangway and the porter left it soon afterwards. The rods were not placed in their proper positions, but remained so far unfastened that the hooks were not secured in the eyes. The porter testified, as a witness for the defendant, that he told the carpenter to put the rods in, and that he replied, "Wait until the rain goes over." While the rods were thus unfastened, the plaintiff came out of the cabin door with a pail of slops, to throw its contents over the side of the vessel. She leaned over the railing at the gangway, the rods gave way, and she fell overboard through the opening and was seriously injured. She probably struck the edge of a small boat which was lying there, and thence fell into the water. She had been in the habit of emptying slops at this gangway, but had never noticed the hooks.

The ship's company consisted of thirty-two or thirty-three persons, divided into three classes of servants, called three departments, the deck department, the engineer's department, and the steward's department. The captain, the first and second officers, the purser, the carpenter and the sailors were in the deck department. The engineers, the firemen, and the coal-passers were in the engineer's department. The steward, the waiters, the cooks, the porter, and the stewardess were in the steward's department. Every one on board, including the plaintiff, had signed the shipping articles, and she had partici-

pated in salvage given to the vessel. The master or captain was in command of the whole vessel.

At the close of the evidence, the counsel for the defendant requested the court to direct the jury to find a verdict for the defendant, on the grounds (1) that the injury sustained by the plaintiff was one occasioned, if there was any negligence, by the negligence of a fellow-servant; and (2) that, on the uncontradicted testimony, the plaintiff herself was guilty of contributory negligence, and could not recover. The court refused so to direct the jury, to which refusal the defendant excepted.

We think the court ought to have directed the jury to find a verdict for the defendant, on the ground that the negligence was that of a fellow-servant, either the porter or the carpenter. As the porter was confessedly in the same department with the stewardess, his negligence was that of a fellow-servant. The contention of the plaintiff is that, as the carpenter was in the deck department and the stewardess in the steward's department, those were different departments in such a sense that the carpenter was not a fellow-servant with the stewardess. But we think that, on the evidence, both the porter and the carpenter were fellow-servants with the plaintiff. The carpenter had no authority over the plaintiff, nor had the porter. They and the plaintiff had all signed the shipping articles; and the division into departments was one evidently for the convenience of administration on the vessel, and did not have the effect of causing the porter and the carpenter not to be fellow-servants with the stewardess.

The injuries to the plaintiff were caused solely by the negligence of one or the other of two fellow-servants, who were in a common employment with her; and there was no violation or omission of duty on the part of the employer contributing to such injuries. Neither of her fellow-servants stood in such relation to her or to the work done by her, and in the course of which her injuries were sustained, as to make his negligence the negligence of the employer. The case, therefore, falls within the well-settled rule, as to which it is unnecessary to cite cases, which exempts an employer from liability for injuries to a servant caused by another servant, and does not fall

within any exception to that rule which destroys the exemption of the employer when his own negligence contributes to the injury, or when the other servant occupies such a relation to the injured party, or to his employment, in the course of which his injury was received, as to make the negligence of such servant the negligence of the employer.

The plaintiff took upon herself the natural and ordinary risks incident to the performance of her duty, and among such risks was the negligence of the porter and the carpenter, or of either of them, in the course of the common employment of the three. There was nothing in the employment or service of the carpenter or the porter which made either of them any more the representative of the defendant than the employment and service of the stewardess made her such representative. The court left it as a question for the jury to determine, if they found that negligence existed, whether the injury was occasioned by the careless act of a servant not employed in the same department with the plaintiff. This ruling was excepted to by the defendant, and we think it was erroneous.

The plaintiff takes the point that, as the verdict did not exceed $5000 this court has no jurisdiction, although the judgment was for the amount of the verdict, with interest and costs. The statute in regard to the jurisdiction of this court provides that the matter in dispute must exceed the sum or value of five thousand dollars, exclusive of costs. Act of February 16, 1875, c. 77, § 3, 18 Stat. 316. It is well settled that the test as to the jurisdiction of this court, in a case like the present, is the amount of the judgment below, even though without the interest included in it, the amount, exclusive of costs, would not be over $5000. *N. Y. Elevated Railroad* v. *Fifth Nat. Bank*, 118 U. S. 608.

The judgment of the Circuit Court is reversed, and the case is remanded to that court with a direction to award a new trial.

HOPKINS *v.* McLURE.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 126. Argued November 20, 1889. — Decided March 3, 1890.

Where the Supreme Court of a State decides against the plaintiff in error on an independent ground, not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering the Federal question.

In this case, the Supreme Court of the State held that the law was not changed by an isolated decision made by it, because such decision was an erroneous declaration of what was the law; and on that view this court held that no Federal question was presented by the record, and the writ of error was dismissed.

THE case is stated in the opinion.

Mr. William E. Earle for plaintiff in error.

Mr. John J. Hemphill for defendants in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

On the 9th of July, 1876, George W. Melton died, intestate and insolvent, in South Carolina, leaving surviving him his widow, Margaret A. Melton, and three infant children. John J. McLure was appointed administrator of his estate, and commenced an action in the Circuit Court of Chester County, South Carolina, in July, 1877, to marshal the assets of the estate, to have the real property of the deceased sold in aid of assets, and to have the creditors of the estate establish their demands. The creditors were called in, and numerous claims were established, among them, a note under seal to R. G. Ratchford & Co., bearing date February 22, 1859; a note under seal to Dr. A. P. Wylie, bearing date May 3, 1872; a note under seal to Samuel D. Melton, bearing date February 1, 1871; a bond secured by a mortgage on real estate to one Duvall, sheriff, dated June 4, 1875, which had been transferred to one Kerr, as clerk of the court of Fairfield County, South Carolina; and

a bond secured by a mortgage on real estate to Hopkins, Dwight & Co., dated May 19, 1876. The widow and the infant children, and various creditors of the deceased were made defendants. The case was referred to a special referee, who reported that the assets of the estate could not exceed $11,000; that the amount due on the mortgage to Duvall, sheriff, was $1087.35, and the amount due on the mortgage to Hopkins, Dwight & Co. was $30,748.44; and that there were debts on sealed notes and specialties dated prior to November 25, 1873, amounting to $7005.04, and debts on simple contracts amounting to $36,415.98, the total of the three classes of debts being $75,256.81. The special referee reported that, after the payment of the costs, the assets were applicable first to the satisfaction of the bond and mortgage to Duvall, sheriff, and next to the bond and mortgage to Hopkins, Dwight & Co. Exceptions were filed by various creditors to the report of the referee, and the case was heard by the Circuit Court.

It appeared that the mortgage to Hopkins, Dwight & Co. had been foreclosed by a judicial sale of the land covered by it; that the proceeds of the sale were insufficient to pay the debt; that the debt and the mortgage were set up as a preferred claim against the general assets in the hands of the administrator; that the land covered by the mortgage held by Kerr as clerk was sold under an order of the court before Kerr became a party to the suit by proving his debt and mortgage; that, after that sale, Kerr, not having obtained its proceeds, instituted proceedings to foreclose the mortgage, obtained judgment, and sold the land, but the proceeds of sale were insufficient to pay the mortgage debt; and that Kerr set up the debt as a preferred one against the general assets of the estate.

The Circuit Court said, in its opinion, that the referee held that both of these debts were preferred claims, on the authority of the case of *Edwards* v. *Sanders*, 6 So. Car. 316; and it discussed the question whether the mortgage debt of Hopkins, Dwight & Co. was a preferred claim after its specific lien had been exhausted, because it was a mortgage.

Section 26 of the act of South Carolina, which became a law

March 13, 1789, being act No. 1455, entitled "An act directing the manner of granting probates of wills and letters of administration, and for other purposes therein mentioned," (Stat. at L. of So. Car. 1839, v. 5, p. 111,) provided as follows: "That the debts due by any testator or intestate shall be paid by executors or administrators in the order following, viz.: funeral and other expenses of the last sickness, charges of probate of will or of the letters of administration; next, debts due to the public; next, judgments, mortgages and executions, the oldest first; next, rent; then, bonds or other obligations; and lastly, debts due on open accounts; but no preference whatever shall be given to creditors in equal degree, where there is a deficiency of assets, except in the cases of judgments, mortgages that shall be recorded from the time of recording, and executions lodged in the sheriff's office, the oldest of which shall be first paid, or in those cases where a creditor may have a lien on any particular part of the estate."

This provision was construed by the Constitutional Court of South Carolina, in 1822, in the case of *Tunno* v. *Happoldt*, 2 McCord, 188. In that case, the deceased left an outstanding "obligation or sealed instrument of mortgage and covenant" and some outstanding simple contract debts. The question arose whether that instrument was to be ranked, in the legal order of payment under the statute, among bond debts or among simple contract debts. The court said that the claim was by simple contract, that is, by a note; that the question was whether the mortgage deed could change the character of the note, or give it a preference over other simple contract debts under the statute; that the simple contract debt was not changed by the mortgage; and that the deed gave a particular lien upon certain property, but its object and intent had terminated, and otherwise left the note as it stood before, still a simple contract.

In *Kinard* v. *Young*, 2 Rich. Eq. 247, in the Court of Appeals in Equity and Court of Errors of South Carolina, in 1846, it was held that, in the administration of the assets of an insolvent testator or intestate, mortgages, as mortgages, were not entitled to priority over rent, specialties, and simple con-

tract debts, except so far as they were liens on any particular part of the estate, and that, after the lien was exhausted, the grade of the demand must be determined by the nature of the instrument which the mortgage was given to secure; the court following the decision in *Tunno* v. *Happoldt.*

The provision of the act of 1789 was incorporated in 1872 in the Revised Statutes of South Carolina, as section 3 of chapter 90, p. 457, as follows: "The assets which come to the hands of an executor or administrator, after proper allowance to the executor or administrator, in a due course of administration, shall be applied to the payment of his debts in the following order, that is to say: 1. Funeral and other expenses of the last sickness, charges of probate or letters of administration; 2. Debts due to the public; 3. Judgments, mortgages, and executions — the oldest first; 4. Rent; 5. Bonds and debts by specialty; 6. Debts by simple contract."

In 1875, the case of *Edwards* v. *Sanders*, 6 So. Car. 316, was decided by the Supreme Court of the State. It was held that, under section 26 of the act of 1789, prescribing the order in which debts of a decedent are to be paid, mortgages, whether of chattels or real estate, rank in the third class, and are entitled to payment out of the general estate in preference to specialty and simple contract debts; that a purchase of the mortgaged premises, by the mortgagee or his assignee, under a decree for foreclosure, does not extinguish the mortgage debt for any unsatisfied balance that may remain; and that, where the purchase is made after the death of the mortgagor, the unsatisfied balance retains its rank as a mortgage debt, with right to priority of payment out of the general estate, over specialty and simple contract debts.

While the case of *Edwards* v. *Sanders* stood as the rule of construction, the referee in the present case held that the mortgages in question were preferred claims. Before the case came on to be heard upon exceptions to the report of the referee, the case of *Piester* v. *Piester*, 22 So. Car. 139, was decided, in January, 1885, by the Supreme Court of the State, which held that, under the act of 1789, a mortgage, as such, had no precedence in the administration of the estate of a deceased person, except

to the extent of its specific lien upon the property mortgaged, and that when such lien was exhausted the mortgage ranked according to the grade of the demand secured by it; thus approving the case of *Kinard* v. *Young*, and overruling that of *Edwards* v. *Sanders*. The court said: "We think that a creditor of a decedent's estate, whose claim is secured by a mortgage on particular property, has under the act a lien upon that property; but when that is exhausted the mortgage as such is *functus officio;* and in further marshalling the assets the demand must rank according as it may be a simple contract or specialty." The court cited the cases of *Tunno* v. *Happoldt* and *Kinard* v. *Young*, and said that the doctrine asserted by them was regarded as the settled construction of the act of 1789, until the case of *Edwards* v. *Sanders*. Of that case the court said that it "is not only unsustained by proper rules of construction, but is in direct opposition to the decided cases and what was at that time considered the settled law of the State." The court then referred to the act of South Carolina, passed December 14, 1878, entitled "An act to alter and amend the law in relation to the payment of debts of a decedent" (No. 548, 16 Stat. 686), which provides: "That in the administration of the assets of a decedent, mortgages shall not be entitled to a priority over rents, debts by specialty, or debts by simple contract, except as to the particular parts of the estate affected by the liens of such mortgages. That after the property covered by the liens is exhausted, the grade of the demand shall be determined by the nature of the instrument which the mortgage was given to secure," as an act which, although it was passed after the facts in the case then at bar arose, "only declared what had been the law of the State since the act of 1789."

After a consideration of these cases, the Circuit Court reached the conclusion, in the present case, that the mortgages in question came under the operation of the decision in *Piester* v. *Piester*, and were not preferred claims as mortgages. The decree of that court was that, the lien of the mortgages having been exhausted, they were no longer preferred claims; and that the debts they were given to secure could only be proved

and take rank against the assets in the hands of the administrator according to the nature of the instrument evidencing the debt, and the statute relating thereto. Exceptions were filed to the decree and the case was heard on appeal by the Supreme Court of the State, which, in April, 1886, affirmed the decree of the Circuit Court. 24 So. Car. 559.

The point was taken by the appellants in the Supreme Court of South Carolina that the case of *Piester* v. *Piester* could not be applied to their cases, for the reason that so to apply it would impair the obligation of contracts or divest vested rights, because, at the time of the making of the contract of Hopkins, Dwight & Co., the law, as then declared by the case of *Edwards* v. *Sanders*, required that the balances due on the two debts should be ranked as mortgages, and as such be entitled to priority over specialty debts; and that the decision in *Piester* v. *Piester* could not divest rights which became vested at the time the intestate died, under the law as it was then declared to be.

But the Supreme Court said that the construction placed on the provisions of the act of 1789 by the decision in *Piester* v. *Piester*, was the same as that laid down in *Tunno* v. *Happoldt* and *Kinard* v. *Young;* that the law stood unquestioned down to the time of the decision in *Edwards* v. *Sanders;* that that decision did not seem to have been followed in a single instance; that from what was said in *Piester* v. *Piester* it would seem never to have been satisfactory to the profession; that at the first opportunity it was overruled; and that, in the meantime, the legislature, by the act of 1878, had shown its dissatisfaction with the construction adopted in the case of *Edwards* v. *Sanders*. On the question whether the decision in *Piester* v. *Piester* effected such a change in the law as would forbid its application to the case under consideration, because it would impair the obligation of a contract or divest rights vested under the law as declared in *Edwards* v. *Sanders*, the Supreme Court said, that, as the proper construction of the statute had been settled for a long series of years by decisions of both of the courts of final resort in the State, in accordance with the view declared in *Piester* v. *Piester*, it would be going very far

to say that a single isolated decision, never recognized or followed in any subsequent case, and never recommending itself to the approval of the profession, should be regarded as having the effect of changing the law. "On the contrary," says the court, "whatever may be the opinions of individuals as to its correctness, it must be regarded as an erroneous declaration of what was the law, and as only the law of the particular case in which it was made."

The members of the firm of Hopkins, Dwight & Co., as successors of the former members of that firm, and the trustee of that firm and of Mrs. Melton and her infant children, have brought a writ of error to review the decree of the Supreme Court affirming that of the Circuit Court; and the defendants in error now move to dismiss the writ of error, on the ground of a want of jurisdiction in this court.

It is contended on the part of the plaintiffs in error that the decision of the court below was based upon the application of the act of 1878 as a valid act, affecting the contract of the plaintiffs in error and impairing its obligation. But the validity of that statute was not drawn in question, and the Supreme Court did not pass upon it. The decree of that court does not rest upon that statute, but upon independent grounds. The decision rests upon a ground broad enough to cover the entire case, without considering the statute. It rests upon the ground that the law of South Carolina, under the act of 1789, was such as it had always been held to be, in *Tunno* v. *Happoldt*, *Kinard* v. *Young* and *Piester* v. *Piester*, and that the law as so declared had always been the law, and was not varied or changed by anything decided in *Edwards* v. *Sanders*. That being so, we must hold that no Federal question is presented by the record.

This view is in accordance with the decisions of this court in *Kreiger* v. *Shelby Railroad Co.*, 125 U. S. 39; *Desaussure* v. *Gaillard*, 127 U. S. 216, and *Hale* v. *Akers*, 132 U. S. 554, the ruling in which cases is, that where the Supreme Court of a State decides a Federal question, in rendering a judgment, and also decides against the plaintiff in error on an independent ground, not involving a Federal question, and broad enough

to maintain the judgment, the writ of error will be dismissed without considering the Federal question.

The writ of error is

Dismissed.

CALIFORNIA INSURANCE COMPANY *v.* UNION COMPRESS COMPANY.

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

No. 1051. Submitted October 30, 1889. — Decided March 3, 1890.

The defendant, a fire insurance company, issued a policy of insurance to the plaintiff, a cotton compress company, on "cotton in bales, held by them in trust or on commission," and situated in specified places. The cotton was destroyed by fire in those places. The plaintiff received cotton for compression, and issued receipts to the depositors, which said "not responsible for any loss by fire." The holders of the receipts exchanged them with one or the other of two railroad companies for bills of lading of the cotton, which exempted the carrier from liability for loss or damage by fire. On issuing the bills of lading the railroad companies notified the plaintiff of their issue, and ordered it to compress the cotton. It was burned while in the hands of the plaintiff for compression, after the bills of lading were issued. In a suit to recover on the policy; *Held*,

(1) It was competent for the plaintiff to prove, at the trial, that it took out the policy for the benefit of the railroad companies, and in pursuance of an agreement between it and those companies that it should do so; also, that by like agreement, it collected from the railroad companies a specified sum for all cotton compressed by it, as covering the compression, the loading, and the cost of insuring the cotton; also, that such customs of business were known to the defendant when the policy was issued, and that an officer of the plaintiff had stated to the agents of the defendant, when the policy was applied for, that it was intended to cover the interests of the plaintiff and of the railroad companies; also, what claims had been made on the railroad companies, by owners of cotton burned, to recover its value;

(2) The railroad companies were beneficiaries under the policy, because they had an insurable interest in the cotton, and to that extent were its owners, and it was held in trust for them by the plaintiff;

(3) It was lawful for the plaintiff to insure in its own name goods held in trust by it, and it can recover for their entire value, holding

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the excess over its own interest in them for the benefit of those who entrusted the goods to it;

(4) The issuing of the bills of lading for the cotton did not effect such a change in the possession of the cotton as to avoid the policy, under a provision in it making it void, "if any change take place in the possession of the subject of insurance;"

(5) The plaintiff can recover for losses caused by the negligence of the railroad companies in improperly exposing the cotton to danger from fire.

(6) The exception "not responsible for any loss by fire" in the receipts given by the plaintiff, and the clause in the bills of lading exempting the railroad companies from liability for loss or damage by fire, did not free the latter from responsibility for damages occasioned by their own negligence or that of their employés;

(7) The ruling, that a common carrier may insure himself against loss proceeding from the negligence of his own servants, made in *Phœnix Insurance Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 324, affirmed.

(8) The words in the policy, "direct loss or damage by fire," explained;

(9) The mere fact of the dwelling by the court below, with emphasis, in its charge to the jury, on facts which seemed to it of controlling importance, and expressing its opinion as to the bearing of those facts on the question of negligence, is immaterial, if it left the issue to the jury;

(10) Under a clause in the policy, that it "shall not apply to or cover any cotton which may at the time of loss be covered in whole or part by a marine policy," such clause is not operative unless it amounts to double insurance, which can exist only in the case of risks on the same interest in property and in favor of the same person;

(11) The right of action of the plaintiff accrued on the occurring of the loss, and did not require that the railroad companies should have actually paid damages for the loss of the cotton.

This was an action at law, brought in the Circuit Court of the United States for the Eastern District of Arkansas, by the Union Compress Company, an Arkansas corporation, against the California Insurance Company, of San Francisco, a California corporation, to recover on a policy of insurance against fire, issued by the latter company to the former company on the 2d of November, 1887.

By the policy the California company insured the Compress Company, for the term of thirty days from November 2, 1887, at noon, to December 2, 1887, at noon, "against all direct

loss or damage by fire, except as hereinafter provided, to an amount not exceeding ten thousand dollars, to the following-described property while located and contained as described herein, and not elsewhere, to wit: *Form of cotton policy.* $10,000 on cotton, in bales, their own or held by them in trust or on commission, while contained in the frame shed 112 to 122, inclusive, and in back shed and yard 115 to 123, inclusive, North Main Street, and on platforms adjoining and in street immediately between the sheds, Sanborn's map of Little Rock, Arkansas; and it is agreed and understood to be a condition of this insurance that this policy shall not apply to or cover any cotton which may at the time of loss be covered in whole or part by a marine policy; and it is further agreed to be a condition of this policy that only actual payment by bank check or otherwise for cotton purchased shall constitute a delivery of cotton from the seller to the buyer; and it is further agreed that this company shall be liable for only such proportion of the whole loss as the sum hereby insured bears to the cash value of the whole property hereby insured at the time of fire; and it is further agreed that tickets, checks, or receipts delivered to bearer shall not be considered as evidence of ownership. Other insurance permitted without notice until required. . . . In case of loss or damage to the property insured, it shall be optional with the company, in lieu of paying such loss or damage, to replace the articles lost or damaged with others of the same kind and quality. . . . This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void . . . if any change . . . take place in the . . . possession of the subject of insurance. . . . In case of any other insurance upon the property hereby insured, whether to the same party or upon the same interests therein or otherwise, whether valid or not, and whether prior or subsequent to the date of this policy, the insured shall be entitled to recover from this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, whether such other insurance be by specific or by general or floating policies, or by policies covering only in excess of specified loss; and it is

hereby declared and agreed that in case of the assured holding any other policy in this or any other company on the property insured, or any part thereof subject to the conditions of average, this policy shall be subject to average in like manner. . . . If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment. . . . In case of loss on property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth" [in the proofs of loss] "together with their respective interests therein."

The complaint alleged that on the 14th of November, 1887, the plaintiff was engaged in the business of compressing cotton, which it received or held on its own account or on commission or in trust for others, at its warehouses and compress buildings and adjoining sheds and platforms situated at the foot of Main Street in the city of Little Rock, Arkansas; that it had on hand, at that date, about 2800 bales of cotton, delivered to it to be compressed and belonging to divers parties, the value of which equalled the sum total of the insurance thereon; and that such cotton, whether owned by the plaintiff or held by it on commission or in trust for others, was insured against loss or damage by fire in twenty-eight insurance companies, which were named, in the several amounts stated opposite their respective names, amounting in the aggregate to $142,500, which included the defendant for the sum of $10,000. It then set forth the issuing of the policy by the defendant to the plaintiff, a copy of which was annexed to the complaint, and that on the 14th of November, 1887, all the cotton in bales, contained on said premises and so insured, was destroyed by fire, "together with a large quantity of other cotton in possession of plaintiff at said place, which was not insured by plaintiff."

The complaint then proceeded as follows: "[That at the time that said cotton came to the possession of the plaintiff it

was engaged in the business of compressing cotton at its compress in the town of Argenta, opposite Little Rock, and on the north side of the Arkansas River, and that said cotton was deposited with the plaintiff for compression by various owners thereof, who delivered the same at the sheds and yards and adjacent grounds in the said city of Little Rock, as described in said policy, with directions that the same should be transported to said compress by the plaintiff or some carrier employed for that purpose by it, and that on the receipt of any bales of said cotton by said plaintiff it gave a receipt for the same to the owner thereof, and that, according to a custom known to said depositors, to the plaintiff, and to the St. Louis, Iron Mountain and Southern Railway Co. and the Missouri Pacific Railway Co., of which it was a part, and the Little Rock and Memphis Railroad Company, which were common carriers having and operating railroads of which both Argenta and Little Rock were stations, said owners transferred said receipts to either one or the other of said carriers and received from said carriers bills of lading for the transportation by said carriers of said cotton to various places to which said cotton was then and there shipped by said owners, with an agreement with said railway companies that said cotton should not be shipped until it had been compressed by the plaintiff. There was a standing and continuing agreement between said plaintiff and said railway companies that the plaintiff should proceed to compress said cotton and all cotton thus received and should insure the same, after notice of the execution of said bills of lading by said railway companies, against loss by fire during the time that said cotton should be in the hands of the plaintiff, for the purpose aforesaid, for a price averaging from sixty to sixty-five cents per bale, to be paid by said railway companies, respectively, when said cotton should be compressed and delivered to said railway companies on their cars at Argenta for transportation under said bills of lading, at which time said carriers should surrender to plaintiff the said receipts issued as aforesaid at the time that said cotton was deposited with the plaintiff for compression by the owners, as above stated; that all of said cotton was in the custody of plaintiff,

at the time of said loss, under and by virtue of said custom and agreement, and that it was lost by the negligence of the servants, agents, and employés of said railway companies, and that since said loss said St. Louis, Iron Mountain and Southern Railway Company has been sued in this court by two of said consignees for the value of part of said cotton above named, to wit, the York Manufacturing Company and Hazard & Chapin, and said railway company defended said actions on the ground that said loss was not occasioned by the negligence of said railway company or its servants and employés, and on a trial of said first-named cause it was adjudged by this court that said York Manufacturing Company and said Hazard & Chapin recover from said railway company the value of said cotton sued for as aforesaid, and that since said adjudication said railway company has paid said judgment and the value of a large part of the cotton for which it had issued bills of lading as aforesaid, and that several suits are now pending in this court against said Little Rock and Memphis Railroad Company, brought by the consignee of portions of said cotton, for the recovery of damages for the loss of said cotton by reason of the negligence of said railroad company, which said suits are now pending and undetermined. On said 14th day of November, 1887, the plaintiff had in its possession at its sheds and premises above mentioned, for purposes of compression, a large amount of cotton, to wit, over 3000 bales; that of this number 2700 bales of cotton were held by this plaintiff for the St. Louis, Iron Mountain and Southern Railway Company and the Little Rock & Memphis Railroad Company. By said contract and agreement between plaintiff and said railroads this plaintiff took out the policies of insurance above set out for the purpose of indemnifying this plaintiff against loss and liability, and the said railroad companies against loss and liability, by reason of the destruction of said cotton while it was being held by plaintiffs for purposes of compression. The St. Louis, Iron Mountain and Southern Railway has been adjudged as aforesaid to pay a large sum of money, to wit, $—, and in addition has paid a still larger amount because of its liability for such loss, amounting in all up to this date to $72,209.58,

and has made demand therefor against the plaintiff for reimbursement of said losses.]" It also averred that the loss by fire on the cotton equalled the insurance on it, and that the plaintiff had performed all the conditions of the policy; and prayed judgment for $10,000, with interest.

The defendant moved to strike from the complaint the words "together with a large quantity of other cotton in possession of plaintiff, at said place, which was not insured by plaintiff," and also the foregoing part included in brackets. It also demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action; and also demurred separately to that part of it which is so included in brackets, on the ground that the facts therein stated did not tend to constitute a cause of action. The court overruled the said motion, and also the demurrer, and the defendant excepted to both of those rulings.

The defendant then filed its answer, admitting the issuing of the policy, and that at the fire one hundred and twelve bales of cotton belonging to one Hanger and held by the plaintiff in trust for Hanger, were burned, for the loss of which the insurance companies named in the complaint had paid the plaintiff $4826.59, in full satisfaction thereof, and of which sum the defendant paid its full portion of the loss. The answer denied the material allegations of the complaint, and averred that the greater portion of the cotton alleged to have been lost at the fire was received by the plaintiff from the owners thereof after the issuing of the policy; that the cotton burned was first delivered by its owners to the plaintiff, and the plaintiff gave to the owners receipts for it, which provided that the plaintiff should not be liable for the loss of it by fire; that afterwards, and after the policy was issued, the cotton was sold to various persons who became its owners, and the Missouri Pacific Railway Company, the Little Rock and Memphis Railroad Company, and the Little Rock, Mississippi River and Texas Railway Company, common carriers of cotton for hire, issued their bills of lading for the same to the purchasers, which provided that the carriers should not be liable for the loss thereof by fire, and at the same time such rail-

road companies took up the receipts issued by the plaintiff to the original owners and surrendered them to the plaintiff, whereby the possession of the cotton was changed, contrary to the provisions of the policy, without any consent of, notice to, or knowledge by the defendant; (7) that it was provided in the policy that it should not apply to or cover cotton which was at the time of loss covered in whole or in part by marine policies, and at that time 2172 bales of the cotton alleged to have been burned, and of the value of $101,973.73, were covered by marine policies theretofore issued to the respective owners of the cotton; (8) that after the railroads had issued their bills of lading for the cotton, and before and at the time of the fire, it was kept in a grossly negligent manner, in a dangerous public place, without being covered or sprinkled, and but a few feet from a railroad track, where locomotives of the Missouri Pacific and the St. Louis, Iron Mountain and Southern railroads, emitting sparks, were constantly passing, by which sparks the fire was kindled, and the cotton was destroyed by a fire which occurred in broad daylight, at about four o'clock P.M., and which fire those two railroad companies, by the use of ordinary care, could have extinguished by removing the bales first ignited, or by putting out the fire by water from the hydrants which were close by; and that none of the cotton was destroyed by the negligence of the Little Rock and Memphis Railroad Company or its employés.

The plaintiff demurred to certain paragraphs of the answer, and among them paragraphs 7 and 8, as not stating facts sufficient to constitute a defence. The court overruled such demurrer as to two of the paragraphs and sustained it as to paragraphs 7 and 8; to which latter ruling the defendant excepted. Thereupon the case was tried by a jury, which found a verdict for the plaintiff for $9491.96, on which a judgment was accordingly entered, to review which the defendant brought a writ of error.

The first four assignments of error on the part of the defendant related to the overruling of its motion to strike out part of the complaint, the overruling of its demurrer to the complaint and to part thereof, and the sustaining of the demurrer of the plaintiff to paragraphs 7 and 8 of the answer.

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At the trial, the plaintiff offered evidence tending to prove that it was engaged in the business of compressing cotton at the town of Argenta, which was on the north bank of the Arkansas River directly opposite the city of Little Rock; that it received cotton for compression at Argenta and also at the premises described in the policy at Little Rock; that for cotton received at either place it issued receipts to the depositors, red receipts at Argenta and green receipts at Little Rock, a blank form of which, as it appears in the bill of exceptions, if filled out, would read thus: "Little Rock, Arkansas, Nov. 1, 1887. Received by the Union Compress Company. From John Smith. Account of John Doe. For compression. Storage after ten days will be charged. Not responsible for any loss by fire. Marks X, Y, Z. No. bales of cotton, 65. Richard Roe, Superintendent;" that the holders of such receipts took them to the freight offices of one or the other of the two railway companies, the Missouri Pacific Railway Company, and the Little Rock and Memphis Railroad Company, and those companies issued bills of lading for cotton, which specified the number of bales and the marks, agreeing to deliver the cotton at an address specified in the bill of lading; that the same bills of lading covered cotton which was received by the plaintiff at Argenta and which actually was at Argenta, and cotton received at Little Rock and which actually was at Little Rock; that one form of bill of lading was issued by the Missouri Pacific Railway Company and two forms by the Little Rock and Memphis Railroad Company; that it was claimed that each form covered a portion of the cotton burned; that each form, by its terms, exempted the carrier from liability for loss or damage by fire; and that, as the cotton might pass through the custody of several carriers before reaching its destination, each of them provided that the legal remedy for loss or damage occurring in transit should be only against the particular carrier in whose custody the cotton actually might be at the time of the happening thereof. The Missouri Pacific Railway Company in its bills of lading reserved to itself the privilege of compressing all cotton signed for on the bill of lading. The Memphis and Little Rock Railroad Company did not re-

serve that privilege, but in one of its two forms, which was a through bill of lading to England, it stipulated for the benefit of any insurance that might have been effected on the goods. There were five of such foreign bills of lading, covering 158 bales of lost cotton. Bills of lading covering 1460 bales alleged to have been burned were issued by the Missouri Pacific Railway Company. The loss claimed on behalf of the latter company was for 1463 bales. The bills of lading issued by the Memphis and Little Rock Railroad Company were for 992 bales, but the loss claimed was for 1211 bales. By the bills of lading issued by the Missouri Pacific Railway Company on the lost cotton, 884 bales were covered after the date of the policy; and by those issued by the Memphis and Little Rock Railroad Company 255 bales were covered after that date.

It also appeared by the bill of exceptions that, on the issuing of the bills of lading, the respective railroad companies notified the plaintiff of their issue, and ordered the cotton designated therein to be compressed at Argenta; that all of the cotton transported from Little Rock to Argenta was carried on the track and by the cars of the Missouri Pacific Railway Company; that the Little Rock and Memphis Railroad Company had no track and ran no cars near the premises described in the policy; that the plaintiff paid the Missouri Pacific Railway Company an agreed price for the transportation of the cotton from Little Rock to Argenta; and that the cotton was to be compressed after it arrived at Argenta, and was there to be loaded on the cars of such of the two railroad companies as its marks and the bills of lading called for, to be transported by them to its destination.

The bill of exceptions further stated that the plaintiff offered evidence tending to prove that 2670 bales of cotton, covered by said bills of lading, were burned at the fire in question, while in the hands of the plaintiff for compression, after the bills of lading were issued and at the place described in the policy.

The plaintiff also proved that in October and November, 1887, there was an accumulation of cotton at the premises described in the policy, owing to the fact that the Missouri Pacific Rail-

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way Company had not sufficient cars to transport the cotton to Argenta as fast as it was received; that the cotton-sheds were open sheds and were at the time of the fire full of cotton, which had no tarpaulin or other cover over it, and stood within three or four feet of the track of the Missouri Pacific Railway Company, over which locomotives and trains passed several times daily; that, after the sheds were full, the cotton was stored in the street, leaving a passage-way some four feet wide for foot passengers; that the two railroad companies had no control over the cotton while so stored, and could not obtain actual possession of it until the Missouri Pacific Railway Company transported it to Argenta for compression; but that that company could take it at any time across the river for compression.

The defendant offered in evidence the proof of loss furnished by the plaintiff to it, made out after the bringing of the suit, alleging the total destruction by fire of 2687 bales of cotton, in addition to what was known as the Hanger cotton, and that the 2687 bales were held by the plaintiff in trust or on commission, that is to say, to be compressed, and were the property of various persons, the plaintiff being interested in the same to the extent of its charges, and stating the names of the consignees and the number of bales and their value pertaining to each consignee, no allusion being made to any interest of the railroad companies.

(1) The plaintiff offered evidence tending to prove that the policy in suit was taken out by it for the benefit of the railroad companies named in the complaint, and in pursuance of agreements between the plaintiff and those companies by which the plaintiff agreed to take out such insurance. The defendant objected to such evidence, on the ground that it was incompetent and in contradiction of the terms of the policy. The objection was overruled, and the defendant excepted.

The plaintiff also offered evidence tending to prove that by agreement between it and the railroad companies it charged and collected from them 13 cents per 100 pounds for all cotton compressed by it, which charge was by agreement intended to cover and did cover the compression of the cotton, the loading

of it on the cars at Argenta, and the cost of insuring it for the benefit of the railroad companies. The defendant objected to the evidence on the ground that it was immaterial, irrelevant and incompetent, the objection was overruled, and the defendant excepted.

The plaintiff also offered evidence tending to prove that the contracts and customs of business before stated were well known to shippers and the defendant when the policy sued on was issued, it having been stated to the agents of the defendant, by an officer of the plaintiff, when the policy was applied for, that it was intended to cover the interests of the plaintiff and of the railroad companies. The defendant objected to this evidence, but the objection was overruled and the defendant excepted.

The plaintiff also offered evidence tending to prove that claims had been filed against the Missouri Pacific Railway Company by the owners of 1463 bales of cotton burned at the fire, of the claimed value of $72,735.58; that since the commencement of this suit that company had paid such claims to the amount of $65,000; and that the balance had been adjusted by that company and would be paid. The defendant objected to the evidence on the ground that it was immaterial, irrelevant and incompetent, but the objection was overruled and the defendant excepted.

The plaintiff further offered evidence tending to prove that claims had been filed against the Little Rock & Memphis Railroad Company by the owners of 1211 bales of cotton burned at the fire, of the claimed value of $57,529.55, no part of which has been paid by that company, though suits had been brought on several of the claims and were still pending. The defendant objected to the evidence on the ground that it was incompetent, irrelevant, and immaterial; but the court overruled the objection and the defendant excepted.

After the close of the evidence, the defendant requested the court to instruct the jury as follows: "1. The policy of insurance of the defendant on which this action is brought covered all goods in possession of the Union Compress Company at the place designated in the said policy, at the date when said pol-

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icy was issued, which were held by the said Union Compress Company under warehouse receipts issued to the owners of said cotton by said company, and also all cotton subsequently and during the life of said policy so received by the Union Compress Company. 2. The policy in question insures the goods of the Union Compress Company at the place designated. It also insures the Union Compress Company to the extent of its liens upon or charges against all goods held by it during the life of the policy, not its own, but held by it in trust or on commission. It also insures the interest of the owners of the legal title to such goods so held. It does not insure any one else. Any possible interest of any common carrier not an owner of the goods, or any of them, in the place designated, is not insured by said policy. 3. The jury are instructed to disregard all evidence in the case tending to show that the insurance in question was issued for the benefit of any railroad company not an owner of any of the goods destroyed by fire, for the value of which recovery is sought herein." The court refused to give any of those three instructions and the defendant excepted to each refusal.

Mr. E. W. McGraw and *Mr. E. W. Kimball* for plaintiff in error.

I. The beneficiaries under the policy are the owners of the cotton; the possible interest of no common carrier is covered thereby; the policy is not ambiguous, and parol testimony is inadmissible to aid in its interpretation.

The law of marine insurance affords a very unsafe guide to the determination of rights under a policy of fire insurance.

A party suing upon a marine policy, and imbibing his ideas of the law of representation and concealment solely from adjudications in fire cases, would meet with many embarrassments. An adjuster who should attempt to adjust and settle a fire loss on the basis of the law adapted to marine insurance would commit grievous errors.

These contracts of insurance, generally designated as fire and marine, while they have some points in common, have a

different ancestry; the law as to each is peculiar to itself; the points in which the contracts and the construction of them differ are nearly as numerous as those in which they agree.

The term "on account of whom it may concern" is of American origin, originated in policies of marine insurance, and is still generally confined to such policies. In Massachusetts, and perhaps one or two other States, it has been to a limited extent engrafted on policies of fire insurance.

Marine insurance comes from the civil law, the rules of which to the present day enter into the construction of its policies.

Originally in England marine policies were frequently, if not commonly, issued in blank, leaving it to the person procuring the insurance to insert the name of such beneficiary as he pleased. When not in blank they were almost equally indefinite as to the identity of the assured. The issue of policies in blank is now prohibited there. The term "for account of whom it may concern" is yet a stranger to English policies. It is the brief American substitute for the lines of the Queen Anne policy above quoted, which lines were in themselves a declaration of the existing doctrine, that the person obtaining the insurance could fill in the name of the beneficiary at his leisure, and that it was a matter which in no way concerned the insurer. When this term was first inserted in a policy of marine insurance in this country it is not easy exactly to determine, nor is it very material. See *Davis* v. *Boardman*, 12 Mass. 80; *Graves* v. *Boston Marine Ins. Co.*, 2 Cranch, 419; *Lawrence* v. *Leber*, 2 Caines, 203; *Hodgson* v. *Marine Ins. Co.*, 5 Cranch, 100; *Seamans* v. *Loring*, 1 Mason, 127.

The business of fire insurance had its origin under the common law, in 1667, after the great fire in London, and from its inception was strictly a contract of indemnity. During the first seventy-nine years of its existence the courts of England upheld the validity of wager policies of marine insurance. While the statute prohibiting wager policies of marine insurance was passed in 1736, no such statute applicable to fire insurance was passed until 1774. Yet before that time Lord Chancellor King and Lord Chancellor Hardwicke had recorded

their opinions, that on a policy of fire insurance there could be no recovery without proof of interest. *Lynch* v. *Dalzell*, 4 Bro. P. C. 431. ed. Toml.; *Sadlers Co.* v. *Badcock*, 2 Atk. 554.

With this wide difference in the history and customs of marine and fire insurance it is not surprising to find in the adjudications concerning the latter, that the question "who was the assured" assumes a prominence that it does not attain under policies of marine insurance.

An insurance on "goods, their own or held by them in trust or on commission" is of American origin, and was an innovation on the accustomed manner of doing a fire insurance business. The form probably made its appearance in policies some years before it appears in the reports. See *Parks* v. *General Interest Assurance Co.*, 5 Pick. 34; *DeForest* v. *Fulton Fire Ins. Co.*, 1 Hall (N. Y.) 84.

Insurance in this form has invariably been held to insure; first, the bailee to the extent of his liens or advances, and second, the *owner* of the goods. The varied interests in goods which may exist without property therein, have never been held covered by the form of insurance under consideration.

In this particular policy the words "their own" and the words "or on commission" may be eliminated as it is an established fact that the Union Compress Company neither owned any of the cotton burned or held any of it on commission. For all purposes of this case the insurance was upon cotton in bales held in trust by the Union Compress Co., at the place designated in the policy.

That the words "in trust" have not a technical meaning is admitted. The trust referred to is not of the kind usually treated of in works on Trusts and Trustees. The words, "held in trust by them" are defined as goods of which they had the care and custody, intrusted to them as representatives of others, and for which they are responsible *to the owner*. *Stillwell* v. *Staples*, 19 N. Y. 401; *Waring* v. *Indemnity Ins. Co.*, 45 N. Y. 606. See, also, *Home Ins. Co.* v. *Baltimore Warehouse Co.*, 95 U. S. 543; *London & Northwestern Railway* v. *Glyn*, 1 El. & El. 652; *Robbins* v. *Fireman's Fund Ins. Co.*, 16 Blatchford, 122; *Siter* v. *Morrs*, 13 Penn. St. 218; *Lee* v.

How. Fire Ins. Co., 11 Cush. 324; *Phœnix Ins. Co.* v. *Favorite*, 46 Illinois, 259; *Home Ins. Co.* v. *Favorite*, 46 Illinois, 263; *Beidelman* v. *Powell*, 10 Mo. App. 280; *Thomas* v. *Cummiskey*, 108 Penn. St. 354.

II. The policy is without ambiguity, and no evidence was admissible to prove that railroad companies, and not the owners of the cotton were intended as beneficiaries.

The subject matter of the insurance is definitely described. It was all the cotton held by the Union Compress Company in trust, at the place designated in the policy. We have shown by an unbroken series of decisions that the term "in trust" has acquired an established definition, in view of which contracts of insurance are entered into. It is held by the courts, and is known to factors, carriers and other bailees, that the beneficiary of such insurance is the *owner* of the goods. There is nothing then ambiguous about the policies, which calls for any explanation whatever.

True, the amount of cotton that was on the premises, its value and the *names* of the owners are not specified, and they can be established only by evidence. But evidence can go no farther. See *Emer* v. *Washington Ins. Co.*, 16 Pick. 502; *Finney* v. *Bedford Ins. Co.*, 8 Met. 348; *S. C.* 41 Am. Dec. 515; *Lippincott* v. *Louisiana Ins. Co.*, 2 Louisiana, 399; *Illinois Mut. Fire Ins. Co.* v. *O'Neile*, 13 Illinois, 89; *Holmes* v. *Charlestown Mut. Fire Ins. Co.*, 10 Met. 211; *S. C.* 43 Am. Dec. 428; *Cheriot* v. *Barker*, 2 Johns. 346; *S. C.* 3 Am. Dec. 437; *Bishop* v. *Clay Ins. Co.*, 45 Connecticut, 430; *Russell* v. *Russell*, 64 Alabama, 500; *Bolton* v. *Bolton*, 73 Maine, 299; *Snowden* v. *Guion*, 101 N. Y. 459; *Hough* v. *People's Fire Ins. Co.*, 36 Maryland, 398, which is an interesting and instructive case; *Home Ins. Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527, 542; *Lucas* v. *Insurance Co.*, 23 West Va. 258.

III. Under the evidence the railroad companies were not and could not be the beneficiaries of the insurance.

1. This cotton policy which was put in evidence contains an unusual and prominent feature, which is irreconcilable with any intent to insure a carrier against a loss caused by its own negligence. Ordinarily a fire insurance policy runs "against

all loss or damage by fire." But the policy in question is against "all *direct* loss or damage by fire." The evidence discloses the fact that all of the bills of lading issued by the railroad companies provided that the carriers should be exempt from loss or damage by fire. The only interest, then, which the common carrier had in this cotton, was a contingent interest, arising from its liability for damages for loss by a fire, occurring through its own negligence.

Now, in the case at bar, the possible loss to the carrier by the destruction of the goods was by no means "direct" in any sense of the term. It was remote, contingent and conditional. The fire alone could not inflict any loss.

2. Another very serious objection to the claim that this insurance was for the benefit of carriers as to the goods destroyed arises on the record. The evidence is not only strong, but irresistible that the insurance was for the owners, and that the court below, if it assumed to decide the facts for the jury, should have come to a conclusion exactly contrary to that which it announced.

3. By the complaint and evidence it appears that all this cotton originally came into the hands of the Union Compress Company. Afterwards the railroads issued bills of lading on the cotton, some of which were issued before the policy, but more after it. If it be material to decide whether or not the possession was changed by those bills of lading, we submit that it was changed, and that at the time of the fire the cotton was in the possession of the railroad companies, and so not covered by our policy. The delivery of the bills of lading was conclusive on the question of the delivery of the cotton. *Kentucky Marine & Fire Ins. Co.* v. *West. & Atl. Railroad*, 8 Baxter, 268. This precise point under very similar circumstances was decided by the Supreme Court of Maryland. That court held that the issuing of a bill of lading by a transportation company of goods in warehouse of another company places the goods in the care and custody of the transportation company for purposes of insurance. *Fire Ins. Asso.* v. *Merchants' and Miners' Trans. Co.*, 66 Maryland, 339.

4. Upon one other point in this connection, we ask leave of

the court, to call in question an expression of opinion of this honorable court, and to respectfully request that that opinion may be reviewed by this court.

In *Phœnix Ins. Co.* v. *Erie Transportation Company*, 117 U. S. 312, Mr. Justice Gray, speaking for the court, said: "No rule of law or of public policy is violated by allowing a common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants." p. 324.

We have already shown in this case that the insurance, if for the benefit of the railroads, was purely and wholly an insurance against negligence.

We wish, if we may, to argue to the court that insurance of that nature is contrary to public policy and void. We do so more hopefully because while, in the case cited, the question of public policy may have been involved, it did not, if we may judge by the reported briefs of counsel, assume as much prominence as other considerations of more immediate interest to their clients.

We most respectfully submit that the tendency of this class of insurance would be to foster a gross and often criminal negligence with respect to property and property rights of others, and to jeopardize the safety not only of the goods insured, but of the property of others in proximity thereto.

IV. In regard to the instruction of the court as to the liability for negligence of the Memphis and Little Rock Railroad Company we have to say that when a court instructs the jury as to facts, its narration or allusion to facts should be fair. It should not select and dwell on isolated facts which might be construed favorably to one side and make no allusion to other facts which might militate against that side. *Evans* v. *George*, 80 Illinois, 51; *Newman* v. *McComas*, 43 Maryland, 70; *West Chester Fire Ins. Co.* v. *Earle*, 33 Michigan, 143; *Jones* v. *Jones*, 57 Missouri, 138; *Chase* v. *Buhl Iron Works*, 55 Michigan, 139.

The instruction of the court below was not a fair one as to the facts. Whether or not the place named in the policy was

a proper place to store cotton under the circumstances was an immaterial question so far as the liability of the railroad company was concerned.

It was the place selected by the owners of the cotton, and not by the railroad company. The cotton was stored there by the owners and not by the company. The accumulation of cotton at this improper place, if it was improper, existed in the month of October, before our policy was issued, and in November. Less than 300 bales of the burned cotton were covered by bills of lading of that company, issued in October. Seventy-two bales of it were covered by a bill of lading issued November 10, only four days before the fire. No negligence can therefore be imputed to the railroad company on account of the unfitness of the place where the cotton was stored.

V. Assignment 3d is that the court erred in sustaining the demurrer of plaintiff to 7th paragraph of defendant's answer. That paragraph is as follows: "The defendant says that it is a provision of said policy, that it shall not apply to or cover cotton, which, at the time of the loss, was covered in whole, or in part, by marine policies, and it says that at the time of said loss, 2172 bales of said cotton, alleged by plaintiff to have been burned at said fire, and of the value of $101,973.73, were covered by marine policies theretofore issued to the respective owners of said cotton."

The policy, which is part of the complaint, contains the following provision. "It is agreed and understood to be a condition of this insurance that this policy shall not apply to or cover any cotton which may at the time of loss be covered in whole or in part by a marine policy."

By its policy, the plaintiff in error absolutely declined to insure any cotton which, at time of loss, was covered by marine policies. As to the validity of this condition, there can be no question. The right of the insurer to decline insurance absolutely upon certain classes of goods, or under circumstances distasteful to the insurer, cannot be denied. He can provide that goods held in trust are not insured, unless so declared in the policy, and the provision is valid. *Baltimore Fire Ins. Co.* v. *Loney*, 20 Maryland, 20.

In this case, the plaintiff in error in positive terms declined to insure cotton covered by marine policies. A reason for this provision may easily be found, but it is not necessary to search for one. It is sufficient to say, thus is the contract written. We allege that at the time of loss, nearly all this cotton was covered by marine policies. If that be so no liability attached to this company for loss of cotton so covered.

VI. Assignment 10th is the rejection of competent evidence proffered by us that at the time of the fire 2172 bales of cotton covered by bills of lading of the railroad companies and alleged to have been burned, and of the value of $101,973, were covered by marine policies of insurance, theretofore issued to the respective owners of said cotton, etc.

By our answer we alleged that at the time of the fire there was a total insurance on the cotton burned to the amount of about $250,000 and claimed the benefit of the contribution clause in our policy. The complaint alleged total insurance to amount of $142,500.

Our policy contained the following contribution clause: "In case of any other insurance upon the property hereby insured, *whether to the same party or upon the same interest therein or otherwise*, whether valid or not, and whether prior or subsequent to the date of this policy, the insured shall be entitled to recover from this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, whether such other insurance be by specific or by general or floating policies, or by policies covering only an excess of specified loss. And it is hereby declared and agreed that in case of the assured holding any other policy in this or any other company on the property insured, or any part thereof, subject to the conditions of average, this policy shall be subject to average in like manner."

It will be seen by the very terms of the policy that it is immaterial on the question of contribution, whether the fire policies were taken out for the benefit of the owners or of the railroad companies. In either case the marine policies are contributory.

The clause is very like, but a little stronger, than that sus-

tained by the Court of Appeals of Maryland in *Fire Ins. Ass'n* v. *Merchants' & Miners' Trans. Co.* already cited. Under it these marine policies were contributory to our fire policy. The validity of the clause can hardly be called in question. It is perfectly competent for an insurance company to provide in its policy that any other policy taken out on the insured property shall be considered contributory, even though that policy be invalid, or that its policy shall be absolutely void under like conditions. *Liverpool, London &c. Ins. Co.* v. *Verdier*, 35 Michigan, 395; *Continental Ins. Co.* v. *Hulman*, 92 Illinois, 145.

We then respectfully submit that we should have been permitted to prove the existence of these contributory policies. That proof being ruled out, we were held to pay the proportion of this loss which 10,000 bears to 142,500, while, if liable at all, we should have been held to pay only in proportion of 10,000 to 244,473.

VII. Assignment 11th is that the court erred in striking out testimony of the bookkeeper of Ralli Brothers, who were claiming pay from the Memphis & Little Rock Railroad Co. for 158 bales of cotton, to the effect that said cotton was covered by marine policies taken out by Ralli Brothers. It was stricken out on the ground that we could prove the insurance only by the policies. It was shown that we could not get the policies. The ruling was erroneous. *Snow* v. *Carr*, 61 Alabama, 363.

It was especially erroneous in this case, because the Company was making a claim on us for the value of those 158 bales solely because Ralli & Brothers had made a claim on them. Any evidence which the railroad could have used against Ralli Brothers we were entitled to use against the railroad, and certainly when Ralli Brothers refused to produce the policies, the railroad company could have proved their existence by their clerk. The bills of lading under which that cotton was shipped stipulated that the carriers should have the benefit of all insurance.

VIII. Our 17th assignment is that the court erred in refusing to instruct the jury that no cause of action arose on this policy, on behalf of the railroad companies, until actual payment of damages to the owners.

The statement of the facts in this case is a strong argument on behalf of that instruction. The Memphis & Little Rock Railroad has not paid a cent, and it is not alleged or proved that it ever will or intends to.

It is contesting the suits brought against it, and may, while we are writing, have defeated them. It was not a party to this action, nor estopped by the pleading therein. If it has defeated the owners in their actions, — and it certainly ought to defeat them, on the evidence in this record, — what recourse would we have were this judgment affirmed?

The Missouri Pacific had paid nothing when this action was commenced.

No cause of action accrues in a case of this kind until *payment* of the railroad companies of the damages they claim. *Cin., Ham. & Dayton Railroad Co.* v. *Spratt*, 2 Duvall, 4.

Mr. U. M. Rose and *Mr. G. B. Rose* for defendant in error.

Mr. John F. Dillon, for defendant in error, in the interest of the St. Louis, Iron Mountain and Southern Railway Company.

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

The foregoing exceptions, except the two which relate to the sustaining of the demurrer to paragraphs 7 and 8 of the answer, may be grouped together, because they relate to the same question. The court refused to strike out the matter in the complaint which is before recited in brackets, and also overruled the demurrer of the defendant to that portion of the complaint; and on the trial the plaintiff was permitted to introduce evidence tending to prove some of the allegations contained in that part of the complaint. The three instructions before quoted as asked by the defendant, and not given, relate to the same matter.

The defendant contends that there was error in the action of the court covered by those exceptions, and complains that the court treated the words in the policy, "their own or held by

them in trust, or on commission," as if they read, "on account of whom it may concern;" that, as the plaintiff did not own the cotton, the beneficiaries under the policy were its owners; that no interest of any common carrier was covered by the policy; that it was not ambiguous; and that no parol testimony was admissible to aid in its interpretation or to show that the railroad companies were intended to be beneficiaries under it. The view urged is, that the plaintiff did not own any of the cotton or hold any of it on commission; that the insurance on goods held in trust was an insurance only for the benefit of the owners of the cotton; and that evidence of an intention to effect the insurance for the benefit of one who was not the owner of the goods was inadmissible, because it would contradict the policy.

But we think the positions taken on behalf of the defendant are not sound. The title to cotton in the temporary custody of a bailee for compression, for which receipts or bills of lading have been given, is manifestly changing hands constantly. The language of the present policy, insuring cotton "their own or held by them in trust or on commission," accommodates such a state of things. In the present case, the insurance was really taken out by the railroad companies, and that fact was well known to the agents of the defendant at the time the policy was issued. The railroad companies had an insurable interest in the cotton, and to that extent were the owners of the cotton, which was held in trust for them by the plaintiff. Evidence of their ownership of the cotton was admissible. *Home Ins. Co.* v. *Balt. Warehouse Co.*, 93 U. S. 527, 542.

The policy covered all the cotton which was placed in the hands of the plaintiff by those companies. It was lawful for the plaintiff to insure in its own name goods held in trust by it, and it can recover for their entire value, holding the excess over its own interest in them for the benefit of those who have entrusted the goods to it. *DeForest* v. *Fulton Fire Ins. Co.*, 1 Hall, 94; *Home Ins. Co.* v. *Balt. Warehouse Co.*, 93 U. S. 527, 543; *Stillwell* v. *Staples*, 19 N. Y. 401; *Waring* v. *Indemnity Fire Ins. Co.*, 45 N. Y. 606; *Waters* v. *Monarch Fire Ass. Co.*, 5 El. & Bl. 870; *Siter* v. *Morrs*, 13 Penn. St.

218; *Johnson* v. *Campbell*, 120 Mass. 449; *Fire Ins. Asso.* v. *Merchants' & Miners' Trans. Co.*, 66 Maryland, 339; *London & Northwestern Railway* v. *Glyn*, 1 El. & El. 652; *Phœnix Ins. Co.* v. *Hamilton*, 14 Wall. 504, 508.

The words "held by them in trust," in this policy, cannot properly be limited to a holding in trust merely for an absolute owner, when it clearly appears that the railroad companies had an insurable interest in the cotton, and the plaintiff held the property in trust exclusively for those companies. The reasoning of the cases where the bailor was the owner of the goods insured by the bailee applies equally to any person, who, having an insurable interest in property, entrusts it to another; and such bailor can, to the extent of his insurable interest, claim the benefit of insurance effected in his favor by his bailee. The original depositors of the cotton surrendered to the railroad companies the receipts which they had taken from the plaintiff, and those companies were thus substituted in the relation to the plaintiff which before had been held by such depositors. The railroad companies thus became the beneficiaries of the trust, so far as the plaintiff was concerned, because they thus became the persons to whom the plaintiff owed the duty of bailment, and the persons entitled to demand the possession of the property from the plaintiff. There was privity in the plaintiff with the person who held its receipt, and privity with no one else. This is a necessary and obvious result of the course of business; and the business in question could not be carried on under any other circumstances so as to give protection by insurance to the parties really interested.

The case is not varied or affected by the clause in the receipts given by the plaintiff, "not responsible for any loss by fire," because the relation of the plaintiff to the property entrusted to it, and its duty to the bailor, determine the legal propriety of the insurance for the benefit of the latter. In the present case, the arrangement was that the railroad companies should pay to the plaintiff, in connection with the charge for compressing, an additional sum which would provide for the insurance of all cotton in the possession of the plaintiff, for which the railroad companies should issue bills of lading. The

defendant had notice that the insurance was effected in the interest of the railroad companies; and it issued the policy in the terms it did, to include the protection of the railroad companies. The fact that the same policy might protect the interest of other persons in respect to cotton held for them by the plaintiff cannot affect the question whether it protects the interest of the railroad companies in respect to cotton held by the plaintiff for them, during the life of the policy. Nor is it material whether the cotton was originally deposited by the railroad companies, or whether their interest accrued through the subsequent transfer to the railroad companies of receipts given by the plaintiff on a deposit of cotton made by other parties.

(2) We come now to another group of errors assigned. The defendant requested the court to instruct the jury as follows: "The policy in question provides that it shall be void if there be any change in the possession of the insured property, except under circumstances which have no bearing on this case. If the jury believe from the evidence that after the policy in question was issued, any common carrier, with the knowledge and consent of plaintiff and under agreement with plaintiff, issued its bills of lading for any of the cotton which at the date of the policy was or thereafter came into possession of the plaintiff, the issuance of such bills of lading, under the conditions of the policy, avoided the policy as to all cotton covered by such bills of lading." The court refused to give such instruction, and the defendant excepted to the refusal.

The court instructed the jury as follows: "By an agreement made between the plaintiff and the St. Louis, Iron Mountain and Southern Railway Company and the Memphis and Little Rock Railway Company, the plaintiff engaged to insure for said railway companies, respectively, all cottons stored in the compress sheds and yards of the plaintiff, at the foot of Main Street, Little Rock, when the railway companies or either of them should notify the plaintiff of the issuance by them of bills of lading therefor. This agreement was carried out, and on the day of the fire the plaintiff held insurance in various companies, aggregating the sum of $142,500.00, in

trust and to indemnify the railway companies against loss or damage by fire of the cotton for which they had issued their bills of lading and which was stored in the plaintiff's sheds and yards described in the policy, at the foot of Main Street." The defendant excepted to this instruction.

The court also charged the jury as follows: "As the plaintiff is a trustee, and insured the cotton for the benefit of the railway companies, and has no separate claim of its own on the property, it is only entitled to recover an amount equal to its liability to the railroad companies; or, in other words, a sum that will make the railway companies whole for the cotton on which they had issued bills of lading; so that, if the market price of cotton produces a larger sum than the aggregate loss of the railway companies (and 2670 bales at $50 per bale, if you should find that was the number of bales and their value, produces an amount slightly in excess of the claims of the railroad companies), then the plaintiff's recovery must be on the basis of the latter sum — that is, one that makes the railway companies whole. In no event is the market value of the cotton to be increased, but it may be reduced by the difference between the value and the amount that will satisfy the just claims of the railway companies. What amount of cotton was burned for which the railway companies had issued bills of lading and which was covered by policies taken out by the plaintiffs, the value of the same, and the amount of the just demands of the railway companies against the plaintiff for the cotton so burned, are questions of fact to be determined by you." The defendant excepted to this charge.

The court also charged the jury as follows: "This suit is brought on a policy of insurance issued by the defendant's company to the Union Compress Company to indemnify the railroad company for the loss of cotton or for cotton that might be burned after the railroad company issued its bills of lading for it, and while it yet remained in the custody of the Compress Company. Now, the Compress Company, under its contract with the railroad company, is bound to make good, by insurance, to the railroad company, any damages resulting to it

from the loss of cotton which the Compress Company held for the railroad company after the railroad company had issued its bills of lading therefor and notified it thereof." The defendant excepted to this charge.

The defendant contends that, although, under a proper construction of the policy, the railroad companies may be regarded as properly beneficiaries under it, the matters involved in the instructions so given by the court were questions of mingled fact and law, and were erroneous, in the light of the facts proved by the plaintiff. The ground urged is, that the policy cannot be reconciled with any intent to insure a railroad company against a loss caused by its own negligence, because the policy insures against "all direct loss or damage by fire;" that, therefore, the only interest which the railroad companies had in the cotton was a contingent interest, arising from their liability for damages for loss by a fire occurring through their own negligence; that the interest alleged to have been insured as that of the railroad companies was not such as could have sustained a claim on a direct loss by fire, because it was a contingent or doubtful interest, and not a certain or direct interest; that the fire alone could not inflict any loss, and that whether the railroad companies would suffer loss would depend on the contingencies, (1) whether or not their negligence caused the loss; (2) whether the owner would be able to prove negligence in the railroad companies; (3) whether the owner was innocent of contributory negligence; and, (4) whether the owner should make a claim for loss against the railroad companies within the statute of limitations.

Under this head, it is also urged, that, on the face of the policy, the insurance was on cotton held in trust by the plaintiff, in a designated place, for thirty days after November 2; that it was claimed by the plaintiff, in the face of the policy and contradictory of its terms, that cotton covered by a bill of lading issued November 8th, by the Missouri Pacific Railway Company, which was held in trust by the plaintiff, and was in the place described, was not covered by the policy until the bill of lading was issued; that if, as the defendant

alleges the fact to be, that cotton was covered by the policy from the 3d to the 8th of November, for the benefit of its owners, there was no process known to the law by which the benefit of such insurance could be transferred to the railroad companies, without action by either the owner or the insurer; that the fact that the plaintiff understood that the insurance was for the benefit of the owners of the cotton was shown by the practical construction put upon the insurance by the plaintiff after the fire, in putting in a claim on behalf of Hanger for 112 bales of cotton burned not covered by the bills of lading, and being paid for it, on behalf of Hanger, as owner of the cotton; and that thus the plaintiff claims that the insurance was for the owners of the cotton, or for the railroad companies, according to circumstances.

It is further urged that, if the bills of lading changed the possession of the cotton, it was at the time of the fire in the possession of the railroad companies and not in that of the plaintiff, and the plaintiff had ceased to hold it in trust; that in such case it was not insured, because of the provision in the policy that any change in the possession should avoid the policy; that if the bills of lading did not change the possession, there could have been no insurance on behalf of the railroad companies, because, in the absence of possession by them, they had no right to insure and no contingent liability to loss; and that it was error in the court to charge that at the time of the fire the plaintiff held insurance on cotton covered by bills of lading.

This court is also asked to review its announcement of the principle of law laid down in *Phœnix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 324, that "no rule of law or of public policy is violated by allowing a common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants."

It is also contended that the jury had a right to decide whether or not the policy was issued on goods held in trust for the railroad companies by the plaintiff, and whether or not

the plaintiff or the railroad companies held the cotton at the time of the fire; and that these were not questions for the court to decide.

In reply to these suggestions, it is to be said, that the exception of loss by fire, contained in the receipts given by the plaintiff, and in the bills of lading given by the railroad companies, did not free them from responsibility for damages occasioned by their own negligence or that of their employés. Nor are we disposed to review our decision that common carriers can insure themselves against loss proceeding from the negligence of their own servants. The doctrine announced in the case cited has been referred to with approval in the subsequent cases of *Orient Ins. Co.* v. *Adams*, 123 U. S. 67, 72, and *Liverpool Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397, 438.

As to the suggestion that by the bills of lading the possession of the cotton was transferred to the railroad companies, and that the policy was avoided thereby, the answer is, that the cotton was still in the hands of the plaintiff, in its actual possession and upon its premises. At most, the railroad companies, by acquiring the receipts of the plaintiff and issuing bills of lading for the cotton, took only constructive possession of it; and the plaintiff, retaining actual and physical possession of it, did not lose any element of possession necessary to give it the right to effect insurance for its own benefit, and, as bailee or agent, for the protection of the railroad companies. All that the railroad companies acquired was the right to ultimate possession, which passed to them by the transfer to them, by the original depositors, of the cotton receipts given by the plaintiff.

As to the argument that no recovery can be had in the interest of the railroad companies, because the injury to them depended upon their liability for the negligence of their employés in causing the fire, and the point taken in regard to the words of the policy, "direct loss or damage by fire," the reply is, that those words mean loss or damage occurring directly from fire as the destroying agency, in contradistinction to the remoteness of fire as such agency. The books are

full of cases on that subject, and the meaning of the policy is not doubtful. Remoteness of agency is the explosion of gunpowder, gases or chemicals, caused by fire; the explosion of steam-boilers; the destruction of buildings to prevent the spread of fire, or their destruction through the falling of burning walls; and so forth. In the present case, the bales of cotton were physically burned by the direct action of fire.

(3) The court also charged the jury as follows: "Now, you have heard the testimony, gentlemen, with reference to the situation under which this cotton was placed and the length of time it remained there. If you think there is no negligence on the part of the railroad company, then you will find that the railroad company is not liable for this cotton. If you can say that that was a proper place to store cotton, and that leaving a passage-way there of not exceeding four feet up and down, through which persons passed at all hours of the day and night to the boat-house and skiff ferry, and it being a dry season, with three or four thousand bales of cotton stored there — *then, if you say this is not negligence, you excuse this railroad company, and to that extent will disallow the claim of the plaintiff; but if you should so find I would be very much surprised at your verdict, and would not be surprised if I should set it aside; but I will leave it for you to say.*" The defendant excepted to this instruction, and especially to the italicized portion thereof.

It is urged that in this part of the charge the court did not allude to facts proved which the defendant claimed disproved negligence, and that thus the instruction was not a fair one as to the facts; that the place of storage was selected and the cotton was stored there by the owners of it, and not by the Memphis and Little Rock Railroad Company; that no negligence can be imputed to the latter on account of the unfitness of the place; that it had no control over the cotton stored in that place, and had no track at that place, the Missouri Pacific Railway Company having the track there; that the Memphis and Little Rock Railroad Company had no opportunity to obtain possession of the cotton until after it had been compressed at Argenta; that the bills of lading of the latter

company exempted it from liability for loss occurring on the lines of other carriers, and the cotton was burned, not on its line, but on the line of the Missouri Pacific Railway Company; that the court made no allusion to any of these matters as going to establish the absence of negligence and liability on the part of the Memphis and Little Rock Railroad Company; that the court threatened the jury with its displeasure and the setting aside of the verdict if the jury should bring in a verdict for the defendant on that issue; and that this action of the court was erroneous.

But the mere fact of the dwelling by the court with emphasis upon facts which seemed to it of controlling importance, and expressing its opinion as to the bearing of those facts on the question of negligence, is immaterial, if the court left the issue to the jury. In the charge, just before the passage complained of, the court, in referring to the question of the liability of the Memphis and Little Rock Railroad Company for the destruction of the cotton, had said to the jury: "It is for you to determine whether this railroad company was not guilty of negligence, and was not at fault in leaving this cotton in an exposed condition after it issued bills of lading therefor;" and in the clause of the charge objected to, the court expressly states that it leaves the question of negligence to the jury.

On this subject, this court said, in *Vicksburg &c. Railroad* v. *Putnam*, 118 U. S. 545, 553: "In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to a jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important and express his opinion upon the facts; and the expression of such an opinion when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error." See, also, *Nudd* v. *Burrows*, 91 U. S. 426; *Indianapolis &c. Railroad* v. *Horst*, 93 U. S. 291; *St. Louis &c. Railway* v. *Vickers*, 122 U. S. 360.

(4) In the course of the trial the plaintiff offered evidence tending to prove that the contracts and custom of business stated in the bill of exceptions were well known to shippers and to the defendant when the policy sued on was issued, it having been stated to the agents of the defendant by an officer of the plaintiff, when the policy was applied for, that it was intended to cover the interests of the plaintiff and of the railroad companies. The defendant objected to the admission of the evidence, but the objection was overruled, and the defendant excepted; and this is alleged as error.

In this connection it is urged that the complaint does not allege any such knowledge on the part of the defendant, or any intention on its part to issue its policy for the benefit of the railroad companies. The case of *Hough* v. *People's Fire Ins. Co.*, 36 Maryland, 398, is cited in support of this assignment of error. But we think the evidence was admissible. In the Hough case the policy covered the merchandise insured, "their own, or held by them in trust, or in which they have an interest or liability." Parol evidence was held to be incompetent which was offered to show that the policy did not cover merchandise which was their own. The evidence would have contradicted the plain terms of the policy. In the present case, the evidence offered was admissible under the ruling in *Home Ins. Co.* v. *Balt. Warehouse Co.*, 93 U. S. 527, 542. In that case the court says: "It is no exception to the rule" (governing the admission of parol evidence) "that, when a policy is taken out expressly 'for or on account of the owner' of the subject insured, or 'on account of whomsoever it may concern,' evidence beyond the policy is received to show who are the owners or who were intended to be insured thereby. In such cases, the words of the policy fail to designate the real party to the contract, and, therefore, unless resort is had to extrinsic evidence, there is no contract at all." See, also, *Finney* v. *Bedford Ins. Co.*, 8 Met. 348; *Fire Ins. Asso.* v. *Merchants' & Miners' Trans. Co.*, 66 Maryland, 339; *Snow* v. *Carr*, 61 Alabama, 363.

Having issued the policy with notice that it was intended to cover the interest of the railroad companies, the defendant is

estopped from asserting that the policy was intended to protect only the legal owners of the cotton.

(5) It is alleged, also, that the court erred in sustaining the demurrer of the plaintiff to paragraph 7 of the defendant's answer, which alleged that at the time of the loss 2172 bales of the cotton alleged to have been burned were covered by marine policies theretofore issued to the respective owners of the cotton, and therefore, under the terms of the policy in this suit, such cotton was not covered by it. It is alleged, also, as error, that the court, at the trial, rejected, on the objection of the plaintiff and under the exception of the defendant, evidence offered by the latter tending to prove that that number of bales of the cotton covered by the bills of lading, and alleged to have been burned, were, at the time of the fire, covered by marine policies of insurance theretofore issued to the respective owners of such cotton, residing in various portions of the United States and in England.

It is to be said, in reply, that paragraph 7 of the answer does not show that the marine policies were on the same interest as that covered by the fire policy. This element is necessary, because otherwise the policy sued on would be of no practical force. As soon as the consignees of the cotton were advised by telegraph of its shipment, they would take out marine policies to cover their own risk; and thus the fire insurance companies would obtain the premiums of insurance from the railroad companies, and immediately avoid all risk, because of the taking out of the marine policies. *North British Ins. Co.* v. *London, Liverpool & Globe Ins. Co.*, 5 Ch. D. 569. The question of the legal effect of the contribution clause of the policy, before recited, is not presented by the record.

The objection alleged at the trial to the introduction of evidence as to the marine policies was made on the ground that it was immaterial and irrelevant, and that the insured knew nothing of those policies and had no interest in them. This was the objection which was sustained; and the allegation of paragraph 7 of the answer was, that the marine policies had been issued to the respective owners of the cotton. It did not appear that either the insurer or the insured had any previous

knowledge of the existence of the marine policies, nor did it appear whether they were issued before or after the date of the fire policy. The issuing of the marine policies, in order to have any effect in this case, must amount to double insurance. In no other view can the defendant have any interest in the question of marine insurance. Double insurance exists only in the case of risks upon the same interest in property and in favor of the same person. *North British Ins. Co.* v. *London, Liverpool & Globe Ins. Co.*, 5 Ch. D. 569; *Lowell Mfg. Co.* v. *Safeguard Fire Ins. Co.*, 88 N. Y. 591; Phillips on Insurance, § 359; Wood on Fire Ins. 1st ed. § 352. No reason can exist for a distinction between the construction of a provision avoiding a policy in case of marine insurance and in case of further or additional fire insurance. In the latter case the provision is always construed as relating only to additional insurance upon the same interest and effected by the same person or in his interest.

The contention of the defendant is, that its policy is avoided by the taking out of a marine policy by the owner of the cotton, without the knowledge or participation of the plaintiff or of the railroad companies, whether the marine insurance was effected before or after the fire insurance in favor of the railway companies, and although the fire insurance policy was taken to protect the independent interests of the railroad companies. We cannot admit the soundness of this view. The cases cited where a policy is avoided by the carrying on of a prohibited business, or the storing of a prohibited article, without the knowledge or consent of the insured owner of a building, are placed upon the ground that the possession of the tenant or occupant of a building is the possession of its owner, and that the contracts which he makes as to the use of the insured premises are in the nature of warranties, and relate to matters over which he has legitimate control. It cannot be contended successfully that the condition in question here was intended by the plaintiff to subject the policy to forfeiture if any person who had a remote and independent insurable interest should take out a policy of marine insurance to protect that interest, the plaintiff having no privity with such

person. As was said in *Grandin* v. *Rochester German Ins. Co.*, 107 Penn. St. 26, 37: "We are not to suppose that conditions involving forfeitures are introduced into policies by insurance companies, which are purely arbitrary and without reason, merely as a trap to the assured or as a means of escape for the company in case of loss. When, therefore, a general condition has no application to a particular policy; where the reason which alone gives it force is out of the case, the condition itself drops out with it." See, also, *Hoffman* v. *Ætna Ins. Co.*, 32 N. Y. 405.

The offer of evidence by the defendant at the trial, in regard to the marine insurance, was by its terms an offer to prove the mere fact of marine insurance, in support of the defence set up in paragraph 7 of the answer; and the claim on the part of the defendant that the evidence was proper to support the further defence set up in the answer, as to the amount of the proportionate liability of the defendant, is not tenable. The offer was to prove merely the fact of marine insurance, and not to prove its amount. It was an offer in bar of liability, and not an offer applicable to a reduction of the verdict. No suggestion of the latter object was made in the offer, and the evidence, if admitted as offered, could have no bearing upon the question as to how much the proportionate liability of the defendant would be reduced by virtue of the marine policies. The only specific offer to prove the terms of any marine policy, and the extent of the insurance under it, was made in the form of an offer of the deposition of one Phillips and the testimony of one Bowen, both of which were excluded on proper grounds, and complaint is made only of the exclusion of the deposition of Phillips.

(6) It is assigned for error that the court erred in striking out the testimony in the deposition of Phillips, the clerk of Ralli Bros., who were claiming pay from the Memphis and Little Rock Railroad Company for 158 bales of cotton, to the effect that that cotton was covered by marine policies taken out by Ralli Bros. The policies of insurance mentioned in the testimony in the deposition were not attached to it. The testimony was objected to by the plaintiff as incompetent because

it was an attempt to prove by parol the contents of written instruments; it was stricken out by the court, and the defendant excepted.

The ruling of the court was manifestly correct. There was no proof that the policies referred to were in Liverpool, for all that the witness Bowen said was that he was informed they were there; and as to the copy which Phillips refused to attach to his deposition, all the evidence in regard to its identity is that Phillips said to the witness Bowen that such copy was a copy of the marine policy which had been issued on the cotton. This was, all of it, only hearsay evidence.

(7) The court was requested by the defendant to instruct the jury as follows: "As this action is brought solely on behalf of the railroad companies on account of liability incurred through carelessness of the agents and servants of the companies, no cause of action accrued against the defendant until the actual payment by said companies of damages on account of the alleged fire, and the recovery cannot be greater than the value, on November 14, 1887, at Little Rock, of the cotton so burned and paid for — nor greater than the sum paid by the railroad companies — that is, if they have paid more than the value of the cotton they cannot recover the excess from the defendant; if they have paid less than the value, they can recover only to the extent of the payment." The court refused to give that instruction, and defendant excepted. This is alleged as error. It is urged that the Memphis and Little Rock Railroad Company has never paid any damages, and that the Missouri Pacific Railway Company had not paid any when this suit was commenced; and it is contended that no cause of action accrues, in a case of that kind, until payment of the damages by the railroad companies is made.

But, as a bailee, under a policy taken out to cover property, his own or held by him in trust or on commission, may enforce the contract of insurance to the full value of the property destroyed, holding the proceeds primarily for his own benefit and the balance for that of his bailor, the right of action of the plaintiff accrued on the occurring of the loss. The case cited by the defendant, *Cin., Hamilton & Dayton Railroad*

v. *Spratt*, 2 Duvall, 4, does not apply to the present case. That was a suit brought by a consignee of goods against a carrier, where the carrier was entitled, under a bill of lading given by it to the consignee, to insurance obtained by the consignee; and it was held that the consignee could not be compelled to proceed upon the policy of insurance before enforcing his claim against the carrier, even where it appeared that the insurer had agreed to pay its loss under the policy, and although it was alleged that the suit was prosecuted for the benefit of the insurer. But here the plaintiff is the assured. The insurance included the protection of the railroad companies. The premium was paid. The insured property was destroyed by fire. The condition of the liability of the insurer was complete, and its liability had fully accrued. The only question for litigation was whether the railroad companies were protected by the insurance. The defendant is called upon to perform only its agreement to pay the insurance money in case of the destruction of the cotton by fire. Its liability is not dependent upon the question whether the liability of the railroad companies has been discharged; nor is the plaintiff's right of action contingent upon the payment by the railroad companies of the value of the cotton burned, but it is contingent only upon the destruction of the cotton by fire under circumstances which impose a liability upon the railroad companies.

We see no error in the record, and the judgment is

Affirmed.

MILLS *v.* DOW'S ADMINISTRATOR.

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

No. 151. Submitted December 9, 1889. — Decided March 3, 1890.

Where the subject matter of a contract relates to the construction of a railroad in Massachusetts, and the defendant resides there, and the contract was made there, and a suit on the contract is brought there, the law of

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Massachusetts is to govern in expounding and enforcing the contract, and in determining the rule of damages for a breach of it.

Where a contract states that the purchasing price of its subject matter is $15,000, and that that sum has been "this day advanced and paid" therefor, it is competent for the vendor, in a suit by him on the contract, to show that only $10,000 was paid, with a view to recover the remaining $5000.

The language of the contract is ambiguous and does not show actual prior or simultaneous payment.

Evidence of a promise by the defendant, as a part of the consideration of the contract, to pay certain debts mentioned in it which the plaintiff owed is admissible; and the refusal of the defendant to pay those debts on demand was a breach of the contract.

An agreement to "assume" a prior contract, and to save the plaintiff harmless from "all liability" by reason of certain other contracts, is broken by a failure to pay the parties to whom the plaintiff was liable, and it is not necessary to a breach that the plaintiff should show that he had first paid those parties.

The agreement is not merely one to indemnify the plaintiff from damage arising out of his liability, but is an agreement to assume his contracts and to discharge him from his liability.

Such agreement was a personal one on the part of the defendant.

On the 23d of October, 1878, the following instrument in writing was executed by Stephen C. Mills on the one part, and Stephen Dow and Nathan P. Pratt on the other:

"Whereas Stephen C. Mills of Stark, in the State of Maine, is the contractor for the building of the Boston and Mystic Valley Railroad Company's railroad bed, bridges, etc., etc.; and whereas the said railroad company has agreed to purchase and cause to be cancelled the said contract, but said company has found it inconvenient or impossible to pay me the agreed price for such purchase; and whereas Stephen Dow of Woburn and Nathan P. Pratt of Reading have agreed to purchase of me the said contract in the interest of said railroad company and for the said company's benefit and profit, and to receive of me an assignment of said contract in trust for said company — that is to say, as collateral security for payment to them by said company of the sum of fifteen thousand dollars, the purchasing price, and interest thereon at the rate of six per centum per annum, for such time as the same shall remain unpaid, which said sum of fifteen thousand dollars the

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said Dow and Pratt have this day advanced and paid to said Mills for said contract and all sums that may hereafter become due thereunder; and whereas the said Mills has sublet some of the work, as per contracts marked 'B,' 'C,' 'D,' 'E' and hereto annexed, with Hall and Burgess, J. M. Ellis and Savage and McCabe; and whereas the said Dow and Pratt assume said contract in their capacities aforesaid; and whereas by the terms of said contract 'A' ten per cent of the monthly estimate is retained in the hands of the company; the said Dow and Pratt as aforesaid accept the assignment of said contract, with the understanding and agreement that they will and shall well and truly save harmless the said Mills from any and all liability by reason of said contracts, the ten per cent reserved, and any claim by reason of said Ellis, Hall and Burgess and Savage and McCabe agreements before mentioned: Now, know all men that I, Stephen C. Mills of Stark, in the State of Maine, the person named in the contract hereto annexed, marked 'A,' in consideration of fifteen thousand dollars to me paid by Stephen Dow, of Woburn, in the county of Middlesex and Commonwealth of Massachusetts, and Nathan P. Pratt of Reading, in said county of Middlesex, in their capacity aforesaid, have assigned and do hereby assign, sell, convey and set over to the said Dow and Pratt as aforesaid, and their assigns, all my interest in the within and beforementioned contract marked 'A,' and every clause, article, or thing therein contained, and I do hereby constitute and appoint them, the said Dow and Pratt, trustees as aforesaid, my attorney or attorneys, in my name, but to their own use as aforesaid, to take all legal means which may [be] proper for the complete recovery and enjoyment of the assigned premises, with power of substitution. In witness whereof I have hereunto set my hand and seal this twenty-third (23) day of October, A.D. 1878.

"S. C. Mills & Co.
"Stephen C. Mills. [L. S.]

"Signed, sealed and delivered in the presence of —
"Henry B. Nottage.
"P. Webster Loche.

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"We the said Stephen Dow and Nathan P. Pratt, hereby accept the above assignment and the conditions preceding the same for the purposes aforesaid.

"Witness: "Stephen Dow.
"P. Webster Loche. "Nathan P. Pratt."

The contract of Mills with the Boston and Mystic Valley Railroad Company, to build and equip the road of that company from Somerville to Wilmington, was made on the 4th of May, 1878. On the 6th of May, 1878, the plaintiff, under the name of S. C. Mills & Co., made a sub-contract with H. C. Hall and J. H. Burgess, being the Hall and Burgess named in the instrument of October 23, 1878, to grade the road-bed of the railroad from Wilmington to Somerville. The road had not been completed on the 23d of October, 1878. Dow and Pratt were stockholders and directors in the company. Of the $15,000 mentioned in the instrument of October 23, 1878, they paid to Mills only $10,000. They did not pay any part of $11,048.08, which was due to Hall and Burgess for work done under their contract, partly before and partly after the instrument of October 23, 1878, was executed. Mills brought this suit against Dow and Pratt, in the Circuit Court of the United States for the District of Massachusetts, to recover those sums. Issue was joined by Dow. Pratt did not appear and was defaulted. At the trial before a jury the court directed a verdict for the defendant Dow, and a judgment accordingly was entered, to review which the plaintiff brought this writ of error. Since the writ was brought, Dow has died, and his administrator has been substituted as defendant in error in his stead.

Dow was president of the railroad company, and as such executed the contract between the company and Mills for the construction and equipment of the road. The sub-contractors named in the instrument of October 23, 1878, continued work on the road under their contracts up to the middle of December, 1878, and furnished the labor and materials set forth in the declaration and in the accounts annexed thereto, so that there was a balance exceeding $6000 due from Mills to Hall

and Burgess, partly for work done prior to October 23, 1878, and partly for work done subsequently to that date. Dow was informed of the amount so due to the sub-contractors, and that the same had never been paid.

The bill of exceptions, after stating the foregoing facts, set forth that the plaintiff offered to show by Hall, for the purpose of proving an independent oral contract based on an alleged liability of Dow as stockholder, that Dow repeatedly promised Hall, in 1879 and subsequently, that he would pay the amount claimed to be due to Hall and Burgess, but the court refused to admit the evidence at that stage of the case, on the ground that there was no evidence of a consideration for the promise, and that the liability, and the fact that Dow was a stockholder, must first be shown; that the plaintiff offered to show, by his own evidence, that the consideration of the instrument of October 23, 1878, was the payment of $15,000; that the defendants promised to pay him that sum as such consideration and had paid only $10,000 of it, the plaintiff claiming that, by the terms of the instrument, the defendants were bound to pay the whole of such consideration, and that, on proof that the consideration was $15,000, and was partially unpaid, he would be entitled to recover; that the court ruled that the inquiry was irrelevant, on the pleadings and proofs as they then stood; that the plaintiff offered further to show that, as a part of the consideration of the instrument, the defendants promised to pay the debts the plaintiff owed to Hall and others named in the instrument; and that the court refused to admit the evidence.

The bill of exceptions stated, also, that there was evidence tending to show that the defendants were stockholders and directors of the company, and Dow was its president, from May 1, 1878, to June 1, 1879; that Hall had authority from the plaintiff to collect from the defendants the amounts due to the sub-contractors; that Dow, at the request of the plaintiff, paid to one or more of the sub-contractors, subsequently to October 23, 1878, the amount due them for work done on the road and had also paid to the plaintiff the amount of a judgment recovered against the latter by Savage and McCabe, in

Citations for Plaintiff in Error.

a suit brought by them subsequently to October 23, 1878, for work done by them under their sub-contract, which amount the plaintiff never paid to Savage and McCabe, and no claim was made for it in this suit; that, before this suit was brought, the sub-contractors demanded their pay from the plaintiff, showing him a statement of their account, and also made a demand on the defendants, and the plaintiff made a like demand on them; that as between the plaintiff and the sub-contractors, there was no dispute as to the amount due; that the company voted to stop the work of construction on the road about the middle of December, 1878, and never resumed the work of construction after that date; that Hall and Burgess did not complete their contract within the time stipulated in it, for the reason, among others, that the company did not meet its payments and never secured the right of way for the portion not constructed by it; and that no evidence was introduced by the plaintiff that he had paid any portion of the sums due the sub-contractors named in the instrument of October 23, 1878. The plaintiff having closed his case, the defendant Dow contended that the plaintiff could not recover without first showing some actual payment or injury other than his liability to Hall and Burgess, so due and made known to the defendants; and that the same had not been paid. The court ruled that there was no competent evidence to sustain the plaintiff's case, and directed a verdict for the defendant Dow.

The bill of exceptions further stated that the plaintiff duly excepted at the trial to such rulings, refusals to rule, and direction of the court.

Mr. George S. Hale and *Mr. A. G. Stanchfield*, for plaintiff in error, cited: *Middlesex Co.* v. *Osgood*, 4 Gray, 447; *Young* v. *Raincock*, 7 C. B. 309; *Cox* v. *United States*, 6 Pet. 172; *Consequa* v. *Willing's Heirs*, Pet. C. C. 225; *Galvin* v. *Thompson*, 13 Maine, 367; *Paige* v. *Sherman*, 6 Gray, 511; *Wilkinson* v. *Scott*, 17 Mass. 249; *Carr* v. *Dooley*, 119 Mass. 294; *Schillinger* v. *McCann*, 6 Greenl. 364; *Beach* v. *Packard*, 10 Vermont, 96; *S. C.* 33 Am. Dec. 185; *Shepard* v. *Little*, 14 Johns. 210; *M'Crea* v. *Purmort*, 16 Wend. 460; *S. C.* 30 Am. Dec. 103;

Argument for Defendant in Error.

Pritchard v. *Brown*, 4 N. H. 397; *S. C.* 17 Am. Dec. 431; *Belden* v. *Seymour*, 8 Connecticut, 304; *S. C.* 21 Am. Dec. 661; *Watson* v. *Blaine*, 12 S. & R. 131; *S. C.* 14 Am. Dec. 669; *Gully* v. *Grubbs*, 1 J. J. Marsh. 387; *Goldshede* v. *Swan*, 1 Exch. 154; *Hubon* v. *Park*, 116 Mass. 541; *Aldrich* v. *Ames*, 9 Gray, 76; *Clark* v. *Deshon*, 12 Cush. 589; *Braman* v. *Dowse*, 12 Cush. 227; *Carr* v. *Roberts*, 5 B. & Ad. 78; *Stout* v. *Folger*, 34 Iowa, 71; *Lathrop* v. *Atwood*, 21 Connecticut, 117; *Locke* v. *Homer*, 131 Mass. 93; *Stewart* v. *Clark*, 11 Met. 384; *Preble* v. *Baldwin*, 6 Cush. 549; *Smith* v. *Pond*, 11 Gray, 234; *Paper Stock Disinfecting Co.* v. *Boston Disinfecting Co.*, 147 Mass. 318; *Gilbert* v. *Wiman*, 1 Comstock (1 N. Y.) 550; *S. C.* 49 Am. Dec. 359; *Calvo* v. *Davies*, 8 Hun, 222; *Warwick* v. *Richardson*, 10 M. & W. 284; *Hodgson* v. *Wood*, 2 Hurl. & Colt. 649; *Port* v. *Jackson*, 17 Johns. 239, cited in *Wicker* v. *Hoppock*, 6 Wall. 94; *Wood* v. *Wade*, 2 Starkie, 167; *Greenleaf* v. *Birth*, 9 Pet. 292; *Schuchardt* v. *Allens*, 1 Wall. 359; *Hickman* v. *Jones*, 9 Wall. 197; *Farnum* v. *Davidson*, 3 Cush. 232; *United States* v. *Tillotson*, 12 Wheat. 180; *Gibbons* v. *Farwell*, 63 Michigan, 344; *Doane* v. *Lockwood*, 115 Illinois, 490; *Jones* v. *Vanzandt*, 2 McLean, 596; *Battis* v. *McCord*, 70 Iowa, 46.

Mr. Stillman B. Allen and *Mr. Montressor T. Allen* for defendant in error.

I. Under a general denial in the answer the plaintiff must prove each material allegation in the declaration. *Rodman* v. *Guilford*, 112 Mass. 405. There is nothing admitted by the answer except the making of said agreement. The questions concerning the admissibility of evidence arise solely upon the allegations contained in the plaintiff's declaration. What the plaintiff is estopped from proving, the defendant need not plead specially.

II. By the evidence offered the plaintiff endeavored to extend and enlarge the provisions of a written contract under the guise of proving by parol its consideration. It is perfectly well settled that a grantor is not absolutely bound by the consideration or the acknowledgment of its payment expressed in his deed, because the consideration is known to be arbitrary,

and a receipt is always open to explanation; and this acknowledgment, although under seal, is nothing more than a receipt, for the seal gives it no additional solemnity. *Wilkinson* v. *Scott*, 17 Mass. 249; *Howe* v. *Walker*, 4 Gray, 318.

In *Flynn* v. *Bourneuf*, 143 Mass. 277, Holmes, J., asserts that the authority of *Howe* v. *Walker*, *ubi supra*, is unshaken, and distinguishes it from *Carr* v. *Dooley*, 119 Mass. 294, *Preble* v. *Baldwin*, 6 Cush. 549, and similar cases.

III. The recital that the $15,000 has been paid is an estoppel upon the plaintiff to deny that fact on the faith of which the assignment was accepted, and so far as concerns the plaintiff this estoppel is in an instrument under his seal. *Leddy* v. *Barney*, 139 Mass. 394; *Southeastern Railway Co.* v. *Wharton*, 6 H. & N. 520; *Horton* v. *Westminster Improvement Com'rs*, 7 Exch. 780; *Lucy* v. *Gray*, 61 N. H. 151; *Mann* v. *Williams*, 143 Mass. 394; *Hudson* v. *Greenwele Seminary*, 113 Illinois, 618; *Lainson* v. *Tremere*, 1 Ad. & El. 792; *Baker* v. *Nachtrieb*, 19 How. 126; *Shoe & Leather Bank* v. *Dix*, 123 Mass. 148.

So far as the defendants are bound by implication arising from the acceptance of a deed poll, (if the writing be so construed,) it is only binding upon them as trustees and not in their individual capacity. And so far as they are bound by their written acceptance, the form of the same limits their liability to their capacity as trustees, notwithstanding their naked signatures. The following cases are cited to the points that the writing is the only evidence of the intent of the parties, and that on the whole writing there is no personal liability. *Goodenough* v. *Thayer*, 132 Mass. 152; *Tucker Mfg. Co.* v. *Fairbanks*, 98 Mass. 101; *Carpenter* v. *Farnsworth*, 106 Mass. 561; *Terry* v. *Brightman*, 132 Mass. 318; *Ellis* v. *Pulsifer*, 4 Allen, 165; *Cutler* v. *Ashland*, 121 Mass. 588; *Cook* v. *Gray*, 133 Mass. 106; *Blanchard* v. *Blackstone*, 102 Mass. 343; *Whitford* v. *Laidler*, 94 N. Y. 145.

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

The plaintiff alleges as error (1) the refusal of the court to admit the evidence offered as to the consideration of $15,000.

as to the promise to pay the balance of it, and as to the promise to pay the debts due to Hall and Burgess; (2) the ruling that the plaintiff could not recover without showing some actual payment or injury, other than his liability to Hall and Burgess so due and made known to the defendants; (3) the ruling that there was no competent evidence to sustain the plaintiff's case; and (4) the withdrawal of the case from the jury and the direction of a verdict for the defendant Dow.

As the subject matter of the instrument of October 23, 1878, was in Massachusetts, and the defendant Dow was a resident there, and the contract was made there, and the suit was brought there, the law of that State is to govern in expounding and enforcing the contract and in determining the rule of damages for a breach of it.

It is contended by the defendant that the instrument contains an admission of the receipt of the entire $15,000; and the question on this branch of the case is whether the plaintiff is precluded from showing the true state of facts. It is well settled in Massachusetts, that a recital in a deed, acknowledging payment of the consideration stated, is only *prima facie* proof, and is subject to be controlled or rebutted by other evidence. *Paige* v. *Sherman*, 6 Gray, 511, 513; *Wilkinson* v. *Scott*, 17 Mass. 249; *Carr* v. *Dooley*, 119 Mass. 294, 296.

Independently of this, the expression in the instrument which is claimed to be an acknowledgment of the receipt of the $15,000, namely, "which said sum of fifteen thousand dollars the said Dow and Pratt have this day advanced and paid to said Mills," is ambiguous, and does not show actual prior or simultaneous payment. *Goldshede* v. *Swan*, 1 Exch. 154.

So, too, the evidence of a promise by the defendants, as a part of the consideration of the instrument, to pay the debts which the plaintiff owed to Hall and others named in it, was admissible; and the refusal of the defendants to pay those debts on demand was a breach of their contract. *Clark* v. *Deshon*, 12 Cush. 589, 591.

The issue being whether the consideration had been paid and whether the obligation of the defendants was broken, it was competent for the plaintiff to show by parol that, after

Hall and Burgess had finished their work under their sub-contract, they stated their account to the plaintiff and demanded payment from him; that he notified the defendants and made demand on them; and that they neglected to pay. Such demand, and a neglect on their part to pay, tended to support the case of the plaintiff.

The balance due by the plaintiff to Hall and Burgess was $11,048.08, with interest from January 1, 1879; and that was the amount of the liability of the plaintiff to them under his contract with them. The agreement of the defendants, in the instrument of October 23, 1878, is that they assume the contract between the plaintiff and the company, and that they will well and truly save the plaintiff harmless from any and all liability by reason of his contracts with Hall and Burgess, Ellis and Savage and McCabe, "the ten per cent reserved," and any claim by reason of such contracts.

The agreement to assume the contract, in connection with the further agreement to save the plaintiff harmless from liability, was broken by a failure to pay the parties to whom the plaintiff was liable, and it was not necessary to a breach that the plaintiff should show that he had first paid those parties. *Braman* v. *Dowse*, 12 Cush. 227; *Locke* v. *Homer*, 131 Mass. 93; *Drury* v. *Tremont Improvement Co.*, 13 Allen, 168, 171; *Stewart* v. *Clark*, 11 Met. 384; *Preble* v. *Baldwin*, 6 Cush. 549; *Smith* v. *Pond*, 11 Gray, 234; *Paper Stock Co.* v. *Boston Disinfecting Co.*, 147 Mass. 318.

By the instrument in question, the defendants took the place of the plaintiff, and became, after the instrument was executed, principals in the work of constructing the railroad; and their acceptance of the assignment and the conditions preceding it included the sub-contracts and what was due and to become due upon them. The contract is not merely one to indemnify the plaintiff from damage arising out of his liability, but is an agreement to assume his contracts and to discharge him from his liability. *Gilbert* v. *Wiman*, 1 Comstock, 550; *Noble* v. *Arnold*, 23 Ohio St. 264, 271; *Carr* v. *Roberts*, 5 B. & Ad. 78; *Chase* v. *Hinman*, 8 Wend. 452; *Rockfeller* v. *Donnelly*, 8 Cowen, 623; *Randall* v. *Roper*, 27 Law

J. N. S. Q. B. 266; *Warwick* v. *Richardson*, 10 M. & W. 284; *Port* v. *Jackson*, 17 Johns. 239; *Wicker* v. *Hoppock*, 6 Wall. 94; *Lathrop* v. *Atwood*, 21 Conn. 117, 125.

The case is not open to the objection that the plaintiff endeavored to extend and enlarge by parol the provisions of a written instrument under the guise of proving its consideration; and the cases on that subject do not apply.

Although the instrument in question states that the defendants have agreed to receive from the plaintiff an assignment of the plaintiff's contract with the railroad company "in trust for said company;" that the defendants "assume said contract in their capacities aforesaid;" that they have paid the $15,000 "in their capacity aforesaid," and the assignment is made to them "as aforesaid;" and that the plaintiff appoints them, "trustees as aforesaid," his attorneys; and although they "as aforesaid accept the assignment," their agreement to save the plaintiff harmless from any and all liability by reason of the contracts named is an absolute personal agreement on their part.

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

ARMSTRONG *v.* AMERICAN EXCHANGE NATIONAL BANK OF CHICAGO.

SAME *v.* SAME.

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

Nos. 1110, 1111. Submitted January 13, 1890. — Decided March 3, 1890.

On June 14, 1887, the Fidelity National Bank of Cincinnati drew a draft for $100,000 on the Chemical National Bank of New York City, payable to the order of the American Exchange National Bank of Chicago, and put it into the hands of one W., who delivered it for value to K. & Co. They endorsed it for deposit to their account in the Chicago Bank, which credited its amount to them and paid their checks against it. It was not paid: *Held*, that the draft was a foreign bill of exchange; that W. did not act as the agent of the Cincinnati Bank; and that in a suit by the Chi-

cago Bank against the receiver of the Cincinnati Bank, which had failed, to recover the amount of the draft, the Chicago Bank was a *bona fide* holder and owner of it for value, and want of consideration could not be shown by the receiver.

The fact that the draft was payable to the order of the plaintiff was not notice to it that W. was not its purchaser or remitter; and the Cincinnati Bank had represented to the plaintiff that W. was a *bona fide* holder of the draft, for his use in making good trades of his with K. & Co.

An instrument signed by the Cincinnati Bank, dated June 14, 1887, addressed to the Chicago Bank, stating that W. & Co. had deposited $200,000 to the credit of the latter bank, for the use of K. & Co., was put by the former bank into the hands of W. & Co., who delivered it to K. & Co., who deposited it with the Chicago Bank, which gave credit for its amount to K. & Co. as cash, and paid with a part of it an overdraft of K. & Co. and honored their checks against the rest of it. In a suit by the Chicago Bank against the said receiver to recover the $200,000: *Held*, that the instrument was in its legal character a certificate of deposit; that the plaintiff was an innocent purchaser of it, for value; that, as the Cincinnati Bank had represented to the plaintiff that it had received from W. & Co. consideration for the paper, it was estopped from setting up the falsity of such representation; that the plaintiff did not take the paper under such circumstances as would put a man of ordinary prudence on inquiry; and that there was nothing to lead the plaintiff to suspect that the money represented by the paper was that of the Cincinnati Bank.

A defence set up to the suit on the certificate of deposit was, that H. (the vice-president of the Cincinnati Bank), its assistant cashier, and W., of W. & Co., conspired to defraud that bank by using its funds in speculating in wheat in Chicago, through K. & Co., so as to make a "corner" in wheat: *Held*, that rumors on the board of trade and in the public press that H. was the real principal for whom W. was acting, could not affect the plaintiff; and that the plaintiff could not refuse to honor the checks of K. & Co. against the deposit, on the ground that K. & Co. intended to use the money to pay antecedent losses in the gambling wheat transactions.

The statute of Illinois, 1 Starr & Curtis, Stat. 1885, pp. 791, 792, §§ 130, 131, and the case of *Pearce* v. *Foote*, 113 Illinois, 228, do not apply to the present case.

Where losses have been made in an illegal transaction, a person who lends money to the loser, with which to pay the debt, can recover the loan, notwithstanding his knowledge of the fact that the money was to be so used.

An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case.

It does not appear that the plaintiff had knowledge or notice that the paper in suit was delivered to it to be used through it by K. & Co. in connection with an attempt to corner the market.

Citations for Appellee.

Where a dividend was declared by the receiver in October, 1887, the plaintiff is entitled to interest on the amount of his dividend from the time it was declared.

In equity. Decree in favor of the complainant. The defendant appealed. The case is stated in the opinion.

Mr. John W. Herron, for appellant, cited: *White* v. *Knox*, 111 U. S. 784; *Vorce* v. *Rosenbery*, 12 Nebraska, 448; *Chariton Plough Co.* v. *Davidson*, 16 Nebraska, 374; *Aldrich* v. *Stockwell*, 9 Allen, 45; *Kyle* v. *Thompson*, 11 Ohio St. 616; *Tisen* v. *Hanford*, 31 Ohio St. 193; *Weber* v. *Orton*, 91 Missouri, 677; *Trust Co.* v. *National Bank*, 101 U. S. 68; *Pollard* v. *Vinton*, 105 U. S. 7; *Farmers' and Mechanics' Bank* v. *Butchers' Bank*, 16 N. Y. 125; *S. C.* 69 Am. Dec. 678; *Baxendale* v. *Bennett*, 3 Q. B. D. 525; *Stewart* v. *Lansing*, 104 U. S. 505; *Marion County* v. *Clark*, 94 U. S. 278; *Pearce* v. *Foote*, 113 Illinois, 228; *Coffman* v. *Young*, 20 Ill. App. 76; *Raymond* v. *Leavitt*, 46 Michigan, 447; *Brown* v. *Tarkington*, 3 Wall. 377; *Chapin* v. *Dake*, 57 Illinois, 295; *Third Nat. Bank* v. *Harrison*, 3 McCrary, 316; *Cunningham* v. *Third Nat. Bank of Augusta*, 71 Georgia, 400; *Dresser* v. *Missouri & Iowa Construction Co.*, 93 U. S. 92; *Williams* v. *Smith*, 2 Hill, 301; *White* v. *Knox*, 111 U. S. 784; *Bank of Bethel* v. *Pahquioque Bank*, 14 Wall. 383; *Chemical Bank* v. *Bailey*, 12 Blatchford, 480.

Mr. C. B. Matthews and *Mr. W. H. Swift*, for appellee, cited: *Munroe* v. *Bordier*, 8 C. B. 861; *Watson* v. *Russell*, 3 B. & S. 34; *South Boston Iron Co.* v. *Brown*, 63 Maine, 139; *Glascock* v. *Rand*, 14 Missouri, 550; *Horn* v. *Fuller*, 6 New Hampshire, 511; *St. Louis & San Francisco Railway Co.* v. *Johnston*, 23 Blatchford, 489; *S. C.* 27 Fed. Rep. 243; *Bank of Circleville* v. *Bank of Monroe*, 33 Fed. Rep. 408; *In re Bank of Madison*, 5 Bissell, 515; *Clark* v. *Merchants' Bank*, 2 Comstock, 380; *In re Franklin Bank*, 1 Paige, 249; *S. C.* 19 Am. Dec. 413; *Platt* v. *Beebe*, 57 N. Y. 339; *Metropolitan Bank* v. *Loyd*, 90 N. Y. 530; *Bank of the Republic* v. *Millard*, 10 Wall. 152; *Brooks* v. *Bigelow*, 142 Mass. 6; *Commercial Bank* v. *Mil-*

ler, 77 Alabama, 168; *Flannery* v. *Coates*, 80 Missouri, 444; *In re Carew's Estate*, 31 Beavan, 39; *Ex parte Richdale*, 19 Ch. D. 409; *Hudson Canal Co.* v. *Pennsylvania Coal Co.*, 8 Wall. 276; *Long* v. *Straus*, 107 Indiana, 94; *Miller* v. *Austen*, 13 How. 218; *Curtis* v. *Leavitt*, 15 N. Y. 9; *Leavitt* v. *Palmer*, 3 Comst. 19; *S. C.* 51 Am. Dec. 333; *Barnes* v. *Ontario Bank*, 19 N. Y. 152; *Bank of Peru* v. *Farnsworth*, 18 Illinois, 563; *Laughlin* v. *Marshall*, 19 Illinois, 390; *Hunt* v. *Divine*, 37 Illinois, 137; *White* v. *Franklin Bank*, 22 Pick. 181; *Hart* v. *Life Association*, 54 Alabama, 495; *Kilgore* v. *Bulkley*, 14 Connecticut, 362; *Lindsey* v. *McClelland*, 18 Wisconsin, 481; *S. C.* 86 Am. Dec. 786; *Bank of Chillicothe* v. *Dodge*, 8 Barb. 233; *Poorman* v. *Mills*, 35 California, 118; *S. C.* 95 Am. Dec. 90; *Hazelton* v. *Union Bank*, 32 Wisconsin, 34; *Trip* v. *Cortenius*, 36 Michigan, 494; *Bean* v. *Briggs*, 1 Iowa, 488; *S. C.* 63 Am. Dec. 464; *Howe* v. *Hartness*, 11 Ohio St. 449; *S. C.* 78 Am. Dec. 312; *Cummings* v. *Gassett*, 19 Vermont, 308; *Hussey* v. *Winslow*, 59 Maine, 170; *Fleming* v. *Burge*, 6 Alabama, 373; *Blood* v. *Northrup*, 1 Kansas, 28; *Nelson* v. *First Nat. Bk. of Chicago*, 48 Illinois, 36; *S. C.* 95 Am. Dec. 510; *Grissler* v. *Powers*, 81 N. Y. 57; *Armstrong* v. *Tyler*, 11 Wheat. 258; *McBlair* v. *Gibbes*, 17 How. 232; *Kinsman* v. *Parkhurst*, 18 How. 289; *Brooks* v. *Martin*, 2 Wall. 70; *Railroad Co.* v. *Durant*, 95 U. S. 576.

Mr. Justice Blatchford delivered the opinion of the court.

These are appeals by David Armstrong, receiver of the Fidelity National Bank of Cincinnati, Ohio, from decrees rendered against him by the Circuit Court of the United States for the Southern District of Ohio, in two suits in equity, brought against him in that court by the American Exchange National Bank of Chicago, Illinois. The first case will be referred to as No. 1110, and the second case as No 1111.

No. 1110 was commenced on the 5th of November, 1887, by a petition, which was demurred to by the defendant. The demurrer was overruled, the defendant answered the petition, and there was a replication to the answer. Then, by leave of

the court, a bill in equity was filed in place of the petition. The bill sets forth the following facts: The plaintiff is a corporation under the laws of the United States, doing a general banking business in Chicago, Illinois. The defendant is the receiver of the Fidelity National Bank of Cincinnati, Ohio, a corporation created under the laws of the United States, which did a general banking business in Cincinnati, Ohio. On the 15th of June, 1887, the plaintiff became the owner and holder of a draft drawn by the Fidelity Bank on the Chemical National Bank of the city of New York, a copy of which, with all credits and endorsements thereon, is as follows:

"The Fidelity National Bank.

"$100,000.00. CINCINNATI, *June* 14, 1887. No. 16,412.

"Pay to the order of American Exch'ge Nat. B'k, Chicago, one hundred thousand dollars.

"BENJ. E. HOPKINS,
"*As. Cas. Cashier.*

"To the Chemical National Bank, New York City."

Endorsed: "Without recourse. A. L. Dewar, cashier. Dep. acct. C. J. Kershaw & Co. C. J. Kershaw & Co. Pay American Exchange Nat. Bank, New York, account of American Exchange Nat. Bank of Chicago, 15 June, 1887. A. L. Dewar, cash."

At the time the draft was drawn, Benjamin E. Hopkins was the assistant cashier of the Fidelity Bank, and by its authority the signature, "Benjamin. E. Hopkins, As. Cas.," was used for the signature of that bank. Within a reasonable time after the plaintiff became the owner of the draft, to wit, on June 17, 1887, it was presented to the drawee for payment, which was refused. It was protested for non-payment, and notice of the demand, refusal, and protest was forthwith given to the Fidelity Bank; and thereupon that bank became liable to the plaintiff in the sum of $100,000, with interest from June 17, 1887. After the draft was drawn and the plaintiff had become its owner, the Fidelity Bank, without the knowl-

edge of the plaintiff, ordered the drawee not to pay the draft; and the drawee, in refusing to pay it, was acting in accordance with such instructions. On the 27th of June, 1887, the Comptroller of the Currency of the United States, acting under the statute, appointed the defendant receiver of the Fidelity Bank. On the 12th of July, 1887, a decree was rendered by the Circuit Court of the United States for the Western Division of the Southern District of Ohio, in a proceeding instituted by such Comptroller against the Fidelity Bank, adjudging that its franchises had been forfeited and declaring it to be dissolved. In September, 1887, the claim of the plaintiff was presented to the receiver in due form, but he rejected it.

The prayer of the bill is for a decree that such claim for $100,000, with interest from June 17, 1887, to June 27, 1887, is a valid claim against the estate in the hands of the defendant as receiver, and that he be directed to satisfy it by paying dividends upon it from the assets of the Fidelity Bank; and for general relief.

The defendant answered the petition, and, after the bill was filed, it was ordered that such answer stand for an answer to the bill, and that the replication which had been filed to it stand also.

The defence set up in the answer is that the plaintiff is not the owner of the draft; that it was signed by Hopkins, and came into the possession of the plaintiff, without any consideration paid for it by the plaintiff to the Fidelity Bank; and that that bank never received any consideration from any person for it, and is not indebted to the plaintiff on account of it.

It was admitted of record that the draft was presented to the drawee within the reasonable time allowed by law, that payment was refused, that it was protested for non-payment and that notice of demand, refusal, and protest was given in due time to the Fidelity Bank; and also that the defendant, on October 31, 1887, declared, and has paid, a dividend of 25 per cent on all claims against the Fidelity Bank and the receiver, approved or adjudicated as valid claims.

Besides cases Nos. 1110 and 1111, a third suit was brought, and testimony was taken in all three of them at the same time. It was stipulated of record that all depositions taken or to be taken in any one of the three cases might be read by either party in all of them.

After a hearing on pleadings and proofs, a decree was entered on the 3d of December, 1888, in No. 1110, setting forth that, on the 15th of June, 1887, the plaintiff became and had ever since been the owner of the draft in question; that it was duly presented to the drawee and payment refused, and the Fidelity Bank had due notice; that the claim was duly presented to the receiver and rejected; that it is a just and valid claim, and should have been allowed by him; that the plaintiff is a *bona fide* holder of the draft for a valuable consideration before maturity, without notice of any want of consideration, free from all equities or defences whatsoever; and directing the defendant to allow the claim as one for the full amount of $100,000 against the assets in his hands as receiver, to satisfy it by paying such dividends as had been made theretofore and as should be made thereafter from the assets of the Fidelity Bank in due course of administration, and to pay the dividend of 25 per cent already declared October 31, 1887, with interest from that date until the date of payment, and also the costs of the suit. From that decree the defendant has appealed.

No. 1111 was commenced by a petition filed on the 5th of November, 1887, which was demurred to and the demurrer was overruled. The defendant then answered the petition, a replication was filed to the answer, and then leave was granted to the plaintiff to file a bill in equity instead of the petition. That bill sets forth as follows, in addition to the same formal matters set forth in the bill in No. 1110: On the 14th of June, 1887, the Fidelity Bank issued a certificate of deposit, or letter of advice, addressed to the plaintiff, of which the following is a copy:

"Briggs Swift, president; E. L. Harper, vice-president; Amm Baldwin, cashier; Benj. E. Hopkins, ass't cashier.

"U. S. depository. The Fidelity National Bank. Capital, $2,000,000.00; surplus, $400,000.00.

"CINCINNATI, *June 14th*, 1887.

"The American Exchange National Bank, Chicago, Illinois.

"Gentlemen: Messrs. Wilshire, Eckert & Co. have deposited two hundred thousand ($200,000.00) dollars to your credit for the use of C. J. Kershaw & Co.

"Respectfully yours,

BENJ. E. HOPKINS, *As. Cas.*"

At the time this certificate of deposit was issued, Benjamin E. Hopkins was the assistant cashier of the Fidelity Bank, and his signature, "Benj. E. Hopkins, As. Cas.," was used as the signature of that bank. The certificate was delivered by it to the plaintiff on the 15th of June, 1887, and the plaintiff has owned it ever since. On the faith thereof, the plaintiff, at the request of said C. J. Kershaw & Co., on said 15th of June, paid to said C. J. Kershaw & Co., and upon their orders, the full amount of $200,000, and by means thereof became entitled to recover from the Fidelity Bank the full amount of the certificate. On June 18, 1887, the plaintiff presented the certificate to the Fidelity Bank, at its banking office in Cincinnati, and demanded payment thereof, which was refused. The plaintiff became indebted to the Fidelity Bank in the sum of $1302.77, for a balance on general account. After deducting such balance, there was due from the latter to the plaintiff, at the time of such demand, $198,697.23, which amount is still due, with interest from June 18, 1887. In September, 1887, that claim was presented to the defendant for allowance, but he rejected it.

The prayer of the bill is for a decree that the claim, amounting to $198,697.23, with interest from June 18, 1887, to June 27, 1887, is a valid claim against the assets in the hands of the defendant as receiver, and that he be directed to satisfy it by paying dividends upon it from the assets of the Fidelity Bank in due course of administration.

The answer to the petition and the replication thereto were ordered to stand in respect to the bill, and like stipulations were made as in case No. 1110.

The defence set up in the answer is as follows: One Joseph Wilshire was a member of the firm of Wilshire, Eckert & Co. E. L. Harper, Benjamin E. Hopkins (the assistant cashier of the Fidelity Bank) and Wilshire conspired to defraud the Fidelity Bank. Harper, Hopkins and Wilshire, with other persons, were, at and before the 14th of June, 1887, engaged in what is called "a deal" in wheat, which is speculating in wheat, in Chicago, by buying very large amounts of wheat on paying a margin or percentage of the purchase price, and entering into contracts for future delivery to them of wheat in large quantities, upon which contracts they were advancing and paying a margin or part of the price of the wheat. The object of the speculation and purchase under the contracts was to enable said parties to own and control all the wheat then in Chicago or to arrive within the time of the performance of the contracts, and thereby to create what is called a "corner" in the market; that is to say, by contracting for the purchase and delivery of more wheat than exists and can by any possibility be delivered, to create a fictitious value or price therefor, effect an advance in the market price of wheat in Chicago, and realize a profit thereon to Harper, Hopkins and Wilshire, and such other persons as might be engaged with them in the speculation. Harper, Hopkins and Wilshire conspired together unlawfully to abstract from the Fidelity Bank its money and to embezzle its funds in the possession or control of Harper and Hopkins as its officers, and, by drawing bills of exchange and other evidences of indebtedness in the name of the bank, to use its credit and resources for their own benefit, not in the prosecution of its legitimate business, but in the purchase of wheat in Chicago and contracts for the future delivery of wheat, in the prosecution of said unlawful speculation. The letter of advice addressed to the plaintiff, set forth in the bill, was signed by Hopkins and delivered by Harper to Wilshire, in the execution of the scheme to abstract the funds of the bank and unlawfully use its credit in the speculation in wheat, and for no

other purpose. Wilshire, Eckert & Co. did not deposit any part of the $200,000 mentioned in the letter of advice, in the Fidelity Bank, to the credit of the plaintiff, for the use therein expressed. The letter was unlawfully and fraudulently addressed to the plaintiff, when in fact no money had been deposited by any person to the credit of the plaintiff with the Fidelity Bank, and in the execution of said scheme. At the time of the alleged delivery of the letter of advice to the plaintiff, it had notice that Harper, Hopkins and Wilshire were engaged in said speculation, and were using the credit and funds of the Fidelity Bank unlawfully for such purpose, and that the letter of advice was written and signed for such purpose, and delivered to Wilshire and by him to the plaintiff, to be used by and through the plaintiff, and by C. J. Kershaw & Co., who were, and to the plaintiff were well known to be, brokers, in the purchase of wheat for the account of Wilshire and his confederates, and had full knowledge that the purchases were in the execution of an unlawful combination to control the market for wheat and thereby enhance the value thereof in Chicago. The terms of the agreement between Wilshire, representing the firm of Wilshire, Eckert & Co., and his confederates, and the circumstances connected therewith, were such that the plaintiff was put upon inquiry, and could not and did not *bona fide* make advances to C. J. Kershaw & Co., nor become entitled to receive from the Fidelity Bank any part of the amount of such advances, and, if made by the plaintiff, they were not made in the regular course of business, but in bad faith and with such notice. The Fidelity Bank did not become indebted to the plaintiff in any amount, and the claim is not a valid one and ought not to be allowed.

On the 3d of December, 1888, after a hearing on pleadings and proofs, a decree was made setting forth that, on the 15th of June, 1887, the plaintiff became the owner of the certificate of deposit or letter of advice set out in the bill; that, on the faith thereof, and without notice of the matters set forth in the answer, the plaintiff, on the 15th of June, 1887, advanced to C. J. Kershaw & Co. the full amount of $200,000, and by reason thereof then became entitled to recover from the Fidel-

ity Bank the full amount of the certificate; that, on the 18th of June, 1887, the plaintiff presented the certificate to the Fidelity Bank and demanded payment thereof, which was refused; that, after the Fidelity Bank became indebted to the plaintiff in said sum of $200,000, the plaintiff became indebted to the Fidelity Bank, in the sum of $1302.77 being a balance due on general account; that, after deducting such balance, there was due from the Fidelity Bank, at the time of such demand, $198,697.23; that the claim therefor was presented to the defendant and rejected; and that the plaintiff is a *bona fide* holder of the certificate, for valuable consideration, without notice of any want of consideration, and free from any equities or defences whatsoever. The decree adjudges that the claim is a valid claim for $198,697.23 against the assets in the hands of the defendant as receiver, and directs him to satisfy the same by paying thereon such dividends as had been made theretofore, and should be made thereafter, from the assets of the Fidelity Bank, in due course of administration, and to pay the dividend of 25 per cent already declared, October 31, 1887, with interest from that date until the time of payment, and also the costs of the proceeding. From this decree the defendant has appealed.

Case No. 1110 will be first considered. The receiver contends that the draft is not a valid claim against the funds in his hands; that there was no endorsement of it by the plaintiff, which was the payee, to a *bona fide* holder; that the draft came into the possession of the plaintiff without any consideration being paid therefor by it to the Fidelity Bank, and that bank never received any consideration from any person for it; and that the plaintiff does not occupy the position of an endorsee of it for value.

The facts in evidence, as we understand them, are these: The draft numbered 16,412 was deposited with the plaintiff by one of its regular customers, C. J. Kershaw & Co., on June 15, 1887, and was endorsed by the plaintiff's cashier and by that firm for deposit, thus: "Dep. acct. C. J. Kershaw & Co. C. J. Kershaw & Co." This draft was endorsed over on the same day by the plaintiff to the American Exchange National Bank of

New York, for collection for account of the plaintiff, and was duly presented to the drawee on the 17th of June, 1887. Payment was refused, the draft was duly protested and returned to the plaintiff, and notice of protest was duly given to the drawer. Another draft for $100,000, numbered 16,413, and not involved in either of the suits Nos. 1110 and 1111, was drawn by the Fidelity Bank on the Chemical National Bank of New York City to the order of C. J. Kershaw & Co., and was endorsed and deposited with the plaintiff by that firm on June 15, 1887. It also was sent forward, payment was refused, it was protested, and notice was given to the drawer. A claim for its amount having been rejected by the receiver, a suit was brought on it by the plaintiff against the receiver, and a decree was rendered in favor of the plaintiff for its full amount. The third suit was No. 1111.

The plaintiff and the Fidelity Bank were corresponding banks, and made collections for each other. The copartnership of C. J. Kershaw & Co. was composed of Charles J. Kershaw and Hamilton Dewar, as general partners, and Charles B. Eggleston, as special partner. It was engaged in the grain commission business on the board of trade in Chicago, and kept its sole bank account with the plaintiff. In March, 1887, and before that time, it began to purchase wheat on orders from Wilshire, Eckert & Co., who were commission merchants in Cincinnati; and it was buying wheat also for J. W. Hoyt, another commission merchant in Cincinnati. It did not know the principals for whom Wilshire, Eckert & Co. and Hoyt were acting, and did not know until the 30th of May that they were acting for the same principal. It was the custom of Wilshire, Eckert & Co. to transfer money to Kershaw & Co., for such purchases, by advising the latter that a certain sum had been deposited in bank in Cincinnati to their credit, and Kershaw & Co. then drew a draft against such deposit, and deposited the draft to their own credit with the plaintiff. Kershaw & Co. selected the Fidelity Bank as the bank in which they wished the funds to be deposited. After the two banks became correspondents, money was transmitted also by certificates of deposit, substantially like the one in No. 1111; and, prior to the

15th of June, 1887, the Fidelity Bank had issued and sent to the plaintiff four such certificates, on printed forms, reading as follows — the written portions being in italics:

"The Fidelity National Bank.

"CINCINNATI, *April 28th*, 1887.

"*A. L. Dewar*, Esq., Cashier *American Exchg. Nat.*, *Chicago, Ills.*

"Dear Sir: We credit your account *twenty-five thousand* dollars, received from *Wilshire, Eckert & Co.*, for the use of *C. J. Kershaw & Co.*

"Respectfully yours,

"*$25,000.* *Ammi Baldwin*, Cashier."

[On the margin:] "Letter of advice."

[Written across the face:] "*Same telegraphed this date.*"

"The Fidelity National Bank.

"CINCINNATI, *Apl. 28th*, 1887.

"*A. L. Dewar*, Esq., Cashier *American Ex. Natl. Bk.*, *Chicago, Ills.*

"Dear Sir: We credit your account *one hundred and three thousand* dollars, received from *C. J. Kershaw & Co.*, *$50,000 wired, $53,000 wired*, for the use of *C. J. Kershaw & Co.*

"Respectfully yours,

"*$103,000.00.* *E. L. Harper, V. P.*"

[On the margin:] "Letter of advice."

"The Fidelity National Bank.

"CINCINNATI, *April 29th*, 1887.

"*A. L. Dewar*, Esq., Cashier *American Exchg. Nat. Bk.*, *Chicago, Ills.*

"Dear Sir: We credit your account *twenty-five thousand* dollars, received from *Wilshire, Eckert & Co.*, for the use of *C. J. Kershaw & Co.*

"Respectfully yours,

"*$25,000.* *Ammi Baldwin*, Cashier."

[On the margin:] "Letter of advice."

[Written across the face:] "*Same telegraphed you this date, under our special telegraphic code.*"

"The Fidelity National Bank.

"CINCINNATI, *April 30th*, 1887.

"*A. L. Dewar*, Esq., Cashier, *Chicago, Ills.*

"Dear Sir: We credit your account *one hundred thousand* dollars, received from *Wilshire, Eckert & Co.*, for the use of *C. J. Kershaw & Co.*

"Respectfully yours,

"*$100,000.* *Ammi Baldwin*, Cashier."

[On the margin:] "Letter of advice."

[Written across the face:] "*Same telegraphed you this date.*"

These certificates were issued for five different deposits made with the Fidelity Bank to the credit of the plaintiff, for the use of Kershaw & Co. The Fidelity Bank sent to the plaintiff a telegram announcing each of such deposits, the telegrams being as follows:

"CINCINNATI, O., 28.

"*To Am'n Ex. Nat. Bk.*

"Wilshire, Eckert & Co. deposit with us for your credit, use C. J. Kershaw & Co., twenty-five thousand dollars.

"FIDELITY N. BANK."

"4—28.

"*To American Ex. Nat. Bank.*

"Kershaw & Co. have placed to your credit fifty thousand dollars. FIDELITY NATIONAL BANK."

"CINCINNATI, O., 28.

"*To American Ex. Nat. Bank.*

"Kershaw & Co. have placed to your credit fifty-three thousand additional. FIDELITY NAT. BANK."

"CINCINNATI, O., 29.

"*To Am. Ex. Nat. Bk.*

"Wilshire, Eckert & Co. deposit to your credit for the use of C. J. Kershaw & Co., $25,000. FIDELITY N. BANK."

"CINCINNATI, O., 30.

"*To American Exchange Natl. Bank, Chicago.*

"Wilshire, Eckert & Co., deposit to your credit for the use of C. J. Kershaw & Co., $100,000. FIDELITY NATL. BANK."

On the 2d of May, 1887, the Fidelity Bank sent another telegram to the plaintiff, announcing that Wilshire, Eckert & Co. had deposited with it, to the credit of the plaintiff, for account of Kershaw & Co., $100,000.

The Fidelity Bank, therefore, had advised the plaintiff, prior to June 15, 1887, that it had received six different deposits to the credit of the plaintiff for the use of Kershaw & Co., amounting in the aggregate to $353,000, and that four of those deposits, amounting to $250,000, had been made by Wilshire, Eckert & Co. It was the custom of the plaintiff, on receiving such certificates of deposit, to place the amount of the same to the credit of Kershaw & Co., and allow them to check against the same as deposits of money; and the four certificates were all paid by the Fidelity Bank. It was also the custom of the plaintiff to place to the credit of Kershaw & Co., as cash, any drafts which they drew on Cincinnati and deposited with it.

On the 13th of June, 1887, Wilshire was in Chicago, and promised Kershaw & Co., that he would deposit on the next day $200,000 for their use, in the Fidelity Bank. Wilshire returned to Cincinnati that night, and on June 14th Kershaw & Co., in anticipation of that deposit, left their draft for $200,000 with the plaintiff, asking the latter to find out by telegram if the deposit had been made, and if so, to forward the draft for collection. The plaintiff telegraphed to the Fidelity Bank, on June 14, as follows: "Has two hundred thousand been placed with you for C. J. K. & Co.?" The

Fidelity Bank on the same day replied: "Not yet made," and the draft was not sent forward. In consequence of this promise of Wilshire, and the previous course of dealing between the two banks, the plaintiff was prepared to receive, on the morning of June 15, as hereafter mentioned, the certificate of deposit for $200,000.

The state of the account of Kershaw & Co. with the plaintiff, on the morning of June 14, 1887, was this: They owed the plaintiff $380,378.37 overdraft and $280,000 in notes; against which the plaintiff held as collateral security 692,688 bushels of wheat, 5000 bushels of corn, and certain wheat then being loaded for shipment. The total value of such collateral, on the morning of that day, was $736,000, and the total indebtedness of Kershaw & Co. to the plaintiff was $660,378.37. During that day there was a panic in wheat, and the price fell from 92 cents to 74¾ cents a bushel. The security of the plaintiff fell in value at a corresponding rate, and at 1 o'clock in the afternoon was worth only $544,894. Kershaw & Co. then owed the plaintiff $525,477.01, namely, $280,000 in notes and $245,477.01 overdraft. Thereupon the plaintiff stopped paying the checks of Kershaw & Co., the amount of the checks refused being about $60,000.

The state of the account between the Fidelity Bank and the plaintiff on the 14th of June, 1887, was as follows: The former owed the latter a balance of something over $100,000, consisting in part of a draft drawn on the former by Wilshire, Eckert & Co., to the order of Kershaw & Co., on the 13th of June, and deposited by Kershaw & Co. with the plaintiff on that day. The plaintiff, in accordance with its custom, had treated such draft as a cash item, and had paid the checks of Kershaw & Co. against it, on the 14th. On the night of the 13th, that draft had been sent by the plaintiff to the Fidelity Bank for payment, and on the 14th the latter telegraphed the plaintiff that it was paid. Payment was made by placing the amount to the credit of the plaintiff on the books of the Fidelity Bank. On the same day (June 14) the plaintiff telegraphed to the Fidelity Bank, "remit at once hundred thousand, clearing-house currency or gold;" in re-

sponse to which it received, on the morning of the 15th, $50,000 in currency by express, and a draft for $50,000, drawn by the Fidelity Bank on the Chemical National Bank of New York, which was duly paid by the drawee. At the close of business on the 14th of June, the plaintiff had security enough to make itself whole as respected Kershaw & Co., and it had called upon the Fidelity Bank for substantially the whole balance of account due from that bank, and the same had been sent on. The plaintiff had, therefore, no inducement to take any unusual risk, in regard to the transactions now to be stated.

Just after the plaintiff had closed its bank for business on the 14th of June, it received the following telegram:

"CINCINNATI, O., 6/14, 1887.

"*Am. Ex. Nat. Bank:*

"Joseph Wilshire will be at your bank to-morrow morning with six hundred thousand dollars to make his trade with Kershaw and others good if they are protected until he arrives.

"FIDELITY NAT. BANK."

The cashier of the plaintiff sent for Kershaw & Co., showed them this telegram, and told them that, while the plaintiff wanted to do everything in its power to assist them, it could not agree to protect them in any manner. Kershaw & Co. replied in substance that if Wilshire came from Cincinnati that night, he would arrive about 8 o'clock the next morning, and that they needed no protection for the time before his arrival. Kershaw & Co. then suggested and dictated the following telegram, which was sent by the cashier of the plaintiff:

"CHICAGO, 14 June, 1887.

"*Fidelity National Bank, Cincinnati, Ohio:*

"If Wilshire is here to-morrow morning with six hundred thousand currency the deal will be safe. Answer quick.

"AM. EXCH. NAT. BANK."

The same night, two telegrams were received by the plaintiff, which read as follows:

"CINCINNATI, Ohio, June 14, 1887.

"*American Exchange Natl. Bank:*

"Wilshire will be there on the morning train.

"FIDELITY NATL. BANK."

"CINCINNATI, Ohio, 6/14, 1887.

"*American Exchange National Bank, Chicago:*

"Have already wired you that he will be there with six hundred thousand in the morning.

"FIDELITY NAT. BANK."

Kershaw & Co. were also advised by telegram from Cincinnati the same afternoon that $600,000 would be sent to Chicago that night.

Wilshire arrived in Chicago on the morning of June 15, and went to the plaintiff's bank, where he had an interview with Kershaw, Dewar and Eggleston, all the members of the firm of Kershaw & Co. Kershaw and Dewar figured up how much money they needed, and estimated that they needed $68,000 to settle up trades through the clearing-house of the board of trade, $90,000 to deposit for additional margins, and $60,000 to make good the checks which the plaintiff had refused to pay the day before, making a total of $218,000. The cashier of the plaintiff took down those figures at the time. Wilshire went out and shortly afterwards returned with an envelope from which he took four drafts, (one of which was the draft in suit in No. 1110,) and the certificate of deposit in suit in No. 1111. Each of the four drafts was for the sum of $100,000, dated June 14, 1887, and drawn by the Fidelity Bank on the Chemical National Bank of New York. One was payable to the order of Wilshire, Eckert & Co., one to the order of J. W. Wilshire, (not sued on,) one to the order of C. J. Kershaw & Co., and the other (in suit in No. 1110) to the order of the plaintiff. The four drafts and the certificate of deposit made up the sum of $600,000.

Opinion of the Court.

The two instruments involved in suits Nos. 1110 and 1111 were taken by Wilshire from the envelope and delivered by him to Kershaw & Co. The plaintiff took them on deposit from Kershaw & Co., and placed the amounts of them to the credit of the latter, in accordance with the usual course of business, together with another of the drafts, for the sum of $100,000. Kershaw & Co. thus received $400,000 of the paper, Irwin, Green & Co. receiving the remainder, $200,000. The evidence shows that the two drafts and the certificate of deposit were taken by the cashier of the plaintiff on its behalf, and placed to the credit of Kershaw & Co. by the plaintiff, without any agreement or arrangement on the part of the plaintiff, except to credit them to Kershaw & Co. as cash.

Before the plaintiff received this $400,000, the account of Kershaw & Co. with it was overdrawn $245,477.01, as before stated. On receiving the deposit the plaintiff placed to the credit of Kershaw & Co., as cash, in a single item, $399,200, the full amount of the deposit less $800 charged for exchange. This was according to the usual course of business between the plaintiff and Kershaw & Co., and according to the understanding of the parties at the time. This deposit cancelled the overdraft of $245,477.01, and left a balance to the credit of Kershaw & Co., on the morning of June 15, of $153,722.99. As soon as the plaintiff opened its bank on that day there was a run upon the account of Kershaw & Co., and before 11 o'clock in the morning the plaintiff had paid or certified their checks to the amount of $239,930.78. Meanwhile the plaintiff received on deposit $25,249.40, but this was a draft drawn against a shipment of wheat which the plaintiff had held as collateral security, and the plaintiff's condition was not bettered thereby. The plaintiff, therefore, in reliance upon such deposit of $399,200, not only cancelled Kershaw & Co.'s overdraft of $245,477.01, but also gave them $239,930.78 of fresh money, making a total of $485,407.79. By crediting the paper as cash, and using it to cancel the overdraft, the plaintiff also waived its right to sell for that purpose the grain which it held as collateral security. The result was that when the plaintiff did sell the grain, after the

paper of the Fidelity Bank was dishonored, it realized only $449,194.88 for the same grain which, when the plaintiff stopped paying Kershaw & Co.'s checks on June 14, was worth $544,894, being a shrinkage of $95,699.12.

When the plaintiff had paid Kershaw & Co.'s checks to the amount of $239,930.78, their account was overdrawn $60,958.39; and when it was found by Kershaw & Co. that it would take $200,000 (instead of $68,000) to pay their differences in the board of trade clearing-house, the plaintiff refused to certify their checks for $200,000, and they therefore suspended payment.

The Fidelity Bank placed the amount of the certificate of deposit involved in suit No. 1111 to the credit of the plaintiff, and the latter charged the same on its books to the Fidelity Bank, as a cash deposit, and notified the Fidelity Bank that it had done so. From the 28th of April, 1887, when the Fidelity Bank sent the first certificate of deposit to the plaintiff, down to the 15th of June, 1887, the Fidelity Bank had represented that Wilshire, Eckert & Co. were depositing funds with it, which it was remitting to the plaintiff; and the telegrams of June 14, 1887, from the Fidelity Bank, held out Wilshire as the owner of the $600,000 which he was to take to Chicago to protect the trades. During the six days while the Fidelity Bank remained open after the paper in question was taken by the plaintiff, the Fidelity Bank made no complaint that the plaintiff had not acted in all the transactions in an honest manner, and in accordance with the instructions of the Fidelity Bank.

What took place between the officers of the Fidelity Bank and Wilshire, which the receiver alleges in his answer amounted to a conspiracy to embezzle the funds of that bank, was not revealed to the plaintiff until it was disclosed by the evidence taken in the suits.

In regard to No. 1110 it is contended by the receiver that the draft could not take effect until it was delivered to the plaintiff; that such delivery must have been made by the Fidelity Bank; that therefore Wilshire was acting for that bank in delivering the draft; and that, as between the Fi-

delity Bank and the plaintiff, want of consideration may be shown.

The draft in question was drawn in Ohio, upon a bank in New York, and was payable in New York. It was, therefore, a foreign bill of exchange. Where there are four parties to such a bill, namely, the drawer, the drawee, the payee, and the remitter or purchaser, the usual course of business is for the drawer to deliver it to the remitter or purchaser, and for the latter to deliver it to the payee. In such a course of dealing, the remitter does not act as the agent of the drawer, but acts for himself, and in a suit on the bill by the payee against the drawer, want of consideration cannot be shown, if the payee is a *bona fide* holder for value. *Munroe* v. *Bordier*, 8 C. B. 862; *Watson* v. *Russell*, 3 B. & S. 34; *South Boston Iron Co.* v. *Brown*, 63 Maine, 139; *Horn* v. *Fuller*, 6 N. H. 511; Daniel on Neg. Inst. § 178; 1 Parsons on Notes & Bills, 181, 199.

When Wilshire went to the plaintiff's bank, on the morning of June 15, 1887, he came duly accredited by the Fidelity Bank as the purchaser of the $600,000 of paper which he brought; and he acted as such in delivering the draft in suit No. 1110. The fact that the draft was payable to the order of the plaintiff was not inconsistent with the representation that Wilshire held it as purchaser and remitter. Wilshire received value for it from Kershaw & Co., and acted with them in getting the draft placed to their credit as cash by the plaintiff; so that the plaintiff became the holder of the draft for value. Wilshire gave to Kershaw & Co. the $400,000 on account of the indebtedness of Wilshire, Eckert & Co. to them. As Wilshire delivered the paper to Kershaw & Co. with the knowledge of the plaintiff, and with the understanding that the plaintiff was to take it and place it to the credit of Kershaw & Co., the past indebtedness of Wilshire, Eckert & Co. to Kershaw & Co. was a sufficient consideration to give to the plaintiff a good title to the paper for the use of Kershaw & Co.; and it is manifest that the inducement to Wilshire to give the paper to Kershaw & Co. was chiefly the consideration that the plaintiff would give credit at once to

Kershaw & Co. for the amount. This credit was given, and on the faith of it the plaintiff paid to Kershaw & Co. on their checks, $239,930.78. The plaintiff thus became the owner of the paper which it received on deposit. *Clark* v. *Merchants' Bank*, 2 N. Y. 380; *In re Franklin Bank*, 1 Paige, 249; *Platt* v. *Beebe*, 57 N. Y. 339; *Metropolitan Nat. Bank* v. *Loyd*, 90 N. Y. 530; *National Bank* v. *Millard*, 10 Wall. 152; *Brooks* v. *Bigelow*, 142 Mass. 6; *Bank* v. *Miller*, 77 Alabama, 168; *Ayres* v. *Farmers' Bank*, 79 Missouri, 421; *Flannery* v. *Coates*, 80 Missouri, 444; *Titus* v. *Mechanics' Bank*, 6 Vroom (19 N. J. L.) 588; *Terhune* v. *Bank*, 7 Stewart (33 N. J. Eq.) 367; *In re Carew's Estate*, 31 Beavan, 39; *Ex parte Richdale*, 19 Ch. D. 409.

We do not think that the fact that the draft was payable to the order of the plaintiff was notice to the plaintiff that Wilshire was not its purchaser or remitter; or that the manner in which the plaintiff acted after taking the draft for deposit shows that the plaintiff was not a *bona fide* holder for value.

The draft for $100,000, in suit No. 1110, and the draft for $100,000 to the order of Kershaw & Co., showed a difference in form, which was noticed by the assistant cashier of the plaintiff, who feared that the Fidelity Bank might claim subsequently that the draft payable to the order of the plaintiff was a part of the $200,000 mentioned in the certificate of deposit in suit in No. 1111. He therefore sent to the Fidelity Bank this telegram:

"CHICAGO, 15 June, 1887.

"*Fidelity National Bank, Cincinnati, Ohio.*

"Your draft on New York, number sixteen four twelve, delivered us this morning, is made payable to our order. Why was this done, and is the amount charged against us or is it intended for use of W., as he may direct? Answer quick.

"AMERICAN EXCHANGE NATIONAL BANK."

This telegram was sent, as the cashier says, "as an extra precaution;" but, without waiting for a reply to it, the plaintiff paid the checks of Kershaw & Co. until their account was not only exhausted but was overdrawn $60,958.39, when fur-

ther payment of their checks was stopped. This was two hours before any reply by telegram was received from the Fidelity Bank. When the reply came, it did not disavow the authority of Wilshire to use the draft No. 16,412 as a part of the $600,000, the reply being as follows:

"CINCINNATI, Ohio, June 15, 1887.

"*American Exchange National Bank, Chicago.*

"We want number sixteen four twelve to apply on your account, and have wired parties. Please send all drafts to us and order Cincinnati National to deliver one to-day. Party that controls special account out of city. Answer.

"FIDELITY NATIONAL BANK."

The inference to be drawn from this telegram was that draft No. 16,412 had been given to Wilshire for his use, but that since it had been issued something had occurred which made the Fidelity Bank desire to withdraw it, if it could obtain the consent of the parties in interest, to whom it had wired. The telegram from the plaintiff was sufficient to notify the Fidelity Bank that Wilshire was using draft No. 16,412 as a part of the $600,000; and it gave the Fidelity Bank an opportunity to "answer quick" that Wilshire had no right to use that draft in that way if such were the fact. There was nothing in the reply telegram from the Fidelity Bank, even if it had been received in time, to warn the plaintiff not to place that draft to the credit of Kershaw & Co., and nothing to discredit Wilshire's title to it. After that, and until the time when the Fidelity Bank closed its doors, it made no claim that the draft No. 16,412 was not issued in good faith as a part of the $600,000, or that the plaintiff had applied it wrongly to the credit of Kershaw & Co.

While the plaintiff was paying the checks of Kershaw & Co., the two drafts for $100,000 each and the certificate of deposit were in the hands of its assistant cashier, on the way to be entered upon its books, and while they were in his hands he made out the following deposit ticket:

"American Exchange National Bank, Chicago.

"Deposited for account of C. J. Kershaw & Co., June 15, 1887. Checks and drafts on other towns and cities:

Cincinnati	200,000
" N. Y.	100,000
*Fidelity.	100,000
	400,000
	800
	399,200

"* Credited subject to advice from the Fidelity Nat. that draft is for Kershaw account. We have wired for advice."

This ticket was handed to the teller with the deposit, before the note at the bottom was put upon it; but immediately afterwards the assistant cashier went back to the teller and added the note. This deposit ticket was not made out when the deposit was made.

It appears that when the deposit was taken, the cashier of the plaintiff made out a deposit ticket showing one item of $400,000 deposited by Kershaw & Co., which ticket was made out at their request when they handed the deposit to the cashier and told him to place it to their credit. That deposit ticket did not come to the hands of the assistant cashier, and he made out the above deposit ticket; but there is no evidence to show that the latter deposit ticket was ever seen or assented to by Kershaw & Co., or by Wilshire. It appears that Kershaw & Co. did not know that the plaintiff had not placed the deposit at once to their credit on its books, although they did know of the telegram which the plaintiff sent to the Fidelity Bank. The above deposit ticket was thus made out by the assistant cashier of the plaintiff, for the use of the plaintiff, and it did not change in any way the terms of the deposit as between the plaintiff and Kershaw & Co., being only a private memorandum for the guidance of the paying teller. The credit on the books of the plaintiff was not made in accordance with the terms of that ticket, the

credit being in one item, of $399,200, and unconditional, the note at the bottom of the ticket not being carried into the books of the plaintiff.

These words in the telegram of June 15 from the Fidelity Bank, "Please send all drafts to us, and order Cincinnati National to deliver one to-day. Party that controls special account out of city," are explained thus: On the 14th of June, Irwin, Green & Co. deposited with the plaintiff a draft of theirs on the Fidelity Bank for $217,862.50, which the plaintiff sent to the Cincinnati National Bank for collection. It was presented on the 15th of June to the Fidelity Bank, which refused to pay it, alleging that the deposit against which the draft was drawn had not been made. Irwin, Green & Co., however, held a certificate of deposit issued by the Fidelity Bank, and their draft was drawn against that deposit. The party, Hoyt, who controlled the special deposit was out of the city of Cincinnati, but he was in Chicago, and said that the draft was all right and ought to be paid. The telegram from the Fidelity Bank contained also the request that the plaintiff should order the Cincinnati National Bank to turn over to the Fidelity Bank, without payment, such draft for $217,862.50, and should send directly to the Fidelity Bank all drafts upon the latter.

On the 16th of June, four telegrams passed between Wilshire and the plaintiff, which show that the plaintiff did not suspect that Wilshire had any connection with the Fidelity Bank or its officers. The first was as follows:

"CINCINNATI, Ohio, 6/16, 1887.

"*To Am. Ex. Bank:*

"After yesterday's understanding Kershaw must be protected to-day. Should this be done, all is well, if not, fear trouble to all. WILSHIRE."

The plaintiff replied as follows, under date of June 17th:

"CHICAGO, June 17, 1887.

"*Wilshire, Cincinnati, Ohio:*

"Do not admit any understanding, but if you will deposit three hundred thousand to the credit of this bank, with the

First National Bank, Cincinnati, and have that bank wire to their correspondents here by cipher that this has been done, and to advise us, and also have Chemical, New York, telegraph us through American Exchange National Bank that the drafts for two hundred thousand which will be presented by American Exchange National Bank for our account and use of Kershaw will be paid, we will protect Kershaw up to four hundred thousand dollars. He claims three hundred thousand will see him through."

On the 16th of June the plaintiff received the following letter from the Fidelity Bank:

"CINCINNATI, June 15, 1887.

"*American Exchange National Bank, Chicago, Illinois:*

"GENTLEMEN: We charge your account $100,000 New York exchange to your order sent you by messenger to-day.

"Respectfully yours,

"E. L. HARPER, *V. P.*"

The plaintiff thereupon sent to Wilshire the following telegram, and Wilshire replied by telegram as follows:

"JUNE 16, 1887.

"*Wilshire, Cincinnati:*

"Fidelity advises us this morning by letter that they have charged to our account New York exchange for one hundred thousand, payable to our order and left with us by you yesterday. This must be reversed and Chemical instructed to wire us they will pay same. Also Fidelity wire us direct that they have reversed the charge, and authorize us to use this item for Kershaw. Otherwise you must deposit four hundred thousand instead of three hundred thousand in the bank we have already designated. Rush.

"AMERICAN EXCHANGE NATIONAL BANK."

"CINCINNATI, 16.

"*To American Exchange Nat'l Bank:*

"Your telegram received at eleven three. Will go to work at once and arrange matter, but you must see Kershaw through without fail. You should have wired us sooner and would have fixed you up as desired. J. W. WILSHIRE."

The telegram dated June 17, from the plaintiff to Wilshire, shows that the plaintiff was determined to avoid trouble over draft No. 16,412, which it had credited to Kershaw & Co., but which the Fidelity Bank had charged to the plaintiff.

Wilshire left Chicago during the night of June 15, knowing the exact condition of things between Kershaw & Co. and the plaintiff. He reported to Harper at Cincinnati the next morning, and at the very time when he was sending his two telegrams of June 16 to the plaintiff, he and Harper were arranging further to defraud the plaintiff by stopping payment of the drafts which Wilshire took to Chicago. They telegraphed the Chemical National Bank not to pay them, and when the four drafts were presented it refused to pay them. Harper and Hopkins, on the 16th of June, charged draft No. 16,412 to the plaintiff on the books of the Fidelity Bank, but they entered it in the transactions of June 15, and changed the footings of the column in which the entry was made.

In reply to the suggestion that the plaintiff took the draft No. 16,412, as collateral security, and therefore was not a *bona fide* holder of it, it is to be said that the plaintiff took the deposit as a cash deposit, and that there was no agreement with Kershaw & Co. that the deposit should be held only as security; because the amount of the deposit was credited as cash on the books of the plaintiff, at or about 11 o'clock on the morning of June 15, and the plaintiff paid the checks of Kershaw & Co. on the faith of the deposit of the draft.

The conclusion of the whole matter is, that the Fidelity Bank represented to the plaintiff that Wilshire was a *bona fide* holder of draft No. 16,412, for his use in making good his trades with Kershaw & Co.; that the plaintiff, relying on such representations, took the draft on deposit from Kershaw & Co., placed it to their credit, and paid their checks; and that, under those circumstances, the Fidelity Bank was estopped from showing that Wilshire was not a *bona fide* holder of the draft, and the receiver stands in no better position than the Fidelity Bank.

The decree of the Circuit Court in No. 1110 was, therefore, right.

As to No. 1111, the paper in question was in its legal character a certificate of deposit. *Hart* v. *Life Association*, 54 Alabama, 495; *Long* v. *Straus*, 107 Indiana, 94; *Lynch* v. *Goldsmith*, 64 Georgia, 42, 50; *Howe* v. *Hartness*, 11 Ohio St. 440; *Miller* v. *Austen*, 13 How. 218.

The certificate stated that Wilshire, Eckert & Co. had deposited so much money. The Fidelity Bank telegraphed to the plaintiff that Wilshire would come with so much money. It intended that the plaintiff should take the paper as money. The plaintiff did take it as money, and the Fidelity Bank entered the paper on its books as being its own check upon itself. Wilshire went to the plaintiff on the morning of June 15 as the purchaser and controller of the certificate in like manner as he went as the purchaser and controller of draft No. 16,412. At the request of Wilshire, Eckert & Co., the Fidelity Bank issued the certificate directly to the plaintiff. What has been said before, in relation to the claim of the plaintiff as the holder of the draft No. 16,412, applies with equal force to its claim as the holder of the certificate. It was a purchaser, and an innocent purchaser, for value, of both pieces of paper. There is no question of negotiability, because the suit is brought by the original payee, and the paper was applied by the plaintiff for the use of Kershaw & Co., as directed by the certificate.

As soon as the paper was delivered to and accepted by the plaintiff, the Fidelity Bank had entered into a contract with it to pay $200,000. The suit is for the amount which the Fidelity Bank agreed to pay, and not for damage sustained by the plaintiff through the misrepresentation of that bank. The plaintiff accepted the contract in good faith, by placing $200,000 to the credit of Kershaw & Co.; and it also charged $200,000 to the Fidelity Bank, and notified that bank that it had done so. The Fidelity Bank acted on that contract, after it was notified of its acceptance by the plaintiff, by placing $200,000 to the credit of the plaintiff, and charging that amount to Wilshire, Eckert & Co. The plaintiff was not required to pay the Fidelity Bank anything upon the contract, because the Fidelity Bank represented that Wilshire, Eckert & Co. had paid for it.

The plaintiff was required, if it accepted the contract, to give the benefit of it to Kershaw & Co. It did that by at once giving Kershaw & Co. credit for $200,000, and that amount still stands on its books to the credit of Kershaw & Co. The defendant cannot escape the consequences of the contract of the Fidelity Bank by saying that the statement of that bank that it had received from Wilshire, Eckert & Co. the consideration for the contract was false, because he is estopped from setting up for his protection the falsity of that statement after the plaintiff had acted upon it. The plaintiff is seeking to recover upon a contract, and the receiver is defending by setting up the false representation of the Fidelity Bank.

The suggestion is not a sound one that the plaintiff took the paper under such circumstances as would put a man of ordinary prudence upon inquiry. The Fidelity Bank, prior to June 14, 1887, had notified the plaintiff of four deposits made with the former by Wilshire's firm, for the use of Kershaw & Co., in April and May, 1887, amounting together to $250,000. For each of those deposits the Fidelity Bank had issued paper similar to that in suit in No. 1111. The amounts were placed to the credit of Kershaw & Co. by the plaintiff, and were paid by the Fidelity Bank to the plaintiff in the due course of business. Nothing passed between the two banks to indicate that the Fidelity Bank knew what Wilshire's firm was doing with the money, until the telegram of June 14, from the Fidelity Bank to the plaintiff, was received by the latter. The plaintiff was banker for Kershaw & Co., and had that day stopped payment of their checks. Kershaw & Co. were the brokers of Wilshire's firm, and had bought a large quantity of wheat for them for future delivery, which needed immediate protection by the deposit of margins. The Fidelity Bank was the banker in Cincinnati of Wilshire's firm, and the two banks were regular correspondents. It was natural for Wilshire to ask his bank to send the telegram to Kershaw & Co.'s bank, and there was nothing in that to put a prudent institution upon inquiry. It was natural that the cashier of the plaintiff should understand that the two banks were carrying on the telegraphic correspondence solely for the benefit of their respective customers; and the

plaintiff was led to expect that Wilshire would arrive the next morning with $600,000 of his own money, to use in making good his trades with Kershaw and others. There was nothing in the telegram to lead the plaintiff to understand that Wilshire would be in Chicago with $600,000 of the money of the Fidelity Bank, to make good trades of his for that bank. The appearance of Wilshire the next morning with $600,000 would naturally lead the plaintiff to believe that it was his own money, and the same money spoken of in the telegram of the day before from the Fidelity Bank.

There was nothing in the paper brought by Wilshire to lead the plaintiff to suspect that the money was the money of the Fidelity Bank. The paper was all in proper form to be controlled by Wilshire, and to be used by him to protect his trades with Kershaw and others. The cashier of the plaintiff had suggested by telegram to the Fidelity Bank, on the 14th of June, that Wilshire should bring currency. As he brought paper, which, if the plaintiff took it, must be treated as money, and as the plaintiff had another draft on the Fidelity Bank for $217,862.50, deposited by Irwin, Green & Co., which was then in Cincinnati for collection, the cashier of the plaintiff, before finally taking the paper, asked Wilshire if the Fidelity Bank was solvent. This indicated no suspicion of the true state of facts, as they were subsequently disclosed, and the question was a natural one to be put to a person who was having large money transactions with the Fidelity Bank, and who had just endorsed its two drafts for $100,000 each. The attorney of the plaintiff was at the bank, and before its cashier took the paper he told the attorney what Wilshire had said, and that everything appeared perfectly straight. He would not have taken the paper and paid out nearly $240,000 on the faith of it if he had suspected that it was otherwise than the *bona fide* paper of the Fidelity Bank, issued for a like amount of money received by that bank.

When the plaintiff learned that the Fidelity Bank had refused to pay the Irwin, Green & Co. draft for $217,862.50, and when it had received the telegram of the Fidelity Bank asking that that draft be turned over to it without payment,

it lost confidence in the solvency of the Fidelity Bank; but it still believed Wilshire to be the true principal, and telegraphed him to put his money in another bank. Wilshire replied by telegram, on June 16: "Will go to work at once and arrange matter; but you must see Kershaw through without fail. You should have wired us sooner, and would have fixed you up as desired," thus keeping up the deception.

The rumors on the board of trade and in the public press that Harper was the real principal for whom Wilshire was acting, cannot affect the plaintiff. There is no evidence that any officer of the plaintiff ever heard any rumor connecting Harper's name with the purchases of grain. Even if the plaintiff had learned as a fact that Harper was buying wheat through Wilshire, that would not have been notice that the statement in the certificate of deposit, that Wilshire, Eckert & Co. had deposited $200,000, was false; nor would it have been notice that Harper was using the funds of the Fidelity Bank. The drafts and the certificate of deposit were all of them signed by Hopkins, the assistant cashier of the Fidelity Bank. Nothing occurred to make the plaintiff suspicious of the *bona fide* character of the paper; and Wilshire, by delivering the paper, affirmed the statement of the Fidelity Bank that his firm had deposited $200,000 to the credit of the plaintiff. Wilshire was concerned in concealing the truth. He had come for the express purpose of deceiving the plaintiff; and the latter cannot be charged with negligence in not asking for information from him. There is no evidence tending to show that the plaintiff had any suspicion that Harper, Hopkins and Wilshire had conspired together to embezzle the funds of the Fidelity Bank, or that the paper was signed by Hopkins, and delivered by Harper to Wilshire, to be used in purchasing wheat. The success of the conspiracy depended on the concealment of the fact that Wilshire, Eckert & Co. were not depositing with the Fidelity Bank the amounts for which it was issuing its paper. There was authority to issue the paper, if Wilshire, Eckert & Co. made the deposit; and the consequence of the fraud must fall upon the Fidelity Bank, and not upon the plaintiff.

As to the suggestion that the plaintiff was not warranted in giving an immediate credit of $200,000 to Kershaw & Co. on the faith of the certificate of deposit, it is to be said that so far as the face of the paper is concerned it was left to the option of the plaintiff either to give Kershaw & Co. the immediate use of the money, or to await the collection of the money on the certificate. It is apparent that the Fidelity Bank, in issuing the paper, intended that the plaintiff should use it as money, and the emergency upon Kershaw & Co. required such use of it.

In reply to the claim on the part of the receiver that if the plaintiff can recover at all it can recover only the money which it paid out in reliance on the certificate, it is to be said that that instrument is a contract by the Fidelity Bank offering to the plaintiff to become its debtor in the sum of $200,000, and asking it to become a creditor of the Fidelity Bank, for the benefit of Kershaw & Co., the object being to convert a credit in Cincinnati, for which Wilshire, Eckert & Co. had paid, into a credit in Chicago with the plaintiff, as the banker of Kershaw & Co., for the use of that firm. The plaintiff accepted this offered contract, assumed the relation of creditor to the Fidelity Bank, for the use of Kershaw & Co., and at once gave them credit for $200,000, thus fully complying with the contract. When the plaintiff placed $400,000 to the credit of Kershaw & Co., it paid them that amount; and the legal effect of the transaction was the same as if the plaintiff had given $400,000 in currency to Kershaw & Co., and they had deposited it to their credit in some other bank.

The plaintiff held Kershaw & Co.'s check for $256,878.18, which it was carrying. The check was regular and the plaintiff had a right to have it paid at once. It had not been charged up, for there was only $11,401.17 in Kershaw & Co.'s account against which to charge it; but in stating the overdraft on the evening of June 14, we have treated it as if it had been debited. That check was paid by the plaintiff and charged to Kershaw & Co., on the morning of June 15, in reliance upon the deposit of the Fidelity Bank paper for $400,000. The plaintiff had the right to apply the deposit of Kershaw & Co.

to the payment of their indebtedness to it which was due. It was the understanding of Kershaw & Co. that all of their outstanding checks should be paid from the deposit. In addition to cancelling the check for $256,878.18, the plaintiff paid out $239,930.78 on June 15. It therefore paid out during that day $496,808.96. It received on deposit $399,200 in Fidelity Bank paper, and $25,249.40 in a draft drawn against a shipment of wheat, and there was a credit upon its books of $11,401.17 at the beginning of business on that day. The debit side of the account was therefore $496,808.96, and the credit $435,850.57, being an excess of debit of $60,958.39.

The plaintiff also forbore to sell the grain which it held as collateral security for Kershaw & Co.'s indebtedness, and which was worth on June 14, at the lowest market price of that day, $544,894. After payment of the Fidelity Bank paper was refused, the plaintiff sold the grain for $449,194, a shrinkage of $95,700. There was no agreement that the plaintiff should hold the grain, but the deposit of $400,000 made it unnecessary to sell it, and good faith toward Kershaw & Co., under the circumstances, required that that should not be done. The plaintiff, therefore, in reliance upon the paper of the Fidelity Bank, paid the check of Kershaw & Co. for $256,878.18, gave them $239,930.78 of further money, and suffered a loss of $95,700 on the collateral security which it held.

We do not think that the matter of the application of the proceeds of the collateral security has anything to do with either of the cases.

As Kershaw & Co. deposited, and the plaintiff credited, the three pieces of Fidelity Bank paper as a single cash item, whatever the plaintiff did on the faith of the deposit of $400,000 was done on the faith of each piece of paper which went to make up that deposit. When the plaintiff accepted the certificate of deposit, it was at liberty to use the credit for $200,000 in any manner which it and Kershaw & Co. might agree upon, the only requirement made by the Fidelity Bank being that the credit should be applied to the use of Kershaw & Co. It was applied to such use as much by paying their indebtedness to the plaintiff as by paying what they owed to

any other party. As the plaintiff is seeking to recover on a contract with which it has fully complied on its part, the receiver must fully comply with the other part of it; and if Wilshire, Eckert & Co. did not put $200,000 in the Fidelity Bank to the credit of the plaintiff, as that bank declared they had done, the receiver must make good the representation by placing a like amount to the credit of the plaintiff.

As to the defence that Harper, Hopkins and Wilshire, with other persons, on and before June 14, 1887, were engaged in purchasing wheat on contracts for future delivery, and otherwise, with the object of creating a "corner" in the market; that at the time of the delivery of the paper to the plaintiff it had notice that they were engaged in such speculation; and that the certificate of deposit was delivered to Wilshire and by him to the plaintiff to be used, through the plaintiff and by Kershaw & Co., who were, and were well known to the plaintiff to be, brokers engaged in the purchase of wheat, in such speculation, for the account of Wilshire and his confederates; the defence amounts to this, that if the plaintiff received money from the Fidelity Bank to be transferred to Kershaw & Co., it could refuse to pay over the money to the latter if it knew that they intended to use the money to pay a gambling debt which the Fidelity Bank had contracted.

When the plaintiff received the deposit from Kershaw & Co., it was bound to honor their checks against it; and it could not refuse to pay them on the ground that Kershaw & Co. intended to make an improper use of the money. If Wilshire, Eckert & Co. and Kershaw & Co. were engaged in gambling, and the former had deposited money in the Fidelity Bank to be transferred to the plaintiff, in order that Kershaw & Co. might check out the amount from the plaintiff's bank in payment of losses sustained in the gambling transactions, and both banks knew that the money was to be so used, still the Fidelity Bank, having received the deposit, could not refuse to pay it over to the plaintiff, and the plaintiff, having received it, could not refuse to honor the checks of Kershaw & Co., drawn against it. *Tenant* v. *Elliott*, 1 B. & P. 3; *Farmer* v. *Russell*, 1 B. & P. 296; *Sharp* v. *Taylor*, 2 Phillips (Ch.) 801; *Arm-*

strong v. *Toler*, 11 Wheat. 258; *Kinsman* v. *Parkhurst*, 18 How. 289; *Brooks* v. *Martin*, 2 Wall. 70; *Planters' Bank* v. *Union Bank*, 16 Wall. 483; *McMicken* v. *Perin*, 18 How. 507.

Nor do we think that the statute of Illinois, 1 Starr & Curtis, Stat. 1885, pp. 791, 792, sections 130, 131, or the case of *Pearce* v. *Foote*, 113 Illinois, 228, has any application to the present case. That statute makes it an offence to "corner" the market, or to attempt to do so, and makes void all contracts to reimburse or pay any money or property knowingly lent or advanced at the time and place of any play or bet, to any person gambling or betting. The two banks were not attempting to corner the market in wheat. Whether Wilshire and his confederates were engaged in attempting to do so, and had made purchases for that purpose through Kershaw & Co. as brokers, is another question. This is not a suit by Kershaw & Co. against Wilshire or his firm, or against the Fidelity Bank. It is a suit on a contract made by the Fidelity Bank with the plaintiff; and the receiver cannot defend it on the ground that the plaintiff knew that if it paid over the money to Kershaw & Co., as the Fidelity Bank requested, the money would be used in an illegal transaction.

In *Pearce* v. *Foote*, *supra*, Foote made an express agreement with certain commission men to trade exclusively in differences in options, declaring that he did not want to buy any provisions, but simply to speculate and settle on differences. He lost a large sum in such transactions, and endorsed over to the commission men certain notes. The court held that such options were gambling contracts, and that, as the statute of Illinois provided that any person who should lose in a gambling transaction might recover back from the winner whatever he should pay on account of such loss, Foote could recover the value of the notes from the commission men. But the plaintiff is not the winner in any gambling transaction. The purport of the decision in *Pearce* v. *Foote* is that, as the commission men participated in the illegal transaction, they could not take the ground that their interest was only that of a commission. The plaintiff is not in the situation of the commission men, and the receiver is not in the situation of Foote.

The cases which have been decided in regard to the statute of Illinois arose between brokers and principals, or between winner and loser, and do not apply to the case at bar.

It is contended, however, by the receiver that the money advanced by the plaintiff to Kershaw & Co., on the 15th of June, was advanced knowingly at the time in the course of an attempt to corner the market and to aid Kershaw & Co. in doing so. The statute of Illinois makes void any contract "for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of such play or bet to any person or persons so gaming or betting." This is not a suit against Kershaw & Co. to recover money lent to them; nor is it true that the plaintiff advanced money to them to assist them in attempting to corner the market. It is not averred in the answer, nor proved, that Kershaw & Co. were engaged in such an attempt. The averment of the answer is that Harper, Hopkins, Wilshire, and other persons to the defendant unknown, were engaged in such an attempt, and that Kershaw & Co. were acting as brokers; but it is not averred that the brokers had any knowledge of the object of their principals, and the evidence shows that they had no such knowledge. The money which the plaintiff advanced to Kershaw & Co., on the 15th of June, was not lent to them on an agreement by them to repay it; but it was advanced to them in consideration of the deposit with the plaintiff of the $400,000 of Fidelity Bank paper. Nor is there any proof that any of the money paid by the plaintiff to Kershaw & Co., on the 15th of June, was paid out for wheat purchased for Wilshire, Eckert & Co. The burden was on the receiver to show clearly that the money paid out was upon illegal transactions. He fails to do so; and much more does he fail to show that the money was paid for present purchases; that is, in the language of the statute, that it was advanced "at the time and place" of the purchases, and not to pay debts incurred in the making of past purchases. If it were shown that the plaintiff advanced money to Kershaw & Co., on the 15th of June, to be used in paying for wheat which Kershaw & Co. had purchased at some time in the past, in an attempt

to corner the market, it would not follow that the plaintiff could not collect from them such advances.

Where losses have been made in an illegal transaction a person who lends money to the loser with which to pay the debt can recover the loan, notwithstanding his knowledge of the fact that the money was to be so used. *Armstrong* v. *Toler*, 11 Wheat. 258; *Kimbro* v. *Bullitt*, 22 How. 256, 269; *Planters' Bank* v. *Union Bank*, 16 Wall. 500; *Tyler* v. *Carlisle*, 79 Maine, 210; *McGavock* v. *Puryear*, 6 Coldwell, 34; *Waugh* v. *Beck*, 114 Penn. St. 422.

It is not shown, as is claimed by the receiver, that in advancing the money to Kershaw & Co. the plaintiff became a participator in an illegal attempt to corner the market, or that it had aided in such an attempt by previously advancing money to them upon a part of the wheat as collateral security. Although the plaintiff had advanced money from time to time to them upon wheat as collateral security, there is no evidence that it knew, or had any reason to suspect, that the wheat was purchased in an attempt to corner the market.

An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case. *Armstrong* v. *Toler*, 11 Wheat. 258; *Faikney* v. *Reynous*, 4 Burrow, 2069; *Petrie* v. *Hannay*, 3 T. R. 418; *Farmer* v. *Russell*, 1 B. & P. 296; *Planters' Bank* v. *Union Bank*, 16 Wall. 483; *McBlair* v. *Gibbes*, 17 How. 232, 236; *Brooks* v. *Martin*, 2 Wall. 70; *Bly* v. *Second Nat. Bank*, 79 Penn. St. 453.

Although the contract between the two banks was made in the State of Illinois, it was to be performed in the State of Ohio; and, the receiver being estopped from saying that Wilshire, Eckert & Co. did not deposit the $200,000 in the Fidelity Bank to the credit of the plaintiff, it is the law of Ohio (*Ehrman* v. *Insurance Co.*, 35 Ohio St. 324) that he cannot be heard to say that the plaintiff acquired the certificate of deposit in connection with an illegal transaction.

The result, however, of the evidence is that it does not appear, as alleged in the answer of the receiver, that the

plaintiff had knowledge or notice that the paper in suit was delivered to it to be used through it by Kershaw & Co. in connection with an attempt to corner the market. A detailed discussion of the evidence would not be profitable.

We think, therefore, that the Circuit Court was right in making a decree against the receiver in No. 1111.

In both of the cases it is claimed that the court erred in adjudging that the plaintiff was entitled to interest on the 25 per cent dividend on its claim, from October 31, 1887, until the time the dividend should be paid. As authority the receiver cites the case of *White* v. *Knox*, 111 U. S. 784. But we do not think it applies. In that case a judgment was obtained for a claim by White, in June, 1883, which included interest on his claim to that time. While the claim was in litigation, the receiver had paid ratable dividends of 65 per cent to other creditors. After the judgment in favor of White, the Comptroller of the Currency calculated the amount due him as of December 20, 1875, the time when the bank failed, and paid him 65 per cent on that amount. He contended that the dividend should be calculated on his claim with interest to the time of the judgment; but this court sustained the action of the Comptroller. In the present case, the claims of the plaintiff, as allowed, do not include interest beyond the date when the bank failed. Interest upon the dividend which it ought to have received on the 31st of October, 1887, is a different matter. The allowance of that interest is necessary to put the plaintiff on an equality with the other creditors. That point was not decided in *White* v. *Knox;* and we think the Circuit Court did not err in allowing such interest.

It results that the decrees in both cases must be

Affirmed.

Mr. Chief Justice Fuller did not take any part in the decision of this case.

GAGE *v.* KAUFMAN.

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

No. 189. Submitted January 27, 1890. — Decided March 3, 1890.

In a bill in equity to quiet title, an allegation that the plaintiff is seized in fee simple is a sufficient allegation that he has the possession as well as the title.

In a bill in equity, an allegation that the plaintiff has no adequate remedy at law is dispensed with by Rule 21 in Equity.

A bill in equity to remove a cloud upon title, created by a tax deed, which alleges that no taxes were due upon which the land could be sold, need not offer to pay any taxes as a condition of relief.

By the law of Illinois, a tax deed is no more than *prima facie* evidence in favor of the purchaser, and may be shown to be invalid by proof that there was no advertisement of sale, or no judgment or precept, or no taxes unpaid, or no notice to redeem given or recorded; and a bill to remove a cloud upon title, alleging that the defendant claims under a tax deed valid on its face, but invalid on the grounds aforesaid, is good on demurrer.

IN EQUITY. The defendant demurred to the bill. The demurrer being overruled he elected to stand on the demurrer, and a decree was entered for the complainant, from which the defendant appealed. The case is stated in the opinion.

Mr. Augustus N. Gage for appellant.

Mr. Edward Roby for appellee.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a bill in equity by a citizen of Illinois against a citizen of New Jersey to remove a cloud upon the title of lands in Chicago of the value of $10,000.

The bill alleged that the plaintiff was seized in fee simple of the lands; that the defendant claimed title to them under two pretended tax deeds to him from the county clerk, recorded in the office of the county recorder, (copies of the records of which were set forth in the bill, showing deeds in the form prescribed

by § 221 of c. 120 of the Revised Statutes of Illinois of 1874); and further alleged that there was no advertisement of any public sale for non-payment of taxes on the day mentioned in either deed; that there was no judgment or precept on which the lands could have been sold; that there were no taxes unpaid on which the sale could have been made; that no notice to redeem the lands from such pretended sale was given by the holder of any certificate of such sale, as required by the constitution and statutes of Illinois; and that no such notice or evidence thereof was filed or recorded by the county clerk.

The defendant demurred to the bill, because it did not show who was in possession of the lands, or that the defendant was not in possession, or that the plaintiff had not an adequate remedy at law; because the plaintiff did not offer to do equity and to repay the taxes paid by the defendant; because the grounds alleged in the bill for setting aside the defendant's title were insufficient to overcome the *prima facie* evidence of the tax deeds set forth in the bill; and for want of equity.

The court overruled the demurrer, and, the defendant electing to stand by it, entered a decree for the plaintiff. The defendant appealed to this court.

The grounds of demurrer are untenable. The allegation that the plaintiff is seized in fee simple is a sufficient allegation that he has the possession as well as the title. 1 Dan. Ch. Pract. c. 6, § 5. The allegation that he has no adequate remedy at law is dispensed with by Equity Rule 21. If, as the bill alleges, no taxes were due upon which the lands could be sold, he was not bound to pay any taxes as a condition of relief. By the law of Illinois, the deed is no more than *prima facie* evidence in favor of the purchaser, and may be shown to be invalid by proof of either of the facts alleged in the bill and admitted by the demurrer, namely, that there was no advertisement of sale, no judgment or precept, no taxes unpaid, or no notice to redeem given or recorded. Illinois Rev. Stat. of 1874, c. 120, §§ 177, 182, 191, 194, 216, 217, 224; *Senichka* v. *Lowe*, 74 Illinois, 274; *Bell* v. *Johnson*, 111 Illinois, 374; *Gage* v. *Rohrbach*, 56 Illinois, 262; *Williams* v. *Underhill*, 58 Illinois, 137; *Dalton* v. *Lucas*, 63 Illinois, 337.

Syllabus.

Upon general principles, and by the Illinois decisions, as the tax deeds appear upon their face to be clouds upon the plaintiff's title, a bill in equity is the proper form of obtaining relief upon the various grounds alleged.

Decree affirmed.

DELAWARE COUNTY COMMISSIONERS *v.* DIEBOLD SAFE AND LOCK COMPANY.

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

No. 39. Submitted April 26, 1889. — Decided March 3, 1890.

Under the act of March 3, 1875, c. 137, the restriction of the original jurisdiction of the Circuit Court of the United States in suits by an assignee whose assignor could not have sued in that court does not apply to a suit removed from a state court.

It is no objection to the exercise of jurisdiction by a Circuit Court of the United States over a suit brought by an assignee of a contract, that the assignor is a citizen of the same State as the defendant, if the assignor was not a party to the suit at the time of its removal from the state court, and, being since made a party, disclaims all interest in the suit, and no further proceedings are had against him, and the complaint alleges that the defendant consented to the assignment.

A claim against a county, heard before the county commissioners, and on appeal from their decision by the circuit court of the county, under the statutes of Indiana, may be removed, at any time before trial in that court, into the Circuit Court of the United States, under Rev. Stat. § 639, cl. 3.

In an action brought against one party to a contract by an assignee, seeking to charge him by virtue of a contract of assignment from the other party and other facts, a complaint stating the same facts, not under oath, and signed by attorney only, in an action by the assignee against his assignor, is incompetent evidence of an admission by the plaintiff that he had no cause of action against this defendant.

In a State whose law allows an assignee of an entire contract, not negotiable at common law, to sue thereon in his own name, and an assignee of part of such a contract to sue thereon jointly with his assignor, or to sue alone if no objection is taken by demurrer or answer to the non-joinder of the assignor, an assignee has the like right to maintain such an action at law in the Circuit Court of the United States.

By a contract for the construction of a jail, under the statutes of Indiana, (which require all such contracts to be let to the lowest responsible

Statement of the Case.

bidder, taking a bond from him for the faithful performance of the work,) the contractors agreed to construct the jail and to provide all the materials therefor within a certain time for the sum of $20,000, which the county commissioners agreed to pay, partly in monthly payments on their architect's certificate, and the rest on the completion and acceptance of the building; and it was agreed that the county should not in any manner be answerable or accountable for any material used in the work; and that, if the contractors should fail to finish the work by the time agreed, they should pay $25 as liquidated damages for every day it should remain unfinished. The contractors assigned to a third person the obligation to do the iron work upon the jail, as if it had been awarded directly to him, and the right to recover therefor from the commissioners $7700 at the times mentioned in the original contract. The assignee did the work to the satisfaction of the commissioners, and to the value of $7700, but not within the time stipulated in the original contract. *Held*, that the assignment, though notified to the commissioners, if not assented to by them, did not render them liable to the assignee, or prevent them from making a settlement in good faith with the original contractors.

The original suit was commenced March 4, 1885, by the Diebold Safe and Lock Company, a corporation of the State of Ohio, against the board of commissioners of Delaware County in the State of Indiana, by a claim in the form of a complaint, filed with the county auditor and by him presented to the board of county commissioners, in accordance with the provisions of the Revised Statutes of Indiana of 1881, (which are copied in the margin,[1]) and containing the following allegations:

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[1] Sec. 5740. The auditor of the county shall attend the meetings of such commissioners, and keep a record of their proceedings; and the sheriff of the county shall also, by himself or deputy, attend and execute their orders.

Sec. 5742. Such commissioners shall adopt regulations for the transaction of business; and in the trial of causes they shall comply, so far as practicable, with the rules for conducting business in the circuit court.

Sec. 5758. Whenever any person or corporation shall have any legal claim against any county, he shall file it with the county auditor, to be by him presented to the board of county commissioners.

Sec. 5759. The county commissioners shall examine into the merits of all claims so presented, and may, in their discretion, allow any claim in whole or in part, as they may find it to be just and owing.

Sec. 5760. No court shall have original jurisdiction of any claim against any county in this state, in any manner except as provided for in this act.

Sec. 5761. No allowance shall be made by such commissioners, unless

Statement of the Case.

That on January 20, 1882, the board of commissioners entered into a written contract with William H. Meyers and Edward F. Meyers, partners as W. H. Meyers & Son, a copy of which was annexed, showing that Meyers & Son agreed to construct a jail for the county on or before September 4, 1882, agreeably to the plans and specifications of a certain architect, and to provide all the materials therefor, for the sum of $20,000, which the board of commissioners agreed to pay, in monthly payments, on the architect's certificate, reserving on each payment twenty per cent, to be paid on the completion and acceptance of the building; Meyers & Son agreed to give bond to secure the performance of the agreement; and it was agreed that "the county will not in any manner be answerable to or accountable for any loss or damages that may happen in or to said works, or any part or parts thereof, respectively, or for any of the materials or other things used and employed in finishing and completing the said works;" and that, "should the contractors fail to finish the work on or before the time agreed upon, they shall pay to the party of

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the claimant shall file with such commissioners a detailed statement of the items and dates of charge, nor until such competent proof thereof is adduced in favor of such claim as is required in other courts; but if the truth of such charge be known to such commissioners, it may be allowed without other proof, upon that fact being entered of record in the proceedings about the claim.

SEC. 5769. Any person or corporation, feeling aggrieved by any decision of the board of county commissioners, made as hereinbefore provided, may appeal to the circuit court of such county, as now provided by law.

SEC. 5774. The auditor shall make out a complete transcript of the proceedings of said board relating to the proceeding appealed from, and shall deliver the same, and all the papers and documents filed in such proceeding, and the appeal bond, to the clerk of the court to which the appeal is taken.

SEC. 5777. Every appeal thus taken to the circuit court shall be docketed among the other causes pending therein, and the same shall be heard, tried and determined as an original cause.

SEC. 5778. Such court may make a final determination of the proceeding thus appealed, and cause the same to be executed, or may send the same down to such board, with an order how to proceed, and may require such board to comply with the final determination made by such court in the premises.

the first part the sum of twenty-five dollars per diem for each and every day thereafter the said works shall remain unfinished, as and for liquidated damages."

That a part of the work to be done and materials furnished under the contract consisted of iron work; and that on March 6, 1882, Meyers & Son assigned to the plaintiff so much of that contract as related to this work, by an agreement in writing as follows:

"Fort Wayne, Ind., March 6th, 1882. We, the Diebold Safe and Lock Company, at Canton, O., hereby agree to construct and place in position in the new jail to be erected in the city of Muncie, Delaware Co., Ind., all of that portion of the work for same (locks included) and described under the head of iron and chrome-steel work in specifications and according to plans delineating them, as already adopted by the board of county commissioners of said county, the same as though the contract for such work had been awarded us direct; the contract price for said work to be seventy-seven hundred dollars ($7700) for above work, completed and accepted by the superintendent of the building and the county commissioners, to be paid by the said county commissioners in monthly estimates, less amount retained according to law and contract between the county commissioners and Wm. H. Meyers & Son, on completion of said work in full, as per amount named in this contract and charged by them against W. H. Meyers & Son, and in full settlement with them for such iron and chrome-steel work under their contract with the county commissioners; and any questions that may arise on the construction of the work or deviations from the plans and specifications, that may arise or be deemed advisable, to be arranged and settled wholly between ourselves and the county commissioners and the superintendent of the building. And we, the Diebold Safe and Lock Company, in consideration of the acceptance of the foregoing proposition by the said W. H. Meyers & Son, agree to do said work, and insure the same in perfect working order, according to the terms proposed, and to the acceptance of the said architect and county commissioners, and in such quantities and time as shall not materially interfere with the completion

of said building, and to complete the whole work on or before August 1st, 1882.

"DIEBOLD SAFE AND LOCK CO.

"We, the said W. H. Meyers & Son, named in the foregoing proposition, do hereby accept the same, and agree that the said Diebold Safe & Lock Company shall do and perform the work and labor and furnish the iron and chrome-steel work for said jail, in manner and form as proposed and agreed by them in the foregoing proposition and agreement, and that they shall receive payment therefor as proposed. Dated Fort Wayne, Ind., March 6th, 1882. "W. H. MEYERS & SON."

That the board of commissioners and the county had notice of and consented to this agreement and assignment when it was made, and before the jail was erected, and before any payments were made to Meyers & Son on account thereof; that the plaintiff, with the knowledge and consent of the board did the iron work and furnished the materials therefor, in accordance with the original contract of the board with Meyers & Son, and to the acceptance of the architect; that such work and materials were of the value of $7700, and Meyers & Son did the rest of the work upon the building; and that the board had not paid anything on account of the iron work, although the plaintiff had duly demanded payment therefor; and the plaintiff claimed payment of the sum of $7700.

The complaint contained a second paragraph, alleging the contract between the board of commissioners and Meyers & Son, its performance by Meyers & Son and its non-performance by the board, an assignment dated November 25, 1884, from Meyers & Son to the plaintiff of all their claims and demands against the board on account of building the jail, and that the sum of $10,000 was due on account thereof from the board to the plaintiff.

The board of commissioners disallowed the claim. The plaintiff appealed to the circuit court of the county; and immediately after the entry of the appeal in that court, and before further proceedings there, filed a petition and bond for the removal of the case into the Circuit Court of the United States, on the grounds that the plaintiff was a citizen of Ohio,

and the defendant a citizen of Indiana, and that by reason of prejudice and local influence the plaintiff could not have a fair trial in the state court.

The case having been entered on the equity docket of the Circuit Court of the United States, a motion was made by the defendant to remand the case to the state court, upon the ground that Edward F. Meyers, one of the plaintiff's assignors, was and always had been (as was admitted) a citizen of Indiana, (it being also admitted that William H. Meyers was and always had been a citizen of Michigan,) and that the petition for removal was filed too late, after the case had been tried and decided by the board of county commissioners, and been appealed to the circuit court of the county. The motion was denied.

The plaintiff then, by leave of the court made William H. Meyers and Edward F. Meyers parties defendant; and they appeared and answered, admitting the allegations of the complaint, and disclaiming all interest in the suit; and the record showed no further proceedings in regard to them.

A demurrer filed by the board of commissioners, upon the ground that the complaint did not state facts sufficient to constitute a cause of action, was overruled; the motion to remand the case to the state court was renewed, and again denied; and the defendant excepted to the overruling of its demurrer and to the denial of its motion to remand.

The board of commissioners then filed an answer, setting up the following defences:

1st. A denial of all the allegations of the complaint.

2d. Payment.

3d. Payment to Meyers & Son without notice of the pretended assignment of the contract to the plaintiff.

4th. Payment, before the assignment mentioned in the second paragraph of the complaint, to Meyers & Son, upon a settlement of accounts, and deducting damages for delay in the work.

5th. That, by the laws of Indiana, no contract for the building of a jail shall be let without giving notice by publication for at least six weeks in some newspaper of general circulation

in the county; the board of county commissioners is prohibited from entering into any contract for such building until the contractors have filed a bond with surety for the faithful performance of the work; and all laborers or material-men may have an action on the bond for work done or materials furnished; that the board took such a bond from Meyers & Son, which remained on file in the auditor's office, subject at all times to be sued upon by the plaintiff or any other laborer or material-man engaged in the construction of the jail; that before the commencement of the suit, and long before the board had any notice of the assignment set out in the second paragraph of the complaint, the board fully settled its account with Meyers & Son, including the value of the work claimed to have been performed by the plaintiff, and paid the amount found to be due to Meyers & Son, after deducting damages for delay in completing the building; that the board could not by law enter into the contract which it was alleged in the first paragraph of the complaint to have entered into, or lawfully consent or agree to treat the plaintiff's agreement with Meyers & Son as an assignment of so much of their contract with the county, and never did in fact recognize or assent to it, or promise to pay the plaintiff, but always treated Meyers & Son as the only contractors with whom it had anything to do; and that the plaintiff, having full knowledge of all the facts aforesaid, elected to rely wholly upon the responsibility of Meyers & Son for their pay in doing the work mentioned in the complaint, and on June 30, 1884, brought an action of assumpsit against Meyers & Son on the same cause of action, which was still pending.

6th. That the Circuit Court of the United States had no jurisdiction, because the plaintiff was a citizen of Ohio, the board of commissioners and Edward F. Meyers citizens of Indiana, and William H. Meyers a citizen of Michigan.

By agreement of the parties, and order of the court, the case was transferred to the law docket. A demurrer to the last three paragraphs of the answer was sustained, and the defendant excepted to the ruling. The plaintiff filed a replication, denying the allegations in the second and

third paragraphs of the answer. The second paragraph of the complaint was dismissed by the court upon the plaintiff's motion; and a trial by jury was had upon the issues of fact open upon the pleadings.

At the trial the plaintiff introduced in evidence the original contract of January 20, 1882, the bond given and taken therewith, and the agreement of March 6, 1882.

The plaintiff also introduced evidence tending to show that shortly after the execution of its agreement with Meyers & Son, and before any work had been done or money paid out on account of the construction of the jail, and while the board was in lawful session, engaged in transacting county business, oral notice was given to it by the plaintiff of the execution and provisions of this agreement, and the board made no objection to the agreement or assignment; that on December 6, 1882, the plaintiff's agent filed in the office of the auditor of the county a written copy of this agreement, together with a written notice to the board that the plaintiff expected to do the iron work, and to receive pay therefor directly from the board, in the same manner as Meyers & Son would have been entitled to do under their contract with the board, and that it would demand payment from the board of the sum of $7700 out of the contract price to be paid by the board for the construction of the jail; and that in April or May, 1883, before the plaintiff did the iron work and furnished the materials, the board, while in session, was notified orally by the plaintiff's agent and others of the execution and provisions of the agreement between Meyers & Son and the plaintiff.

On the other hand, the commissioners severally testified that they had no notice or knowledge of that agreement, or of the plaintiff's claim, until December 6, 1883. The auditor testified that there was no such notice in his office, and he had no recollection of any such notice having been filed there or brought to his knowledge. But the deputy auditor testified that a written claim, for $7700, presented by the plaintiff on account of said work and contract, was in the office before that date, and had been returned by him to the plaintiff by order of a member of the board.

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It was proved, and not denied, that at all times prior to April and May, 1883, the board of commissioners had in the county treasury, of the fund provided for the erection of the jail and the payment of the contract price therefor, after deducting all payments made on account thereof, about $12,000, not taking into consideration any damages accruing to the county by reason of delay in completing the jail; that the value of the work then done did not exceed $7000 or $8000; that the plaintiff did all the iron work and furnished all the materials therefor according to the original contract and to the acceptance of the board of commissioners, and to the value of more than $7700, but not within the time stipulated in that contract; and that neither the plaintiff nor any person on his behalf had ever received anything in payment therefor, either from the board of commissioners or from Meyers & Son.

The plaintiff introduced evidence tending to show that the board of commissioners never paid to Meyers & Son or to their order, or to any one for their benefit, more than the sum of $13,000, on account of the construction of the jail.

The defendant introduced evidence tending to show that it had so paid out more than $18,000; that in the spring of 1883, after the work on the jail had progressed for some time, and about $8300 had been paid by the defendant to Meyers & Son, but before any of the iron work had been done, the defendant refused to pay any more money to Meyers & Son, and put one Parry in charge of the work; and that on September 5, 1883, the jail being then in a forward state of completion, a settlement was had between the board of commissioners and Meyers & Son, as a part of which it was agreed that the sum of $4500 should be considered as the damages sustained by the county for delay in completing the jail, and be deducted from the contract price, and the amount necessary to complete the jail was estimated, and the balance found to be due Meyers & Son was paid to them by the county, and the jail was taken off their hands by the board of commissioners; that at the time of that settlement the amount actually necessary to complete the jail, together with the aforesaid sum of $4500,

exceeded by more than $2000 the contract price of the jail; and that the plaintiff had then been engaged upon the iron work for a week, and completed that work on September 24, 1883.

The plaintiff introduced evidence tending to show that at the time of that settlement the defendant agreed in writing with Meyers & Son to pay them the sum of $2000, part of the aforesaid sum of $4500, in case one Secrist, who was then prosecuting a claim against the county for stone furnished to Meyers & Son for the jail, should not finally recover the same against the county, and that Secrist's suit was finally determined against him and in favor of the county by the judgment of the Supreme Court of Indiana, reported in 100 Indiana, 59, yet no part of the said sum of $2000 had ever been paid to Secrist or to any one else; that the actual damages sustained by the county on account of the delay in completing the jail did not exceed the sum of $25; and that the $4500 deducted from the contract price on account of such delay was not intended to be enforced against Meyers & Son.

The defendant offered evidence tending to show "that the settlement was made in good faith, and that the two thousand dollars which the defendant promised to pay Meyers & Son, in case the Secrist claim was defeated was not intended as a sham."

The complaint, signed by the plaintiff's attorneys, in an action brought June 30, 1884, by the plaintiff against Meyers & Son, setting forth the same facts as the complaint in the present case, and seeking to recover against Meyers & Son the sum of $7700 for work done upon the jail, was offered in evidence by the defendant, as tending to show that at that time the plaintiff did not claim to have any such demand as it now asserted against the present defendant. This evidence was objected to by the plaintiff, and excluded by the court; and to the ruling excluding it the defendant excepted.

The defendant requested the court to instruct the jury that, by the statutes of Indiana, contracts for the construction of county jails and other public buildings must be advertised and let by the board of county commissioners as an entirety, and

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not in parts; and that the contract between the board of commissioners and Meyers & Son was not so divisible and assignable by the latter, that an assignment of a part thereof by them and mere notice given by the assignee to the board of commissioners of the assignment, obliged the board to recognize the assignment and to account and settle with and pay the assignee for work done and materials furnished by the assignee.

The court refused to give the instructions requested; and instructed the jury that the effect of the agreement between Meyers & Son and the plaintiff was to put the plaintiff into a position of being entitled to do the iron work and to get the pay therefor from the county; that Meyers & Son made no agreement to pay the plaintiff, and the plaintiff by doing that work acquired no right of action against Meyers & Son, but was entitled simply to look to the county; and that if the board of commissioners had notice of the agreement between Meyers & Son and the plaintiff before the settlement with Meyers & Son, the defendant was bound by that agreement, and obliged to withhold from Meyers & Son money enough to pay the plaintiff, and the plaintiff might maintain this action; and that if a copy of the contract was presented by the plaintiff and received by the auditor at his office, that was legal notice to the board of commissioners.

To this instruction, as well as to the refusal to give the instructions requested, the defendant duly excepted.

The court further instructed the jury that if the defendant, before and at the time of the settlement with Meyers & Son, had no notice of the plaintiff's claim, the plaintiff could not recover if the settlement was made in good faith; but that if the settlement was a sham, not intended as between the parties to be a settlement, the plaintiff might recover in this suit the sum in the defendant's hands owing to Meyers & Son under the original contract. No exception was taken to this instruction at the trial.

The jury returned a verdict for the plaintiff in the sum of $8739.50, upon which judgment was rendered; and the defendant sued out this writ of error.

Argument for Defendants in Error.

Mr. Addison C. Harris and *Mr. William H. Calkins* for plaintiff in error.

Mr. Levi Ritter, *Mr. E. F. Ritter* and *Mr. B. W. Ritter*, for defendants in error, argued upon the merits of the case as follows:

It is urged that a part only of the contract could not be assigned without the consent of the county and that it is not liable to the plaintiff unless it assented to the assignment; that mere notice is not sufficient.

In Indiana it has been held in a number of cases that part of a contract may be assigned without the assent of a debtor. *McFadden* v. *Wilson*, 96 Indiana, 253.

In *Harrison, Receiver*, v. *Wright*, 100 Indiana, 515, on pages 530, 531, it is said: "The rule that a chose in action, or a part of a chose in action, cannot be assigned, is the rule of law, but it is not the rule in equity, and still less is it the rule under modern statutes, which, as in this State, expressly authorize the assignments of choses in action, and direct that all actions shall be prosecuted in the name of the real party in interest. Under these statutes, no good reason is apparent why the assignee may not maintain an action at law."

"If, by the assignment, the assignee acquires a legal right, it is by force of the statute, without regard to the assent of the debtor or holder of the fund. If he acquires an equitable assignment or right simply under the rules in equity, this right is independent of any assent by the debtor or holder of the fund." See, also, *Indiana Manufacturing Co.* v. *Porter*, 75 Indiana, 428; *Bartholomew County* v. *Jameson*, 86 Indiana, 154, 165; *Louisville & St. Louis Railroad* v. *Caldwell*, 98 Indiana, 245; *Wood* v. *Wallace*, 24 Indiana, 226; *Lapping* v. *Duffy*, 47 Indiana, 51; *Groves* v. *Ruby*, 24 Indiana, 418; *Hays* v. *Branham*, 36 Indiana, 219.

From these cases it will be seen that in Indiana at least an assignment of a part of a fund may be made without the assent of the debtor. And this is the rule elsewhere as well. See *Laughlin* v. *Fairbanks*, 8 Missouri, 367, 371; *Anderson* v. *Van Alen*, 12 Johns. 343; *Russell* v. *Fillmore*, 15 Vermont,

130; *Field* v. *New York*, 6 N. Y. 179; *S. C.* 57 Am. Dec. 435; *Moody* v. *Kyle*, 34 Mississippi, 506; *Corser* v. *Craig*, 1 Wash. C. C. 424; *Patten* v. *Wilson*, 34 Penn. St. 299; *Lyon* v. *Summers*, 7 Connecticut, 399.

The rule that a partial assignment could not be made without the consent of the debtor never amounted to more than that without such consent the assignee could not maintain an action in his own name.

It was within the power of Meyers & Son to assign an interest in the contract with the county, together with a portion of the money due therefor. The fact that they were required to give bond for the performance of the work does not affect this right. Their bond remained in force as well after the assignment as before. They were still liable to the county upon their contract and bond, and the county was not injured by the assignment. We cite the court to the following cases, some of which have been cited in support of other positions herein: *Field* v. *New York*, 6 N. Y. 179; *S. C.* 57 Am. Dec. 435; *Devlin* v. *New York*, 63 N. Y. 8; *Dannant* v. *Comptroller*, 77 N. Y. 45.

These are all cases of partial assignments and cover this case. See, also, as in point: *Parker* v. *City of Syracuse*, 31 N. Y. 376, 379; *Horner* v. *Wood*, 23 N. Y. 350; *Taylor* v. *Palmer*, 31 California, 241; *Cochran* v. *Collins*, 29 California, 129, 131; *Morse* v. *Gilman*, 18 Wisconsin, 373; *Gee* v. *Swain*, 12 Wisconsin, 450; *Ernst* v. *Kunkle*, 5 Ohio St. 520; *Bradley* v. *Root*, 5 Paige, 632; *Pendleton* v. *Perkins*, 49 Missouri, 565; *Brackett* v. *Blake*, 7 Met. 335; *S. C.* 41 Am. Dec. 442.

The right to assign contracts with, or claims against, municipal corporations is recognized in Indiana. *Board* v. *Jameson*, 86 Indiana, 154; *Smith* v. *Flack*, 95 Indiana, 116; *Coquillard* v. *French*, 19 Indiana, 274.

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

Before proceeding to consider the merits of this case, it is necessary to dispose of the objections taken to the jurisdiction assumed by the Circuit Court of the United States.

1. It was contended that that court had not cognizance of the suit, because the plaintiff's assignors could not have prosecuted it, inasmuch as one of them was a citizen of the same State as the defendant. But that restriction was applicable only to suits commenced in the federal court, and did not extend to suits removed into it from a state court. Act of March 3, 1875, c. 137, §§ 1, 2, 18 Stat. 470; *Claflin* v. *Commonwealth Ins. Co.*, 110 U. S. 81.

2. It was further objected that the assignors were necessary parties to the suit, because they had assigned to the plaintiff part only of their original contract with the defendant; and because the statutes of Indiana, while they require every action arising out of contract to be prosecuted by the real party in interest, provide that "when any action is brought by the assignee of a claim arising out of a contract, and not assigned by endorsement in writing, the assignor shall be made a defendant, to answer as to the assignment or his interest in the subject of the action." Indiana Rev. Stat. of 1881, §§ 251, 276. But this objection was rather to the nonjoinder of defendants than to the jurisdiction of the court, and presented no valid reason why the court should not proceed. The assignors were not parties to the suit at the time of the removal into the Circuit Court; and as soon as they were made parties in that court, they disclaimed all interest in the suit; and as no further proceedings were had, or relief sought or granted, against them, their presence was unnecessary. *Walden* v. *Skinner*, 101 U. S. 577; *Morrison* v. *Ross*, 113 Indiana, 186. Besides, the first paragraph or count of the complaint (upon which alone the trial proceeded) alleged that the defendant not only had notice of the assignment to the plaintiff, but consented to that assignment. If that were so, there would be a new and direct promise from the defendant to the plaintiff, and the assignors would be in no sense parties to the cause of action.

3. It was also objected that the petition for removal was filed too late, after the case had been tried and determined by the board of county commissioners. But under the statutes of Indiana then in force, although the proceedings of county commissioners, in passing upon claims against a county, are in

some respects assimilated to proceedings before a court, and their decision, if not appealed from, cannot be collaterally drawn in question, yet those proceedings are in the nature, not of a trial *inter partes*, but of an allowance or disallowance, by officers representing the county, of a claim against it. At the hearing before the commissioners, there is no representative of the county, except the commissioners themselves; they may allow the claim, either upon evidence introduced by the plaintiff, or without other proof than their own knowledge of the truth of the claim; and an appeal from their decision is tried and determined by the circuit court of the county as an original cause, and upon the complaint filed before the commissioners. Indiana Rev. Stat. §§ 5758–5761, 5777; *State* v. *Washington Commissioners*, 101 Indiana, 69; *Orange Commissioners* v. *Ritter*, 90 Indiana, 362, 368. It follows, according to the decisions of this court in analogous cases, that the trial in the Circuit Court of the county was "the trial" of the case, at any time before which it might be removed into the Circuit Court of the United States, under clause 3 of section 639 of the Revised Statutes. *Boom Co.* v. *Patterson*, 98 U. S. 403; *Hess* v. *Reynolds*, 113 U. S. 73; *Union Pacific Railway* v. *Kansas City*, 115 U. S. 1, 18; *Searl* v. *School District*, 124 U. S. 197, 199.

The only ruling upon evidence, which is excepted to, is to the exclusion of the complaint in an action brought by the present plaintiff against its assignors. But there is no material difference between the facts stated in that complaint and those stated in the complaint in the present suit; and the former complaint, not under oath, nor signed by the plaintiff, but only by its attorneys, was clearly incompetent to prove an admission by the plaintiff that upon those facts it had not a cause of action against this defendant. *Combs* v. *Hodge*, 21 How. 397; *Pope* v. *Allis*, 115 U. S. 363; *Dennie* v. *Williams*, 135 Mass. 28.

We are then brought to the main question of the liability of the defendant to the plaintiff, depending upon the validity and effect of the partial assignment to the plaintiff from the original contractors of their contract with the defendant.

By the law of Indiana, the assignee by a valid assignment of an entire contract, not negotiable at common law, may maintain an action thereon in his own name against the original debtor; and the assignee by valid assignment of part of a contract may sue thereon jointly with his assignor, or may maintain an action alone if no objection is taken by demurrer or answer to the nonjoinder of the assignor. Indiana Rev. Stat. § 251; *Groves* v. *Ruby*, 24 Indiana, 418. These rules govern the practice and pleadings in actions at law in the federal courts held within the State. Rev. Stat. § 914; *Thompson* v. *Railroad Companies*, 6 Wall. 134; *Albany & Rensselaer Co.* v. *Lundberg*, 121 U. S. 451; *Arkansas Co.* v. *Belden Co.*, 127 U. S. 379, 387. The case at bar was therefore rightly treated by the court below as an action at law; and the real question in controversy is not one of the form of pleading, but whether the plaintiff has any beneficial interest as against the defendant in the contract sued on.

A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable. But when rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and his obligations, cannot be assigned without the consent of the other party to the original contract. *Arkansas Co.* v. *Belden Co.*, 127 U. S. 379, 387, 388. And the fact that that party is or represents a municipal corporation may have a bearing upon the question whether the contract is assignable, in whole or in part, without its assent.

By the Revised Statutes of Indiana, it is the duty of the county commissioners to cause jails and other county buildings to be built and furnished, and to keep them in repair. Indiana Rev. Stat. § 5748. But they are forbidden to contract for the construction of any building, the cost of which exceeds $500, except upon public advertisement for bids and

to the lowest responsible bidder, and taking from him a bond with sureties to faithfully perform the work according to the contract, and to promptly pay all debts incurred by him in the prosecution of the work, including labor and materials furnished; and any laborer or material-man having a claim against the contractor may sue upon that bond. Indiana Rev. Stat. §§ 4244, 4247.

It has been held by the Supreme Court of Indiana that the only remedy of laborers and material-men is against the contractor, or upon his bond, and that they have no lien upon the building, or right of action against the county; as well as that a county cannot be charged by process in the nature of garnishment or foreign attachment for the debts of its creditors to third persons; and the reason assigned in each class of cases is, that it would be contrary to public policy that a county should be involved in controversies and litigations between its contractors and their creditors. *Parke Commissioners* v. *O'Conner*, 86 Indiana, 531; *Secrist* v. *Delaware Commissioners*, 100 Indiana, 59; *Wallace* v. *Lawyer*, 54 Indiana, 501.

In *Bass Foundry* v. *Parke Commissioners*, 115 Indiana, 234, where a contractor, to whom the county commissioners had let a contract for the construction of a court-house and jail, sublet the iron work to the plaintiff, and, after partially completing the buildings, abandoned the work and declared his inability to resume it; and it was alleged in the complaint, and admitted by demurrer, that the commissioners agreed with the plaintiff to pay it for such work; it was held that it was within the incidental power of the commissioners, without letting a new contract, to take charge of the work and complete the building, and to bind the county to pay the plaintiff the actual and reasonable value of iron work done by him at their request; but that they had no power to assume, on behalf of the county, debts due from the contractor to the plaintiff; and the court, after referring to the statutes above cited, said: "In the event that a contractor should abandon his contract when the work was at such an incipient stage as that to complete it would amount practically to the construction of a court-house by county commissioners, without regard to the contract

previously let, it might be a question whether the contracts made by them for labor and materials would be binding as such upon the county." 115 Indiana, 243.

In *Bartholomew Commissioners* v. *Jameson*, 86 Indiana, 154, cited for the plaintiff, the assignment was of an entire sum due to the assignor for personal services. In *Smith* v. *Flack*, 95 Indiana, 116, likewise cited for the plaintiff, the municipality was not a party to the suit, nor were its rights or liabilities brought in question; but the controversy was upon the effect of an assignment as between the parties to it and persons claiming under them.

In the case at bar, by the original contract between Meyers & Son and the county commissioners, the contractors agreed to construct a jail for the county, and to provide all the materials therefor, for a gross sum of $20,000, which the commissioners agreed to pay, partly in monthly payments on their architect's certificate, and the rest upon the completion and acceptance of the building; and it was expressly agreed that the county should not in any manner be answerable or accountable for any materials used in the work; and also that, if the contractors should fail to finish the work by the time agreed on, they should pay to the commissioners, as and for liquidated damages, the sum of twenty-five dollars for every day the work should remain unfinished. Meyers & Son executed a bond for their faithful performance of the contract, as required by the statute.

By the subsequent assignment, to which neither the county nor the board of commissioners was a party, Meyers & Son undertook to assign to the plaintiff the obligation to construct and put in place in the jail all the iron work required by the original contract, as if the contract for such work had been awarded directly by the commissioners to the plaintiff; and undertook to fix the contract price for such work at $7700, to be paid by the commissioners at the times mentioned in the original contract.

The plaintiff in fact did the iron work according to the original contract and to the acceptance of the commissioners, and to the value of more than $7700, but not within the time

stipulated in that contract. Soon after the plaintiff began to do that work, the commissioners made a settlement with the original contractors, which, if valid, left in their hands much less than that sum.

The court declined to instruct the jury, as requested by the defendant, that the statutes of Indiana required contracts for the construction of jails and other county buildings to be advertised and let by the board of commissioners as an entirety, and not in parts; and that the contract between Meyers & Son and the board of commissioners was not divisible and assignable by the contractors, and their assignment of part of the contract to the plaintiff and mere notice thereof to the board did not impose any obligation upon the board to recognize the assignment, and to account and settle with and pay the plaintiff for work done and materials furnished by the latter.

There was conflicting evidence upon two points: 1st. Whether the commissioners before the settlement had notice of the assignment to the plaintiff; 2d. Whether the settlement was made in good faith. The judge instructed the jury that the plaintiff was entitled to recover, either if the defendant had such notice, or if the settlement was in bad faith. Exceptions were taken to the refusal to give the instruction requested, and to the instruction given upon the first alternative only. But it cannot be known on which alternative the jury proceeded in coming to their verdict. Upon the evidence before them and the instructions given, they may have concluded that the settlement between the defendant and the original contractors was in perfect good faith, and left in the defendant's hands much less than the sum claimed by the plaintiff, and that the defendant never assented to any assignment or division of the contract, and may have found for the plaintiff upon the single ground that they were satisfied that the defendant had notice of the assignment. The decision of the case therefore turns on the correctness of the instructions refused and given upon the effect of the assignment and notice.

This case does not require us to consider whether an assign-

ment of the entire contract for the construction of the jail would have been consistent with the intention of the parties as apparent upon the face of the contract, or with the intention of the legislature as manifested by the statutes under which the contract was made. The plaintiff claims under no such assignment.

Those statutes and the judicial exposition of them by the Supreme Court of the State, as well as the terms of the contract itself, are quite inconsistent with the theory that the original contractors can, at their pleasure, and without the assent of the county commissioners, split up the contract and assign it in parts, so as to transfer to different persons or corporations the duty of furnishing different kinds of material and labor, and the right of recovering compensation for such material and labor from the county commissioners.

Both the statutes and the contract contemplate that the county commissioners shall be liable only to the contractors for the whole work, and not to any persons doing work or supplying materials under a subcontract with them.

The original contract of the county commissioners was for the construction by Meyers & Son of the building as a whole by a certain date; for the payment to them by the commissioners of a gross sum of $20,000 for such construction, upon an accounting with them from time to time; and for the payment by the contractors of twenty-five dollars, as liquidated damages, for every day that the building should remain unfinished beyond that date.

The assignment was not in the nature of a mere order for the payment of a sum of money; but it was of that part of the contract which related to the iron work, and required the assignee to perform this part of the work, and assumed to fix at the sum of $7700 the compensation for this part, which the assignee should receive from the commissioners. There is nothing, either in the original contract, or in the evidence introduced at the trial, to show what proportion the iron work bore to the rest of the work requisite for the construction and completion of the jail, or that any separate estimate of the cost or value of the iron work was contemplated by the

original contract, or ever made by the defendant, or by any officer or agent of the county.

In short, the only agreement which the county commissioners were proved to have made was with Meyers & Son, to pay them a gross sum of $20,000 for the whole work upon an accounting with them, and Meyers & Son paying damages as agreed for any delay in its completion. The agreement of Meyers & Son with the plaintiff assumed to compel the commissioners to pay the plaintiff, for its performance of part of the work, a definite sum of $7700, and made no provision for damages for delay, and thus undertook to fix a different measure of compensation from the original contract.

The facts that the iron work was done by the plaintiff to the acceptance of the commissioners, though after the time stipulated in the original contract, and was of the value of more than $7700, did not conclusively prove, as matter of law, that the commissioners, on behalf of the county, made or recognized any contract with or liability to the plaintiff, in the place and stead of its assignors and employers; or preclude the commissioners from insisting on the right to pay no more than the amount due, according to the original contract, for the whole of this and other work necessary to complete the building, and to ascertain the amount so due by an accounting and settlement with Meyers & Son, in which the sum due for all kinds of work, as well as the stipulated damages for any delay in completing the building, could be taken into consideration.

The county commissioners could not, without their consent, and at the mere election of the original contractors and their subcontractors and assignees, be compelled to account with the latter separately, or be charged with a separate obligation to pay either of them a part of the entire price, instead of accounting for and settling the whole matter with the original contractors.

It might be within the authority of the commissioners, upon becoming satisfied that Meyers & Son, after having performed a substantial part of their original contract, were unable to complete it, to give their consent to such an agreement with the plaintiff as was described in the assignment; and it is

possible that the jury would have been authorized upon the evidence to find such a consent.

But the difficulty with the instructions given to the jury is, that no question of such consent was submitted to or determined by them; and that they were in effect instructed, in direct opposition to the request of the defendant, that mere notice to the defendant of the assignment to the plaintiff would prevent the defendant from afterwards making a settlement with the original contractors in good faith and according to the sums justly due by the terms of the contract from either party to the other, without retaining in its hands enough to pay the plaintiff's claim. This instruction held the defendant bound by a contract to which it was not proved to have ever assented, and requires a new trial to be granted.

The cases in other States, cited for the plaintiff, in which municipal corporations have been held liable to an assignee of a contract, upon notice of the assignment, without proof of their consent, expressed or implied, are distinguishable from the case before us, and quite consistent with our conclusion.

In some of them, the assignments were of the whole or part of money already due, or to become due, to the contractor, in other words, assignments of a fund, and not of any obligation to perform work. *Brackett* v. *Blake*, 7 Met. 335; *Field* v. *New York*, 6 N. Y. 179; *Hall* v. *Buffalo*, 1 Keyes, 193; *Parker* v. *Syracuse*, 31 N. Y. 376; *People* v. *Comptroller*, 77 N. Y. 45. In others, the assignments were of entire contracts for the labor of convicts, or for work upon streets, which were held, from the nature of the subject, to imply no personal confidence in the contractor. *Horner* v. *Wood*, 23 N. Y. 350; *Devlin* v. *New York*, 63 N. Y. 8; *Ernst* v. *Kunkle*, 5 Ohio St. 520; *St. Louis* v. *Clements*, 42 Missouri, 69; *Taylor* v. *Palmer*, 31 California, 241.

The plaintiff much relied on a decision of the Supreme Court of Pennsylvania, in a case in which a contractor to build a school-house for a city assigned his right to all moneys due or to become due under it; the city, with notice of the assignment, and after the school-house had been built by the assignees and accepted and occupied by the city, paid the last

instalment of the price to the original contractor; there was no controversy as to the performance of the work, or as to the amount to be paid, but only as to the person entitled to receive payment; and the court, treating the assignment as one of money only, held the assignee entitled to recover against the city. *Philadelphia* v. *Lockhardt*, 73 Penn. St. 211, 216.

On the other hand, that court, speaking by the same judge, in a case decided within five years afterwards, and more nearly resembling the one now before us, where a contractor for building a bridge assigned all his interest in the contract, "except the item of superstructure," to one who had expended money upon the bridge, held that such a partial assignment of the contract, though notified to the city, did not make it liable to the assignee, because "the policy of the law is against permitting individuals, by their private contracts, to embarrass the financial affairs of a municipality." *Philadelphia's Appeal*, 86 Penn. St. 179, 182. See also *Geist's Appeal*, 104 Penn. St. 351, 354.

It thus appears that the Supreme Court of Pennsylvania has taken the same view as the Supreme Court of Indiana, as already shown, holding it to be against public policy to permit municipal corporations, in the administration of their affairs relating to the construction of public works, to be embarrassed by sub-contracts between their contractors and third persons, to which they have never assented.

Judgment reversed, and case remanded with directions to set aside the verdict and order a new trial, and to take such further proceedings as may be consistent with this opinion.

WISCONSIN CENTRAL RAILROAD COMPANY *v.* PRICE COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 76. Argued and submitted November 6, 7, 1889. — Decided March 3, 1890.

No State has power to tax the property of the United States within its limits.

Where Congress has prescribed conditions upon which portions of the public domain may be alienated, and has provided that upon the performance of the conditions a patent shall issue to the donee or purchaser, and all such conditions have been complied with, and the tract to be alienated is distinctly defined, and nothing remains but to issue the patent, then the donee or purchaser is to be treated as the beneficial owner of the land, holding it as his own property, subject to state and local taxation; but when an official executive act, prescribed by law, remains to be done before the tract can be distinctly defined, and before a patent can issue, the legal and equitable titles remain in the United States, and the land is not subject to local taxation.

The act of the Secretary of the Interior in approving the selection of indemnity lands by a railroad land-grant company, to supply deficiencies in selections within the place limits, is judicial, and until it is done the company has no equitable right in the selected tracts; and this rule is not affected by the fact that such a refusal was given under a mistake of law, and was subsequently withdrawn, and an assent given.

A mere dictum in an opinion, not essential to the decision, is not authoritative and binding.

In April, 1884, the plaintiff in this suit, the Wisconsin Central Railroad Company, a corporation created under the laws of Wisconsin, was the owner of certain lands situated in the town of Worcester, in the county of Price, in that State, and had a patent for them from the State bearing date on the 25th of February, 1884, upon which taxes had, in the year 1883, been assessed by that county, although, as claimed by the plaintiff, the title to a part of these lands was at that time in the United States, and to the remainder of them in the State of Wisconsin. Upon a claim that the lands were thus exempt from taxation, the plaintiff, in April, 1884, brought the present suit in a Circuit Court of the State, to obtain its judgment

that the state taxes were illegal, and to enjoin proceedings for their enforcement.

The facts, out of which this claim that the lands were exempt from taxation arose, are briefly these: On the 5th of May, 1864, Congress passed an act making a grant of lands to the State of Wisconsin to aid in the construction of three distinct lines of railway between certain designated points. 13 Stat. 66, c. 80. One of these lines is now held by the plaintiff. The grant in aid of it is in the third section of the act, the language of which is as follows:

"That there be, and is hereby, granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Portage City, Berlin, Doty's Island, or Fond du Lac, as said State may determine, in a northwestern direction, to Bayfield, and thence to Superior, on Lake Superior, every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road, upon the same terms and conditions as are contained in the act granting lands to said state, to aid in the construction of railroads in said state, approved June three, eighteen hundred and fifty-six. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of, any sections or parts thereof, granted as aforesaid, or that the right of preemption or homestead has attached to the same, that it shall be lawful for any agent or agents of said state, appointed by the governor thereof, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, as much public land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of preëmption or homestead has attached as aforesaid, which lands (thus selected in lieu of those sold and to which the right of preëmption or homestead has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by said state, or by the company to which she may transfer the same, for the

use and purpose aforesaid: *Provided*, That the lands to be so located shall in no case be further than twenty miles from the line of said road."

The seventh section enacted: "That whenever the companies to which this grant is made, or to which the same may be transferred shall have completed twenty consecutive miles of any portion of said railroads, supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, patents shall issue conveying the right and title to said lands to the said company entitled thereto, on each side of the road, so far as the same is completed and coterminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each twenty miles of said road is completed: *Provided, however*, That no patents shall issue for any of said lands unless there shall be presented to the Secretary of the Interior a statement, verified on oath or affirmation by the president of said company, and certified by the governor of the state of Wisconsin, that such twenty miles have been completed in the manner required by this act, and setting forth with certainty the points where such twenty miles begin and where the same end; which oath shall be taken before a judge of a court of record of the United States."

The ninth section declared: "That if said road mentioned in the third section aforesaid is not completed within ten years from the time of the passage of this act, as provided herein, no further patent shall be issued to said company for said lands, and no further sale shall be made, and the lands unsold shall revert to the United States."

By the act of Congress of April 9, 1874, the time for the completion of the road and for the reversion of the lands was extended to December 31, 1876. 18 Stat. 28, c. 82.

All the lands embraced by section three of the act of 1864 were granted in 1866 by the State of Wisconsin to the Portage and Lake Superior Railroad Company and to the Winnebago and Superior Railroad Company, respectively, companies which had been incorporated under the laws of that State.

Statement of the Case.

Private and Local Laws of Wisconsin of 1866, c. 314, § 8; c. 362, § 9. In 1869 the consolidation of these two companies, under the name of the Portage, Winnebago and Superior Railroad Company, was authorized by the State, and, in 1871, the name of the consolidated company was changed to the Wisconsin Central Railroad Company, the plaintiff in this suit.

The Portage, Winnebago and Superior Railroad Company duly filed the location of its road from Stevens' Point to Bayfield on October 7, 1869; and in December following the Commissioner of the General Land Office withdrew from sale, preëmption and homestead entry the odd-numbered sections of land within the twenty-miles limit along the line of the location. The road was built in sections of twenty miles each. Section six and portions of sections five and seven fell within Price County. Section five was completed in February, 1874, section six in December, 1876, and section seven in June, 1877.

The whole number of acres in the odd-numbered sections along the line of the railroad within the ten-mile limits was 1,377,383.93. Of this number 789,622 acres had been disposed of by the United States before the act of May 5, 1864, was passed, and 161,659.53 were disposed of after its passage and before the line of the road was located in October, 1869.

The plaintiff, the Wisconsin Central Railroad Company, received from the United States, prior to November 16, 1877, patents for the 240,363.54 acres within the place limits, that is, within ten miles on either side of the line of the road as located, and patents for 203,459.62 acres within the indemnity limits, that is, between ten and twenty miles of the line of the road. On January 9, 1878, the company received from the United States a patent for 162,622.89 acres, and on August 10, 1878, a patent for 29,398.51 acres, both of these patents covering land within the place limits. No other patents were issued by the United States to the company previous to the commencement of this suit, and the patents issued did not include the land upon which the taxes were assessed, to restrain the collection of which the suit is brought. Of the lands in question, eleven parcels of forty acres each lay within

the place limits. The remainder of the lands lay within the indemnity limits. A list of selections of lands within the place limits claimed by the company on account of the sixth section of the road from Stevens' Point to Bayfield, was filed in the local land office on December 5, 1876; they included, among other lands, the eleven forties mentioned. A list of selections of land within the indemnity limits claimed by the company on account of the same section of railway, was filed in that office on the 9th and 15th of December, 1876; they included the remainder of the lands referred to in the complaint. Repeated demands were made by the railroad company, from the time these lists were filed until after the trial of this cause, for patents covering the lands referred to, but no patents were granted for any of them. A full statement of the efforts to secure patents is given in the testimony of the vice-president and general legal manager of the company.

It appears from this statement, the accuracy of which is not questioned in any particular, that up to the time of the decision of this court in *Leavenworth, Lawrence & Galveston Railroad* v. *United States*, 92 U. S. 733, which was rendered in April, 1876, it had been the practice of the Land Department to allow grantees by the United States of land to aid in the construction of railroads, whose grants were similar in their terms to the one under consideration here, to take land from the indemnity limits in lieu of lands sold or otherwise disposed of by the United States prior to the passage of the act, and of lands to which a preëmption or homestead right had previously attached; but that this practice was subsequently changed in consequence of the language of the court in that case and its supposed decision that indemnity could be allowed only for such lands as were sold or reserved or otherwise disposed of, or to which the right of preëmption or homestead had attached, between the passage of the act and the time the line or route of the road was definitely fixed.

The Commissioner of the General Land Office, in a letter addressed to the Secretary of the Interior, under date of November 16, 1877, contained in the record, stated that this practice had existed since the inauguration of the railroad land

grant system, but that it would appear from the decision in question that the practice was erroneous; that indemnity could only be allowed for lands sold or disposed of after the passage of the granting act, and applying that rule to the grant under consideration the company had received patents for 41,820.09 acres in excess of the indemnity authorized. The Secretary of the Interior, in answer to this letter, under date of December 26, 1877, referred to the decision of the Supreme Court, and held in pursuance of it that lands sold or disposed of by the United States prior to the passage of the act granting lands to the State of Wisconsin were excepted from the operation of the grant, and that indemnity could not be obtained for the lands thus lost — citing from the opinion of the court to show that such was its decision. The Secretary concluded by stating that in accordance with that rule the company had already received 41,820.09 acres in excess of what it was entitled to, and instructed the commissioner to call upon the company to relinquish its claim to that quantity of land, in order that it might be restored to the public domain. Repeated efforts were afterwards made by the agents of the company to induce the Secretary of the Interior to change his views upon that point, but without success. Accordingly, no selections of indemnity lands for lands lost from the grant within the place limits along the line of the constructed road known as section six were ever approved by him, and no patents of the United States were issued for such lands, or for any lands within the place limits along that section, until after this suit was commenced.

Having failed to secure any patent from the United States, the plaintiff made application in February, 1884, to the State of Wisconsin for a patent, and, on the 25th of that month, a patent by the State was issued to it embracing the lands mentioned in the complaint. When application was thus made to the officials of the State, a careful examination was had by them of the selections in order to determine whether any of the parcels were swamp lands.

There was no controversy concerning the facts of the case, and the trial court found substantially as follows:

1. That the lands described in the complaint were all wild,

unoccupied, and unimproved and situated in the town of Worcester in the county of Price, and were a portion of the lands granted to the State by the third section of the act of Congress of May 5, 1864, for the purpose of constructing what is now the plaintiff's railroad.

2. That eleven forties of the land described were situated within the ten-mile limits of said grant, and all the rest within the indemnity limits, and all in odd-numbered sections.

3. That all of said lands were assessed in that town in 1883 and put on the tax-roll, and the amount of tax carried out against each respective piece, but were not assessed to the plaintiff by name, or to any one else, or to "unknown owners," and that none of the real estate included in the assessment-roll for that year was assessed to the owners thereof; that a warrant was attached to said tax-roll and the roll, with said warrant attached, placed in the hands of the town treasurer for collection; that the taxes were unpaid thereon, and the town treasurer returned the same to the county treasurer as delinquent.

4. That on the 25th of February, 1884, the plaintiff received a patent from the State for all said lands, and thereby acquired the absolute title in fee to the same; that until then the plaintiff could get no title to the lands and had no right to sell or convey the same; that until they were segregated and identified and the grant applied thereto, the grant was "a float."

5. That the plaintiff's right to the lands was in dispute between the State and the United States; that said lands and others were withheld from the State and the plaintiff by the Secretary of the Interior, and thereby the issue of patents therefor by the United States was delayed; that the plaintiff did not in any manner cause the delay, but, on the contrary, was diligent and persistent in its efforts to procure the patents; that the delay in their issue was caused entirely by the government of the United States and the General Land Office, against the protest of both the plaintiff and the State, and in spite of continued and unintermitted efforts made by both to obtain their issue by the Interior Department.

Statement of the Case.

6. That the lands described had at the time the taxes were levied and assessed thereon in 1883 been selected as lands to which said land grant applied, but said selections had not been approved by the Secretary of the Interior and had not been certified to the State, or in any manner identified as lands for which the plaintiff would eventually receive patents, but, on the contrary, the Secretary of the Interior refused to recognize the right of the State to the lands or to approve the selections made.

As conclusions of law the court found, in effect:

1. That it was not the intent and meaning of the act of Congress that said lands should be subject to taxation until they had been earned by the plaintiff and patented by the United States; that while they had been in truth earned by the plaintiff before they were assessed for taxation, yet the plaintiff's right to the same and to patents therefor had been denied by the Secretary of the Interior; that the plaintiff could not exercise control over them until it should be determined whether it was entitled to receive patents for them as part of the lands granted.

2. That the lands were "a float" as long as the plaintiff's right thereto was not admitted and recognized by the Secretary of the Interior, but denied and disputed by him and patents therefor withheld by him against the will and request of the plaintiff, and hence during such time the lands were not subject to taxation by the State.

3. That said lands were not subject to taxation in 1883, and that the taxes levied and assessed thereon for that year were illegal and void for the reason that said lands were then exempt from taxation.

4. That said tax was a cloud upon the plaintiff's title to said lands, and it was, therefore, entitled to the relief prayed for in the complaint.

Upon these findings judgment in favor of the plaintiff perpetually restraining the defendants from collecting said taxes was entered. The defendants appealed to the Supreme Court of the State, by which the judgment below was reversed, and the cause remanded to the Circuit Court with directions to

dismiss the complaint. 64 Wisconsin, 579. To review this latter judgment the cause was brought to this court on writ of error.

Mr. Louis D. Brandeis and *Mr. Jeremiah Smith* (with whom was *Mr. Edwin H. Abbot* on the brief) for plaintiff in error.

Mr. Willis Hand, *Mr. M. Barry* and *Mr. John C. Spooner*, for defendants in error, submitted on their brief.

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

It is familiar law that a State has no power to tax the property of the United States within its limits. This exemption of their property from state taxation — and by state taxation we mean any taxation by authority of the State, whether it be strictly for state purposes or for mere local and special objects — is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency. If the property of the United States could be subjected to taxation by the State, the object and extent of the taxation would be subject to the State's discretion. It might extend to buildings and other property essential to the discharge of the ordinary business of the national government, and in the enforcement of the tax those buildings might be taken from the possession and use of the United States. The Constitution vests in Congress the power to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise. *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 168.

This doctrine of exemption from taxation of the property of the United States, so far as lands are concerned, is in express

terms affirmed in the constitution of Wisconsin, which ordains that the State "shall never interfere with the primary disposition of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to *bona fide* purchasers thereof; and no tax shall be imposed on land the property of the United States." Constitution of 1848, Art. II, sec. 2.

It follows that all the public domain of the United States within the State of Wisconsin was in 1883 exempt from state taxation. Usually the possession of the legal title by the government determines both the fact and the right of ownership. There is, however, an exception to this doctrine with respect to the public domain, which is as well settled as the doctrine itself, and that is, that where Congress has prescribed the conditions upon which portions of that domain may be alienated, and provided that upon the performance of the conditions a patent of the United States shall issue to the donee or purchaser, and all such conditions are complied with, the land alienated being distinctly defined, it only remaining for the government to issue its patent, and until such issue holding the legal title in trust for him, who in the meantime is not excluded from the use of the property — in other words, when the government has ceased to hold any such right or interest in the property as to justify it in withholding a patent from the donee or purchaser, and it does not exclude him from the use of the property — then the donee or purchaser will be treated as the beneficial owner of the land, and the same be held subject to taxation as his property. This exception to the general doctrine is founded upon the principle that he who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of state taxation.

Thus, in *Carroll* v. *Safford*, 3 How. 441, 461, the complainant had entered certain lands belonging to the United States, in the local land office, paid for them the required price, and received from the office a land certificate. Patents were issued for them, but, before their issue, the lands were assessed for taxation and sold for the taxes. The question whether

they were subject to taxation by the State after their entry and before the patents were issued was answered in the affirmative. Said the court: "When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be cancelled by the United States than a patent;" and again: "It is said the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically, at law, but not in equity. The land in the hands of the purchaser is real estate, descends to his heirs, and does not go to his executors or administrators." And again: "Lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are considered, they are protected under the patent certificate as fully as under the patent. Suppose the officers of the government had sold a tract of land, received the purchase money, and issued a patent certificate: can it be contended that they could sell it again, and convey a good title? They could no more do this than they could sell land a second time which had been previously patented. When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser; and any second purchaser would take the land charged with the trust."

In *Witherspoon* v. *Duncan*, 4 Wall. 210, 218, a similar question arose and was in like manner answered. Said the court: "In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they are private property. If subject to sale, the government has no power to revoke the entry and withhold the patent. A second sale, if the first was authorized by law, confers no right on the buyer, and is a void act;" and again: "The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime

holds the naked legal fee in trust for the purchaser, who has the equitable title." See, also, *Railway Co.* v. *Prescott*, 16 Wall. 603, 608; *Railway Co.* v. *McShane*, 22 Wall. 444, 461.

In the light of these decisions, it will be necessary, in order to determine the liability of the property held by the plaintiff to taxation in 1883, to consider the nature and extent of its interest in the property at that time acquired under the grant of Congress of May, 1864, and by its subsequent construction of the road.

Numerous grants of land were made by Congress between 1860 and 1880 to aid in the construction of railroads; some directly to incorporated companies, others to different States, the lands to be by them transferred to companies by whom the construction of the roads might be undertaken. The different acts making these grants were similar in their general provisions, and so many of them have been, at different times, before this court for consideration that little can be said of their purport and meaning, the title they transfer, and the conditions upon which the lands could be used and disposed of, which has not already and repeatedly been said in its decisions. Each grant gave a specified quantity of lands, designated by sections along the route of the proposed road, with the exception of such as might, when the line of the road should be definitely fixed, have been disposed of or reserved by the government, or to which a preëmption or homestead right might then have attached. For these excepted sections, which otherwise would have been taken from those designated along the line of the road, other lands beyond those sections within a specified distance were allowed to be selected. The title conferred was a present one, so as to insure the donation for the construction of the road proposed against any revocation by Congress, except for non-performance of the work within the period designated, accompanied, however, with such restrictions upon the use and disposal of the lands as to prevent their diversion from the purposes of the grant. It was the practice of the Land Department, as shown by the evidence in this record, up to the decision of *Leavenworth, Lawrence & Galveston Railroad Co.* v. *United States*, in April, 1876, 92 U. S.

733, to allow deficiencies in the quantity of land intended to be granted, arising from sales or other disposition made before the date of the grant, as well as those made subsequently, and those arising from the attachment of preëmption or homestead rights, to be supplied from lands lying beyond the original sections, within what were termed the indemnity limits. This practice was held in *Winona & St. Peter Railroad Co.* v. *Barney* to have been correct. 113 U. S. 618, 625. As the court there said: "The policy of the government was to keep the public lands open at all times to sale and preëmption, and thus encourage the settlement of the country, and, at the same time, to advance such settlement by liberal donations to aid in the construction of railways. The acts of Congress, in effect, said: 'We give to the State certain lands to aid in the construction of railways lying along their respective routes, provided they are not already disposed of, or the rights of settlers under the laws of the United States have not already attached to them, or they may not be disposed of or such rights may not have attached when the routes are finally determined. If at that time it be found that of the lands designated any have been disposed of, or rights of settlers have attached to them, other equivalent lands may be selected in their place, within certain prescribed limits.' The encouragement to settlement by aid for the construction of railways was not intended to interfere with the policy of encouraging such settlement by sales of the land, or the grant of preëmption rights." The court accordingly held that the indemnity clause covered losses from the grant by reason of sales and the attachment of preëmption rights previous to the date of the act, as well as by reason of sales and the attachment of preëmption rights between that date and the final determination of the route of the road.

After the decision of the court in the Leavenworth case the Land Department changed its practice and refused to allow the deficiencies, arising from sales or other disposition made, or from the attachment of preëmption or homestead rights before the date of the act, to be made up from selections within the indemnity limits. But that decision did not warrant the change. The question in that case was not, for what deficien-

cies indemnity could be had, but what lands could be taken for deficiencies which existed. If what was then said indicated that deficiencies which could be supplied were limited to such as might arise after the passage of the act, it was a mere dictum not essential to the decision, and therefore not authoritative and binding. The refusal of the Land Department, therefore, to allow the deficiencies arising in the sections within the place limits in this case to be supplied by selections from the indemnity lands, and to issue patents of the United States for them, was erroneous.

The question now arises as to how far this refusal affected the legal or equitable title of the company to the lands taxed in 1883, for which it only obtained a patent in 1884. The lands taxed amounted to eleven parcels of forty acres each lying within the original sections named in the grant, that is, within the ten miles limit from the line of the road, and the remainder were within the indemnity limits. Neither were allowed, because, by excluding the deficiencies arising before the date of the grant from indemnity, the whole amount of the lands granted had already been patented. So far as the eleven parcels of forty acres each are concerned, the right of the plaintiff to them and to a patent for them had as early as 1877 become complete under the terms of the granting act. The line of the railroad had been definitely fixed on the 7th of October, 1869; and the three twenty-mile sections, numbers five, six, and seven, were all completed in June, 1877, and supplied with the buildings and appurtenances specified in the act to entitle the company to patents for them from the United States. The title conferred by the grant was necessarily an imperfect one, because, until the lands were identified by the definite location of the road, it could not be known what specific lands would be embraced in the sections named. The grant was, therefore, until such location, a float. But when the route of the road was definitely fixed, the sections granted became susceptible of identification, and the title attached to them and took effect as of the date of the grant, so as to cut off all intervening claims. *Schulenberg* v. *Harriman*, 21 Wall. 44, 60; *Leavenworth &c. Railroad* v. *United States*, 92 U. S.

733, 741; *Missouri, Kansas & Texas Railroad Co.* v. *Kansas Pacific Railway Co.*, 97 U. S. 491, 496; *Railway Co.* v. *Baldwin*, 103 U. S. 426, 429. The road having been built as early as June, 1877, and supplied, as required, with the appurtenances specified, the company was entitled to have the restrictions upon the use of the land released. It had then, to the eleven forty-acre parcels which were capable of identification, an indefeasible right or title; it matters not which term be used. The subsequent issue of the patents by the United States was not essential to the right of the company to those parcels, although in many respects they would have been of great service to it. They would have served to identify the lands as coterminous with the road completed; they would have been evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved of possibility of forfeiture for breach of them; they would have obviated the necessity of any other evidence of the grantee's right to the lands; and they would have been evidence that the lands were subject to the disposal of the railroad company with the consent of the government. They would have been in these respects deeds of further assurance of the patentee's title, and, therefore, a source of quiet and peace to it in its possessions.

There are many instances in the reports where such effect as is here stated has been given to patents authorized or directed to be issued to parties, notwithstanding they had previously received a legislative grant of the premises, or their title had been already confirmed. In *Langdeau* v. *Hanes*, 21 Wall. 521, 529, we have one of that kind. There, this court said: "In the legislation of Congress a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey; but where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer

from the government." We are of opinion, therefore, that these eleven forty-acre parcels were in 1883 subject to taxation by the State of Wisconsin. The lands had become the property of the railroad company, and there was nothing to hinder their use and enjoyment. For that purpose it is immaterial whether it be held that the company then had a legal and indefeasible title to the lands, or merely an equitable title to them to be subsequently perfected by patents from the government.

But as to the remainder of the lands taxed, which fell within the indemnity limits, the case is different. For such lands no title could pass to the company not only until the selections were made by the agents of the State appointed by the governor, but until such selections were approved by the Secretary of the Interior. The agent of the State made the selections, and they had been properly authenticated and forwarded to the Secretary of the Interior. But that officer never approved of them. Nor can such approval be inferred from his not formally rejecting them. He refused, as already stated, to issue to the company any patents for any more lands, insisting that it had already received over 40,000 acres too much, and he directed the Commissioner of the General Land Office to require the company to restore this excess to the government. The approval of the Secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any preëmption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And in determining whether a particular selection could be

taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and if so, what portion had been thus appropriated, and what portion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts. The doctrine, that until selection made no title vests in any indemnity lands, has been recognized in several decisions of this court. Thus in *Ryan* v. *Railroad Co.*, 99 U. S. 382, 386, in considering a grant of land by Congress, in aid of the construction of a railroad, similar in its general features to the one in this case, the court said: "Under this statute, when the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute. With respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed." And again, speaking of a deficiency in the land granted, it said: "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was, for that purpose." The selection had been approved by the Secretary.

In *St. Paul &c. Railroad* v. *Winona &c. Railroad*, 112 U. S. 720, 731, the court, speaking of a previous decision, said: "The reason of this is that, as no vested right can attach to the lands

in place — the odd-numbered sections within six miles of each side of the road — until these sections are ascertained and identified by a legal location of the line of the road, so in regard to the lands to be selected within a still larger limit, their identification cannot be known until the selection is made. It may be a long time after the line of the road is located before it is ascertained how many sections, or parts of sections, within the primary limits have been lost by sale or preëmption. It may be still longer before a selection is made to supply this loss."

In *Sioux City &c. Railroad* v. *Chicago &c. Railway*, 117 U. S. 406, 408, where the railroad grant as to indemnity lands was substantially similar to the one in this case, and one of the questions was as to the title to the indemnity lands, the court said: "No title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection made approved by the Secretary of the Interior."

In *Barney* v. *Winona &c. Railroad*, 117 U. S. 228, 232, the court said: "In the construction of land-grant acts, in aid of railroads, there is a well-established distinction observed between 'granted lands' and 'indemnity lands.' The former are those falling within the limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the Land Department, as of the date of the act of Congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection."

The same view has been held by different Attorneys General of the United States, in their official communications to heads of the departments, where selections of the public lands have been granted, subject to the approval of the Secretary of the Interior, *Cape Mendocino Lighthouse Site*, 14 Opinions Attys. Gen. 50, *Portage Land Grant*, Ib. 645, and such has been the consistent practise of the Land Department. The uniform language is, that no title to indemnity lands becomes vested in any company or in the State until the selections are made;

and they are not considered as made until they have been approved, as provided by statute, by the Secretary of the Interior.

It follows from these views that the indemnity lands described in the complaint were not subject to taxation as the property of the railroad company in 1883. The judgment of the Supreme Court of Wisconsin must, therefore, be

Reversed, and the cause remanded with directions to enter a decree perpetually enjoining the collection of the taxes levied in the year 1883 upon the indemnity lands, and dismissing the complaint as to the eleven parcels of forty acres each; and it is so ordered.

BURTHE *v.* DENIS.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 1381. Submitted January 13, 1890. — Decided March 3, 1890.

The property of a subject of the Emperor of the French in Louisiana was occupied by the army of the United States during the war of the rebellion. A claim for the injury caused thereby was adjusted by the commanding general, but payment was refused in consequence of the passage of the act of February 21, 1867, 14 Stat. 397, c. 57. After the organization of the commission under the Claims Convention of 1880 with France, 21 Stat. 673, his executor (he having meantime died in Paris leaving a will distributing his estate) presented this claim against the United States to the commissioners, and an allowance was made which was paid to the executor. In settling the executor's accounts in the courts of Louisiana two of the legatees, who were citizens of France, laid claim to the whole of the award. The other legatees, who were citizens of the United States, claimed the right to participate in the division of this sum. The award of the commission being silent on the subject, the briefs of counsel on both sides before the commission together with letters from the claimants' counsel, and a letter from one of the commissioners, were offered to show that only the claims on the part of the French legatees were considered by the commission, and the evidence was admitted. The Supreme court of Louisiana ordered the award to be distributed among all the legatees, French and American; *Held*.

Statement of the Case.

(1) That this court had jurisdiction to review the judgment of the state court;
(2) That the French legatees only were entitled to be represented before the commission, and they only were entitled to participate in the distribution;
(3) That the briefs of counsel were properly admitted in evidence;
(4) That the letters of counsel and of the commissioner should have been rejected; but,
(5) That it was immaterial whether the evidence was or was not received, as the decision of the question depended upon considerations which such evidence could in no way affect.

Extrinsic evidence to aid in the interpretation of the judgment of a court or commission is inadmissible unless, after reference to the pleadings and proceedings, there remains some ambiguity or uncertainty in it.

At the commencement of the late civil war L. F. Foucher, a citizen of France and a resident of the city of Paris, and bearing the title of Marquis de Circé, was the owner of a plantation situated on the east bank of the Mississippi River, a few miles above the centre of the city of New Orleans, though within its corporate limits. A portion of it was known as Exposition Park or Audubon Park. When the city was occupied by the Federal troops in 1862 they took possession of the plantation. Some of its fields were used for pasture; some were converted into camping ground; and upon part a hospital for the soldiers was built. The whole was in the military occupation and control of the United States, to the entire exclusion of the owner. In 1865 a claim for reimbursement of the damages sustained was presented on behalf of the owner to the Military Claims Commission sitting at New Orleans. General Canby, as commanding general of the district embracing that city, and the head of the commission, made a report upon the claim, recommending, upon the advice of his chief quartermaster, its settlement by the payment of $36,433.33. This report was addressed to the Adjutant General's Department, and forwarded to Washington in June, 1866. No part of this claim, was, however, paid, for the reason, as stated by counsel, that before action was had upon it the act of Congress of February 21, 1867, was passed, forbidding the settlement of any claim for the occupation of or injury to real estate by the military authorities or troops of the United

States where such claim originated during the war. 14 Stat. 397, c. 57.

In 1869 Foucher died, leaving a will, in which he made his widow, also a citizen of France, his universal legatee, and she was put in possession of his estate. In 1877 she died, leaving a will by which she devised her entire estate to her nephews and nieces, who were appointed her universal legatees, jointly. After some litigation to determine the true construction of this will, the legatees went into possession of her estate. 31 La. Ann. 568. The estates both of Foucher and of his widow were settled and the property distributed among the legatees of the latter or their heirs. The executors were discharged and the successions considered as finally closed. Neither the estate of Foucher nor of his widow had received any moneys upon the claim which had been presented on behalf of Foucher in 1865, for the damage sustained by the occupation and use of his plantation by the Federal troops, the payment of which had been recommended by General Canby; nor was any mention made of the claim in the distribution of the estate of either.

In January, 1880, a convention was concluded between the United States and France, 21 Stat. 673, by which it was agreed that "all claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the government of France, arising out of acts committed against the persons or property of citizens of the United States not in the service of the enemies of France, or voluntarily giving aid and comfort to the same, by the French civil or military authorities, upon the high seas or within the territory of France, its colonies and dependencies, during the late war between France and Mexico, or during the war of 1870–'71, between France and Germany, and the subsequent civil disturbances known as the 'Insurrection of the Commune;' and on the other hand, all claims on the part of corporations, companies or private individuals, citizens of France, upon the government of the United States, arising out of acts committed against the persons or property of citizens of France not in the service of the enemies of the United States, or voluntarily giving aid and

comfort to the same, by the civil or military authorities of the government of the United States, upon the high seas or within the territorial jurisdiction of the United States, during the period comprised between the thirteenth day of April, eighteen hundred and sixty-one, and the twentieth day of August, eighteen hundred and sixty-six, shall be referred to three commissioners, one of whom shall be named by the President of the United States, and one by the French government, and the third by His Majesty the Emperor of Brazil." The convention also provided that the commission thus constituted should be competent and obliged to examine and decide upon all claims of the above character presented to them by the citizens of either country, except such as had been already diplomatically, judicially or otherwise by competent authorities previously disposed of by either government; but that no claim or item of damage or injury based upon the emancipation or loss of slaves should be entertained. The convention also provided that the commission should, without delay, after its organization, proceed to examine and determine the claims specified, and that the concurring decisions of the commissioners or of any two of them should be conclusive and final; and the contracting parties especially engaged so to consider them, and to give full effect to such decisions, without any objections, evasions, or delay whatever.

The commission thus provided for was organized and proceeded to the hearing of claims at the city of Washington. The claim of Foucher was for acts committed against his property within the period prescribed, and the parties interested in that claim were desirous of presenting it to the commission for consideration. That commission, as it was authorized to do under the act of June 16, 1880, providing for carrying the treaty into effect, had adopted rules for the conduct of its business, among which was one that, if the claimant were dead, his executor or administrator, or legal representatives, must appear for him, and that each claimant should file in the office of the commission a statement of his claim, in the form of a memorial addressed to the commission. 21 Stat. 296, c. 253, § 4. The successions of Mr. and Mrs. Foucher were

accordingly reopened, and Arthur Denis was appointed dative testamentary executor in both, that is, an executor to take the place of the one named in the wills of the deceased.

Soon afterwards Mr. Denis filed in the office of the commission a memorial entitled "Arthur Denis, dative testamentary executor of Foucher *vs.* The United States." In this memorial he presented the claim in the right of Foucher, deceased, and joined with him as claimants all parties interested in the successions of Mr. and Mrs. Foucher, all of whom were citizens of the United States, except Paul Louis Burthe and Dominique François Burthe, who were citizens of France; and he filed a power of attorney showing that he appeared as their agent. Subsequently these latter parties filed a separate petition or memorial, in which they appeared in person. They are heirs each of one-eighth of the estate of Mrs. Foucher.

In June, 1883, the commission rendered its award as follows:

"Arthur Denis
vs.
The United States. } No. 603.

"We allow this claim at the sum of nine thousand and two hundred dollars, with interest at five per cent from April 1st, 1865."

Of this award Mr. Denis collected $8229.18, from which he reserved $114.98 for future costs, and deducted $2834.20 for charges and expenses, which are conceded to have been correct, leaving a balance of $5280. This sum as dative executor he proposed to distribute among all the heirs and legatees of Mrs. Foucher precisely as he would have done had this amount been moneys possessed by her as part of her estate at the time of her death. All the parties, except the plaintiffs in error, are citizens of the United States, and were such citizens at the time of the award. The plaintiffs in error being the only heirs who were at the time citizens of France, insisted that they were entitled to the whole award. Mr. Denis presented the matter to the Civil District Court for the Parish of Orleans for determination, showing the respective proportions the heirs and legatees would be entitled to receive if the sum

Statement of the Case.

mentioned was to be distributed among them in the same proportion as the original estates. Accompanying this showing — tableau of distribution as it is termed — he made the following statement:

"The undersigned, testamentary executor, understands that the French and American Claims Commission established the uniform jurisprudence for its decisions that it could not hear and determine any claims against the United States except those of claimants and beneficiaries who were French citizens, and that the said commission rejected all claims of persons not French citizens, even when they represented the claim of a deceased French person.

"In claim No. 603, of the succession of L. F. Foucher de Circé, the actual claimants are all American citizens except Paul Louis Burthe and Dominique François Burthe, who are French citizens. Under the said jurisprudence of the commission, and considering the status of the American claimants, the executor felt great doubt and hesitation as to the distribution to be made under this tableau. On the one hand it seemed as if the commission, under its rulings, could not have made any award in favor of the American claimants, and that the award as allowed must have been intended for the French claimants only; but, on the other side, the commission not having in express terms excluded the American claimants, the executor concluded, in making the tableau, to allow to the several legatees their recognized proportions of interest in the estates, leaving the French heirs to come by oppositions and assert their rights, if any they have, to the entire award."

To this representation, or tableau of distribution, the plaintiffs in error made opposition, alleging that they were entitled to the whole award, being the only heirs and legatees who were French citizens at the time the claim was presented and when the award was rendered; and that no award under the treaty could have been made in favor of the other heirs and legatees, they being citizens of the United States at that time, and that no executor, administrator or person representing the succession of a person who was not a French citizen at the time the damage was suffered and award rendered could have

any standing before the commission. The District Court of the parish, the court of original jurisdiction, maintained the position of the plaintiffs in error, and decreed that the entire fund, $5280, should go to them, one-half to each. From this judgment the executor appealed to the Supreme Court of Louisiana, which tribunal reversed the decree below, giving judgment in favor of the executor, to the effect that the entire fund in his possession from the award, less the charges and expenses incurred and the amount retained for future costs, should be distributed proportionally among the legatees and heirs of Mrs. Foucher, according to the tableau of distribution presented by him. From this latter judgment the case was brought to this court on writ of error.

Mr. Alexander Porter Morse, (with whom was *Mr. Charles Carroll* on the brief,) for plaintiffs in error.

Mr. Henry Chiapella for defendants in error.

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

As the contention of the plaintiffs in error that they are entitled to the entire award rendered by the French and American Claims Commission, after deducting from it the conceded charges and expenses, is founded upon the stipulations of the treaty of 1880, the refusal of the Supreme Court of Louisiana to recognize the right thus asserted by them presents a question for the jurisdiction of this court, within the express terms of the 25th section of the Judiciary Act of 1789, which is reproduced, somewhat enlarged in its provisions, in the Revised Statutes, § 709. The decision was against the right specially claimed under the treaty in question.

The position of the plaintiffs in error was, in our judgment, well taken, and should have been sustained. Independently of the express provisions of the treaty it could not reasonably be urged that the award should inure to the benefit of citizens of the United States. It would be a remarkable thing, and we think without precedent in the history of diplomacy, for

the government of the United States to make a treaty with another country to indemnify its own citizens for injuries received from its own officers. To any suggestion of that kind from a foreign country the government of the United States would probably answer that it was entirely competent to deal with its own citizens and to do justice to them without the interposition of any other country.

But the express language of the treaty here limits the jurisdiction of the commission to claims by citizens of one country against the government of the other. It matters not by whom the claim may have been presented to the commission. That body possessed no authority to consider any claims against the government of either the United States or of France, except as held, both at the time of their presentation and of judgment thereon, by citizens of the other country.

There is no ambiguity in the language of the treaty on this subject; it is entirely free from doubt. It is true Arthur Denis presented the claim as dative testamentary executor of Mr. Foucher's succession, and he joined, in his memorial to the commission, all the legatees and heirs under the will of Madame Foucher, to whom the estate of her husband had been left, appearing also for the plaintiffs in error under a power of attorney from them, they subsequently appearing in person. This memorial only gave the commission full knowledge of the origin and condition of the claim. It could not enlarge its power or bring within its jurisdiction any claim against the United States of other parties than citizens of France. When the award was made it could lawfully be intended for no other than such citizens. The right of the plaintiffs in error to the award arises from the treaty, to which any rules for the distribution of estates under the law of Louisiana must give way, the treaty being of superior authority in the case. They were entitled, each to one-eighth of any property coming to them as legatees of Mrs. Foucher, and that proportion of the whole claim shown to exist against the United States for damages to the property of her husband and for its use was all that the commission could allow, as it could not consider the interests of their co-legatees or co-heirs,

they not being citizens of France. The amount of the whole claim as set forth in the memorial presented by Denis exceeded $100,000. The amount which General Canby, in 1865, recommended to be paid, as already stated, exceeded $36,000. Whatever the damages sustained by Foucher as estimated by the commission, that body could allow only one-fourth thereof, the proportion due to the plaintiffs in error. Any award to their co-legatees would have been invalid and void. They may be entitled to an equal share in the whole claim against the government of the United States; but if so they must resort to remedies provided by the laws of the United States for the prosecution of claims against them, or, if those remedies are inadequate to give this relief, they must apply to Congress. Relief by the commission under the treaty could be given only to those legatees who were at the time citizens of France.

On the hearing before the District Court, the brief of counsel for the French government, and of private counsel filed with the commission for the claimants, and letters of the latter counsel, were produced to show that no claim was pressed by them except on behalf of the plaintiffs in error; and also a letter of one of the commissioners, to show that no other claim was considered by the commission. Objection was taken to this evidence on the ground that the decision of the commission could not be interpreted by subsequent testimony, or by the arguments of counsel before it, or the opinions of attorneys employed in the case. As we understand the objection, it went to the competency of the testimony, rather than to its sufficiency. As a general rule, the judgment of a court or commission is to be interpreted by its own language and the pleadings or proceedings upon which it is founded. Extrinsic evidence to aid in its interpretation is inadmissible unless after reference to the pleadings and proceedings there remains some ambiguity or uncertainty in it. In such cases resort may be had to other evidence, as where, from the generality of the language in the pleadings, or proceedings as well as in the decision, it becomes necessary to ascertain and limit the extent of the judgment intended. Thus where a former judgment is pleaded in bar of a second action upon the same demand, it is

competent to show by extrinsic evidence the identity of the demands in the two cases, if this does not appear on the face of the pleadings. *Washington, Alexandria & Georgetown Steam Packet Co.* v. *Sickles*, 24 How. 333; *Miles* v. *Caldwell*, 2 Wall. 35; *Cromwell* v. *County of Sac*, 94 U. S. 351, 355.

If it had been necessary to limit the effect of the award of the commission in the present case, we do not perceive any valid objection to extrinsic evidence for that purpose. The brief of counsel for the claimants would show the character and extent of their contention before that body. But letters of counsel and the letter of one of the commissioners can hardly be considered as competent evidence. Their declarations, if receivable at all, could only be so in the form of testimony given by them as witnesses in the case, and not in any *ex parte* written communication. But, though received as evidence, they could not have had any effect upon the decision as to the claim of the plaintiffs in error. Their claim rested on the treaty, which authorized no award in favor of any other parties before the commission. It is therefore immaterial that such evidence was received. The nature and extent of the award, and the parties entitled to it, depended upon considerations which such evidence could in no way affect.

It follows that the judgment of the Supreme Court of Louisiana must be

Reversed and the cause remanded, with directions to take further proceedings in accordance with this opinion; and it is so ordered.

BERNARDS TOWNSHIP *v.* MORRISON.

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

No. 195. Argued January 30, 31, 1890. — Decided March 3, 1890.

All the questions presented and argued in this case have been often considered and decided by this court, and the court adheres to the decisions in

Montclair v. *Ramsdell*, 107 U. S. 147; *Bernards Township* v. *Stebbins*, 109 U. S. 341; and *New Providence* v. *Halsey*, 117 U. S. 336.

Cotton v. *New Providence*, 47 N. J. Law, 401; and *Mutual Benefit Life Co.* v. *Elizabeth*, 42 N. J. Law, 235, approved.

The organization of townships and the number, character, and duties of their various officers are matters of legislative control.

Officers duly appointed under statute authority represent a municipality as fully as officers elected.

When the legislature has declared how an officer is to be selected, and the officer is selected in accordance with that declaration, his acts, within the scope of the powers given him by the legislature, bind the municipality.

In contract, to recover on bonds issued by a municipal corporation. Judgment for the plaintiff, to review which this writ of error was sued out. The case is stated in the opinion.

Mr. Alvah H. Clark and *Mr. James R. English* for plaintiffs in error.

Mr. Cortlandt Parker for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

This is an action on township bonds. Judgment was rendered against the township, and it alleges error. The bonds were issued under an act approved April 9, 1868, and found in the session laws of New Jersey for that year, pages 915, etc. Outside of the obligatory words, this was the form of the bond:

"This bond is one of a series of like tenor, amounting in the whole to the sum of one hundred and twenty-seven thousand dollars, issued on the faith and credit of said township in pursuance of an act entitled 'an act to authorize certain towns in the counties of Somerset, Morris, Essex and Union to issue bonds and take stock in the Passaic Valley and Peapack Railroad Company,' approved April 9, 1868.

"In testimony whereof, the undersigned, commissioners of the said township of Bernards, in the county of Somerset, to carry into effect the purposes and provisions of the said act, duly appointed, commissioned and sworn, have hereunto set

our hands and seals the first day of January, in the year of our Lord one thousand eight hundred and sixty-nine.

"JOHN H. ANDERSON, [L. S.]
"JOHN GUERIN, [L. S.]
"OLIVER R. STEELE, [L. S.]
"*Commissioners.*

"Registered in the county clerk's office.

"WILLIAM ROSS, JR.
"*County Clerk.*"

The first section of the act provides that, upon the application in writing of twelve or more resident freeholders, the Circuit Court of the county shall appoint three resident freeholders to be commissioners.

Section two reads as follows:

"That it shall be lawful for said commissioners to borrow, on the faith and credit of their respective townships, such sums of money not exceeding ten per centum of the valuation of the real estate and landed property of such township, to be ascertained by the assessment rolls thereof respectively for the year eighteen hundred and sixty-seven, for a term not exceeding twenty-five years, at a rate of interest not exceeding seven per centum per annum, payable semi-annually, and to execute bonds therefor under their hands and seals respectively; the bonds so to be executed may be in such sums and payable at such times and places as the said commissioners and their successors may deem expedient; but no such debt shall be contracted or bonds issued by said commissioners of or for either of said townships, until the written consent shall have been obtained of the majority of the taxpayers of such township or their legal representatives appearing upon the last assessment roll as shall represent a majority of the landed property of such township (including lands owned by non-residents) appearing upon the last assessment roll of such township; such consent shall state the amount of money authorized to be raised in such township, and that the same is to be invested in the stock of the said railroad company, and the signatures shall be proved by one or more of the commissioners; the fact

that the persons signing such consent are a majority of the taxpayers of such township, and represent a majority of the real property of such township, shall be proved by the affidavit of the assessor of such township endorsed upon or annexed to such written consent, and the assessor of such township is hereby required to perform such service; such consent and affidavit shall be filed in the office of the clerk of the county in which such township is situated, and a certified copy thereof in the town clerk's office of such township, and the same or a certified copy thereof shall be evidence of the facts therein contained, and received as evidence in any court of this State, and before any judge or justice thereof."

By section three these commissioners were authorized to dispose of the bonds, and invest the money in railroad stock in the name of the township, to subscribe for and purchase stock in the railroad company, and to act at stockholders' meetings.

Section fourteen provides "that all bonds issued in accordance with the provisions of this act shall be registered in the office of the county clerk of the county in which the township is situated issuing the same, and the words 'registered in the county clerk's office' shall be printed or written across the face of each bond, attested by the signature of the county clerk when so registered, and no bond shall be valid unless so registered."

It is conceded that the commissioners were duly appointed; that the issue of bonds was not in excess of the amount authorized by the statute; that a paper purporting to contain the consent of the requisite number of taxpayers, duly verified by the affidavit of the township assessor, was filed in the office of the clerk of the county; and that the plaintiffs were *bona fide* holders. But the contention is that the consent roll did not in fact contain the requisite number of taxpayers, and that the affidavit of the assessor was not true; also that the commissioners did not borrow any money on the bonds, but disposed of them without lawful consideration. The Circuit Court held that these defences were unavailing against *bona fide* holders of the bonds; and with that ruling we concur. Indeed, all the questions which were earnestly presented and

argued by counsel for plaintiffs in error have been often considered and decided by this court. The act gave the commissioners power, under certain conditions, to issue the bonds. The recitals therein show that they were issued "in pursuance" of the act; and the bonds were all duly registered as required. The case of *Montclair* v. *Ramsdell*, 107 U. S. 147, 158, was a suit on bonds in form like the ones in suit, and issued under a statute practically identical. The validity of those bonds was sustained; and in the course of his opinion, speaking for the court, Mr. Justice Harlan says: "Legislative authority for an issue of bonds being established by reference to the statute, and the bonds reciting that they were issued in pursuance of the statute, the utmost which plaintiff was bound to show, to entitle him *prima facie* to judgment, was the due appointment of the commissioners and the execution by them in fact of the bonds. It was not necessary that he should, in the first instance, prove either that he paid value, or that the conditions preliminary to the exercise by the commissioners of the authority conferred by statute were in fact performed before the bonds were issued. The one was presumed from the possession of the bonds; and the other was established by the statute authorizing an issue of bonds, and by proof of the due appointment of the commissioners, and their execution of the bonds, with recitals of compliance with the statute." See, also, the cases of *Bernards Township* v. *Stebbins*, 109 U. S. 341, and *New Providence* v. *Halsey*, 117 U. S. 336, in which bonds issued either under the act before us, or that referred to in 107 U. S. *supra*, were considered by the court. Reference also may be made to two New Jersey cases, *Cotton* v. *New Providence*, 47 N. J. Law, 401, and *Mutual Life Co.* v. *Elizabeth*, 42 N. J. Law, 235.

It were useless to refer to the long list of cases in which recitals, like these, have been held sufficient to sustain bonds in the hands of *bona fide* holders. It is urged that these commissioners were not elected by the people; that they were not the general officers of the township, but were special officers appointed by the Circuit Court — special agents, as it were, for the specific purpose; that the statute does not in terms

give them authority to determine whether the preliminary conditions have been complied with; and that this case is, therefore, to be distinguished in these respects from those cases where similar recitals have been held conclusive. But though not the ordinary officers of the township, they were the ones to whom by legislative direction was given full authority in the matter of issuing bonds. The organization of townships, the number, character and duties of their various officers, are matters of legislative control; and it is not doubtful that officers appointed represent the municipality as fully as officers elected. When the legislature has declared how an officer is to be selected, and the officer is selected in accordance with that declaration, his acts, within the scope of the powers given him by the legislature, bind the municipality. But these special commissioners were not the only officers of the township whose acts gave currency to these bonds. If inquiry had been directed to the county and township records, the affidavit of the township assessor to the consent required would have been found; and on the face of the bonds it appears that the county clerk of the county has added his official certificate to their validity; so that the acts of general as well as of special officers and agents of the township are the foundation upon which rests the validity of these bonds.

While it is true that the act does not in terms say that these commissioners are to decide that all preliminary conditions have been complied with, yet such express direction and authority is seldom found in acts providing for the issuing of bonds. It is enough that full control in the matter is given to the officers named. In the case of *Oregon* v. *Jennings*, 119 U. S. 74, 92, the rule is thus stated by Mr. Justice Blatchford: "Within the numerous decisions by this court on the subject, the supervisor and the town clerk, they being named in the statute as the officers to sign the bonds, and the 'corporate authorities' to act for the town in issuing them to the company, were the persons entrusted with the duty of deciding, before issuing the bonds, whether the conditions determined at the election existed. If they have certified to that effect in the bonds, the town is estopped from asserting, as against a

bona fide holder, that the conditions prescribed by the popular vote were not complied with."

Whatever may be the hardships of this particular case, to sustain the defences pressed would go far towards destroying the market value of municipal securities. We see no error in the ruling of the Circuit Court, and its judgment is therefore

Affirmed.

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

LINCOLN COUNTY *v.* LUNING.

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

No. 1274. Submitted January 13, 1890. — Decided March 3, 1890.

The Eleventh Amendment to the Constitution does not operate to prevent counties in a State from being sued in a Federal Court.

No state statute exempting a county in the State from liability to suit except in the courts of the county can defeat the jurisdiction of suits given by the Constitution to the Federal courts.

This court follows the Supreme Court of Nevada in holding that the statute under which the bonds in controversy were issued was not in conflict with the Constitution of of that State.

County of Greene v. *Daniel*, 102 U. S. 187, followed.

When, after default by a municipal corporation in the payment of interest upon its bonds the legislature provides for the creation of a special fund by the debtor, out of which the creditor is to be paid, the debtor cannot set up the statute of limitations to an action on the bonds and coupons, without showing that the fund has been provided.

The case is stated in the opinion.

Mr. H. F. Bartine for plaintiff in error.

Mr. Abraham Clark Freeman for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

This is an action on bonds and coupons. Judgment was rendered against the county and it alleges error. The pri-

mary question is as to the jurisdiction of the Circuit Court. This jurisdiction is challenged on two grounds. First, it is claimed that because the county is an integral part of the State it could not, under the Eleventh Amendment of the Federal Constitution be sued in the Circuit Court; and, secondly, inasmuch as the act under which the bonds were issued provided for litigation concerning the same, and named a court of the State in which such litigation could be had, that such jurisdiction was exclusive and prevented suit in the Circuit Court.

With regard to the first objection, it may be observed that the records of this court for the last thirty years are full of suits against counties, and it would seem as though by general consent the jurisdiction of the Federal courts in such suits had become established. But irrespective of this general acquiescence, the jurisdiction of the Circuit courts is beyond question. The Eleventh Amendment limits the jurisdiction only as to suits against a State. It was said by Chief Justice Marshall, in *Osborn* v. *The Bank of the United States*, 9 Wheat. 738, 857, that "the Eleventh Amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is of necessity limited to those suits in which the State is a party on the record."

While that statement was held by this court in the case of *In re Ayers*, 123 U. S. 443, to be too narrow, yet by that decision the jurisdiction was limited only in respect to those cases in which the State is a real, if not a nominal defendant; and while the county is territorially a part of the State, yet politically it is also a corporation created by and with such powers as are given to it by the State. In this respect it is a part of the State only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the State. *Metropolitan Railroad Co.* v. *District of Columbia*, 132 U. S. 1.

The constitution of the State of Nevada explicitly provides for the liability of counties to suit. Article eight is entitled "Municipal and other corporations," and its ten sections contain provisions, some applicable to private and others to both

private and municipal corporations. Section five declares that "corporations may sue and be sued in all courts in like manner as individuals." And that this section is not to be limited to private corporations is evident not alone from the generality of its language and from the title of the article, but also from several sections therein in which municipal corporations are expressly named. Thus the second section subjects the property of corporations to taxation with a proviso "that the property of corporations formed for municipal . . . purposes may be exempted by law." And section ten expressly recognizes the county as a municipal corporation, for its language is "no county, city, town or other municipal corporation shall become a stockholder," etc. Thus the liability of counties as municipal corporations to suit is declared by the constitution itself. Further the act under which these bonds were issued provided for suits against the county in respect to this indebtedness in one of the courts of the State; and this liability of a county to suit has been affirmed by the Supreme Court of Nevada in the following cases: *Waitz* v. *Ormsby Co.*, 1 Nevada, 370: *Clarke* v. *Lyon County*, 8 Nevada, 181; *Floral Springs Water Co.* v. *Rives*, 14 Nevada, 431.

With regard to the other objection the case of *Cowles* v. *Mercer County*, 7 Wall. 118, 122, is decisive. In that case the court, by the Chief Justice, expressed its opinion on the very question in these words: "But it was argued that counties in Illinois, by the law of their organization, were exempted from suit elsewhere than in the Circuit courts of the county. And this seems to be the construction given to the statutes concerning counties by the Supreme Court of Illinois. But that court has never decided that a county in Illinois is exempted from liability to suit in national courts. It is unnecessary, therefore, to consider what would be the effect of such a decision. It is enough for this case that we find the board of supervisors to be a corporation authorized to contract for the county. The power to contract with citizens of other States implies liability to suit by citizens of other States, and no statute limitation of suability can defeat a jurisdiction given by the Constitution."

With regard to the objection that the statute under which these bonds were issued contravenes the state constitution, it is enough to refer to the case of *Odd Fellows' Bank* v. *Quillen*, 11 Nevada, 109, in which the Supreme Court of the State held the act valid; following in that decision the case of *Youngs* v. *Hall*, 9 Nevada, 212.

It is further objected that the complaint was defective in not showing that the bonds and coupons had been presented to the county commissioners and county auditor for allowance and approval, as provided by sections 1950 and 1964–5–6 of the General Statutes of the State. Those sections, referring to claims and accounts, have application only to unliquidated claims and accounts, and do not apply to bonds and coupons. This question was presented in the case of *County of Greene* v. *Daniel*, 102 U. S. 187, 194, in which the court observed, speaking of bonds and coupons, that "the claim was, to all intents and purposes, audited by the court when the bonds were issued. The validity and amount of the liability were then definitely fixed, and warrants on the treasury given, payable at a future day."

The remaining question arises on the statute of limitations. By the general limitation law of the State, some of the coupons were barred; but there has been this special legislation in reference to these coupons. The bonds were issued under the funding act of 1873. In 1877 the county was delinquent in its interest, and the legislature passed an act amendatory to the act of 1873. This amendatory act provided for the registering of overdue coupons, and imposed upon the treasurer the duty of thereafter paying the coupons as money came into his possession applicable thereto, in the order of their registration. Statutes of Nevada, 1877, 46.

The coupons, which by the general limitation law would have been barred, were presented, as they fell due, to the treasurer for payment, and payment demanded and refused, because the interest fund was exhausted. Thereupon the treasurer registered them as presented, in accordance with the act of 1877, and from the time of their registration to the commencement of this suit there was no money in the treasury appli-

cable to their payment. This act, providing for registration and for payment in a particular order, was a new provision for the payment of these bonds, which was accepted by the creditor, and created a new right upon which he might rely. It provided, as it were, a special trust fund, to which the coupon holder might, in the order of registration, look for payment, and for payment through which he might safely wait. It amounted to a promise on the part of the county to pay such coupons as were registered, in the order of their registration, as fast as money came into the interest fund; and such promise was by the creditor accepted; and when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided.

The cases of *Underhill* v. *Sonora*, 17 California, 173, and *Freehill* v. *Chamberlain*, 65 California, 603, are in point. In the former case, the court observes that "the legislative acts then recognized the debt and made provision for its payment. This is enough to withdraw the case from the operation of the statute; it is equivalent to a trust deed by the State setting apart property out of which the money due was to be paid at a given time, if not sooner paid upon a claim acknowledged to be an outstanding debt; and we cannot conceive of any principle of law or justice which would hold the claim to be barred by the statute simply because the creditor waited after this for his money." In the other case it was held that "where a statute provides for the issuing of bonds of a city with interest coupons payable as fast as money should come into the treasury from special sources designated by the act, the statute of limitations does not commence to run against the coupons until the money is received in the treasury in accordance with the terms of the act."

Both of these decisions were rendered before the act of 1877 was passed, and, being in an adjoining State which has always had close relations with the State of Nevada, may well have induced the passage of that act.

These are all the questions presented. We see no error in the rulings in the Circuit Court, and its judgment is therefore

Affirmed.

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LINCOLN COUNTY *v.* SUTRO, No. 1275. LINCOLN COUNTY *v.* VINCENT, No. 1276. Error to the Circuit Court of the United States for the District of Nevada. These cases are similar, and the same judgment will therefore be entered in them.

Mr. H. F. Bartine for plaintiffs in error.

Mr. Abraham Clark Freeman for defendants in error.

FOGG *v.* BLAIR.

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

No. 188. Argued January 24, 27, 1890. — Decided March 3, 1890.

A liquidated claim against a railroad company, not converted into a judgment, which another railroad company, purchasing its road and property, agrees with the selling company to assume and pay as part of the consideration, does not thereby become a lien upon the property so as to take priority over the lien of a mortgage made by the purchasing company to secure an issue of bonds.

ON the 16th of February, 1867, the St. Louis and Keokuk Railroad Company was incorporated by the legislature of Missouri to construct and operate a railroad from some suitable point on the North Missouri Railroad, not exceeding thirty miles west of St. Charles, in St. Charles County, to some point near the mouth of the Des Moines River, on the northern boundary of the State. Under its charter the company located its road between the points designated and constructed a portion of it and graded other portions, and in this work expended several hundred thousand dollars.

The appellant, Josiah Fogg, held a demand against this company for work and advances on its account, and on the 22d of September, 1870, an adjustment and settlement of the amount was had between them; and it was found that the company was indebted to him in the sum of $9547.75.

Afterwards, on the 13th of June, 1872, a corporation known

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as the St. Paul, Hannibal and Keokuk Railroad Company was formed under the general law of Missouri, to construct and operate a railroad with one or more tracks, from the city of St. Louis to a point near the northeast corner of the State opposite to Keokuk in Iowa, with a branch, in Lincoln County, to its coal fields, from a point near Troy, and a branch up the valley of Mill Creek, from a point where the line crosses the creek.

To this new corporation the old corporation, upon the request and direction of the holders and owners of a majority of its stock, on the 4th of March, 1873, sold and transferred its entire road and all the branches, buildings, machinery and appurtenances belonging to or connected with it.

In consideration of the transfer, the new corporation, that is, the St. Louis, Hannibal and Keokuk Railroad Company, among other things agreed to assume, pay and satisfy all the debts and liabilities incurred by the first company or legally imposed upon it, for right of way, station grounds, ties and bridging, and also to perform various contracts of that company which are specially mentioned. The new corporation was composed principally of the same persons and the same officers as the old corporation, and among the contracts assumed was one with the Missouri and Iowa Construction Company for building the road, and it stipulated that in payment of this work bonds of the company should be issued secured by a first mortgage on its property.

Pursuant to this contract, the new company, on the 1st of October, 1872, executed to Dewitt C. Blair of New Jersey, and Clarence C. Mitchell of New York, a mortgage or deed of trust of its railroad, then constructed or that might thereafter be constructed, with its right of way, buildings and appurtenances then existing or which might afterwards be acquired, its rolling stock and machinery of every kind, and all its franchises and property, to secure bonds of the company issued on that day, in sums of $1000 each, to the amount of $4,200,000.

Afterwards this mortgage was taken up and cancelled, and on the 1st of August, 1877, a new mortgage or deed of trust was executed by the company to Dewitt C. Blair, of all its property situated between the cities of St. Louis and Hannibal

in Missouri, and its franchises, to secure the payment of its bonds issued of that date, amounting to $1,680,000. The interest was not paid upon these bonds, and the trustee, on the 6th of February, 1884, commenced a suit in the Circuit Court of the United States for the Eastern District of Missouri, to foreclose the mortgage and sell the property. The bill not only made the mortgagor a party defendant, but also certain persons named, of whom Josiah Fogg was one, representing that they claimed to have liens, as judgment creditors, incumbrancers, or otherwise, upon the mortgaged premises, but alleging that their interest, if any, accrued subsequently to the lien of the mortgage and was subordinate thereto.

As mentioned above, on the 22d of September, 1870, Josiah Fogg had a settlement with the St. Louis and Keokuk Railroad Company, by which the amount due him by the company on that date was agreed to be $9547.75. For this amount and interest he brought suit in the Circuit Court of the United States in April, 1881, and on the 3d day of October, 1882, he recovered judgment for $16,439.63. Execution issued thereon having been returned unsatisfied, in May, 1883, he brought suit, on the equity side of the court, against the St. Louis, Hannibal and Keokuk Railroad Company to have that judgment declared a lien upon its property and to compel that company to pay the judgment, and to enjoin it from selling or incumbering its property until such payment was made. The suit was brought against both the old and new company, and resulted in a decree entered on the 5th of May, 1884, adjudging that the two companies were liable jointly and severally for the judgment and interest, which amounted then to $18,365.11, the payment of which was decreed against them. The judgment was not declared to be a lien upon the property of the company, nor was the use or disposition of its property enjoined.

To the suit for the foreclosure of the mortgage brought by Dewitt C. Blair, trustee, Josiah Fogg appeared and answered the bill, and also filed a cross-bill. By his cross-bill he sought to obtain priority for his judgment over the demands of the trustee, acting for and representing the bondholders. He set

forth the origin of his demand, the recovery of judgment for the amount against both the first and second corporations, and founded his claim to priority over the mortgage on the theory, that the old corporation could not transfer its property to the new corporation without the new corporation becoming trustee for all the creditors of the old company; that its property was thus affected with a trust, and could not be subjected to a mortgage so as to give priority to the bonds secured over the demands of creditors existing at the time of such transfer; and that the trustee, Dewitt C. Blair, took the bonds of the company for John I. Blair and the executors of Moses Taylor, deceased; and charged, upon information and belief, that he took them with full notice of the claim of the complainant against the old corporation; and that the suit to foreclose the mortgage was a scheme designed to cut him off from enforcing his demand, and to have the railroad and its appurtenances sold under a decree of foreclosure and bought in by said John I. Blair and the executors of Moses Taylor, at a price greatly under their actual value. To this cross-bill the trustee, Dewitt C. Blair, as defendant, answered denying its allegations, some of them positively and others upon information and belief — positively the allegations that the transfer of the property of the first corporation was made in fraud of the rights of the complainant, and that the second corporation took the property with knowledge and notice of the debt owing to him by the first corporation. A replication was filed to the answer and proofs were taken. Upon the hearing the court dismissed the cross-bill, holding that the claim of the complainant was not entitled to priority over the bonds secured by the mortgage. 25 Fed. Rep. 684, and 27 Fed. Rep. 176. From this decree the case was brought by appeal to this court.

Mr. James Carr (with whom was *Mr. George D. Reynolds* and *Mr. E. A. Sumner*) for appellant.

Mr. Walter C. Larned for appellee.

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

The claim of the appellant that his demand, which passed into judgment May 5, 1884, against both the St. Louis and Keokuk Railroad Company and the St. Louis, Hannibal and Keokuk Railroad Company, is entitled to payment prior to the bonds secured by the mortgage or trust deed, would seem to be answered by the dates of the judgment and mortgage respectively. The judgment was not rendered against the original company until October 3, 1882, and not against both companies until May 5, 1884. The mortgage was executed on the 1st day of August, 1877, five years before the first judgment and nearly seven years before the second.

It does not appear in the record precisely what the services were which were rendered by the complainant, or for what purposes advances by him were made. This is not material, however, as no claim is made, because of the nature of those services and advances, to a lien on the property of the original company, under the statute of the State. It does not appear that any proceedings were taken to establish such a lien. Independently of that statute, there was no lien upon any property of the railroad company for the demand of the complainant. It stood like any ordinary debt against a corporation, which could only be enforced by legal proceedings establishing its validity and amount by judicial determination, and then by process upon the judgment obtained, in subordination to any previously existing liens upon the property.

In some States — and this is the case in Missouri — statutes make judgments of their courts liens upon the real property of the judgment debtor, and the same rule applies in such States to judgments in the courts of the United States. But in all cases the judgments become liens only from the time they are rendered, or notice thereof is filed in the register's office of the county where the property is situated. They are subordinate to any prior mortgage upon the property. This doctrine is so familiar that it is surprising that any other can be supposed to exist. The property of a railroad company is not held under any such trust to apply it to the payment of its debts as to restrict its use for any other lawful purpose, it matters not how meritorious the demand of the creditor may

be. He must obtain a lien upon the property of the company, or security in some other form, or he will have to take his chances with all other creditors to obtain payment in the ordinary course of legal proceedings for the collection of debts.

In *Thompson* v. *White Water Valley Railroad Co.*, decided at the present term, 132 U. S. 68, it was held that the claim of bondholders of the company secured by a mortgage upon its railroad, and all property then appertaining thereto, or which the company might afterwards acquire, had priority over a claim of contractors to a lien upon the rents and profits of a portion of the road constructed by them subsequently to the mortgage. It was earnestly contended that they had an equitable lien upon the earnings of that portion of the road because with their moneys it was constructed. But the court replied that the work was not done at the request of the mortgagees, but upon a contract with the lessee of the road, by which the latter stipulated, as one of the considerations of the lease, to construct that part of the line, and that with those contractors the bondholders secured by the mortgage had no relations, and therefore incurred to them no obligation. In the opinion of the court reference was made to the case of *Galveston Co.* v. *Cowdrey*, 11 Wall. 459, 481. In that case there were several creditors, and it was contended that priority should be given to the last creditor, for he had aided in preserving the property. But the court answered that this rule had never been introduced into our laws, except in maritime cases, which stood on a particular reason; that by the common law whatever is affixed to the freehold becomes a part of the realty, except certain fixtures erected by tenants, which did not affect the question; that rails put down upon the company's road become a part of the road, and that the rule also applies to those permanent fixtures which are essential to the successful operation of the road; they become the property of the company, as much so as if they existed when the mortgage was executed. The case of *Thompson* v. *White Water Valley Railroad Co.* was much stronger than the one now before us; for there a special contract existed between the lessee company and the contractors that such lien should

exist; while here there was no contract that the complainant's claim should be a lien upon any property.

In *Dunham* v. *Railway Co.*, 1 Wall. 254, 267, it was held that a mortgage by a railroad company of its road "built and to be built" took precedence, even as regards the unbuilt portion, over the claim of a contractor who had himself finished it under an agreement with the company that he should retain its possession and apply its earnings to the liquidation of the debt to him, and who had in accordance with such agreement taken possession of the road and retained it. The mortgage was executed and recorded before the contract for the completion of the road was made; and the court said: "All of the bonds, except those subsequently delivered to the contractor, had, long before that time, been issued, and were in the hands of innocent holders. The contractor, under the circumstances, could acquire no greater interest in the road than was held by the company. He did not exact any formal conveyance, but if he had, and one had been executed and delivered, the rule would be the same. Registry of the mortgage was notice to all the world of the lien of the complainant, and in that point of view the case does not even show a hardship upon the contractor, as he must have known, when he accepted the agreement, that he took the road subject to the rights of the bondholders."

We do not attach any weight to the objection that the transfer by the old company of its entire property to the new company was illegal and *ultra vires*, and, therefore, to be disregarded. However such a transfer might be considered in a suit to set it aside, the objection does not lie in the mouth of the appellant, for he has proceeded against the new company and obtained, upon the assumed validity of such transfer, a decree that it pay his judgment, which is founded upon a demand that company agreed to assume, as part of the consideration of the transfer.

There is no evidence in the record before us that the parties who took the bonds issued by the St. Louis, Hannibal and Keokuk Railroad Company had any notice, actual or constructive of the demand of the complainant. But if they had, it

would not have affected their rights. That demand was not then reduced to judgment, and created no lien upon the property of the company, nor any restriction upon the company's right to use it for any lawful purpose. The bonds were given to raise the necessary funds to complete the road of the company, and the mortgage was executed to secure their payment. They were negotiable instruments, and in the hands of the purchasers cannot be impeached for any neglect of the company issuing them to pay the demands of other creditors. We are unable to perceive any ground upon which their priority over the claim of the appellant can be in any way impaired.

We do not question the general doctrine invoked by the appellant, that the property of a railroad company is a trust fund for the payment of its debts, but do not perceive any place for its application here. That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders; it does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to *bona fide* purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence. The cases of *Curran* v. *State of Arkansas*, 15 How. 304, 307, and *Wood* v. *Dummer*, 3 Mason, 308, give no countenance to anything of the kind.

Judgment affirmed.

STURR *v.* BECK.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

No. 1172. Submitted December 9, 1889. — Decided March 3, 1890.

No judgment or decree of the highest court of a Territory can be reviewed in this court in matter of fact, but only in matter of law.

The filing of a homestead entry of a tract across which a stream of water runs in its natural channel with no right or claim of right to divert it therefrom, confers a right to have the stream continue to run in that channel, without diversion; which right, when completed by full com-

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pliance with the requirements of the statutes on the part of the settler, and the issue of a patent, relates back to the date of the filing, and cuts off intervening adverse claims to the water.

The legislation of Congress upon this subject reviewed.

This suit was commenced by Daniel Sturr against Charles W. Beck by a complaint filed in a district court of the Territory of Dakota, seeking an injunction against the defendant from interfering with an alleged water right and ditch of the complainant and the use of the water of a certain creek through the same, and for damages alleged to have been sustained by interference which had already taken place. The allegations of the complaint were denied in the answer of the defendant, so far as inconsistent with its statements; and the facts in regard to the matters set up in the complaint were averred by the defendant as he claimed them to be, with a prayer for an injunction against the complainant from trespassing upon his land and diverting the water of the creek, and from keeping and maintaining the ditch on his land, and for damages and costs. The cause was tried by the court upon an agreed statement of facts, it being stipulated that the court might make its findings of fact and conclusions of law on such agreed statement with the same effect as if the facts therein contained had been proven in court. The court thereupon proceeded to make its findings of fact and conclusions of law as follows:

"*Findings of Fact.*

"1st. That the plaintiff, Daniel Sturr, made a homestead filing or entry of the S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, E. $\frac{1}{2}$ S. E $\frac{1}{4}$, and S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ of sec. 35, town. 7 N., of range 3 E., B. H. M., on the 15th day of May, 1880, and thereafter at the United States land office at Deadwood, D. T., made final proof or entry thereof on the 10th day of May, 1883, having settled thereon in June, 1877, and he has resided thereon continuously ever since, cultivating at least seventy acres thereof, and has received a patent for said land from the United States.

"2d. That one John Smith made a homestead filing or entry of the W. $\frac{1}{2}$ S. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, and lot 2 of sec. 2,

town. 6 N., of range 3 E., B. H. M., on the 25th day of March, 1879, and thereafter at the United States land office at Deadwood, D. T., made final proof or entry thereof on the 10th day of May, 1883, having settled thereon in March, 1877, and resided thereon until he sold the same to defendant Beck, in May, 1884, and has received a patent for said land from the United States.

"3d. That on or about the 15th day of May, 1880, the plaintiff, Daniel Sturr, without any grant from John Smith, the occupant and claimant, as above stated, went upon the homestead claim of John Smith, above described, and located a water right on said Smith's homestead, claiming the right to divert 500 inches, miner's measurement, of the waters of False Bottom Creek then and long prior thereto flowing over and across said land in its natural channel, and to carry the same by means of a ditch to and upon his own homestead claim, immediately adjacent.

"4th. That said plaintiff posted a written notice at the point of said proposed diversion, claiming the right to divert said water, and caused a copy of the same to be filed in the office of the register of deeds in and for Lawrence County, Dakota, on the 9th day of May, 1881, and the same was recorded in Book 14, page 468, of the records of said county.

"5th. That immediately thereafter the plaintiff constructed a ditch from the point of such diversion across the John Smith homestead and diverted and conveyed not less than 300 inches of the waters of said False Bottom Creek to and upon his said land adjacent, and there used the same for irrigating his crops growing thereon whenever the same was necessary, until interfered with by the defendant, in the summer of 1886.

"6th. That on May first, 1884, John Smith conveyed his said homestead to the defendant, Charles W. Beck, by warranty deed purporting to convey the fee without any reservation; whereupon the plaintiff entered into the possession thereof and has so remained ever since.

"7th. That in the spring of 1886 the defendant Beck notified the plaintiff Sturr to cease diverting the waters of False Bottom Creek from their natural channel upon defendant's

said land, and forbade him maintaining his said ditch upon defendant's said land for that purpose.

"8th. That the custom existing and which has existed in Lawrence County ever since its settlement recognizes and acknowledges the right to locate water rights and to divert, appropriate and use the waters of flowing streams for purposes of irrigation when such location, diversion and use does not conflict or interfere with rights vested and accrued prior thereto.

"9th. That neither John Smith nor the defendant Beck ever made any water-right location claiming the waters of False Bottom Creek, and had not prior to the said location thereof by the plaintiff, Daniel Sturr, ever diverted the said waters from their natural channel where they had been accustomed to flow.

"10th. That said John Smith, on the second day of February, 1882, recited in the written contract of that date made with the plaintiff, Daniel Sturr, that the latter was the owner of the Elm Tree water right, which was the said water right located as aforesaid by said Sturr on the 15th day of May, 1880.

"11th. That the use of said water for irrigation is beneficial and valuable to the person or persons owning or possessing the same.

"*Conclusions of Law.*

"1st. That at the time of the location of the water right made upon John Smith's homestead by the plaintiff, Daniel Sturr, in May, 1880, a prior right to have the waters of said False Bottom Creek flow in the regular channel of said creek over and across said land had vested in John Smith by virtue of his homestead filing or entry made on the 25th day of March, 1879, he having made final proof or entry thereafter.

"2d. That said vested right so acquired by said John Smith was conveyed to the defendant, Charles W. Beck, by warranty deed on May first, 1884.

"3d. That the plaintiff, Daniel Sturr, by his location and diversion of the waters of False Bottom Creek, so made by him upon the homestead of said John Smith on the 15th day

of May, 1880, acquired no right as against the defendant Beck to divert said waters or to maintain a ditch upon defendant's land for that purpose.

"4th. That the patent issued to John Smith for the premises mentioned related back to the date of his making his homestead filing or entry of said premises on the 25th day of March, 1879.

"5th. That the plaintiff can take nothing by this action."

Judgment in favor of the defendant was entered dismissing the complaint upon the merits and awarding costs.

To the tenth finding of fact and to conclusions of law Nos. 1, 2, 3 and 4 plaintiff duly excepted, and also to the judgment and decree, and filed his motion to set aside certain of the findings of fact and conclusions of law, and to adopt others named in their places, and also for a new trial, which motions were severally overruled, and he excepted. Plaintiff thereupon prosecuted an appeal to the Supreme Court of the Territory, and assigned as error that the court erred "in its finding of fact No. 10, and in not correcting the same as requested by plaintiff in his motion to correct said finding;" in the conclusions of law Nos. 1, 2, 3 and 4 respectively; in denying the motion for a new trial; and "because the decision of the court is against law." The judgment of the District Court was affirmed by the Supreme Court, which rendered the following opinion: "The judgment of the lower court is affirmed. The court holds that the homesteader was the prior appropriator of the water right, and the plaintiff has no right to enter upon the prior possession of the defendant under his H. E. for the purpose of appropriating any portion of the running streams and creeks thereon." An appeal was then taken to this court.

Mr. Daniel McLaughlin and *Mr. William R. Steele* for appellant.

Mr. R. A. Burton for appellee.

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

With the notice of appeal and appeal bond appellant filed his own affidavit and that of another that the ditch and water right in controversy were reasonably worth $7500. After the record was filed here a motion was made by appellee to dismiss, accompanied by several affidavits, to the effect that such value was far less than $5000. And upon this motion counter-affidavits have been presented. We have carefully examined all these papers and conclude that the motion should be overruled.

No judgment or decree of the highest court of a Territory can be reviewed by this court in matter of fact, but only in matter of law; and we are confined in this case to determining whether the court's findings of fact support the judgment. *Idaho and Oregon Land Co.* v. *Bradbury*, 132 U. S. 509; 18 Stat. 27, 28.

John Smith settled on the tract of land described in March, 1877, and continued to reside thereon until he sold and conveyed it by warranty deed to Beck, the appellee. He made his homestead filing or entry March 25, 1879, and his final proof May 10, 1883, and received a patent from the United States. The waters of False Bottom Creek flowed in its natural channel over and across Smith's homestead, and in May, 1880, Sturr, the appellant, went upon that homestead, located a water right thereon and constructed a ditch which diverted the waters of the creek to his own adjacent land. Beck went into possession under the deed from Smith, and in 1886 notified Sturr to cease diverting the water and maintaining the ditch, and this suit thereupon followed.

It is not contended on behalf of Sturr that he is entitled to maintain the ditch because he constructed and used it, or that Smith's acquiescence amounted to anything more than a revocable license. There was no grant nor an adverse enjoyment so long continued as to raise a legal presumption of a grant. But it is insisted that the doctrine of prior appropriation of water on the public land and its beneficial use protects him from interference because neither Smith nor Beck made any water-right location claiming the waters of False Bottom Creek, and had never diverted those waters prior to Sturr's location.

If, however, Smith obtained a vested right to have the creek flow in its natural channel by virtue of his homestead entry of March 25, 1879, and possession thereunder, or if his patent took effect as against Sturr by relation as of that date, then it is conceded that Sturr cannot prevail and the judgment must be affirmed.

The right of a riparian proprietor of land bordering upon a running stream to the benefit to be derived from the flow of its waters as a natural incident to, or one of the elements of, his estate, and that it cannot be lawfully diverted against his consent, is not denied, nor does the controversy relate to the just and reasonable use as between riparian proprietors. The question raised is whether Smith occupied the position of a riparian proprietor or a prior appropriator, as between himself and Sturr, when the latter undertook to locate his alleged water right. At that time Smith had been in possession for three years, and his homestead entry had been made over a year.

A claim of the homestead settler, such as Smith's, is initiated by an entry of the land, which is effected by making an application at the proper land office, filing the affidavit and paying the amounts required by sections 2238 and 2290 of the Revised Statutes. Under section 2291 the final certificate was not to be given or patent issued "until the expiration of five years from the date of such entry." But under the third section of the act of May 14, 1880, 21 Stat. 141, c. 89, § 3, providing that "any settler who has settled, or who shall hereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the preëmption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the preëmption laws," the ruling of the Land Department has been that if the homestead settler shall fully comply with the law as to continuous residence and cultivation, the settlement defeats all

claims intervening between its date and the date of filing his homestead entry, and in making final proof his five years of residence and cultivation will commence from the date of actual settlement.

Under section 2297 of the Revised Statutes it is provided that upon change of residence or abandonment as therein mentioned, before the expiration of the five years, "then and in that event the land so entered shall revert to the government." It was held by Attorney General MacVeagh, in an opinion to the Secretary of War, July 15, 1881, that "where a homestead entry of public land has been made by a settler the land so entered cannot, while such entry stands, be set apart by the President for a military reservation, even prior to the completion of full title in the settler;" that "upon the entry the right in favor of the settler would seem to attach to the land, which is liable to be defeated only by failure on his part to comply with the requirements of the homestead law in regard to settlement and cultivation. This right amounts to an equitable interest in the land, subject to the future performance by the settler of certain conditions (in the event of which he becomes invested with full and complete ownership); and until forfeited by failure to perform the conditions, it must prevail not only against individuals, but against the government." 1 Land Dec. 30. And many rulings of the Interior Department sustain this view. These official utterances are entitled to great respect at the hands of this court, as remarked by Mr. Justice Lamar in *Hastings & Dakota Railroad Co.* v. *Whitney*, 132 U. S. 357, 366.

In *Witherspoon* v. *Duncan*, 4 Wall. 210, 218, it is said by Mr. Justice Davis, speaking for the court, that "in no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they are private property. . . . The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the

purchaser who has the equitable title." It may be said that this language refers to the certificate issued on final proofs, but if the word "entry," as applied to appropriations of land, "means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim," *Chotard* v. *Pope*, 12 Wheat. 586, 588, the principle has a wider scope.

In *Hastings & Dakota Railroad Co.* v. *Whitney*, *ubi supra*, an affidavit for the purpose of entering land as a homestead was filed on behalf of one Turner, in a local land office in Minnesota, on May 8, 1865, Turner claiming to act under section 1 of the act of March 21, 1864, 13 Stat. 35, c. 38, now section 2293 of the Revised Statutes of the United States. As a matter of fact, Turner was never on the land, and no member of his family was then residing, or ever did reside on it, and no improvements whatever had ever been made thereon by any one. Upon being paid their fees, the register and receiver of the land office allowed the entry, and the same stood upon the records of the local land office, and upon the records of the General Land Office, uncancelled, until September 30, 1872. Between May, 1865, and September, 1872, Congress made a grant to the State of Minnesota for the purpose of aiding in the construction of a railroad from Hastings, through certain counties, to a point on the western boundary of the State, which grant was accepted by the legislature of the State of Minnesota and transferred to the Hastings and Dakota Railroad Company, which shortly thereafter definitely located its line of road by filing its map in the office of the Commissioner of the General Land Office. All these proceedings occurred prior to the 30th of September, 1872. This court declared that the almost uniform practice of the department has been to regard land upon which an entry of record, valid upon its face, has been made, as appropriated and withdrawn from subsequent homestead entry, preëmption, settlement, sale or grant, until the original entry be cancelled or be declared forfeited, in which case the land reverts to the government as part of the public domain, and becomes again subject to entry under the land laws; and it was held that whatever defects there might be in

an entry, so long as it remained a subsisting entry of record, whose legality had been passed upon by the land authorities and their action remained unreversed, it was such an appropriation of the tract as segregated it from the public domain, and, therefore, precluded it from subsequent grant; and that this entry on behalf of Turner "attached to the land" in question, within the meaning of the act of Congress making the grant, 14 Stat. 87, c. 168, and could not be included within it. And as to mere settlement with the intention of obtaining title under the preëmption laws, while it has been held that no vested right in the land as against the United States is acquired until all the prerequisites for the acquisition of title have been complied with, yet rights in parties as against each other were fully recognized as existing, based upon priority in the initiatory steps, when followed up to a patent. "The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants." *Shepley* v. *Cowan*, 91 U. S. 330, 337.

Section 2339 of the Revised Statutes, which is in substance the ninth section of the act of Congress of July 26, 1866, 14 Stat. 253, c. 262, provides: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed." This section, said Mr. Justice Miller, in *Broder* v. *Water Co.*, 101 U. S. 274, 276, "was rather a voluntary *recognition of a preëxisting right of possession*, constituting a valid claim to its continued use, than the establishment of a new one."

By section 17 of the act of July 9, 1870, amendatory of the act of July 26, 1866, it was provided, among other things, that "all patents granted, or preëmption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such

water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory." 16 Stat. 218, c. 235, § 17. And this was carried forward into section 2340 of the Revised Statutes, and Smith's patent was subject to that reservation.

The 9th section of the act 1866 is referred to by Mr. Justice Field in *Atchison* v. *Peterson*, 20 Wall. 507, 512, and in the opinion it is said that "the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common law doctrine of riparian proprietorship with respect to the waters of those streams."

When, however, the government ceases to be the sole proprietor, the right of the riparian owner attaches, and cannot be subsequently invaded. As the riparian owner has the right to have the water flow *ut currere solebat*, undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriation of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect.

The Dakota Civil Code contains this section:

"SEC. 255. The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same." Levisee's Dakota Codes, 2d ed. 781.

By section 527, which is section 1 of an act relating to water rights, passed in February, 1881, Sess. Law, 1881, c. 142, § 1, it is provided: "That any person or persons, corporation or company, who may have or hold a title or possessory right or title to any mineral or agricultural lands within the limits of this Territory, shall be entitled to the usual enjoyment of the waters of the streams or creeks in said Territory for mining, milling, agricultural or domestic purposes: *Provided*, That

the right to such use shall not interfere with any prior right or claim to such waters when the law has been complied with in doing the necessary work." Levisee's Codes, 861.

Section 650 of the Code of Civil Procedure is as follows:

"Any person settled upon the public lands belonging to the United States, on which settlement is not expressly prohibited by Congress, or some department of the general government, may maintain an action for any injuries done the same; also an action to recover the possession thereof, in the same manner as if he possessed a fee simple title to said lands." Levisee's Codes, 171.

The local custom is set forth in the findings to have consisted in the recognition and acknowledgment of "the right to locate water rights, and to divert, appropriate and use the waters of flowing streams for purposes of irrigation when such location, diversion and use does not conflict or interfere with rights vested and accrued prior thereto."

Thus, under the laws of Congress and the Territory, and under the applicable custom, priority of possession gave priority of right. The question is not as to the extent of Smith's interest in the homestead as against the government, but whether as against Sturr his lawful occupancy under settlement and entry was not a prior appropriation which Sturr could not displace. We have no doubt it was, and agree with the brief and comprehensive opinion of the Supreme Court to that effect.

The judgment is affirmed.

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

SEARL *v.* SCHOOL DISTRICT NO. 2 IN LAKE COUNTY.

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

No. 1104. Submitted January 10, 1890. — Decided March 3, 1890.

A tract of land in Leadville, Colorado, was deemed by the municipal authorities to be the most convenient and proper situation for the erection of a school-house, which had become a necessity in that part of the town. The person in possession claimed under what was known as a squatter title. Another person laid claim to it under a placer patent from the United States. Both claims of title were known to the authorities, and were submitted by them in good faith to counsel for advice. The counsel advised them that the squatter title was good, and on the faith of that advice they purchased the lot from the person in possession, and built a school-house upon it, at a cost of $40,000. The claimant under the placer title brought an action of ejectment to recover possession. The municipal authorities, being satisfied that he must prevail, filed their bill in equity to enjoin him from proceeding to judgment in his action at law, and commenced proceedings under a statute of the state for condemnation of the tract for public use. The plaintiff in the ejectment suit appeared in the condemnation proceedings, and claimed to recover from the municipality the value of the improvements as well as the value of the land as it was when acquired by the municipality; and, being a citizen of Kansas, had the cause removed, on the ground of diverse citizenship, into the Circuit Court of the United States. It was there agreed that the value of the property, without the improvements, was $3000; and the court instructed the jury that they should find "that the value of said property at this date is $3000;" *Held*, that this instruction was correct.

No vested right is impaired by giving to an occupant of land, claiming title and believing himself to be the owner, the value of improvements made by him under that belief, when ousted by the legal owner under an adverse title.

In exercising the right of eminent domain for the acquisition of private property for public use, the compensation to be awarded must not only be just to the owner, but also just to the public which is to pay for it.

School District No. 2, in the county of Lake and State of Colorado, filed its petition in the county court of that county against R. S. Searl, stating that long prior to the first day of July, 1881, it had been and then was, a school district duly

and regularly organized; that on July 1, 1881, one Frances M. Watson was in the actual possession and occupancy, under a deed of conveyance to her, of certain lots in a certain block of an addition to the city of Leadville; that on the same day one Schlessinger was in the actual possession and occupancy under deed of conveyance to him of certain other lots; that said Watson and Schlessinger then were, and they and their grantors had for a long time prior thereto been, in the actual possession and occupancy of said lots, claiming the ownership thereof; that on that day the board of directors of the school district, having been duly authorized and directed so to do, purchased the lots from Watson and Schlessinger and they were conveyed to the district, the said lots being contiguous and together constituting but one tract or lot, not exceeding one acre; that the lots were situated within the boundaries of the school district, and were purchased for the purpose of a school lot upon which to locate and construct a school-house for the benefit of the school district and the people resident therein; that the school district entered into possession and occupation of the land on July 1, 1881, and proceeded to and did construct thereon a large, costly and valuable school-house, and ever since that time had been and then was in the possession and occupancy of said land, using the same for the purposes of a school; that since the purchase and entry into possession by the school district, the defendant, Searl, had acquired the legal title to the lots composing the school lot, the full title to the same having become vested in him on the second day of February, 1884; "that he is now the owner of said property, and that the title thereto acquired by your petitioner as aforesaid has wholly failed; that your petitioner made the purchases, entered into the possession, and constructed the school-house aforesaid in good faith, believing that it had good right so to do; that said school-house is located with reference to the wants and necessities of the people of each portion of said district, and was at the time of said purchases and is now necessary for the school purposes of said district, and that said land and school lot contain no more than is necessary for the location and construction of the school-house aforesaid and the

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convenient use of the school; that the compensation to be paid for and in respect of the property aforesaid for the purposes aforesaid cannot be agreed upon by your petitioner and the said defendant, the parties interested; and that the said defendant is a non-resident of the State of Colorado." Petitioner then averred that the value of the property did not exceed the sum of two thousand dollars; and prayed that the compensation to be paid by it to defendant for and on account of said property be assessed in accordance with the statute.

The defendant appeared and on his application the cause was removed into the Circuit Court of the United States for the District of Colorado. Upon the trial before the circuit judge and a jury, it was "agreed and admitted, among other things, that the premises appropriated were necessary for the petitioner and were taken for public use." And the following stipulation in writing was offered and read in evidence:

"For the purposes of the present hearing and trial only of the above-entitled action or proceeding, either in this court, where it is now pending, or in the Supreme Court of the United States, where it may be taken on appeal or writ of error, the following facts are agreed upon by and between the respective parties hereto, to wit:

"First. That a receiver's receipt was issued for the Sizer placer, United States survey No. 388, on the 16th day of April, A.D. 1881, out of the district land office of the United States at the city of Leadville, in the State of Colorado, to one Isaac Cooper, claimant.

"Second. That on the 18th day of May, A.D. 1881, a United States patent was issued to the said Isaac Cooper for the said Sizer placer.

"Third. That the land sought to be condemned in the present proceeding is a part of the said Sizer placer.

"Fourth. That since the 20th day of November, A.D. 1882, and before the institution of this proceeding, the said Isaac Cooper conveyed to the said R. S. Searl the said Sizer placer, and the said Searl by virtue thereof is now the owner and holder of the said patent title thereto.

"Fifth. That prior to the application for a patent to the

said Sizer placer, and up to the time when the said school board purchased the same and took possession thereof, the land herein sought to be condemned was occupied, possessed and improved, and the ownership thereof claimed, by persons holding under what was called and known as a 'squatter title.'

"Sixth. That on or about the first day of July, A.D. 1881, the said school board purchased and took conveyances of the land now sought to be condemned, with the buildings and improvements thereon, made and erected by the said squatter occupants, from said occupants, and paid therefor the sum of thirty-five hundred ($3500) dollars.

"Seventh. That on or before the thirtieth day of July, A.D. 1881, the said school board went into actual possession of the lots described in the petition herein, and immediately commenced to build, and on the thirtieth day of January, A.D. 1882, prior to the institution of these proceedings, completed improvements, suitable and appropriate for educational purposes, at a cost to the said school district of forty thousand ($40,000) dollars; which property it has since possessed and occupied and still occupies for school purposes.

"Eighth. That at the time of the commencement of this action and the institution of these proceedings in condemnation, the land described in the petition herein, together with the improvements thereon so made by the school board as aforesaid, was of the value of forty thousand ($40,000) dollars.

"Ninth. That at the said times of taking possession and at the time of the commencement of this action and the institution of these proceedings in condemnation, the land described in the petition herein, without the improvements thereon made by the school board, was of the value of three thousand ($3000) dollars, and that the area of same is less than one acre.

"Tenth. That petitioner had knowledge of the issuance of a United States patent, covering the property sought to be condemned, prior to the purchase of the title which it subsequently purchased, and which was known as the squatter title.

"That prior to such purchase petitioner employed and paid reputable counsel to investigate said title, that the counsel so employed reported in favor of the validity of the so-called

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squatter title and against the validity of the United States patent; that, believing said so-called squatter title to be better than the title conveyed by United States patent, petitioner purchased the same; that after said purchase petitioner subscribed to the funds of an association organized for the purpose of endeavoring to defeat said patent title.

"Eleventh. That prior to the commencement of and during the erection of the school building now standing on the land sought to be condemned, the board of school directors of petitioner was notified on behalf of respondent, who at that time owned an equitable interest in the said property, and on behalf of respondent's grantors, that any building said school district might erect on said lots would be erected at the peril of the said school district, and would be claimed, when completed, by said respondent and his grantor; but the said school district, having purchased the said lots of the squatters in possession as aforesaid and believing that it had the better title thereto, proceeded, notwithstanding such notice, and made and erected said improvements as aforesaid.

"And in view of the statute, (Dawson's Colorado Code, p. 80, sec. 253,) and for the purpose of putting as speedy an end to contention as possible, it is further stipulated that the foregoing values may be taken as the actual values at the time of the trial of this suit, and that the property sought to be condemned is for public use, and within the meaning of the law is necessary for the school district.

"Twelfth. That R. S. Searl is now, and was at the time of the commencement of these proceedings, a citizen and resident of the State of Kansas."

The bill of exceptions also stated that "the said defendant, R. S. Searl, introduced further evidence tending to show that he became the legal owner of the premises on the 2d day of February, 1884, and commenced his action of ejectment on the 24th of March, 1884, which was at issue and set for trial in this court on the 11th day of June, 1884; that petitioner filed bill for injunction and obtained writ of injunction restraining trial of ejectment suit on the 7th of June, 1884, and commenced these proceedings on the 9th of June, 1884."

Argument for Plaintiff in Error.

The defendant requested the court to give to the jury a number of instructions, which are omitted in view of the grounds of decision here.

The court refused these instructions and charged the jury generally, and instructed them that the form of their verdict should be as follows: "We, the jury, find, first, that the accurate description of the property sought to be condemned in this action is lots 812, 814, 816, 818, and the north 13.6 feet, and the east 35 feet of lot 810, North Poplar Street, and lots 211 and 213 East 9th Street, in Cooper's subdivision of the surface of the Sizer placer, U. S. survey No. 388, situate in the county of Lake and State of Colorado, together with the improvements thereon. Second, That the value of said property at this date is $3000."

To the giving of this instruction, and to the refusal to give those prayed by the defendant, the defendant by his counsel then and there excepted. The jury thereupon returned a verdict in the sum of three thousand dollars, and judgment was rendered thereon that the petitioner upon "the payment of the amount of the said verdict to the said respondent or the deposit of the said amount in this court within thirty days hereafter, shall be, and it hereby is, invested with the fee in and to said premises. And it appearing that the said petitioner is in possession, it is further considered by the court that upon the payment or deposit of the said sum of money within the time aforesaid [said petitioner shall] retain possession of and hold the premises aforesaid, with all the rights and interests thereto belonging and appertaining."

To review this judgment a writ of error was sued out from this court.

Mr. Samuel P. Rose and *Mr. Frank W. Owers* for plaintiff in error.

The common law always gave the buildings erected by a trespasser with full knowledge of the condition of the title to the land on which he built to the legal owner of that land. The weight of authority in condemnation suits follows the

common law. *United States* v. *Tract of Land*, 47 California, 515; *Graham* v. *Connersville Railroad*, 36 Indiana, 463; *N. Y. & West Shore Railroad* v. *Gennet*, 37 Hun, 317; *Meriam* v. *Brown*, 128 Mass. 391; *Dietrich* v. *Murdock*, 42 Missouri, 279; *Hibbs* v. *Chicago &c. Railroad*, 39 Iowa, 340; *Farrar* v. *Stackpole*, 6 Maine (6 Greenl.) 154; *S. C.* 19 Am. Dec. 201.

In the case of *United States* v. *Tract of Land*, 47 California, 515, the United States entered upon property claimed by one "Jack" under an unconfirmed Mexican grant and against his protest erected a light-house thereon. The grant was subsequently confirmed and thereupon the United States proceeded to condemn the property and sought to pay only the value of the land. The Supreme Court of California held that the value of the buildings, being part of the realty, as well as the value of the land, must be paid. The case at bar is infinitely stronger than the light-house case. In that case Jack's title was unconfirmed, and the United States was, at the time of entry, endowed with the power to condemn. In the case at bar the title of plaintiff in error was evidenced by a patent, regular upon its face, and defendant in error was not empowered to condemn.

The case of *Graham* v. *Connersville Railroad*, 36 Indiana, 463, is precisely like the light-house case. In the last case the railroad company, having at the time the right to condemn, and knowing the condition of the title, entered upon Graham's land, against his protest, and built upon it a hotel and depot. In subsequent proceedings to condemn, the railroad company was compelled to pay the value of the hotel and depot. The other cases cited are to the same effect.

The section of the constitution of Colorado relating to the taking of private property for public use is practically word for word identical with the relative section in the constitution of Missouri. Were it not so, the Federal Constitution and that of each of the States mentioned guarantees "that no person shall be deprived of life, liberty or property without due process of law." It is evident that plaintiff in error has been deprived of his property rights without due process of law, and that he is still divested of those rights by defendant in

error without even an attempt on its part to comply with the requirements of the statute law.

The certainty of compensation is the primary requisite to the appropriation of lands for public use under the right of eminent domain. Potter's Dwarris on Statutes 390; Cooley's Const. Lim. 699.

That compensation must be not only certain but provided for prior to or pending the proceedings, see 2 Kent Com. 339; *Bloodgood* v. *Mohawk & Hudson Railroad*, 18 Wend. 17; *S. C.* 31 Am. Dec. 313; *Bonaparte* v. *Camden & Amboy Railroad*, 1 Baldwin C. C. 205; *Garrison* v. *City of New York*, 21 Wall. 196, 204; Potter's Dwarris Statutes 387–392.

The statutes of Colorado provide either for payment before the taking possession, or in case of disagreement between the owner and the condemning party, for a deposit in court "pending the ascertainment of damages." No payment was made in this case, and no attempt was made to deposit in court an amount which would indemnify plaintiff in error.

Mr. C. S. Thomas for defendant in error.

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

Upon the conceded facts, unless the plaintiff in error was entitled to be compensated for the school-house in question, the instruction limiting the recovery to three thousand dollars was correct, and the judgment must be affirmed.

The constitution of the State of Colorado provides "that no person shall be deprived of life, liberty or property, without due process of law;" and "that private property shall not be taken or damaged, for public or private use, without just compensation." Art. II. §§ 25, 15, Gen. Stat. Col. 1883, 34, 35; 1 Charters and Constitutions, 221, 222.

Did the just compensation thus secured to the owner of property taken in the exercise of the power of eminent domain, include in this instance payment to the plaintiff in error for the improvements made by the school district in order to carry

out the specific use and purpose for which the land was required? Could plaintiff in error properly insist that the loss of the school-house was an injury which he sustained by reason of the taking?

The argument is that the moment the school-house was completed it belonged to the owner of the land by operation of law, and therefore that he was entitled to be recompensed for it upon condemnation. The maxim *quicquid plantatur solo, solo cedit*, is not of universal application. Structures for the purposes of trade or manufacture, and not intended to become irrevocably part of the realty, are not within the rule, *Van Ness* v. *Pacard*, 2 Pet. 137; nor is it applicable where they are erected under agreement or by consent, the presumption not arising that the builder intended to transfer his own improvements to the owner. And courts of equity, in accord with the principles of the civil law, when their aid is sought by the real owner, compel him to make allowance for permanent improvements made *bona fide* by a party lawfully in possession under a defective title. Story Eq. Jur. § 1237.

The civil law recognized the principle of reimbursing to the *bona fide* possessor the expense of his improvements if he was removed from his possession by the legal owner, by allowing him the increase in the value of the land created thereby. And the betterment laws of the several states proceed upon that equitable view. The right of recovery, where the occupant in good faith believes himself to be the owner, is declared to stand upon a principle of natural justice and equity, and such laws are held not to be unconstitutional as impairing vested rights, since they adjust the equities of the parties as nearly as possible according to natural justice; and in its application as a shield of protection, the term "vested rights" is not used in any narrow sense, but as implying a vested interest of which the individual cannot be deprived arbitrarily without injustice. The general welfare and public policy must be regarded, and the equal and impartial protection of the interests of all. Cooley Cons. Lim. *356, *386.

But if the entry upon land is a naked trespass, buildings permanently attached to the soil become the property of the

owner of the latter. The trespasser can acquire no rights by his tortious acts.

The Circuit Court was not dealing with an action of ejectment or trespass, but simply with a proceeding in the exercise of the right of eminent domain. That right is the offspring of political necessity, and is inseparable from sovereignty unless denied to it by its fundamental law. It cannot be exercised except upon condition that just compensation shall be made to the owner, and it is the duty of the State, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it. *Garrison* v. *New York*, 21 Wall. 196, 204; *Kohl* v. *United States*, 91 U. S. 367, 371. The occupancy here was in no respect for a private purpose or pecuniary gain, but strictly and wholly for the public use. There could be no presumption that this public agent intended to confer public property upon a private individual, nor were the circumstances such as to impart the character of wilful trespass to the entry by the district, or impose liability to the forfeiture of improvements made in discharge of its public duty.

It is among the agreed facts in the case that the premises appropriated were necessary for the schools and were taken for that public use; that though the district had knowledge of the issuing of a patent covering the property, yet it purchased the adverse title of the party then in possession, believing it to be better than the patent title, and upon the advice of reputable counsel, who had, on investigation, reported against the validity of the patent and in favor of the validity of the title purchased, and paid thirty-five hundred dollars, which was five hundred dollars more than the actual value, without the building, was admitted to be when the trial took place; and that, notwithstanding notice that it was proceeding at its peril, it erected the building in reliance upon such belief that it had the better title. The only legitimate inference from these facts is that the district acted throughout in good faith, as the opposite of fraud and bad faith, and, although it may have been wholly mistaken, the intention guided the

entry and fixed its character, and it cannot be held to have been such a trespass as to justify the claim that the school building, erected in similar good faith, so became part and parcel of the land as to entitle the owner to recover its value. Plaintiff in error knew when he obtained the title that the land was in necessary use by the public for a purely public purpose, and that no intention of parting with the structures could be imputed; and no notice of what his grantor or himself intended to insist on could destroy the good faith in fact, which the conceded belief of the district imparted to its conduct.

In *Wright* v. *Mattison*, 18 How. 50, this court, in considering a statute of the State of Illinois in protection of persons "in the actual possession of lands or tenements under claim and color of title made in good faith," reiterated the rule that color of title is matter of law, but good faith in the party claiming under such color is purely a question of fact; and held that, while defects in the title might not be urged against it as destroying color, they might have an important and legitimate influence in showing a want of confidence and good faith in the mind of the vendee, if they were known to him, and he therefore believed the title to be fraudulent and void. The court approved of the opinion of the Supreme Court of Illinois in *Woodward* v. *Blanchard*, 16 Illinois, 424, in which it was said by Scates, C. J., that "the state of mind of the party in relation to such title was an existing truth which must be ascertained and found as a fact in the cause. Many independent facts and surrounding circumstances may be admissible in evidence, and legitimately considered as establishing or impeaching the state of mind in its good faith, honest belief or trust in, or dependence upon such title." And this language was quoted by the court from that opinion: "Good faith is doubtless used here in its popular sense, as the actual, existing state of the mind; whether so from ignorance, scepticism, sophistry, delusion, fanaticism, or imbecility, and without regard to what it should be from given legal standards of law or reason." *Ewing* v. *Burnet*, 11 Pet. 41; *Pillow* v. *Roberts*, 13 How. 472. As remarked by Beckwith, J., in *McCagg* v. *Heacock*, 34 Illinois,

476, 479: "The good faith required by the statute, in the creation or acquisition of color of title, is a freedom from a design to defraud the person having the better title;" and "the knowledge of an adverse claim to, or lien upon property, does not, of itself, indicate bad faith in a purchaser, and is not even evidence of it, unless accompanied by some improper means to defeat such claim or lien."

We are of opinion that plaintiff in error could not successfully contend that the school district should be treated as a naked trespasser. And as the actual value of the land at the time of the trial must have included whatever increase may have enured by reason of its adaptability to school purposes and every other element entering into its cash or market value, as tested by its capacity for any and all uses, it follows that the true criterion of recovery was adopted.

It is not denied that the school district, when it filed its petition, was entitled to acquire the property in the exercise of the power of eminent domain, but it is said that it could not do so prior to February 13, 1883, the date of the passage of an act rendering such action on its part lawful. Sess. Laws, Colorado, 1883, 263; Gen. St. § 3044, 893. But we cannot perceive that this affects the precise question before us. Inability to condemn indicates that possession was not taken with the view of proceedings to that end, but that is conceded on the other ground, that the school district believed that it had the better title and erected its building accordingly. When it came to possess and exercise the power, the inquiry was limited to such compensation as was just and did not embrace remote or speculative damages, or payment for injuries not properly susceptible of being claimed to have been sustained.

It was ruled in *Secombe* v. *Railroad Company*, 23 Wall. 108, 118, in relation to the taking of private property by a railroad company under the power of eminent domain, that "prior occupation without authority of law would not preclude the company from taking subsequent measures authorized by law to condemn the land for their use. If the company occupied the land before condemnation without the consent of the

owners, and without any law authorizing it, they are liable in trespass to the persons who owned the land at the time, but not to the present plaintiff."

Plaintiff in error obtained the legal title February 2, 1884, and this petition was filed the second day of June of that year. If he suffered injury by being kept out of possession, for which he could recover damages, they could not be assessed in this action, and there is nothing in the record to show that any claim to that effect was made.

Chapter XXXI of the General Laws of Colorado treats of eminent domain, and constitutes Chapter XXI of Dawson's Code of Civil Procedure, referred to in the record. Section 253 provides that "in estimating the value of all property actually taken, the true and actual value thereof at the time of the appraisement shall be allowed and awarded," and that "in all cases the owner or owners shall receive the full and actual value of all property actually taken." Dawson's Code, 1884, 80. This means, of course, the value of the owner's real interest. It was agreed that at the time of the trial the actual value of the land, "without the improvements thereon made by the school board," was three thousand dollars, so that, as before stated, the sole question is whether the Circuit Court erred in holding that the defendant could not be allowed for the improvements. We think that in this there was no error. In our judgment, the technical rule of law invoked to sustain the defendant's contention that he owned the schoolhouse, was inapplicable, and the value of the improvements could not justly be included in the compensation. Numerous well-considered decisions of the state courts announce the same results. *Justice* v. *Nesquehoney Valley Railroad*, 87 Penn. St. 28, 32; *Jones* v. *New Orleans & Selma Railroad*, 70 Alabama, 227; *Lyon* v. *Green Bay & Minnesota Railroad*, 42 Wisconsin, 538; *Chicago & Alton Railroad Co.* v. *Goodwin*, 111 Illinois, 273; *Oregon Railway & Navigation Co.* v. *Mosier*, 14 Oregon, 519; *Morgan's Appeal*, 39 Michigan, 675.

The judgment is *Affirmed.*

ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY *v.* JOHNSTON.

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

No. 41. Argued Decembr 19, 1889. — Decided March 3, 1890.

A customary depositor in a bank in New York deposited with it a sight draft on a railway company in Boston. It was described as a "check" on the deposit ticket, which distinguished between "checks" and "bills." He had made similar deposits before, never drawing against them, the bank always reserving the right to charge exchange and interest for the time taken in collection. The depositor's bank-book was with the bank at the time of the deposit. No entry was made in it until some days later, and then not by direction of the depositor. The receiving teller applied to the cashier for instructions on the receipt of the deposit and was directed to receive it as cash. The bank sent the draft to Boston for collection, and it was collected there. Before that was done, the bank in New York, which was insolvent when the transaction took place, suspended, closed its doors, and never resumed; *Held*, that the question whether the bank had become the owner of the draft, or was only acting as the agent of its customer, was one of fact, rather than of law, and that there was not enough evidence to establish that the customer understood that the bank had become the owner of the paper.

When a bank has become hopelessly insolvent, and its president knows that it is so, it is a fraud to receive deposits of checks from an innocent depositor, ignorant of its condition, and he can reclaim them or their proceeds; and the pleadings in this case are so framed as to give the plaintiff in error the benefit of this principle.

For more than five years prior to the 6th day of May, 1884, the St. Louis and San Francisco Railway Company had an account with the Marine National Bank of the city of New York. On the 5th day of May of that year it drew a sight draft on the Atchison, Topeka and Santa Fé Railroad Company at Boston, Massachusetts, payable to the order of the Marine Bank, for the sum of $17,835, an amount due from the latter company, and sent the same to the Marine Bank with a deposit ticket filled up by the assistant treasurer of the San Francisco Company, in the following words and figures:

Statement of the Case.

"Deposited by the St. Louis & San Francisco Railway Co. in the Marine National Bank May 5th, 1884.

	Dollars.	Cents.
"Bills		
"Checks	$17,835"	

The messenger who took the draft and deposit ticket to the bank had no special instructions, and handed them to an assistant of the receiving teller, who was absent at the time. The railway company's pass-book was then, and had been since April 30, 1884, in the possession of the bank, and no entry was made in it until some days afterwards, and then not by direction of the railway company. The assistant receiving teller applied to the assistant cashier for instructions, and was by him directed to receive the draft as cash, and it was so entered on the credit ledger of dealers with the bank, but not with the knowledge or by the request of the railway company. The Marine Bank sent the draft to the Atlantic National Bank of Boston for collection and credit, and it was by that bank presented to the Atchison Company on the 6th of May, 1884, and that company at five minutes before one o'clock P.M. of that day delivered its check on the National Bank of North America to the Atlantic Bank, which was presented for payment and paid to the Atlantic Bank on May 7, 1884. The Marine Bank was insolvent when it received the draft, and closed its doors at twenty minutes before eleven o'clock on the morning of the 6th of May, 1884, and never resumed business.

Walter S. Johnston was appointed receiver of the bank on the 13th of May, 1884, and thereupon a correspondence ensued between the receiver and the San Francisco Company, which resulted in an agreement between them that the receiver might retain the proceeds, subject to the right of the San Francisco Company to assert its claim thereto, which it does in this action. It is conceded that the Marine Bank never paid or advanced anything to the San Francisco Company on the draft, and that the latter, at the time the draft was sent to the bank, or at any time since, was not indebted to it. The balance to the credit of the railway company in the Marine Bank at nine o'clock A.M. on May 6, 1884, not including the draft, was

$117,981.72, besides some checks it had drawn and which it was obliged to take up.

The treasurer and assistant treasurer of the railway company testified that there was no arrangement or understanding, verbal or written, or dealing, to their knowledge, with the Marine Bank, by which the San Francisco Company was authorized or entitled to draw against out-of-town paper before actual collection, and that no drafts were ever so drawn; that they knew of no such agreement, verbal or in writing; that they drew on what they had and not on what they did not have; that the railway company had no occasion to draw against drafts or checks before collection, and did not do so; and that the company was allowed interest on its daily balances. Four deposits of out-of-town paper, other than that in question, were proven to have been made under the dates of August 23, August 27 and November 3, 1883, and April 10, 1884. The deposit tickets in each case referred to the deposit as "checks." The deposits of August 23, August 27 and November 3, were made up of two items each, but neither was marked on the tickets as cash, and there was no evidence that either of them was. The receiving teller testified that generally foreign paper, (paper outside of the city of New York,) of large amount, when received, was marked "F," and such a mark in red pencil appeared on the deposit tickets of November 3, 1883, for $17,860; of April 10, 1884, for $18,930; and of May 5, 1884, for $17,835, being the deposit in controversy. The witness said this was done, so "that if any of the officers should ask what certain checks consisted of — if a large deposit — we would be able to tell." These drafts or checks on banks outside of the city were kept on a slip called "foreign and general office slip," and put in a different pigeon-hole from that where domestic paper was placed.

The assistant note-teller had charge of the transmission of paper drawn on banks or persons outside of the city of New York, and testified thus: "Q. And all that you had to do, as it was out-of-town paper, was to transmit it for collection, was it not? A. And see that we got the money back again. Q. Those were all your duties in regard to it? A. Well, I had

other duties. Q. What were they? A. To see that the St. Louis and San Francisco Railway Company did not deposit too many large foreign checks as cash. Q. Why did you do so? A. Because I had entire charge of the foreign checks. The foreign checks are usually out five days, and that is five days' interest, and unless those concerned kept a large balance we charged them exchange, and where we paid interest on the balances we then charged interest and exchange where they kept large balances, and for that reason we watched all foreign checks deposited. . . . Q. What were the instructions you received in regard to the St. Louis and San Francisco Railway Company? A. To see whether they were depositing many large foreign checks and how much it cost, and whether it was advisable to get exchange from them. . . . Q. Do you recollect what officer it was who gave you those instructions? A. No, sir. Q. Did you ever after that enforce them? A. I do not understand the meaning of the word 'enforce.' I notified the officers of all large checks deposited by the St. Louis and San Francisco Railway Company. Q. How frequently? A. I don't remember; as often as they came in."

This particular draft was marked "F," and put in the foreign pigeon-hole, and credited as cash by direction of the assistant cashier. The form of letter universally used in transmitting foreign paper for collection was put in by defendant, and contained this paragraph: "Please return as promptly as possible all unpaid collections protested, unless marked thus X, when please return without protest." In the five instances of the deposit of these out-of-town drafts, they were credited to the San Francisco Company on the bank's books, and the San Francisco Company entered and added their amount on the margin of its check-book.

It appeared from the evidence that the bank had been insolvent for a year, and that it was hopelessly so on Saturday, the third day of May, and until its doors were closed. The receiver said that he got judgment for over $730,000 on the over-drafts of a firm doing business with the bank, which overdrafts occurred in the last two or three days in one account, and had been running for two or three weeks in the other

account; that the over-draft in the individual account of one of the partners amounted to $140,000; in the firm account, to $300,000; and in the firm special account, to $350,000, most of which was before Saturday, the 3d of May. Estimating the assets of the bank at what they were actually worth, and not at their face value, the deficit, according to the receiver's judgment when he took charge, was over a million and a half of dollars. The bank was really insolvent from the time the indebtedness from the firm in question, which was insolvent, grew to such a point, that, if called and not paid, the bank could not meet its obligations. The president of the Marine Bank was a partner of that firm.

The bill in this case was filed to obtain the proceeds of the draft as the property of the San Francisco Company, and, among other things, alleged:

"On the said 5th day of May it was well known to the said bank and to its officers, and so the fact was, that the said bank was insolvent, and, well knowing the fact, the said bank wrongfully neglected to disclose the same to your orator, but by continuing business with open doors, and otherwise representing to your orator and all other persons dealing with it that the said bank was solvent, and on the faith of such representations, your orator believed the said bank to be solvent, and had no knowledge or suspicion or means of knowing that it was insolvent or in danger of becoming so, and, acting upon such representations and relying on the solvency of said bank your orator delivered the said draft to it, and the bank received the same for collection as aforesaid. Thereafter, and on the same day, the said bank, by its cashier, endorsed the said draft as follows: 'Pay Atlantic National Bank of Boston or order, for collection, for account of Marine National Bank of the city of New York,' and transmitted the said draft, so endorsed, to the said Atlantic National Bank for collection."

And "that, by reason of the premises, the said draft, when delivered as aforesaid to the said bank, did not become the property of the said bank, and that your orator did not part with its title to or interest in the said draft, but that it re-

mained the property of your orator, and that the proceeds of the said draft, when collected, likewise did not become the property of the said bank, or of the defendant, but remained always, and still are, the property of your orator, and your orator is entitled to follow them specifically into the hands of the defendant and to recover them from him." Upon final hearing the bill was dismissed, and the opinion of the Circuit Court will be found reported in 23 Blatchford, 489, and in 27 Fed. Rep. 243.

Mr. John E. Burrill for appellant.

Mr. Charles E. Miller for appellee.

I. The deposit of a check in a bank accepted by it and credited to the depositor creates a debt and vests the property in the check in the bank. *Metropolitan Nat. Bank* v. *Loyd*, 90 N. Y. 530; *Cragie* v. *Hadley*, 99 N. Y. 131; *Bank of the Republic* v. *Millard*, 10 Wall. 152; *Scammon* v. *Kimball*, 92 U. S. 362, 370; *Libby* v. *Hopkins*, 104 U. S. 303, 308.

II. The law will not presume, from the mere fact that this deposit was of out-of-town paper, that any different result followed from the deposit than in the case of other paper. No such distinction exists in law, and no custom or course of dealing has been shown to create any such distinction.

The case comes before the court as an ordinary deposit of cash or checks.

III. The case of *Scott* v. *The Ocean Bank*, 23 N. Y. 289, cited by appellant's counsel, is not in his favor.

The court, in that case, bases its decision mainly upon the fact that neither by express agreement nor by any previous dealings was it shown that the depositor was entitled to a credit for bills remitted by him.

At page 290 the court says: "It is not shown nor claimed that there was an express agreement between the company and Lyell that he should, on the receipt by it of the bills remitted, be entitled to have a credit in the account between them for the amount thereof; nor is it found that in the course

of the dealings between them any credit was in fact ever given to him for any of such bills until the proceeds thereof were realized and received."

And at page 292 the court says: "When, therefore, it appears that the bill in question was retained in the possession of the company after its acceptance, and that no credit had been given for it at the time it was passed to the defendants, and when nothing is disclosed in the whole course of dealings, between the parties, to show that any bill was ever credited or agreed to be credited in account before its collection, or that Lyell ever drew, or was entitled to draw, upon the company, or that it was bound to accept drafts otherwise than upon and for funds actually received in cash it must be considered that the company, at the time of the transfer, stood in the relation of agents for its collection merely."

In the case at bar, the facts clearly establish a course of dealing between the parties of credits for similar bills at the time of their deposit, and the court has so found.

In the *Scott* case the court also dwells upon the fact that the depositor himself was not a party to the bill.

In *Dickinson* v. *Wason*, 47 N. Y. 439, the note was in terms sent for collection.

In *Balbach* v. *Frelinghuysen*, 15 Fed. Rep. 683, cited by plaintiff, the court lays stress upon the fact that the account between the parties had not changed between the date of the deposit and the failure of the bank, and that no draft had been drawn by the depositor.

In the case at bar the plaintiff did draw checks after the deposit, and before the failure, against its gross balance in the bank, and such checks were paid and the account between the parties had changed after the deposit.

IV. If it was the fact that the bank was insolvent when the deposit was made, it would not affect the transaction.

(*a*) Fraud cannot be imputed to a party who contracts a debt, knowing that he is insolvent, merely from the fact of his insolvency and his omission on a purchase of property on credit to disclose that fact to his vendor. *Nichols* v. *Pinner*, 18 N. Y. 295; *Nichols* v. *Michael*, 23 N. Y. 264; *S. C.* 80 Am.

Dec. 259; *Wright* v. *Brown*, 67 N. Y. 1; *People's Bank* v. *Bogart*, 81 N. Y. 101; *Morris* v. *Talcott*, 96 N. Y. 100.

V. There is no evidence that the directors of the bank had any knowledge of its condition. Such knowledge cannot be presumed where fraud is charged. *Wakeman* v. *Dalley*, 51 N. Y. 27.

Knowledge by any of the officers of a bank of its insolvency, is insufficient to avoid transactions between the bank and its customers, on the ground of fraud, unless the evidence clearly shows that the directors who represent the corporation also had such knowledge. *Balbach* v. *Frelinghuysen*, 15 Fed. Rep. 683.

VI. The bill contains no allegation that the officers of the bank entertained any fraudulent intention toward the plaintiff in receiving the deposit, and a recovery cannot be had upon that theory. The decree must be *secundum allegata.*

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

This was not the deposit of a check on the Marine Bank itself. In such a case it was held in *Oddie* v. *National City Bank*, 45 N. Y. 735, that the check, if received and credited, could not be charged back for want of funds. Nor was it a check on another bank, as to which Church, C. J., remarks, a different principle would be applied, as the presumption of agency might arise. It was a sight draft drawn by the San Francisco Company on its debtor in Boston, and collected through the Marine Bank's correspondent at that place. Neither it, nor the money collected upon it, passed into the hands of any third person for value. The collection was made after the Marine Bank had closed its doors. It is not claimed that there was any express arrangement or understanding between the San Francisco Company and the bank that the deposits of out-of-town paper should be treated as cash. Can such an understanding be implied from the mere fact that the San Francisco Company was credited with the draft upon the books of the bank, as if the deposit were of money, although the deposit ticket named it under the head of checks, and that the com-

pany itself added on the stubs of its check-book such deposits to the current amount, coupled with an alleged commercial usage to allow good customers to draw against a credit thus created? In five years of business between them, the San Francisco Company had never drawn against such paper. The evidence of the bank's clerks leaves no doubt that, as to out-of-town drafts for large amounts, the bank kept track of them and reserved the right to charge exchange and also interest for the average time taken in collection, notwithstanding its agreement to pay interest on the daily balances. This was not consistent with the theory of an understanding between the bank and the company that the title to this and similar drafts should pass absolutely to the bank. If the draft had not been paid, the bank could have cancelled the credit, as it clearly accepted no risk on the paper. The draft was entered at its full value, which indicated that it was not discounted, but credited for convenience and in anticipation of its payment.

It is settled law in this court that the holder of a bank check cannot sue the bank for refusing payment, in the absence of proof that it was accepted by the bank or charged against the drawer, (*Bank of The Republic* v. *Millard*, 10 Wall. 152; *First National Bank* v. *Whitman*, 94 U. S. 343, 344; *Laclede Bank* v. *Schuler*, 120 U. S. 511, 514;) but the depositor can sue for the breach of the contract to honor his checks. If, under the circumstances disclosed in this case, the only balance the San Francisco Company had was made up of the deposit of this draft, and it had drawn against it, and the bank had declined to honor the check, could the San Francisco Company have sustained an action on the ground of a general commercial usage, when by the course of dealing for five years it had never drawn against paper so deposited? Because banks often let good customers overdraw, do the latter thereby get the right to do so when the bank deems it improper to permit it? Undoubtedly if the San Francisco Company had overdrawn, and this draft had been credited to cover the over-draft, or if the company had drawn against the draft, the bank could hold the paper until the account was squared. And if the bank had transferred the draft to one occupying the position of a *bona*

fide holder, such transfer would have conferred title on its transferee by reason of its reputed ownership, so far as the latter was concerned. *Metropolitan National Bank* v. *Loyd*, 90 N. Y. 530.

In that case, as reported in 25 Hun, 101, which was affirmed in 90 N. Y. 530, the Court of Appeals remarking in reference to the opinion that it "so fully reviews the evidence and the authorities, that we should be content with simply expressing our concurrence, if the case had not been sent here by that court as involving a question of law which ought to be reviewed," the Supreme Court says "that the intention that the check should be received as cash is to be inferred from the fact that the check was due immediately and was drawn on a bank, and for all purposes of the parties was equivalent to so much money, . . . and such intention is confirmed by preceding transactions, admitted by the depositor, in which checks were deposited and entered as cash in his bank book, and that the custom of the bank in its dealings with him was to credit him with all checks as money."

And in *Scott* v. *Ocean Bank*, 23 N. Y. 289, it was held that "the property in notes or bills transmitted to a banker by his customer to be credited the latter, vests in the banker only when he has become absolutely responsible for the amount to the depositor," and that "such an obligation, previous to the collection of the bill, can only be established by a contract to be expressly proved or inferred from an unequivocal course of dealing."

"Every man who pays bills not then due into the hands of his banker," said Lord Ellenborough in *Giles* v. *Perkins*, 9 East, 12, 14, "places them there as in the hands of his agent to obtain payment of them when due. If the banker discount the bill, or advance money upon the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it *pro tanto* for his advance."

If there be no bargain that the property should be changed, the relation resembles that of principal and agent. Mere liberty to draw does not make out such a bargain, particularly where interest is allowed by the banker upon the bills only

from the time when their amount is received. *Ex parte Barkworth*, 2 De G. & J. 194; *Thompson* v. *Giles*, 2 B. & C. 422; *Ex parte Sargeant*, 1 Rose, 153.

The question was one of fact rather than of law, and we think there should be something more in the evidence tending to establish that the San Francisco Company understood that the bank had become owner of the paper, than these mere credits for convenience, before that can be held to be the fact, notwithstanding it may be a recognized usage to allow a customer to draw. So far from there being shown an unequivocal course of dealing tending to support that conclusion, it seems to us the tendency of the evidence is otherwise.

But if there could be any question on that branch of the case, we are unable to see that there could be on the other. This bank was hopelessly insolvent when the deposit was made, made so apparently by the operations of a firm of which the president of the bank was a member. The knowledge of the president was the knowledge of the bank. *Martin* v. *Webb*, 110 U. S. 7, 15; *Bank* v. *Walker*, 130 U. S. 267; *Cragie* v. *Hadley*, 99 N. Y. 131. In the latter case it was held that the acceptance of a deposit by a bank irretrievably insolvent, constituted such a fraud as entitled the depositor to reclaim his drafts or their proceeds. And the *Anonymous Case*, 67 N. Y. 598, was approved, where a draft was purchased from the defendants, who were bankers, when they were hopelessly insolvent, to their knowledge, and the court held the defendants guilty of fraud in contracting the debt, and said their conduct was not like that of a trader "who has become embarrassed and insolvent, and yet has reasonable hopes that by continuing in business he may retrieve his fortunes. In such a case he may buy goods on credit, making no false representations, without the necessary imputation of dishonesty. *Nichols* v. *Pinner*, 18 N. Y. 295; *Brown* v. *Montgomery*, 20 N. Y. 287; *Johnson* v. *Morrell*, 2 Keyes, 655; *Chaffee* v. *Fort*, 2 Lans. 81. But it is believed that no case can be found in the books holding that a trader who was hopelessly insolvent, knew that he could not pay his debts and that he must fail in business and thus disappoint his creditors, could honestly take

advantage of a credit induced by his apparent prosperity and thus obtain property which he had every reason to believe he could never pay for. In such a case he does an act, the necessary result of which will be to cheat and defraud another and the intention to cheat will be inferred." And it was decided that "in the case of bankers, where greater confidence is asked and reposed, and where dishonest dealings may cause widespread disaster, a more rigid responsibility for good faith and honest dealing will be enforced than in the case of merchants and other traders;" and that "a banker who is, to his own knowledge, hopelessly insolvent, cannot honestly continue his business and receive the money of his customers; and although having no actual intent to cheat and defraud a particular customer, he will be held to have intended the inevitable consequences of his act, *i.e.* to cheat and defraud all persons whose money he receives, and whom he fails to pay before he is compelled to stop business."

The Circuit Court did not, in the present case, express any different view, but held that the bill was not properly framed to present the question. Certainly there must be sufficient equity apparent on the face of a bill to warrant the court in granting the relief prayed; and the material facts on which the complainant relies must be so distinctly alleged as to put them in issue. *Harding* v. *Handy*, 11 Wheat. 103. And if fraud is relied on, it is not sufficient to make the charge in general terms. "Mere words, in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisdiction, unless the transactions to which they refer are such as in their essential nature constitute a fraud or a breach of trust, for which a court of chancery can give relief." *Van Weel* v. *Winston*, 115 U. S. 228, 237; *Ambler* v. *Choteau*, 107 U. S. 586, 591. The defendant should not be subjected to being taken by surprise, and enough should be stated to justify the conclusion of law, though without undue minuteness.

The bill alleged that the bank was insolvent on the 5th day of May; that this was well known to its officers; that it wrongfully neglected to disclose its insolvency to complainant,

and, by continuing business and otherwise, represented to complainant and all other persons dealing with it, that it was solvent; that complainant, on the faith of these representations believed such to be the fact, without suspicion that the bank was, or was in danger of becoming, insolvent; that, acting upon the representations, and relying on the bank's solvency, complainant delivered the draft; that next morning the bank closed its doors, and the draft was collected thereafter; and that, by reason of the premises, the draft or its proceeds did not become the property of the bank. The receiver in his answer specifically denied these averments. We think the issue thus framed was sufficient to enable the court to proceed to a decree. The fraudulent intention flowed from the guilty knowledge, and the bank must be held to the consequences of a representation which it knew to be contrary to the fact, and upon which the complainant innocently acted. Granted that the mere omission to disclose the insolvency, if there had been ground for the supposition that the bank might continue in business, would not be sufficient, there is nothing for such a belief to rest on here. As a matter of pleading, the averment was that the bank wrongfully neglected to make the disclosure; as a matter of fact, the condition of the bank was so hopeless that it was its duty to make it. The omission to specifically state in the pleading the degree of insolvency which rendered the bank's conduct fraudulent, was not fatal, as the conclusion asserted showed the intention of the pleader, and the particular contention could fairly be tested on the hearing.

The decree is reversed, and the cause remanded with directions to enter a decree in favor of the complainant according to the prayer of the bill and to take further proceedings in conformity with this opinion.

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

GREGORY v. STETSON.

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

No. 1514. Submitted January 6, 1890. — Decided March 3, 1890.

A Circuit Court can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby.

Two attorneys representing two separate parties, delivered a promissory note to a third person as bailee, and took his receipt therefor, in which he stated that he held it subject to their joint order, and to be dealt with as they might jointly direct. One of the separate parties filed a bill in equity against the bailee to compel him to deliver up the proceeds of the note (which had been paid) without making parties to the bill the two attorneys and the other party; claiming that he was entitled to do so by reason of an award in an arbitration that had taken place by which it had been decided that he should become the owner of the note on the performance of certain conditions which he had performed; *Held*, that they were necessary parties to the bill and that no decree could be made by the court in their absence.

This was a suit in equity brought in the Circuit Court of the United States for the District of Massachusetts by Charles A. Gregory, a citizen of Illinois, against William C. N. Swift and John G. Stetson, citizens of Massachusetts, for the alleged violation by Stetson of the following contract of bailment as respects the $15,000 note therein mentioned:

"Boston, *Dec. 24, 1886.*

"Received of Thomas H. Talbot, Esq., as attorney for Mary H. Pike, executrix of Frederic A. Pike, and of Francis A. Brooks, Esq., as attorney of Charles A. Gregory, two notes of hand made or signed by W. C. N. Swift, of New Bedford, dated April 20, 1883, one for $15,000, on two years' time, and one for $20,334.60, three years' time, payable to Charles F. Jones. Said notes are to be held by me, subject to the joint order and direction of the said Talbot and Brooks, and dealt with as they may jointly direct.

"John G. Stetson."

The amended bill filed on the 30th of January, 1889, alleged that on the 10th of January, 1887, complainant filed a bill in

that court against the defendants Swift and Stetson, and one Thomas H. Talbot, and referred to that bill as in part incorporated therein. The material allegations of that bill, so far as concerns this case, were as follows: That on or about the 16th of December, 1884, complainant filed a bill in one of the state courts of Massachusetts against the defendant Swift and one Frederic A. Pike, of Calais, in the State of Maine, to obtain possession of the two notes heretofore mentioned, then in the possession of Pike, which suit was afterwards removed into the court below where it was then pending and undetermined; that the defendants to that suit filed their respective answers to the bill, issues were joined, proofs taken and the case assigned for final hearing, but was not heard, for the reason that it was then agreed in writing between Pike and complainant to refer their controversy to the Hon. E. R. Hoar to determine the true ownership and rights of possession of the notes referred to, and in case of the death of either or both of them their respective legal representatives should be bound by the award to be made; that soon after the submission to the referee, Pike died testate, having appointed his wife, Mary A. Pike, executrix of his will, and residuary legatee of his estate, who proceeded in relation to the matter before the referee in the same manner as if the submission had been entered into by her personally; and that the referee after hearing the parties interested made and published the following award, and delivered a copy of the same to complainant:

"The undersigned, referee in the matter submitted to him by Charles A. Gregory and Frederic A. Pike, under the submission, a copy of which is hereto annexed, having duly heard the parties, awards and determines thereon, and this is my final award in the premises as follows, to wit: That the said Pike is not entitled to detain or withhold from said Gregory the two Swift notes mentioned or described in the submission except for the purpose of securing the payment of another certain note, signed by G. W. Butterfield and Charles F. Jones, for the sum of $2437.50, dated July 26, 1883, and payable to C. H. Eaton of Calais, Me., or order, a copy of which is hereto

annexed; that upon or after the said Eaton note, or whatever sum is now due thereon with interest, as stipulated in said note, shall have been paid by the said Gregory, the said Gregory will be entitled to the possession of the two Swift notes, one of $15,000, and one of $20,334.60. He also finds and determines that upon the payment of said Eaton note by said Gregory, he will be entitled to a transfer or delivery to himself of said Eaton note, and to the benefit of any sums which may be recovered of the said Butterfield and Jones on said note. Dated at Boston, the thirtieth day of November, in the year one thousand eight hundred and eighty six.

"E. R. Hoar.

"On or before January 1, 1884, we promise to pay C. H. Eaton, or order, two thousand four hundred and thirty-seven dollars and fifty cents, with interest at the rate of one per cent per month from date. Value received.

"G. W. Butterfield.
"Charles F. Jones."

It was then alleged that afterwards Mrs. Pike, having examined the award which had been temporarily returned to the referee for that purpose, undertook to revoke the power under which the referee had acted, and to vacate and annul the award made by him, whereupon the referee, upon being waited upon by complainant through F. A. Brooks, his attorney, accompanied by Thomas H. Talbot, the attorney for Mrs. Pike, returned the award to complainant and gave the said notes to said attorneys, who thereupon took them to defendant Stetson, receiving from him the receipt, heretofore set out in full; that complainant on the 4th of January, 1887, in order to entitle himself to the sole and exclusive possession of the notes heretofore mentioned, paid the note of $2437.50 in favor of C. H. Eaton, mentioned in the award, whereby he became entitled to receive from the defendant Stetson the two notes referred to, the rights of Mrs. Pike and her attorney, Talbot, in and to the same thus having ceased and become of no effect; and that by an instrument in writing dated December 5, 1884, Charles F. Jones, the payee of the two notes,

transferred and assigned them to complainant, and authorized him to sue for and collect them, using the payee's name for that purpose, and to deal with them generally as his own property.

The bill in this case then alleged that the defendants Swift and Stetson each answered that bill, and that issue was duly joined upon those answers; that on the 13th of June, 1887, while the defendant Stetson was in possession of the $15,000 note by virtue of the contract heretofore set out in full, the defendant Swift filed his petition in the old equity cause of *Gregory* v. *Pike and Swift* to enjoin the suing out or levying of an execution upon any judgment that might be rendered upon the law side of the court upon that note, which had matured and had been sued upon in the name of the payee Jones, until the final determination of the rights of the parties to that equity cause; that on the 9th of July it was ordered by the court below in the old equity cause that the defendant Stetson file the $15,000 note in the action at law of *Jones* v. *Swift*, and that upon the entry of judgment in that action the defendant Swift be directed to pay into the registry of the court the amount of that judgment, the same to be held subject to the rights of the parties claiming the note, and to abide the decision of the court in that cause; and that in obedience to those orders of court, and by the voluntary procurement of the defendant Swift, judgment was entered in the action at law against Swift on the $15,000 note, the note was delivered up by the defendant Stetson and filed with the papers in that action, and the amount of the judgment was paid by Swift to the clerk of the court below, who then claimed to hold the same "subject to the rights of the parties claiming said note and to abide the decision of the court" in the old equity cause of *Gregory* v. *Pike et al.*

The bill then alleged that all the orders and proceedings heretofore mentioned as pertaining to that old cause in equity were irregular, improper and contrary to law; that at and before the time of the passage of said orders the cause in which they were made had been abated by the death of Pike, one of the defendants thereto, which fact was suggested to the

court by complainant on the 6th of January, 1887; that complainant is entitled to the benefits of the action at law heretofore mentioned and to the proceeds of the judgment obtained therein, he having by leave of the court intervened in that action, as a claimant of the note in suit, before the entry of judgment upon it; that the amount of the judgment having been paid over to the defendant Stetson, as clerk of the court, the same was entered satisfied by him, and the money so received was deposited in bank, where it has since remained, the $15,000 note being filed in said old equity cause; and that the defendant Stetson claims to have been duly authorized by the aforesaid orders of court to deal with the note as above set forth, and to be exempted by those orders from all liability to complainant under the before mentioned receipt of December 24, 1886.

The bill prayed that the money paid by the defendant Swift to the defendant Stetson, as clerk of the court, in satisfaction of the judgment rendered on the $15,000 note, be remanded to Stetson, in his individual capacity, as if no orders, as above recited, had been passed, and that he be ordered to pay over the proceeds of that note to complainant, and for other and further relief.

Later amendments to the prayer of the bill were, that complainant be decreed to have become the sole owner of the $15,000 note prior to July 9, 1887, and that the defendant Stetson's possession of the same thereafter was that of a trustee holding for complainant's sole use and benefit; and a further prayer that if the relief sought against Stetson could not be granted, the defendant Swift be ordered and decreed to pay to complainant the amount of said $15,000 note.

The defendants filed separate demurrers to the bill, which were sustained by the court, and the bill was dismissed. *Gregory* v. *Swift*, 39 Fed. Rep. 708. The complainant thereupon prosecuted his appeal to this court.

Mr. F. A. Brooks for appellant.

The old equity suit against Pike had been got ready for hearing at much expense when Pike, who was not a resident

of Massachusetts, became dangerously ill. In the event of his death before rendition of judgment it was understood that the suit would be abated, and all benefit thereof lost.

Under these circumstances the cause was taken out of court, and submitted to Judge Hoar, as arbitrator, upon the evidence already taken and printed for the use of the court. It was expressly provided in the submission that it should not be affected by the decease of either party thereto, and Judge Hoar was not only made arbitrator to decide the cause, but was placed in possession of the notes themselves as a stakeholder, and he was to pass over these notes to whichever of the claimants he as arbitrator should find to be entitled thereto. After he had decided that the plaintiff, Gregory, would be entitled to said notes upon payment by him of the Eaton note, and that the testator Pike was not entitled to them, his executrix, Mrs. Pike, undertook to repudiate the award in violation of the express provisions of the submission, that the parties thereto and their assigns and legal representatives would "observe, keep and perform" the said award, when made.

The letter of Mrs. Pike's counsel, conveying notice to the arbitrator of her intended revocation of the submission, contained no statement of any reason for such revocation; but we are led to suppose that she acted in this respect under the impression that the decease of either party to a submission, before any award made, operates of itself as a revocation. This effect was, however, prevented in the case, as we suppose, by the provision introduced into the submission for that purpose. *Blundell* v. *Brettargh*, 17 Ves. 232; *Cooper* v. *Johnson*, 2 B. & Ald. 394; *Prior* v. *Hembrow*, 8 M. & W. 873; *McDougal* v. *Robertson*, 4 Bing. 435.

If it should be held that Pike's death would operate to revoke the submission, notwithstanding the clause therein intended to prevent this result, we then submit that Mrs. Pike, as executrix of her husband's will, had power to submit claims against the estate to arbitration, and that her appearance before the arbitrator in pursuance of the submission, and prosecuting the same until the publication of the award, was the adoption by her of the old submission, and was equivalent in law to the

execution by her of a new submission. *Bean* v. *Farnam*, 6 Pick. 269.

The notice given to the arbitrator by Mrs. Pike, through her attorney Harvey, December 24, 1886, for the purpose of revoking the submission, of itself imports or implies the previous existence of a submission intended to be revoked by her.

We submit, therefore, in view of all the facts and circumstances of the case, it was not the intention of the receipt given by Stetson as stakeholder that neither party should be able to get possession of the notes, though successful before the arbitrator, unless he could procure the order or direction of the other, authorizing Stetson to give them up.

If this were so, then stakeholders could never be required to perform their duty or trust to the party entitled, without the concurrence or consent of both parties; or, in other words, the losing party could always prevent any delivery of the stakes except at the end of a law-suit.

Of course we do not claim that the stakeholder should not be free to decline to deliver over the stakes, so long as he has any reasonable doubt as to who is entitled to them. He is always at liberty, in the case of conflicting claims, to bring a bill of interpleader, and in that way get a decision of the court which shall bind all parties.

Mr. John G. Stetson, in person, submitted on the opinion of the court below.

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

The bill having been dismissed by agreement, as respects the defendant Swift, the only questions in the case for our consideration are those relating to the demurrer of the defendant Stetson. That demurrer rests on ten grounds, but the court below considered only one of them, viz., the ninth one, which is as follows: "This bill is defective for want of proper parties, in that it does not make Mary H. Pike, executrix of Frederic A. Pike, Thomas H. Talbot and Francis A. Brooks, or either of them, parties thereto."

Opinion of the Court.

We are of opinion that the decree of the court below must stand. The rule as to who shall be made parties to a suit in equity is thus stated in Story's Eq. Pl. § 72: "It is a general rule in equity (subject to certain exceptions, which will hereafter be noticed) that all persons materially interested, either legally or beneficially, in the subject matter of a suit are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree, which shall bind them all. By this means, the court is enabled to make a complete decree between the parties, to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others, who are interested in the subject matter, by a decree, which might otherwise be grounded upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto." See also 1 Daniell's Chan. Pl. and Prac. 246 *et seq.*

In the case before us we are unable to see how any final decree could be rendered affecting the parties to the contract sued on without making them all parties to the suit. It is an elementary principle that a court cannot adjudicate directly upon a person's right without having him either actually or constructively before it. This principle is fundamental. The allegations of the bill show that the contract sued on was made and entered into subsequently to the termination of the proceedings before the referee. By the terms of that contract the note in dispute between Mrs. Pike and the complainant was to be held by the bailee, Stetson, "subject to the joint order and direction" of their respective attorneys. It seems too plain to require argument that complainant Gregory, Mrs. Pike, Talbot, Brooks and Stetson, all had an interest in the subject matter of the contract — such an interest, too, as brings the case within the rule just announced.

The point was made in the court below, and it is also pressed here, that Mrs. Pike being a non-resident and beyond the juris-

diction of the court, it was impossible to join her as a party defendant to this suit, and that it was, therefore, unnecessary to attempt to do so. The court below ruled against the complainant on this point, and we see no error in that ruling. The general question involved therein has been before this court a number of times, and it is now well settled that, notwithstanding the statute referred to and the 47th equity rule, a Circuit Court can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby. *Shields* v. *Barrow*, 17 How. 130, 141, 142; *Coiron* v. *Millaudon*, 19 How. 113, 115, and cases there cited.

But even admitting the complainant's contention as regards the making of Mrs. Pike a party to this suit, it does not follow that Talbot and Brooks should not have been made parties. As we have shown, they had a substantial interest in the subject matter of the contract sued on, and they should have been made parties to the suit.

We see no error in the decree of the court below prejudicial to the complainant, and it is therefore

Affirmed.

LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY *v.* MISSISSIPPI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 1195. Submitted January 10, 1890. — Decided March 3, 1890.

The statute of the State of Mississippi of March 2, 1888, requiring all railroads carrying passengers in that State (other than street railroads) to provide equal, but separate, accommodations for the white and colored races, having been construed by the Supreme Court of the State to apply solely to commerce within the State, does no violation to the commerce clause of the Constitution of the United States.

The construction of a state statute by the highest court of the State is accepted as conclusive in this court.

THE case is stated in the opinion.

Mr. W. P. Harris for plaintiff in error.

The defendant in error submitted on the record.

Mr. Justice Brewer delivered the opinion of the court.

The question presented is as to the validity of an act passed by the legislature of the State of Mississippi on the 2d of March, 1888. That act is as follows:

"Sec. 1. *Be it enacted*, That all railroads carrying passengers in this State (other than street railroads) shall provide equal, but separate, accommodation for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition, so as to secure separate accommodations.

"Sec. 2. That the conductors of such passenger trains shall have power, and are hereby required, to assign each passenger to the car or the compartment of a car (when it is divided by a partition) used for the race to which said passenger belongs; and that, should any passenger refuse to occupy the car to which he or she is assigned by such conductor, said conductor shall have power to refuse to carry such passenger on his train, and neither he nor the railroad company shall be liable for any damages in any event in this State.

"Sec. 3. That all railroad companies that shall refuse or neglect within sixty days after the approval of this act to comply with the requirements of section one of this act, shall be deemed guilty of a misdemeanor, and shall, upon conviction in a court of competent jurisdiction, be fined not more than five hundred dollars; and any conductor that shall neglect to, or refuse to, carry out the provisions of this act shall, upon conviction, be fined not less than twenty-five nor more than fifty dollars for each offence.

"Sec. 4. That all acts and parts of acts in conflict with this act be, and the same are hereby repealed, and this act to take effect and be in force from and after its passage." Acts of 1888, p. 48.

The plaintiff in error was indicted for a violation of that statute. A conviction in the trial court was sustained in the Supreme Court, and from its judgment this case is here on

error. The question is whether the act is a regulation of interstate commerce and therefore beyond the power of the State; and the cases of *Hall* v. *DeCuir*, 95 U. S. 485, and *Wabash, St. Louis &c. Railway* v. *Illinois*, 118 U. S. 557, are specially relied on by plaintiff in error.

It will be observed that this indictment was against the company for the violation of section one, in not providing separate accommodations for the two races; and not against a conductor for a violation of section two, in failing to assign each passenger to his separate compartment. It will also be observed that this is not a civil action brought by an individual to recover damages for being compelled to occupy one particular compartment, or prevented from riding on the train; and hence there is no question of personal insult or alleged violation of personal rights. The question is limited to the power of the State to compel railroad companies to provide, within the State, separate accommodations for the two races. Whether such accommodation is to be a matter of choice or compulsion does not enter into this case. The case of *Hall* v. *DeCuir*, *supra*, was a civil action to recover damages from the owner of a steamboat for refusing to the plaintiff, a person of color, accommodations in the cabin specially set apart for white persons; and the validity of a statute of the State of Louisiana, prohibiting discrimination on account of color, and giving a right of action to the party injured for the violation thereof, was a question for consideration. The steamboat was engaged in interstate commerce, but the plaintiff only sought transportation from one point to another in the State. This court held that statute, so far as applicable to the facts in that case, to be invalid. That decision is invoked here; but there is this marked difference. The Supreme Court of the State of Louisiana held that the act applied to interstate carriers, and required them, when they came within the limits of the State, to receive colored passengers into the cabin set apart for white persons. This court, accepting that construction as conclusive, held that the act was a regulation of interstate commerce, and therefore beyond the power of the State. The Chief Justice, speaking for the court, said: "For the purposes of this case

we must treat the act of Louisiana of February 23, 1869, as requiring those engaged in interstate commerce to give all persons travelling in that State, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. Such was the construction given to that act in the courts below, and it is conclusive upon us as the construction of a state law by the state courts. It is with this provision of the statute alone that we have to deal. We have nothing whatever to do with it as a regulation of internal commerce, or as affecting anything else than commerce among the States." And again: "But we think that it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced."

So the decision was by its terms carefully limited to those cases in which the law practically interfered with interstate commerce. Obviously whether interstate passengers of one race should, in any portion of their journey, be compelled to share their cabin accommodations with passengers of another race, was a question of interstate commerce, and to be deter-

mined by Congress alone. In this case, the Supreme Court of Mississippi held that the statute applied solely to commerce within the State; and that construction being the construction of the statute of the State by its highest court, must be accepted as conclusive here. If it be a matter respecting wholly commerce within a State, and not interfering with commerce between the States, then, obviously, there is no violation of the commerce clause of the Federal Constitution. Counsel for plaintiff in error strenuously insists that it does affect and regulate interstate commerce, but this contention cannot be sustained.

So far as the first section is concerned, (and it is with that alone we have to do,) its provisions are fully complied with when to trains within the State is attached a separate car for colored passengers. This may cause an extra expense to the railroad company; but not more so than state statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the State.

No question arises under this section, as to the power of the State to separate in different compartments interstate passengers, or to affect, in any manner, the privileges and rights of such passengers. All that we can consider is, whether the State has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the State is no invasion of the powers given to Congress by the commerce clause.

In the case of *Wabash Railway Co.* v. *Illinois*, *supra*, Mr. Justice Miller, speaking for the court, said: "If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. The charges for these might be within the competency of the Illinois legislature to regulate. The

reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the States, or interstate commerce, but is exclusively commerce within the State. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the States. It has often been held in this court, and there can be no doubt about it, that there is a commerce wholly within the State, which is not subject to the constitutional provision, and the distinction between commerce among the States and the other class of commerce between the citizens of a single State, and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other. *The Daniel Ball*, 10 Wall. 557; *Hall* v. *DeCuir*, 95 U. S. 485; *Telegraph Co.* v. *Texas*, 105 U. S. 460."

The statute in this case, as settled by the Supreme Court of the State of Mississippi, affects only such commerce within the State, and comes, therefore, within the principles thus laid down. It comes also within the opinion of this court in the case of *Stone* v. *Farmers' Loan and Trust Co.*, 116 U. S. 307.

We see no error in the ruling of the Supreme Court of the State of Mississippi, and its judgment is, therefore,

Affirmed.

Mr. Justice Harlan dissenting.

The defendant, the Louisville, New Orleans and Texas Railroad Company, owns and operates a continuous line of railroad from Memphis to New Orleans. If one of its passenger trains — starting, for instance, from Memphis to go to New Orleans — enters the territory of Mississippi, without having cars attached to it for the separate accommodation of the white and black races, the company and the conductor of such train are

liable to be fined as prescribed in the statute, the validity of which is here in question. In other words, it is made an offence against the State of Mississippi if a railroad company engaged in interstate commerce shall presume to send one of its trains into or through that State without such arrangement of its cars as will secure separate accommodations for both races.

In *Hall* v. *DeCuir*, 95 U. S. 485, 488, this court declared unconstitutional and void, as a regulation of interstate commerce, an act of the Louisiana legislature which required those engaged in interstate commerce to give all persons travelling in that State, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. The court, speaking by Chief Justice Waite, said: "We think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without, or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced. It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many

more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

It seems to me that those observations are entirely pertinent to the case before us. In its application to passengers on vessels engaged in interstate commerce, the Louisiana enactment forbade the separation of the white and black races while such vessels were within the limits of that State. The Mississippi statute, in its application to passengers on railroad trains employed in interstate commerce, requires such separation of races, while those trains are within that State. I am unable to perceive how the former is a regulation of interstate commerce, and the other is not. It is difficult to understand how a state enactment, requiring the separation of the white and black races on interstate carriers of passengers, is a regulation of commerce among the States, while a similar enactment forbidding such separation is not a regulation of that character.

Without considering other grounds upon which, in my judgment, the statute in question might properly be held to be

repugnant to the Constitution of the United States, I dissent from the opinion and judgment in this case upon the ground that the statute of Mississippi is, within the decision in *Hall* v. *DeCuir*, a regulation of commerce among the States, and is, therefore, void.

I am authorized by MR. JUSTICE BRADLEY to say that, in his opinion, the statute of Mississippi is void as a regulation of interstate commerce.

ASPINWALL *v.* BUTLER.

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

No. 957. Submitted January 7, 1890. — Decided March 3, 1890.

This case differs in no material fact from *Delano* v. *Butler*, 118 U. S. 634, and is governed by it.

When the previous proceedings looking to an increase in the capital stock of a national bank have been regular and all that are requisite, and a stockholder subscribes to his proportionate part of the increase and pays his subscription, the law does not attach to the subscription a condition that it is to be void if the whole increase authorized be not subscribed; although there may be cases in which equity would interfere to protect him in case of a material deficiency.

The provision in Rev. Stat. § 5142, that no increase of capital in a national bank shall be valid until the whole amount of the increase shall be paid in, and the Comptroller of the Currency notified and his consent obtained, was intended to secure the actual cash payment of the subscriptions made, and to prevent watering of stock; but not to invalidate *bona fide* subscriptions actually made and paid.

The Comptroller of the Currency has power by law to assent to an increase in the capital stock of a national bank less than that originally voted by the directors, but equal to the amount actually subscribed and paid for by the shareholders under that vote.

THE case is stated in the opinion.

Mr. Benjamin N. Johnson, for plaintiff in error, cited: *Eaton* v. *Pacific Nat. Bank*, 144 Mass. 260; *Winters* v. *Armstrong*, 37 Fed. Rep. 508; *Chubb* v. *Upton*, 95 U. S. 665;

Hamilton Plank Road Co. v. *Rice*, 7 Barb. 157; *Nutter* v. *Lexington &c. Railroad Co.*, 6 Gray, 85; *Salem Milldam Co.* v. *Ropes*, 6 Pick. 23; *Central Turnpike* v. *Valentine*, 10 Pick. 142; *Scovill* v. *Thayer*, 105 U. S. 143; *Sutherland* v. *Olcott*, 95 N. Y. 93; *Railway Co.* v. *Allerton*, 18 Wall. 233; *Gray* v. *Christian Society*, 137 Mass. 329; *People's Ins. Co.* v. *Westcott*, 14 Gray, 440; *Zabriskie* v. *Cleveland Railway Co.*, 23 How. 381; *Atlantic Delaine Co.* v. *Mason*, 5 R. I. 463.

Mr. A. A. Ranney, for defendant in error, cited: *Cadle* v. *Baker*, 20 Wall. 650; *Davis* v. *Essex Baptist Society*, 44 Connecticut, 582; *Upton* v. *Tribilcock*, 91 U. S. 47; *Winters* v. *Armstrong*, 37 Fed. Rep. 508, and cases cited; *Brigham* v. *Mead*, 10 Allen, 245; *Buffalo &c. Railroad* v. *Dudley*, 14 N. Y. 336; *Seymour* v. *Sturgess*, 26 N. Y. 134; *Am. Tube Works* v. *Boston Machine Co.*, 139 Mass. 5; *Reed* v. *Boston Machine Co.*, 141 Mass. 454; *Wontner* v. *Shairp*, 4 C. B. 404; *Asphitel* v. *Sercombe*, 5 Exch. 147; *Johnson* v. *Goslett*, 3 C. B. (N. S.) 569; *Watts* v. *Salter*, 10 C. B. 477; *Garwood* v. *Ede*, 1 Exch. 264; *Scovill* v. *Thayer*, 105 U. S. 143; *Chubb* v. *Upton*, 95 U. S. 665; *Pullman* v. *Upton*, 96 U. S. 928; *Casey* v. *Galli*, 94 U. S. 673; *Keyser* v. *Hitz*, 2 Mackey, 473; *Kennedy* v. *Gibson*, 8 Wall. 498; *Curran* v. *Arkansas*, 15 How. 304; *Hawthorne* v. *Calef*, 2 Wall. 10; *Davis* v. *Weed*, 44 Connecticut, 569, Shipman, J.; *Railway Co.* v. *Allerton*, 18 Wall. 233; *Sawyer* v. *Hoag*, 17 Wall. 610; *Gray* v. *Portland Bank*, 3 Mass. 364; *Hart* v. *St. Charles Street Railway*, 30 La. Ann. 758; *Terry* v. *Eagle Lock Co.*, 47 Connecticut, 141; *Clarke* v. *Thomas*, 34 Ohio St. 46; *Nutter* v. *Lexington &c. Railroad*, 6 Gray, 85; *Reed* v. *Memphis Gayoso Gas Co.*, 9 Heiskell, 545; *Skowhegan & Athens Railroad* v. *Kinsman*, 77 Maine, 370.

Mr. Justice Bradley delivered the opinion of the court.

This case is governed by that of *Delano* v. *Butler*, 118 U. S. 634. The cases are not identical, it is true; but the principles established in that case require a similar decision in this. The substantial facts, up to a certain point, are the same; what took place afterwards cannot vary the result.

Opinion of the Court.

The Pacific National Bank of Boston failed, and passed into the hands of a receiver on the 22d day of May, 1882, and the Comptroller of the Currency on the 27th of November, 1882, ordered an assessment of 100 per cent on the capital stock for the purpose of enforcing the individual liability of the stockholders, to pay the liabilities of the institution, under section 5151 of the Revised Statutes. Fifty shares of the stock, amounting to $5000, stood in the name of Aspinwall individually, and 50 other shares in his name as trustee and guardian. This suit was brought against him by the receiver of the bank to recover $5000 as the holder of the individual stock. He denied that he was the holder of any such stock; and, for another plea, averred that it had been fraudulently and illegally issued, and was not binding against him as a holder thereof. A trial by jury was waived, and the cause was tried by the Circuit Court, which made a special finding of facts, and decided in favor of the plaintiff. The writ of error is to that decision.

After the finding of facts had been made, the defendant prayed the court to rule "upon the facts found in this case the plaintiff is not entitled to judgment;" but the court refused this prayer, and found that the defendant was the owner of fifty shares of stock on May 20 and May 22, 1882, and entered judgment for the plaintiff for the sum of $6550; to which refusal to rule, ruling and entry of judgment the defendant then excepted; and this is the only exception in the case. The question is, whether this general finding is supported by the special facts found, and is in accordance with the law.

Amongst other things, the findings set forth the 5th and 6th of the original articles of association of the bank. By the 5th article the capital stock is fixed at $250,000, but with the privilege of being increased, according to section 5142 of the Revised Statutes, to any sum not exceeding $1,000,000; and in case of increase, each stockholder was to have the privilege of subscribing his *pro rata* share. The 6th article specifies the powers and duties of the board of directors, amongst which was the power "to provide for an increase of the capital of the association, and to regulate the manner in which

such increase shall be made," and the power "to make all by-laws that it may be proper and convenient for them to make under said Revised Statutes for the general regulation of the business of the association and the management and administration of its affairs."

The findings also set forth the first and eleventh by-laws of the bank; the former of which fixed the regular annual meeting of the stockholders for the election of directors on the second Tuesday of January of each year; fourteen days' notice of which was to be given. The eleventh by-law was as follows, to wit:

"SEC. 11. Whenever an increase of stock shall be determined upon it shall be the duty of the board to notify all the stockholders of the same and cause a subscription to be opened for such increase, and each stockholder shall have the privilege of subscribing for such number of shares of new stock as he may be entitled to subscribe for in proportion to his existing stock in the bank. If any stockholder should fail to subscribe for the amount of stock to which he may be entitled within a reasonable time, which shall be stated in the notice, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock."

The findings further state:

"On the 13th day of September, 1881, the capital stock of the bank was $500,000, divided into 5000 shares of the par value of $100 each, of which shares the defendant, Aspinwall, as trustee under the will of Augustus Aspinwall and guardian under the will of Thomas Aspinwall for the benefit of his son, William H. Aspinwall, a minor, held fifty, which stood in his name as guardian and trustee on the books of the bank, a certificate of said shares having been taken in the same way. . . .

"September 13, 1881, the directors of the bank passed the following vote:

"'*Voted*, that the capital of this bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in an amount equal to that now held by them.'"

A printed notice of this resolution was thereupon sent to all the stockholders of the bank; and at the bottom of this printed notice there was left a space and lines indicated for stockholders to write therein their subscriptions to the new stock to which they were entitled. Other than this there was no subscription paper opened. Some stockholders signified their assent on the notice in the place indicated at the bottom and sent it to the bank. Others did not, but went or sent to the bank and paid the money for the new stock to which they would be entitled in the proposed increase, taking receipts in the printed form prepared for that purpose.

The defendant received said notice, and thereupon went to the bank and informed A. I. Benyon, its president, that he had not sufficient funds in his hands as guardian and trustee with which to take as such the fifty shares in the proposed increase, and that he should, therefore, subscribe for and take the same himself individually. The president of the bank said that he could do so. The defendant afterwards returned to the bank the said notice received by him with the following subscription written at the bottom thereof signed by him:

"I will take the fifty new shares to which I am entitled and will pay for them as above. WILLIAM ASPINWALL."

Subsequently, on October 1st, 1881, the defendant went to the bank and paid the sum of five thousand dollars, receiving therefor a receipt, a copy of which is as follows:

"Pacific National Bank.

"$5000. BOSTON, *October* 1st, 1881.

"Received of William Aspinwall five thousand dollars on account of subscription to new stock.

"J. M. PETTENGILL, *Cashier.*"

The defendant was well acquainted with Mr. Benyon, seeing him almost daily, and he did some business with the bank.

At the time the defendant paid this money and took this receipt he asked Mr. Benyon, the president of the bank, if

there was any of the new stock that had not been taken, stating that if that were the case he, the defendant, would like to take some more of the new stock. The president of the bank replied that all the new stock had been taken, and that the defendant could not have any more than fifty shares already subscribed for and taken. Defendant desired his certificate, but was told that he could only have a receipt, as they were not in a position to issue certificates. The defendant believed this statement of the president of the bank, that all the new stock had been taken, to be true, but he was not told that all the money had been paid for the new stock.

Payments for new stock in the proposed increase of $500,000 were made to the amount of $330,100 on and prior to October 1, 1881, subsequent to which time additional payments were made until November 15, 1881. The total amount thus paid in for new stock was $461,300.

Certificates for the new stock were issued on and after October 1, 1881, as called for, nearly all being delivered. The following is a copy of the certificate delivered to, and received by, the defendant, November 5, 1881, to wit:

"Fifty shares.

"Pacific National Bank of Boston, Mass.

"This certifies that William Aspinwall, of Brookline, is proprietor of fifty shares in the capital stock of the Pacific National Bank of Boston, Mass.; transferable only on the books of said bank in person or by attorney on surrender of this certificate.

"Boston, October 1, 1881. A. I. Benyon, *President.*

"J. M. Pettengill, *Cashier.*"

The bank kept a book, called a stock ledger, in which it entered the names of the stockholders, their places of residence, and the number of shares held by each in a debit and credit account.

An entry of fifty shares to the credit of William Aspinwall appears to have been made in this stock ledger, of which the following is a copy:

"William Aspinwall, of Brookline.

"October 1st, 1881. By fifty shares . . . . . $5000."

At what time this certificate and entry were made does not appear except by the books. The stock ledger shows that the amount of capital stock as credited to the respective parties named therein in a credit and debit form as aforesaid was, on November 18, 1881, $961,300, and so remained to May 22, 1882, the entry as to said defendant being the same at the latter date as made originally as aforesaid.

On the 18th of November, 1881, said bank became insolvent, suspended payment, and closed its doors; and Daniel Needham, an examiner of national banks, was placed by the Comptroller of the Currency in charge of said bank and all its funds, assets, records and books. The bank remained under the exclusive charge and in the possession of said Needham, with its doors closed to business, until on or about March 18, 1882.

A committee of the directors went to Washington in December, 1881, and had an interview with the Comptroller of the Currency in relation to the affairs of the bank. The fact that a vote had been passed in September previous to increase the capital to a million dollars, and that the full amount of that increase had not been subscribed for or paid in when the bank failed, in November, was talked over in that conversation. It was discussed with the Comptroller as to what should be done in view of the facts and as to what should be regarded as the capital of the bank, and in pursuance of that interview the directors of the bank, on December 13, 1881, passed the following vote, viz.:

"*Voted*, That whereas it was voted by this board on the thirteenth day of September last that the capital of this bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in equal amount to that held by them; and whereas the stockholders were duly notified of said vote, and also that subscriptions to the new stock would be payable October 1; and whereas $461,300 of said new stock has been taken and paid in; and whereas $38,700 thereof has not been taken and paid in:

"*Voted*, That said $38,700 of said stock be, and is hereby, cancelled and deducted from said capital stock of $1,000,000, and that the paid-up capital stock of this association amounts to $961,300.

"*Voted*, That the Comptroller of the Currency be notified that the capital of this association has been increased in the sum of $461,300, and that the whole amount of said increase has been paid in as part of the capital of this association, and that he be requested to issue his certificate of said increase to this association according to law."

The following certificate was thereupon sent to the Comptroller of the Currency by the cashier and sworn to by him, to wit:

"Pacific National Bank of Boston.

"December 13, 1881.

"To the Comptroller of the Currency, Washington, D.C.:

"It is hereby certified that the capital stock of 'The Pacific National Bank of Boston' has been increased, pursuant to the articles of association of said bank, in the sum of four hundred and sixty-one thousand three hundred dollars, all of which has been paid in, and that the paid-up capital stock of said bank now amounts to nine hundred sixty-one thousand three hundred dollars.

"[seal.] J. M. Pettengill, *Cashier*."

Upon the receipt by the Comptroller of a copy of the vote of December 13th and the certificate of the cashier of December 13th the Comptroller sent, December 16, 1881, to the directors of the bank the following certificate:

"Treasury Department,

"Office of Comptroller of the Currency,

"Washington, *December* 16, 1881.

"Whereas satisfactory notice has been transmitted to the Comptroller of the Currency, that the capital stock of 'The Pacific National Bank of Boston, Mass.,' has been increased

in the sum of four hundred and sixty-one thousand three hundred dollars in accordance with the provisions of its articles of association, and that the whole amount of such increase has been paid in:

"Now it is hereby certified that the capital stock of 'The Pacific National Bank of Boston, Mass.,' aforesaid has been increased as aforesaid in the sum of four hundred and sixty-one thousand three hundred dollars; that said increase of capital has been paid into said bank as a part of the capital stock thereof, and that the said increase of capital is approved by the Comptroller of the Currency.

"In witness whereof I hereunto affix my official signature.

"[SEAL.] JOHN J. KNOX, *Comptroller.*"

At a meeting of the directors of the bank, held on the 14th of December, 1881, resolutions were adopted and a copy sent to the Comptroller, whereby, after setting forth, by way of recital, several particulars with regard to the condition of the bank, going to show that it might resume business under certain conditions, it was, amongst other things, resolved as follows, to wit:

"*Resolved*, That in the opinion of the directors of said bank the interests of both creditors and stockholders require its early reorganization.

"*Resolved*, That the Comptroller of the Currency be requested to authorize the stockholders of the association to levy an assessment of 100 per cent upon the par value of the capital stock now paid in, viz., $961,300, upon condition that said Weeks shall return to this bank $350,000 additional checks, as agreed, before said assessment shall be made."

Other resolutions adopted at the same time set forth a certain scheme of reorganization, and it was finally resolved as follows, to wit:

"*Resolved*, That a copy of these resolutions be forwarded to the Comptroller of the Currency and his approval asked of the scheme of reorganization herein set forth, and that he grant the directors until January 15, 1882, to perfect said scheme of organization."

There was no vote of the stockholders of said association passed relating to increase or reduction of its capital stock, unless the vote of January 10, 1882, hereafter mentioned, was such. On the 16th day of December, 1881, the Comptroller of the Currency sent to the bank the following communication, namely:

"WASHINGTON, *Dec.* 16, 1881.

"The Pacific National Bank of Boston, Massachusetts:

"The entire capital stock of the Pacific National Bank of Boston, Massachusetts, amounting to nine hundred and sixty-one thousand three hundred (961,300) dollars, having been lost, notice is hereby given to said bank, under the provisions of section 5205 of the Revised Statutes of the United States, to pay the deficiency in its capital stock by an assessment of one hundred (100) per cent upon its shareholders *pro rata* for the amount of capital stock held by each, and that if such deficiency shall not be paid and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver may be appointed to close up the business of the association according to the provisions of section 5234 of the Revised Statutes of the United States.

"In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington and District of Columbia, this sixteenth day of December, A.D. 1881.

"[SEAL.] JOHN JAY KNOX,

"*Comptroller of the Currency.*"

It does not appear that any communication was made to the defendant by the bank with reference to said votes of the directors of December 13 and 14, or the certificates of the Comptroller of December 16, or with reference to any change in the proposed increase in the capital of the bank to one million dollars. The defendant never saw nor had communicated to him the books of the bank or their contents. He was in the bank almost daily and knew of the suspension on November 18, 1881. He does not remember or believe

that he had knowledge of the proposed change, or the change made in the proposed increase of the stock of $500,000, and of the certificate of the Comptroller of December 16, 1881, until informed of the facts during the stockholders' meeting of January 10, 1882, or possibly on that day just before the meeting was organized and after the stockholders were assembled for the same, when he learned them.

On the 10th of January, 1882, the annual meeting of the stockholders of the bank was held pursuant to call. At this meeting the examiner made a report of the condition of the bank, a board of directors was chosen, and, after a statement by the counsel of the bank of the facts relating to the increase of its capital stock, and as to how much had in fact been paid in under the vote to increase to one million dollars, and of the legal result thereof, and of the vote of December 13, and the certificates of the Comptroller of the Currency, dated December 16, and after a full discussion of the matter, the following vote was adopted by stock vote, 5494 shares in favor and 55 shares against:

"*Voted*, In accordance with the notice of the Comptroller of the Currency, dated December 16, 1881, there be, and hereby is, laid an assessment of one hundred per cent upon the shareholders of the Pacific National Bank of Boston, Mass., *pro rata* for the amount of capital stock of said bank held by each shareholder.

"*Voted*, That the board of directors notify each shareholder of said assessment and collect the same forthwith."

Notice of this vote was sent to the stockholders.

The defendant attended said meeting of the shareholders, acting as the holder of and representing only the fifty shares of original stock held by him as trustee and guardian, and as such voted in the negative on the question of the assessment, expressly stating on his ballot that he voted as the holder of fifty shares of old stock held by him as trustee and guardian. He did not vote or in any way act at said meeting as the holder of any new stock, and notified the directors of the bank that he did not consider himself a holder of any shares in the alleged increase of $461,300.

April 28, 1882, the defendant paid the assessment voted January 10, 1882, on the fifty shares of original stock held by him as guardian and trustee, using his own personal funds to make such payment, but did not pay any assessment on any new stock.

On March 18, 1882, by permission of the Comptroller of the Currency, on representations to the effect that the bank was then solvent, the directors took possession of the assets of the bank, opened its doors to business, and continued to do a general banking business, loaning money, receiving and paying deposits, and paying debts and expenses, until the 20th day of May, 1882, but made no losses or new loans during that period.

On or about April 21, 1882, notice was sent to all those who had not paid the assessment voted January 10th, and amongst others to the defendant, that unless such assessment should be paid by the 28th of April, 1882, their stock would be advertised for sale, and would be sold at auction according to law on the 31st of May, 1882.

On the 22d of May, 1882, the defendant delivered to the cashier of the bank the certificate for new stock which he had received, and a written demand for the repayment of the $5000 which he had paid thereon; and on the 30th of May he brought suit against the bank therefor, which is still pending.

On the 20th of May, 1882, the directors voted to go into liquidation, and the business of the bank was closed, and a receiver was appointed by the Comptroller of the Currency. It was found that the liabilities of the bank, exclusive of capital stock, were $2,500,000, and its assets worth about $500,000.

The court further found that the board of directors and the Comptroller of the Currency acted in good faith and without fraud in the premises.

It will be seen from the foregoing statement that all the material facts which existed in the case of *Delano* v. *Butler*, *qua supra*, existed in the present case, except that Delano actually paid the assessment made on his new stock as well as that made on his original stock; whereas, in the present case, Aspinwall refused to pay said assessment, repudiated the new

stock, and has brought suit to recover the amount of his subscription paid therefor.

We do not think that this difference makes any difference in the liability. The new stock was created in a regular manner by the board of directors, who had authority for that purpose; it was subscribed and actually paid in by the stockholders; it was certified to the Comptroller of the Currency, and approved by him; and it was reported to the meeting of stockholders and approved by them, as their almost unanimous vote for an assessment shows.

The most forcible objection to the validity of the increased capital of $461,300, is, that it did not equal the amount first voted for by the directors, which was $500,000. But as reduced, it had the sanction of the directors, the approval of the Comptroller of the Currency, and the assent of the stockholders at their meeting on the 10th of January, 1882. The deficiency under $500,000 arose from the fact that some of the stockholders did not avail themselves of their right to subscribe. The 11th section of the by-laws of the bank has this express provision, that "if any stockholder should fail to subscribe for the amount of stock to which he may be entitled within a reasonable time, which shall be stated in the notice, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock." This gave the directors full power over the deficiency of the subscriptions, and was in itself authority, if no other existed, to validate the action of the directors and the Comptroller in disregarding such deficiency, and equating the new stock to the subscriptions actually made and paid in. There was no express condition that the individual subscriptions should be void if the whole $500,000 was not subscribed; and, in our judgment, there was no implied condition in law to that effect. Each subscriber, by paying the amount of his subscription, thereby indicated that it was not made on any such condition. It is not like the case of creditors signing a composition deed to take a certain proportion of their claims in discharge of their debtor. The fixed amount of capital stock in business corporations often remains unfilled, both as to the number of shares

subscribed, and as to payment of instalments; and the unsubscribed stock is issued from time to time as the exigencies of the company may require. The fact that some of the stock remains unsubscribed is not sufficient ground for a particular stockholder to withdraw his capital. There may be cases in which equity would interfere to protect subscribers to stock where a large and material deficiency in the amount of capital contemplated has occurred. But such cases would stand on their own circumstances. It could hardly be contended that the present case, in which more than ninety-two per cent of the contemplated increase of capital was actually subscribed and paid in, would belong to that category. In *Minor* v. *Mechanics' Bank of Alexandria*, 1 Pet. 46, only $320,000 out of $500,000 of capital authorized by the charter was subscribed in good faith, but the court did not regard this deficiency in the subscriptions as at all affecting the status of the corporation, or the validity of its operations.

Some reliance is placed on the words of the act of Congress which authorizes an increase of capital within the maximum prescribed in the articles of association. They are found in section 5142 of the Revised Statutes, which declares that any banking association may, by its articles, provide for an increase of its capital from time to time, but adds, "no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained specifying the amount," etc. This clause would have been violated by an issue of $500,000 of new stock, when only $461,300 was paid in; but not by an issue of the exact amount that was paid in. The clause in question was intended to secure the actual payment of the stock subscribed, and so to prevent what is called watering of stock. In the present case the statute was strictly and honestly complied with.

The argument of the defendant asks too much. It would apply to the original capital of a company as well as to an increase of capital. And will it do to say, after a company has been organized and gone into business, and dealt with the public, that its stockholders may withdraw their capital and

be exempt from statutory liability to creditors, if they can show that the capital stock of the company was not all subscribed?

In the *Delano Case* the objection under consideration was discussed by Mr. Justice Matthews, speaking for the court, in the manner following. He there said: "In the present case the association did, in fact, finally assent to an increase of the capital stock, limited to $461,300; that amount was paid in as capital, and the Comptroller of the Currency, by his certificate, approved of the increase, and certified to its payment; so that there seems little room to question the validity of the proceedings resulting in such increase. All the requisites of the statute were complied with. The circumstance that the original proposal was for an increase of $500,000, subsequently reduced to the amount actually paid in, does not seem to affect the question, for the amount of the increase within the maximum was always subject to the discretionary power of the association itself, exerted in accordance with its articles of association, and to the approval and confirmation of the Comptroller of the Currency." 118 U. S. 649. In these remarks we entirely concur, and do not see why they do not furnish a complete answer to the objection arising from the change of amount. There was no agreement or condition that the amount should not be changed. The making of the change, therefore, could not have the effect of enabling the defendant to repudiate his subscription and his acceptance of the stock, unless he could show that the change was fraudulently made, or was made to such an inequitable extent as to defeat the purpose and object of the increase.

If these views are correct, it makes no manner of difference what the defendant afterwards did in the way of objection or protest, either at the stockholders' meeting or elsewhere. The stock was lawfully created, the defendant subscribed for the shares in question and paid for them, and received his certificate; and nothing was afterwards done by the directors, the Comptroller of the Currency, or the stockholders in meeting assembled, which they had not a perfect right to do. The defendant became a stockholder; he held the shares in ques-

tion when the bank finally went into liquidation; and, of course, became liable under section 5151 of the Revised Statutes to pay an amount equal to the stock by him so held.

The judgment is

Affirmed.

KELLER *v.* ASHFORD.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 3. Argued October 15, 16, 1888. — Decided March 3, 1890.

Upon appeal from a judgment of the Supreme Court of the District of Columbia in general term, affirming a judgment in special term, dismissing a bill in equity founded upon a contract bearing interest, the sum in dispute at the time of the judgment in general term, including interest to that time, is the test of the appellate jurisdiction of this court.

A recorder's copy of a deed is competent and sufficient evidence of its contents against the grantee in favor of a person not a party to it, after the grantee and a person who procured it to be made and to whom it was originally delivered have failed to produce it upon notice to do so.

In a deed of real estate, "subject, however, to certain incumbrances now resting thereon, payment of which is assumed by the grantee," and containing a covenant of special warranty by the grantor against all persons claiming under him, the clause assuming payment of the incumbrances includes existing mortgages made by the grantor, as well as unpaid taxes assessed against him.

The grantee named in a deed of real estate, by the terms of which he assumes the payment of a mortgage thereon, is liable to the grantor for a breach of that agreement, although he is not shown to have had any knowledge of the deed at the time of its execution, if after being informed of its terms he collects the rents and sells and conveys part of the land.

An agreement in a deed of real estate, by which the grantee assumes the payment of a mortgage made by the grantor, is a contract between the grantee and the mortgagor only; and does not, unless assented to by the mortgagee, create any direct obligation, at law or in equity, from the grantee to the mortgagee. But the mortgagee may avail himself in equity of the right of the mortgagor against the grantee. And if the mortgagee, after the land has been sold under a prior mortgage for a sum insufficient to pay that mortgage, and after he has recovered a personal judgment against the mortgagor, execution upon which has been returned unsatisfied, brings a suit in equity against the grantee alone, and the omission to make the mortgagor a party is not objected to at the hearing, it affords no ground for refusing relief.

Statement of the Case.

THIS was a bill in equity by Henrietta C. Keller, the holder of a promissory note for $2000, made by one Thompson, secured by his mortgage of land in Washington, against Francis A. Ashford as grantee of the land subject to this mortgage, and who by the terms of the deed to him assumed payment of incumbrances on the land. The bill prayed for a decree in the plaintiff's favor against Ashford for the amount of that note, and for general relief. The case was heard upon pleadings and proofs, by which it appeared to be as follows:

On August 17, 1875, Thompson, being seised in fee of lot 5 in square 889 in the city of Washington, conveyed it to one Rohrer, by a deed of trust in the nature of a mortgage, to secure the payment of Thompson's promissory note of that date for $1500, payable in three years with interest at ten per cent, held by one Harkness.

On February 21, 1876, Thompson conveyed the same lot by like deed of trust to one Gordon, to secure the payment of Thompson's note of that date for $2000, payable in one year, with interest at eight per cent yearly until paid, to the order of Moses Kelly; and Kelly endorsed this note for full value to the plaintiff.

On January 1, 1877, Thompson, at the instance and persuasion of Kelly, executed and acknowledged and delivered to Kelly a deed, expressed to be made in consideration of the sum of $4500; conveying this lot, together with lots 6, 7 and 8 in the same square (each of which three other lots was also in fact subject to a mortgage for $2000) to Ashford in fee, "subject, however, to certain incumbrances now resting thereon, payment of which is assumed by said party of the second part;" and containing covenants by the grantor of warranty against all persons claiming from, under or through him, and for further assurance. At the date of this deed, the only incumbrances on the land conveyed were the five mortgages above mentioned, and some unpaid taxes assessed against Thompson while owner of the land. On January 22, 1877, this deed, together with a notary's certificate of its acknowledgment by the grantor, was recorded in the registry of the District of Columbia.

Statement of the Case.

At the taking of the depositions before the examiner, the plaintiff, having given notice to Ashford and to Kelly to produce the original deed, and both of them having failed to do so, was permitted, against the defendant's objection, to put in evidence a copy of the deed and acknowledgment, certified by the recorder to be a true copy.

No consideration was actually paid for the conveyance. The value of the lots conveyed was, according to Thompson's testimony, $4000 each or $16,000 in all, or, according to Ashford's testimony, not less than $3400 each or $13,600 in all.

Thompson testified that he never had any negotiations with Ashford about the property; and that he was induced to make this deed by the assurance of Kelly that the grantee would assume the incumbrances upon the land and relieve him from liability upon the notes he had given secured by mortgage.

Ashford testified that he never had any negotiations with any one about the purchase of the land; and that in February, 1877, Kelly, who was his father-in-law, to whom he had lent much money and for whom he had endorsed several notes, told him that, in order to secure him from loss, he had procured a conveyance to be made to him of these four lots, in which he thought "there was considerable equity;" informed him at the same time that there were incumbrances or mortgages upon the property, but did not specifically mention any of them, except the $1500 mortgage upon lot 5; told him that the interest on this was pressing, and that, if he would pay it, Kelly would relieve him from any further trouble as to the incumbrances; and advised him to go on and collect the rents of the property, so as to indemnify himself against that interest and pay the taxes in arrears.

It was proved that Ashford in March, 1877, entered into possession of the four lots, and paid the taxes previously assessed upon them, and also paid interest accruing under the mortgage for $1500 on lot 5, and collected the rents of the four lots, until December 4, 1877, when he sold and conveyed lots 7 and 8 to one Duncan, subject to existing incumbrances thereon; and continued to collect the rents of the other two

lots, and to pay the interest accruing under the mortgage for $1500 on lot 5, until March 14, 1878, when this lot was sold, pursuant to the provisions of that mortgage, by public auction and conveyed to Harkness for the sum of $1700, which was insufficient to satisfy the amount then due on that mortgage.

On comparing Ashford's testimony with that of Boarman, the plaintiff's attorney, and with a letter written by Ashford to Boarman on October 3, 1877, it clearly appears that Ashford was informed of the clause in the deed to him, assuming payment of incumbrances, and was requested to pay the plaintiff's mortgage, as early as September, 1877, and then, as well as constantly afterwards, declined to pay it, or to recognize any personal liability to do so. There was no direct evidence that he knew of this clause before September, 1877.

The plaintiff brought an action at law upon the note against Thompson as maker and Kelly as endorser on November 13, 1877, and recovered judgment against both in December, 1877, on which execution issued and was returned unsatisfied, April 15, 1878.

The present bill was filed May 13, 1878. A decree dismissing the bill was rendered in special term, May 9, 1882, which, after the death of Ashford and the substitution of his executrix in his stead, was affirmed in general term, February 16, 1885, upon the grounds that Ashford had never accepted the deed to him, and also that the plaintiff's remedy, if any, was at law. 3 Mackey, 455. On the same day, as the record states, "from this decree the plaintiff appeals in open court to the Supreme Court of the United States, which appeal is allowed." The appeal bond was approved February 18, and the appeal was entered in this court April 10, 1885.

The case was argued upon a motion to dismiss the appeal for want of sufficient amount in controversy to give this court jurisdiction, as well as upon the merits.

Mr. Walter D. Davidge, (with whom was *Mr. William W. Boarman* on the brief,) for appellant, cited to the point that, under the circumstances, Ashford had become personally liable

to the holder of the note: *Trotter* v. *Hughes*, 12 N. Y. (2 Kernan) 74; *S. C.* 72 Am. Dec. 137; *Spaulding* v. *Hallenbeck*, 35 N. Y. 204; *Belmont* v. *Coman*, 22 N. Y. 438; *S. C.* 78 Am. Dec. 213; *Locke* v. *Homer*, 131 Mass. 93; *Pike* v. *Brown*, 7 Cush. 133; *Crawford* v. *Edwards*, 33 Michigan, 354; *Urquhart* v. *Brayton*, 12 R. I. 169; *Huyler* v. *Atwood*, 26 N. J. Eq. (11 C. E. Green) 504; *Bishop* v. *Douglass*, 25 Wisconsin, 696; *Ricard* v. *Sanderson*, 41 N. Y. 179; *Halsey* v. *Reed*, 9 Paige, 446; *King* v. *Whitely*, 10 Paige, 465, and cases therein cited; *Curtis* v. *Tyler*, 9 Paige, 432; *Garnsey* v. *Rogers*, 47 N. Y. 233; *Pardee* v. *Treat*, 82 N. Y. 385; *Lawrence* v. *Fox*, 20 N. Y. 268; *Burr* v. *Beers*, 24 N. Y. 178; *S. C.* 80 Am. Dec. 327; *Thorp* v. *Keokuk Coal Co.*, 48 N. Y. 253; *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y. 35; *Vrooman* v. *Turner*, 69 N. Y. 280; *Hoff's Appeal*, 21 Penn. St. 200; *Moore's Appeal*, 88 Penn. St. 450; *Merriman* v. *Moore*, 90 Penn. St. 78; *Townsend* v. *Long*, 77 Penn. St. 143; *Justice* v. *Tallman*, 86 Penn. St. 147; *Miller* v. *Thompson*, 34 Michigan, 10; *Strohauer* v. *Voltz*, 42 Michigan, 444; *Booth* v. *Conn. Mut. Life Ins. Co.*, 43 Michigan, 299; *Crowell* v. *Currier*, 27 N. J. Eq. (12 C. E. Green) 152; *Klapworth* v. *Dressler*, 2 Beasley (N. J.) 62; *S. C.* 78 Am. Dec. 69; *Norwood* v. *DeHart*, 30 N. J. Eq. (3 Stewart) 412; *Crowell* v. *Hospital of St. Barnabas*, 27 N. J. Eq. (12 C. E. Green) 650; *Thompson* v. *Bertram*, 14 Iowa, 476; *Corbett* v. *Watermann*, 11 Iowa, 86; *Lamb* v. *Tucker*, 42 Iowa, 118; *Bowen* v. *Kurtz*, 37 Iowa, 239; *Schmucker* v. *Sibert*, 18 Kansas, 104; *Rogers* v. *Herron*, 92 Illinois, 583; *Gautzert* v. *Hoge*, 73 Illinois, 30; *Coffin* v. *Adams*, 131 Mass. 133; *Miller* v. *Billingsly*, 41 Indiana, 489; *Fitzgerald* v. *Barker*, 70 Missouri, 685; *S. C.* 26 Am. Rep. 660, note, where some of the above cited cases are discussed; *George* v. *Andrews*, 60 Maryland, 26.

Mr. George F. Appleby and *Mr. Calderon Carlisle* for appellee.

I. The copy from the record would be proof if deed was delivered of a conveyance of the lots in question by Archie Thompson to Ashford, — proof of the covenants of Thompson,

Argument for Appellee.

— but it is proof of nothing else. The assumption clause is urged as either a personal contract or evidence of a personal contract. There is no law requiring such a contract to be recorded, and hence a copy from the record is not evidence; the original has not been produced or proved to have been lost, and if this is offered as proof of such a contract for personal liability, it has been objected to and is not competent evidence. *Judson* v. *Dada*, 79 N. Y. 373, 378.

II. But this deed only speaks for the grantor; it purports to be an indenture but is only a deed-poll, and of itself it cannot bind Ashford; indeed, if the contract is this clause in the deed, and not something growing out of transactions between the parties amounting to a contract of which the recital is a mere *mention*, we have an unsigned promise imputed to Ashford to answer for the debts of Archie Thompson. The cases, which seeming similar, hold such a promise by a vendee to a vendor to be without the statute, are all cases where there is a clearly proved transaction between parties in which the vendee for an equivalent makes a vendor's debt his own before he makes any promise as to it. Browne on Stat. of Frauds, 214–214 *e*.

III. But suppose the deed in all its parts to be perfectly proved before the court, the warranty clause destroys all the force of the assumption as to complainant, whose lien is not enumerated nor excepted, and is a claim under the grantor; "certain," "not all," "incumbrances," cover taxes, which were claims not under the grantor, and there was both a tax sale and an unpaid tax resting on the property. Even a mortgage excepted from covenant against incumbrances, is not excepted from warranty. *Estabrook* v. *Smith*, 6 Gray, 572; *S. C.* 61 Am. Dec. 445; *Harlow* v. *Thomas*, 15 Pick. 66; *Maher* v. *Lanfrom*, 86 Illinois, 513, 523. Taxes are incumbrances. *Long* v. *Moler*, 5 Ohio St. 271; *Mitchell* v. *Pillsbury*, 5 Wisconsin, 407.

IV. The complainant is forced, even if the foregoing points be not well taken, to prove actual notice of and assent to this assumption clause by Ashford, and this cannot be inferred or presumed. There is no proof that the deed was ever delivered to or seen by Ashford.

The recording of it did not amount to a delivery nor did it charge Ashford with notice of the assumption clause. *Bull* v. *Titsworth*, 29 N. J. Eq. (2 Stewart) 73; *Cordts* v. *Hargrave*, 29 N. J. Eq. (2 Stewart) 446; *Mead* v. *Brun*, 32 N. Y. 277.

While assent may be presumed to that which is beneficial, it is never presumed to that which is detrimental. *Higman* v. *Stewart*, 38 Mich. 513. There must be an intelligent assent to fasten a liability such as this upon a man; here is none.

The payment of interest is not inconsistent with Ashford's not having assumed the incumbrances. *Elliott* v. *Sackett*, 108 U. S. 132; *Drury* v. *Hayden*, 111 U. S. 223.

The subsequent conveyance to Duncan at Kelly's request, under the circumstances, does not fix this liability.

The collection of rents was in pursuance of an understanding with Kelly and at his request to indemnify Ashford for interest paid out by him, Ashford. *Girard Trust Co.* v. *Stewart*, 86 Penn. St. 89.

There is no act of Ashford inconsistent with his ignorance of the assumption clause up to the early spring of 1878, when Mr. Boarman read it to him. On discovery that a second trust was really existent, he repudiated the whole matter and refused to hold the property and go on paying interest on Harkness' note.

V. The transaction between Kelly and Ashford was really a mortgage though absolute on its face. *Arnaud* v. *Grigg*, 29 N. J. 485. Refers to *Garnsey* v. *Rodgers*, 47 N. Y. 233.

In *Elliott* v. *Sackett*, the deed was reformed on the ground of mutual mistake.

In *Kilmer* v. *Smith*, 77 N. Y. 226, the deed was reformed on account of ignorance of one party and fraud of another.

In *Drury* v. *Hayden*, suit was by mortgagee and the court denied relief, and reasoned that deed might have been reformed. See, also, *Albany Savings Inst.* v. *Burdick*, 87 N. Y. 40, 44; *Dey Ermand* v. *Chamberlin*, 88 N. Y. 658.

VI. This complainant shows no pretence of a right in a court of equity. There is nothing whatever in the record to charge the conscience of Ashford. He kept back no purchase-money and assumed no trust.

If he had known all about the Thompson note, and had promised to pay it, the complainant's remedy would have been at law. *Ins. Co.* v. *Bailey*, 13 Wall. 620, 621.

If Ashford had made a promise to a third person to pay the debt due Miss Keller on the authority of this court, she might have maintained assumpsit. *Hendrick* v. *Lindsay*, 93 U. S. 143; *Lawrence* v. *Fox*, 20 N. Y. 268; *Burr* v. *Beers*, 24 N. Y. 178; *S. C.* 80 Am. Dec. 327; *Elliott* v. *Sackett*, *supra*; *Shepherd* v. *May*, 115 U. S. 505, 510.

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

The motion to dismiss for want of jurisdiction must be denied. This appeal was claimed and allowed February 16, 1885. At that time, the act of February 25, 1879, c. 99, was in force, which provided that "the final judgment or decree of the Supreme Court of the District of Columbia, in any case where the matter in dispute, exclusive of costs, exceeds the value of twenty-five hundred dollars, may be reëxamined and reversed or affirmed in the Supreme Court of the United States upon writ of error or appeal." 20 Stat. 321. The case is not affected by the act of March 3, 1885, c. 355, § 1, further limiting the appellate jurisdiction of this court, because that act only provides that "no appeal or writ of error shall hereafter be allowed" from any such judgment or decree, unless the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars. 23 Stat. 443. The change of phraseology, referring to the time when the appeal or writ of error is allowed, instead of to the time when it is entertained by this court, was evidently intended to prevent cutting off appeals taken and allowed before the passage of the act, as had been held to be the effect of the language used in the act of 1879. *Railroad Co.* v. *Grant*, 98 U. S. 398. In a suit founded upon a contract, the sum in dispute at the time of the judgment or decree appealed from, including any interest then accrued, is the test of appellate jurisdiction. *Bank of United States* v. *Daniel*, 12 Pet. 32, 52; *The Patapsco*, 12 Wall. 451; *New York Elevated*

Railroad v. *Fifth National Bank*, 118 U. S. 608; *Zeckendorf* v. *Johnson*, 123 U. S. 617. By the express terms of the promissory note sued on in this case, it bore interest at the rate of eight per cent yearly from its date until paid. Computing interest accordingly, the sum in dispute was much more than $2500 at the time of the decree in general term, which was the decree from which this appeal was taken. In *Railroad Co.* v. *Trook*, 100 U. S. 112, cited for the appellee, as in *District of Columbia* v. *Gannon*, 130 U. S. 227, the judgment in special term was for damages in an action sounding in tort, which bore no interest, either by the general law, or by the judgment of affirmance in general term.

Nor can the objection of the defendant, that the original deed from Thompson to Ashford was not produced, or its execution proved, be sustained. The deed is admitted to have been duly recorded. There is no presumption that it was in the possession of the plaintiff, who was not a party to it; but it is to be presumed to have been in the possession, either of Ashford, the grantee named in the deed, or of Kelly, who procured the deed to be made, and to whom it was originally delivered. Both of them having failed to produce it upon notice to do so, the recorder's copy was competent and sufficient evidence of the contents of the deed, as between the parties to this suit. Rev. Stat. D. C. §§ 440, 467; *Dick* v. *Balch*, 8 Pet. 30.

But upon the merits of the case we are unable to concur with the views expressed by the court below, in its opinion reported in 3 Mackey, 455, either as to the effect of the testimony, or as to the rights of the parties. The material facts, as they appear to us upon full examination of the record, have been already stated. It remains to consider the law applicable to those facts.

The questions to be decided concern the extent, the obligation and the enforcement of the agreement created by the clause in the deed of conveyance from Thompson to Ashford of this and three other lots, "subject, however, to certain incumbrances now resting thereon, payment of which is assumed by said party of the second part."

Opinion of the Court.

The five mortgages made by the grantor, namely, the plaintiff's mortgage for $2000 and a prior mortgage for $1500 on lot 5, and a mortgage of $2000 on each of the three other lots, and some unpaid taxes which had been assessed against the grantor, were incumbrances, and were the only incumbrances existing upon the granted premises at the time of the execution of this conveyance. Rawle on Covenants (5th ed.) § 77. The clause in question, by the words "certain incumbrances now resting thereon," designates and comprehends all those mortgages and taxes, as clearly as if the words used had been "the incumbrances," or "all incumbrances," or had particularly described each mortgage and each tax. We give no weight to Thompson's testimony as to Kelly's previous conversation with him to the same effect, because that conversation is not shown to have been authorized by or communicated to Ashford, and cannot affect the legal construction of the deed as against him.

It was argued that, because the deed contains a covenant of special warranty against all persons claiming under the grantor, the words "certain incumbrances" cannot include the mortgages made by the grantor, but must be limited to the unpaid taxes which, it is said, would not come within the covenant of special warranty. But the answer to this argument is that any person claiming title by virtue of a lien created by taxes assessed against the grantor would claim under the grantor, equally with one claiming by a mortgage from him; and incumbrances expressly assumed by the grantee are necessarily excluded from the covenants of the grantor.

Ashford is not shown to have had any knowledge of the conveyance at the time of its execution; and a suggestion was made in argument, based upon some vague expressions in his testimony, that the conveyance was intended to be made to him, by way of mortgage only, to secure him against loss on his previous loans to and endorsements for Kelly. But his subsequent acts are quite inconsistent with the theory that the conveyance did not vest the legal estate in him absolutely.

Within a month or two after the conveyance, having been told that the four lots had been conveyed to him and were

subject to incumbrances, (although perhaps not then informed of the amount of the incumbrances,) he entered into possession of the lots, and thenceforth collected the rents; and within nine months after the conveyance he had notice of the clause assuming payment of incumbrances, and was requested to pay the plaintiff's mortgage, and declined to pay it or to recognize any personal liability for it; yet he afterwards sold and conveyed away two of the lots, and continued to keep possession and to collect rents of the other two. Having thus accepted the benefit of the conveyance, he cannot repudiate the burden imposed upon him by the express agreement therein, and would clearly have been liable to his grantor for any breach of that agreement. *Blyer* v. *Monholland*, 2 Sandf. Ch. 478; *Coolidge* v. *Smith*, 129 Mass. 554; *Locke* v. *Homer*, 131 Mass. 93; *Muhlig* v. *Fiske*, 131 Mass. 110.

The case therefore stands just as if Ashford had himself received a deed by which he in terms agreed to pay a mortgage made by the grantor. In such a case, according to the general, not to say uniform, current of American authority, as shown by the cases collected in the briefs of counsel, the mortgagee is entitled in some form to enforce the agreement against the grantee; and much of the argument at the bar was devoted to the question whether his remedy should be at law or in equity.

Upon the question whether the mortgagee could sue at law there is no occasion to examine the conflicting decisions in the courts of the several States, because it is clearly settled in this court that he could not.

This case cannot be distinguished from that of *National Bank* v. *Grand Lodge*, 98 U. S. 123, and clearly falls within the general rule upon which the judgment in that case was founded.

It was there held that a contract by which the Grand Lodge, for a consideration moving from another corporation, agreed with it to assume the payment of its bonds, would not support an action against the Grand Lodge by a holder of such bonds; and Mr. Justice Strong, delivering judgment, after observing that the contract was made between and for the benefit of the

two corporations, that the holders of the bonds were not parties to it, and that there was no privity between them and the Grand Lodge, said: "We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and a defendant is necessary to the maintenance of an action of assumpsit. The subject has been much debated, and the decisions are not all reconcilable. No doubt, the general rule is, that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control, which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raised from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it, (there being no novation,) he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required." 98 U. S. 124. See also *Cragin* v. *Lovell*, 109 U. S. 194.

In the earlier case of *Hendrick* v. *Lindsay*, 93 U. S. 143, cited by the defendant, a request, accompanied by a promise of indemnity, to one person, to sign an appeal bond, was construed to include another person who signed it as surety, and therefore to support a joint action by the principal and the surety, both of whom had signed the bond relying upon the promise, so that the only consideration for the promise moved from them.

In the case at bar, the promise of Ashford was to Thompson

and not to the mortgagees, and there was no privity of contract between them and Ashford. The consideration of the promise moved from Thompson alone. The only object of the promise was to benefit him, and not to benefit the mortgagees or other incumbrancers; and they did not know of or assent to the promise at the time it was made, nor afterwards do or omit any act on the faith of it. It is clear, therefore, that Thompson only could maintain an action at law upon that promise.

In equity, as at law, the contract of the purchaser to pay the mortgage, being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee. *Parsons* v. *Freeman*, 2 P. Wms. 664, note; *S. C.* Ambler, 115; *Oxford* v. *Rodney*, 14 Ves. 417, 424; *In re Empress Engineering Co.*, 16 Ch. D. 125; *Gandy* v. *Gandy*, 30 Ch. D. 57, 67.

But it has been held by many state courts of high authority, in accordance with the suggestion of Lord Hardwicke in *Parsons* v. *Freeman*, Ambler, 116, that in a court of equity the mortgagee may avail himself of the right of the mortgagor against the purchaser.

This result has been attained by a development and application of the ancient and familiar doctrine in equity that a creditor shall have the benefit of any obligation or security given by the principal to the surety for the payment of the debt. *Maure* v. *Harrison*, 1 Eq. Cas. Ab. 93, pl. 5; Bac. Ab. Surety, D. 4; *Wright* v. *Morley*, 11 Ves. 12, 22; *Phillips* v. *Thompson*, 2 Johns. Ch. 418; *Curtis* v. *Tyler*, 9 Paige, 432, 435; *New Bedford Institution for Savings* v. *Fairhaven Bank*, 9 Allen, 175; *Hampton* v. *Phipps*, 108 U. S. 260, 263.

In *Hampton* v. *Phipps*, just cited, this court declared the doctrine to be well settled, and applicable "equally between sureties, so that securities placed by the principal in the hands of one, to operate as an indemnity by payment of the debt, shall enure to the benefit of all;" and declined to apply the doctrine to the case before it, because the mortgage in question was given by one surety to another merely to indemnify him against being compelled to pay a greater share of the debt

than the sureties had agreed between themselves that he should bear, and he had not been compelled to pay a greater share.

The doctrine of the right of a creditor to the benefit of all securities given by the principal to the surety for the payment of the debt does not rest upon any liability of the principal to the creditor, or upon any peculiar relation of the surety towards the creditor; but upon the ground that the surety, being the creditor's debtor, and in fact occupying the relation of surety to another person, has received from that person an obligation or security for the payment of the debt, which a court of equity will therefore compel to be applied to that purpose at the suit of the creditor. Where the person ultimately held liable is himself a debtor to the creditor, the relief awarded has no reference to that fact, but is grounded wholly on the right of the creditor to avail himself of the right of the surety against the principal. If the person, who is admitted to be the creditor's debtor stands at the time of receiving the security, in the relation of surety to the person from whom he receives it, it is quite immaterial whether that person is or ever has been a debtor of the principal creditor, or whether the relation of suretyship or the indemnity to the surety existed, or was known to the creditor, when the debt was contracted. In short, if one person agrees with another to be primarily liable for a debt due from that other to a third person, so that as between the parties to the agreement the first is the principal and the second the surety, the creditor of such surety is entitled, in equity, to be substituted in his place for the purpose of compelling such principal to pay the debt.

It is in accordance with the doctrine, thus understood, that the Court of Chancery of New York, the Court of Chancery and the Court of Errors of New Jersey, and the Supreme Court of Michigan have held a mortgagee to be entitled to avail himself of an agreement in a deed of conveyance from the mortgagor by which the grantee promises to pay the mortgage. *Halsey* v. *Reed*, 9 Paige, 446, 452; *King* v. *Whitely*, 10 Paige, 465; *Blyer* v. *Monholland*, 2 Sandf. Ch. 478; *Klapworth* v. *Dressler*, 2 Beasley, 62; *Hoy* v. *Bramhall*, 4 C. E.

Green, 74, 563; *Crowell* v. *Currier*, 12 C. E. Green, 152; *S. C.* on appeal, *nom. Crowell* v. *St. Barnabas Hospital*, 12 C. E. Green, 650; *Arnaud* v. *Grigg*, 2 Stew. Eq. 482; *Youngs* v. *Trustees of Public Schools*, 4 Stew. Eq. 290; *Crawford* v. *Edwards*, 33 Michigan, 354, 360; *Miller* v. *Thompson*, 34 Michigan, 10; *Higman* v. *Stewart*, 38 Michigan, 513, 523; *Hicks* v. *McGarry*, 38 Michigan, 667; *Booth* v. *Connecticut Ins. Co.*, 43 Michigan, 299. See also *Pardee* v. *Treat*, 82 N. Y. 385, 387; *Coffin* v. *Adams*, 131 Mass. 133, 137; *Biddel* v. *Brizzolara*, 64 California, 354; *George* v. *Andrews*, 60 Maryland, 26; *Osborne* v. *Cabell*, 77 Virginia, 462.

The grounds and limits of the doctrine, as applied to such a case, have been well stated by Mr. Justice Depue, delivering the unanimous judgment of the Court of Errors of New Jersey, in *Crowell* v. *St. Barnabas Hospital*, as follows:

"The right of a mortgagee to enforce payment of the mortgage debt, either in whole or in part, against the grantee of the mortgagor, does not rest upon any contract of the grantee with him, or with the mortgagor for his benefit."

"The purchaser of lands subject to mortgage, who assumes and agrees to pay the mortgage debt, becomes, as between himself and his vendor, the principal debtor, and the liability of the vendor, as between the parties, is that of surety. If the vendor pays the mortgage debt, he may sue the vendee at law for the moneys so paid.

"In equity, a creditor may have the benefit of all collateral obligations for the payment of the debt, which a person standing in the situation of a surety for others holds for his indemnity. It is in the application of this principle that decrees for deficiency in foreclosure suits have been made against subsequent purchasers, who have assumed the payment of the mortgage debt, and thereby become principal debtors as between themselves and their grantors."

"But the right of the mortgagee to this remedy does not result from any fixed or vested right in him, arising either from the acceptance by the subsequent purchaser of the conveyance of the mortgaged premises, or from the obligation of the grantee to pay the mortgage debt as between himself and

his grantor. Though the assumption of the mortgage debt by the subsequent purchaser is absolute and unqualified in the deed of conveyance, it will be controlled by a collateral contract made between him and his grantor, which is not embodied in the deed. And it will not in any case be available to the mortgagee, unless the grantor was himself personally liable for the payment of the mortgage debt.

"Recovery of the deficiency after sale of the mortgaged premises, against a subsequent purchaser, is adjudged in a court of equity to a mortgagee not in virtue of any original equity residing in him. He is allowed, by a mere rule of procedure, to go directly as a creditor against the person ultimately liable, in order to avoid circuity of action, and save the mortgagor, as the intermediate party, from being harassed for the payment of the debt, and then driven to seek relief over against the person who has indemnified him, and upon whom the liability will ultimately fall. The equity on which his relief depends is the right of the mortgagor against his vendee, to which he is permitted to succeed by substituting himself in the place of the mortgagor." 12 C. E. Green, 655, 656.

The decisions of this court, cited for the defendant, are not only quite consistent with this conclusion, but strongly tend to define the true position of a mortgagee, who has in no way acted on the faith of, or otherwise made himself a party to, the agreement of the mortgagor's grantee to pay the mortgage; holding, on the one hand, that such a mortgagee has no greater right than the mortgagor has against the grantee, and therefore cannot object to the striking out by a court of equity, or to the release by the mortgagor, of such an agreement when inserted in the deed by mistake; *Elliott* v. *Sackett*, 108 U. S. 132; *Drury* v. *Hayden*, 111 U. S. 223; and, on the other hand, that such an agreement does not, without the mortgagee's assent, put the grantee and the mortgagor in the relation of principal and surety towards the mortgagee, so that the latter, by giving time to the grantee, will discharge the mortgagor. *Shepherd* v. *May*, 115 U. S. 505, 511.

The present case is a strong one for the application of the general doctrine. The land has been sold under a prior mort-

gage for a sum insufficient to pay that mortgage, leaving nothing to be applied towards the payment of the mortgage held by the plaintiff; and the plaintiff has exhausted her remedy against the mortgagor personally, by recovering judgment against him, execution upon which has been returned unsatisfied.

Although the mortgagor might properly have been made a party to this bill, yet as no objection was taken on that ground at the hearing, and the omission to make him a party cannot prejudice any interest of his, or any right of either party to this suit, it affords no ground for refusing relief. *Mechanics' Bank* v. *Seton*, 1 Pet. 299; *Whiting* v. *Bank of United States*, 13 Pet. 6; *Miller* v. *Thompson*, 34 Michigan, 10.

Decree reversed, and case remanded with directions to enter a decree for the plaintiff.

SHEPHERD *v.* PEPPER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 136. Argued November 26, 27, 1889. — Decided March 3, 1890.

Where appeals by five defendants from a final decree were allowed in open court in October, 1885, and the amount of the supersedeas bond as to one of them was fixed at $100, but he never gave it, and the others perfected their appeal, and the record was filed in this court in October, 1886, and, when the case came on for hearing in November, 1889, he asked leave to file a proper bond, it was granted *nunc pro tunc* as of the day of hearing.

S. gave two deeds of trust of a lot of land in the District of Columbia to secure loans made by P. Afterwards he gave a deed of trust of the same lot to secure a loan made by C., that deed covering also a lot in the rear of the first lot, and fronting on a side street. At the time all the deeds were given, there was a dwelling-house on the premises, the main part of which was on the first lot, but some of which was on the rear lot. P., on an allegation that B., a trustee in each of the first two deeds, had refused to sell the property covered by them, filed a bill asking the appointment of a trustee in place of those appointed by the first two deeds. The suit resulted in a decree appointing a new trustee in place of B., "in the deed of trust," but not identifying which one. The new trustee and the remaining old one then sold the land at auction to P.,

Statement of the Case.

under the first trust deed. S. then filed a bill to set aside the sale, and P. filed a cross bill to confirm it. The bill was dismissed. P. then filed this bill against S. and C., and all necessary parties, to have a trustee appointed to sell the land covered by the three trust deeds, and the improvements on it, to have a receiver of the rents appointed, and to have the rents and the proceeds of sale applied first to pay P. A receiver was appointed, and a decree made for the sale of the entire property, as a whole, by trustees whom the decree appointed, and for the ascertainment by the trustees of the relative values of the land covered by the first two trust deeds and the improvements thereon, and of the rear piece of land and the improvements thereon, and for the payment to P. of the net proceeds of sale representing the value of the land and improvements covered by the first two trust deeds, less the expenses chargeable thereto, and of the residue to C., and, out of the rents, to P., what he had paid for taxes and insurance premiums, and for a personal decree against S., in favor of P., for any deficiency in the proceeds of sale to pay the claims of P.; *Held*,

(1) It was the intention of both S. and P. that the first two deeds of trust should include the rear land as well as the front lot;

(2) The decree in the first suit by P. was so uncertain as to be practically void, and there was no effective appointment of a trustee and no effective sale to P.;

(3) P. was not estopped by that sale from having the property sold again;

(4) P. was not required, as a condition of the sale of the rear lot, to pay the whole of the debt due to C.; and the case was a proper one for selling the property as an entirety;

(5) It was, also, a proper one for the appointment of a receiver of the rents, and those rents in the hands of the receiver, after paying charges, ought to go to make up any deficiency in the proceeds of sale to satisfy the *corpus* of all the secured debts, and ought to be first applied to pay any balance due to P.;

(6) Under § 808 of the Revised Statutes relating to the District of Columbia a decree *in personam* for a deficiency is a necessary incident of a foreclosure suit in equity;

(7) As the notes secured by the deeds of trust bore interest at the rate of nine per cent per annum, until paid, it was proper to allow that rate of interest on the principal until paid, and not to limit the rate to six per cent after decree, because the contracts were not merged in the decree;

(8) The rate of interest on the decree for deficiency is properly six per cent, under §§ 713 and 829 of said Revised Statutes.

(9) The statute of limitation not having pleaded as to any part of the principal or interest, the defendant cannot avail himself of it.

In equity. Decree in favor of the complainant. The respondents appealed. The case is stated in the opinion.

Mr. William F. Mattingly and *Mr. Enoch Totten*, for appellants, Shepherd and others, and *Mr. Henry Wise Garnett* for Mrs. Gray, appellant, filed a joint brief, citing: *Carpentier* v. *Brenham*, 40 California, 221; *Supervisors of Iowa County* v. *Mineral Point Railroad*, 24 Wisconsin, 93; *Howard* v. *Railway Co.*, 101 U. S. 837; *Thompson* v. *Roberts*, 24 How. 233; *Rapalee* v. *Stewart*, 27 N. Y. 310; *Duff* v. *Wyncoop*, 74 Penn. St. 300; *Swanson* v. *Tarkington*, 7 Heiskell, 612; *Tuite* v. *Stevens*, 98 Mass. 305; *Grymes* v. *Sanders*, 93 U. S. 55; *Rogers* v. *Higgins*, 57 Illinois, 244; *Stockton* v. *Ford*, 18 How. 418; *McLaughlin* v. *Barnum*, 31 Maryland, 425; *Eastman* v. *Amoskeag M'fg. Co.*, 47 N. H. 71; *Neilson* v. *Lagow*, 12 How. 98; *Dudley* v. *Price*, 10 B. Mon. 84; *Christmas* v. *Mitchell*, 3 Iredell Eq. 535; *Miller* v. *McIntyre*, 6 Pet. 61; *Miller* v. *Bealer*, 100 Penn. St. 583; *Wagar* v. *Stone*, 36 Michigan, 364; *Gilman* v. *Illinois & Mississippi Telegraph Co.*, 91 U. S. 617; *Railroad Cos.* v. *Schutte*, 103 U. S. 118; *Kountze* v. *Omaha Hotel Co.*, 107 U. S. 378; *Teal* v. *Walker*, 111 U. S. 242.

Mr. Nathaniel Wilson and *Mr. Walter D. Davidge*, for appellee, cited: *Strong* v. *Grant*, 2 Mackey, 218; *Mobile County* v. *Kimball*, 102 U. S. 691; *Gould* v. *Evansville &c. Railroad*, 91 U. S. 526; *Gardner* v. *Sharp*, 4 Wash. C. C. 609; *Walden* v. *Bodley*, 14 Pet. 156; *Hughes* v. *United States*, 4 Wall. 232; *Russell* v. *Place*, 94 U. S. 606; *Cromwell* v. *Sac County*, 94 U. S. 351; *Graham* v. *Railroad Co.*, 3 Wall. 704; *Davis* v. *Brown*, 94 U. S. 423; *Dodge* v. *Freedman's Savings & Trust Co.*, 106 U. S. 445; *Grant* v. *Phœnix Life Ins Co.*, 121 U. S. 105; *Keyser* v. *Hitz*, 4 Mackey, 179; *Holden* v. *Trust Co.*, 100 U. S. 72; *Philadelphia, Wilmington & Baltimore Railroad* v. *Howard*, 13 How. 307.

Mr. Justice Blatchford delivered the opinion of the court.

On the 1st of June, 1874, Alexander R. Shepherd and his wife made a deed of trust to Andrew C. Bradley and William H. Philip, conveying to them real estate situated in the city

of Washington, in the District of Columbia, described in the deed as follows: "Part of lot numbered two (2) in square numbered one hundred and sixty-four (164), and bounded and described as follows, viz.: Beginning at a point on North K Street forty-three feet and nine inches ($43\frac{9}{12}$ ft.) east of the southwestern corner of said square, and running thence west on K Street forty-three feet and nine inches ($43\frac{9}{12}$ ft.), to said southwestern corner of said square; thence northwesterly along the line of Connecticut Avenue about eighty feet and ten inches ($80\frac{10}{12}$ ft.), to the south line of original lot numbered three (3) in said square; thence northeasterly and at right angles with said avenue and along the line of said lot three (3), about eighty-five (85) feet, to intersect a line drawn due north from the point of beginning, and thence due south to the point of beginning." The deed recited that Shepherd was indebted to George S. Pepper in the sum of $35,000, evidenced by a promissory note executed to Pepper, dated June 1, 1874, and payable in five years after date, with interest, payable semi-annually, at the rate of nine per cent per annum, until paid, accompanied by 10 coupon notes for $1575 each, representing the interest; and it conveyed the land in trust to secure the payment of the notes. It gave power to the trustees to sell the premises at public auction, on a default in the payment of the notes or any instalment of interest, and to convey the property in fee simple to the purchaser. Shepherd covenanted in the deed to keep the buildings on the land insured during the continuance of the trust in the sum of $25,000, and to have the policies assigned to the trustees; and that, on his failure to do so, Pepper might do it and the premium he should pay should be considered as secured by the trust deed.

On the 22d of March, 1875, Shepherd and his wife executed to William F. Mattingly and the said Andrew C. Bradley another deed of trust, covering the same premises by the same description as in the first deed, to secure the payment to the said Pepper of a promissory note dated March 22, 1875, for $10,000, payable five years after date, with interest, payable semi-annually, at the rate of nine per cent per annum, until paid, accompanied by 10 coupon notes of $450 each, represent-

ing the interest. The other provisions of this trust deed were in terms like those of the first one, except that the insurance against fire was to be $10,000.

On the 15th of May, 1876, Shepherd and his wife executed a deed of trust to James E. Fitch and Lewis J. Davis, covering premises described as follows: "All that certain piece or parcel of ground situate and lying in the city of Washington, District of Columbia, and known and described upon the ground plat or plan of said city as lot number three (3), in A. R. Shepherd's subdivision of square number one hundred and sixty-four (164), said lot number three (3), fronting forty-three feet and nine inches (43 ft. 9 in.) on K Street N. W., and one hundred and nine feet and one-half inch (109 ft. ½ in.) on Connecticut Avenue." The deed was made to secure the payment of a promissory note for $35,000, made by Shepherd, dated May 15, 1876, given to Mercy Maria Carter, payable three years after date with interest at the rate of nine per cent per annum, payable quarterly. This deed covered the same premises embraced in the first two deeds of trust, and an additional piece of land in the rear of those premises, having a frontage on Connecticut Avenue of 28 feet 2½ inches, and running eastward across the rear part of the premises covered by the first two deeds of trust.

On the 15th of November, 1876, Shepherd and his wife executed an assignment, for the benefit of the creditors of Shepherd, to George Taylor, Henry A. Willard, and Samuel Cross, which assignment covered "lot 3 in square 164." Willard refused to accept the trust, and Peter F. Bacon was duly appointed assignee in his place.

On the 11th of April, 1878, Pepper filed a bill in equity, in the Supreme Court of the District of Columbia, making as defendants Shepherd and his wife, Bradley, Philip, Mattingly, Taylor, Cross and Bacon. The bill set forth the making and contents of the two deeds of trust in favor of Pepper and of the assignment by Shepherd; that Pepper was still the holder of the note for $35,000 and the note for $10,000, and the coupon notes belonging thereto; that there were large arrears of interest due thereon; that the property was largely

encumbered with taxes, and had been sold for the taxes for the year ending June 30, 1877; that Shepherd had failed to keep the property insured, and Pepper had advanced the amount of the premiums of insurance: that Pepper had, in writing, requested the trustees, under the deeds of trust, to advertise the property for sale, but the defendant Bradley, a trustee under each of the deeds, had refused to do so, by a letter to Pepper, in which he also stated "that the trust does not cover the entire area of the house, cutting off about twenty feet of the rear."

There was and is a dwelling-house on the land, which covers the entire width on K Street, and at least a part of it extends the entire depth of the land embraced in the first two deeds of trust; and a part of the rear part of it is built upon the land covered by the deed of trust in favor of Mercy Maria Carter which is not embraced in the two deeds of trust in favor of Pepper.

The bill averred that at the time the two loans were negotiated by Pepper he was informed and believed that the two deeds of trust covered the whole of the house and lots; that he had nothing to do with the preparation of those deeds, but they were prepared by Shepherd or his attorney; that Pepper never saw them until after the negotiations were concluded and the money paid; that Shepherd alone was responsible for any mistake or omission; that at the dates of the deeds of trust the house was completed and occupied by Shepherd as a dwelling; that sub-lot A in square 164, being the premises not covered by the two deeds of trust in favor of Pepper, was at that time owned by Shepherd; that it was understood that the two deeds of trust in favor of Pepper would and did cover the whole area occupied by the house and grounds; that the part of the house not included in those two deeds of trust was what is known as the "picture gallery;" that the rear end of it could be detached without marring or lessening the value of the property; that the plaintiff was entitled to enforce the collection of the moneys due to him, irrespective of any injury which the sale might do to Shepherd or any one holding under him; and that, in any event, the

plaintiff had the right to enforce the sale of so much of the property as was covered by the two deeds of trust in his favor.

The prayer of the bill was that a trustee might be appointed by the court in place of the trustees under the two deeds of trust, with directions and authority forthwith to execute the trusts of the two deeds.

Answers to this bill were put in by Mattingly, Bradley and Shepherd, the answer of Shepherd setting up that the loans to him by Pepper were usurious and void under the laws of the State of Pennsylvania, which governed the contracts. Issue was joined, proofs were taken, and the case was heard at special term, which, on the 12th of May, 1879, entered a decree overruling the defence of usury, and further decreeing as follows; "That James M. Johnston be, and is hereby, appointed trustee in the place and stead of Andrew C. Bradley in the deed of trust, and recorded in Liber ——, folio ——, of the land records for the District of Columbia, and referred to in the record in this cause. This decree is without prejudice to all other rights of defendant." Shepherd, on the 14th of May, 1879, appealed from this decree to the general term; but, after the sale to Pepper hereinafter mentioned, he dismissed his appeal.

Johnston and Philip, claiming and purporting to act under the deed of trust of June 1, 1874, and regarding Johnston as having been appointed trustee in the place of Bradley, under that deed, by virtue of the decree of May 12, 1879, advertised for sale at public auction the premises described in that deed, by the description contained in it. The sale took place on the 23d of October, 1879, and the property was sold to Pepper, at such auction, for $50,000; and Philip and Johnston as trustees, executed and delivered to Pepper a deed of the property.

On the 14th of November, 1879, Shepherd filed a bill in equity in the Supreme Court of the District of Columbia, against Philip, Johnston, and Pepper, setting forth the sale and the deed to Pepper, and alleging that Johnston and Philip acted without authority in selling the property, inasmuch as Johnston was not a trustee under the deed of trust, and the

decree of May 12, 1879, did not confer upon him any power under that deed, nor substitute him in the place of Bradley under it, nor remove Bradley from his office of trustee under it; that it was announced at the sale by the auctioneer that the sale was made subject to taxes estimated at $2700, and that the lot sold did not include the rear part of the building; that the property was knocked down to Pepper for $50,000 and the said taxes; that the price was grossly inadequate; that Shepherd, at the time of the sale, was the owner of a valuable equitable interest in the property; and that the sale was void.

The prayer of the bill was that the sale be set aside and the deed to Pepper cancelled; that the defendants be restrained from interfering with the property, or attempting to enforce at law any legal right claimed as a consequence of the sale or the deed; and for general relief.

Philip and Johnston answered the bill, as also did Pepper. Pepper also filed a cross-bill against Shepherd, Philip and Johnston, setting forth the contents of the original bill and of the answers to it, and praying that the sale to Pepper be decreed to be legal and valid, and the deed to him effectual to convey to him an unencumbered fee simple title to the real estate; for a writ of assistance to put him in possession of the premises; for a receiver to collect the accruing rents; for an injunction to restrain Shepherd and all persons claiming under him from interfering with the plaintiff in respect of the premises and for general relief.

A replication was filed to the answers to the original bill, and Shepherd, and also Philip and Johnston, answered the cross-bill. Issue was joined on such answers and proofs were taken. The case was heard at special term, and a decree was made on the 30th of October, 1880, dismissing the bill, with costs, the decree being made by Mr. Justice James. It stated that Shepherd appealed to the general term from the decree.

On the 24th of December, 1880, Mr. Justice James filed an opinion in the suit, in which he stated that the decree of May 12, 1879, in the suit of Pepper against Shepherd, was inoperative and void for uncertainty. He added: "It purports to

substitute a trustee in one of two deeds mentioned in the pleadings, without designating which of them. It is true that it can be inferred, from the comparative effects of the substitution in the one or the other case, that the court was not likely to intend to substitute Mr. Johnston for Mr. Bradley in the deed which conveyed only an equitable title, but I do not think that I am at liberty to explain and give certainty to the decree by reference to such considerations. It has been suggested that a decree may be explained by reference to the pleadings on which it is based, and this undoubtedly may be done in a proper case; but I do not find that the uncertainty of the decree in this case can be cleared up in that way. It follows that, if the decree is uncertain on its face, the alleged title of Pepper, through Mr. Johnston as substituted trustee, is not a cloud upon the title of the complainant, and consequently this court cannot take jurisdiction to grant the relief prayed. Therefore, the decree must be that the bill be dismissed."

On the 14th of January, 1881, the defendants in the suit of Shepherd against Pepper entered an appeal from the decree of October 30, 1880. On the 11th of February, 1881, Shepherd dismissed his appeal from that decree. A motion by Shepherd to dismiss the appeal from that decree taken by the defendants therein, appears to have been granted by default; and they, on the 25th of February, 1881, filed petitions praying the court in general term to reinstate their appeal. The ground of these petitions was, that the opinion of Mr. Justice James found as a fact that the trustees, Philip and Johnston, had no power to make a sale, which finding did not appear in the decree of October 30, 1880. The court acted upon the petitions for reinstating, by making an order, on the 17th of June, 1881, striking from the files of the court the opinion of Mr. Justice James. This left the decree of the special term, made October 30, 1880, to stand as a decree merely dismissing the bill of Shepherd.

On the 20th of July, 1881, Pepper began the present suit by filing in the Supreme Court of the District of Columbia a bill in equity against Shepherd and his wife; Mercy Maria Carter, who had been married and become Mercy Maria Carter Gray;

Fitch and Davis, the trustees in the deed of trust for the benefit of Mrs. Gray; Bradley, Mattingly, and Johnston, trustees (Philip having died); David R. Bartlett, Bacon and Cross, assignees under the deed of assignment of November 15, 1876, (Bartlett having been appointed assignee in the place of Taylor); and John Alexander and George M. Barker, two of the creditors secured by that assignment, as representatives of that class of creditors.

The bill sets forth the two deeds of trust in favor of Pepper and the deed of trust in favor of Mrs. Gray. It avers that Pepper owns and holds the promissory note for $35,000 and the one for $10,000; that they are both overdue; that a large amount of interest is due upon them; that Pepper has advanced moneys on account of taxes and insurance on the premises covered by the three deeds of trust, which moneys are secured by the two deeds of trust in his favor; that Mrs. Gray still holds her promissory note for $35,000, which is overdue, with interest from May 15, 1877; and that the parties who claim to be secured by the assignment of November 15, 1876, a copy of which is annexed to the bill, are very numerous and cannot without inconvenience and delay be brought before the court. It then sets forth the filing of the former bill by Pepper; the contents of the decree of May 12, 1879; the appeal by Shepherd from that decree; the sale of the property to Pepper by Philip and Johnston, trustees; the filing of the bill by Shepherd, the proceedings thereunder, and the entry of the decree of October 30, 1880; the filing of the opinion of Mr. Justice James; and the order striking that opinion from the files.

The bill further alleges, that it is competent to show at any time the grounds upon which the decree of October 30, 1880, was placed by the opinion of the court; that, as that opinion states that the decree of May 12, 1879, did not give to Johnston any power to sell, the decree of October 30, 1880, was in effect an adjudication upon, and favorable to, the averments in the bill filed by Shepherd; that the sale to Pepper was made without authority, and that the deed of Philip and Johnston to Pepper was null and void; that, as Shepherd had always insisted that

the decree of May 12, 1879, was void and the sale to Pepper a nullity, and to the end that said lot 3 may be sold as a whole, Pepper files his bill in order that an undisputed title to the whole property may be obtained by means of foreclosure proceedings under the decree of the court; that the lot numbered 3 in Shepherd's subdivision of square 164, fronting 43 feet 9 inches on K Street and 109 feet $\frac{1}{2}$ inch on Connecticut Avenue, being the property described in the deed of trust in favor of Mrs. Gray, is improved by an expensive dwelling-house, erected thereon by Shepherd; that the portion of that lot 3 contained in the descriptive clauses of the two deeds of trust given by Shepherd to secure the moneys loaned to him by Pepper, does not embrace all the ground covered by and appurtenant to the dwelling-house, the portion omitted from those two deeds of trust being a lot designated as sub-lot A, fronting about 28 feet $2\frac{1}{2}$ inches on Connecticut Avenue, and running back with that width; that the omission of that strip from those two deeds of trust was either by accident or fraud on the part of Shepherd or his agents; that in either case Pepper is entitled to have the description of the ground in those deeds corrected, so as to include that strip; that by the agreement of Pepper with Shepherd it was provided that Shepherd should grant to trustees, to secure Pepper, all of the real estate covered by his residence on the corner of K Street and Connecticut Avenue, and all the property to be used as appurtenant and connected therewith, and which is designated on the plat books of the city as lot 3 of Shepherd's subdivision of square 164; that, relying upon the fact that the first deed of trust embraced all the property now described as lot 3 in square 164, Pepper agreed to make a second loan on the same property, and therefore the second deed of trust was executed as now found; that, relying upon the belief that both of the deeds of trust embraced all of the real estate used or to be used by Shepherd for his residence and appurtenant thereto, Pepper advanced the $45,000, and relied upon the deeds as his security for the loan, believing that they conformed to his contracts with Shepherd and embraced all the real estate owned at that point by Shepherd and all the land covered by the house and

appurtenant thereto; that he would not have loaned any money to Shepherd if he had known that the deeds of trust did not embrace all of such real estate and the improvements made or to be made at that point by Shepherd, with the yard now belonging thereto; that, after the execution of the deeds and the advance of the $45,000, Pepper discovered that sub-lot A, constituting the rear 28 feet 2½ inches of lot 3 in square 164, was omitted entirely from the deeds, thereby cutting off a portion of the improvements and seriously impairing the security; that the omissions were made by the fraud of Shepherd or his agents, and without any suspicion of the omission on the part of Pepper; that Shepherd states that he fully intended to embrace in the two deeds all the said real estate, and executed the deeds with the belief that all of said property was so included, but that the omission to include all of it was due to accident or mistake on the part of himself or of his agents who prepared the deeds, and without fraud on his or their part; that it was well understood by Mrs. Gray, when and before she loaned the $35,000 to Shepherd, that the two prior deeds of trust in favor of Pepper constituted prior liens on all the real estate embraced in the deed of trust to secure her, that is, lot 3 in square 164; that she made her loan with the belief on her part that both of the prior deeds of trust actually embraced all of the said real estate, and with the belief that Pepper and Shepherd understood that all of said real estate was so embraced; that she had actual notice that Pepper and Shepherd fully intended to embrace in the first and second deeds of trust all the real estate embraced in the third one; that the lien of Pepper under his two deeds of trust is paramount to that of Mrs. Gray, as to all of the real estate referred to in her deed of trust, and ought to be enforced, either by reforming the first two deeds by including therein all of the real estate embraced in the deed in favor of Mrs. Gray, or by enforcing the lien of Pepper on lot 3 as an equitable mortgage prior to any rights of Mrs. Gray therein; that after Pepper had so advanced to Shepherd the $45,000, he learned for the first time that Shepherd, when he executed the first two deeds, had only a tax title to sub-lot A, in square 164; that Shepherd had, since said loans were made

to him, perfected his title to sub-lot A, by buying in all adverse claims, and had paid the money therefor from his own means; that such sub-lot A was conveyed either to Shepherd or to some friend as trustee for him; and that in either case the perfected title will enure to the benefit of Pepper and of Mrs. Gray.

The bill further alleges that the said principal sums, with large arrears of interest, are due to Pepper and to Mrs. Gray, respectively, and sums are also due to Pepper for premiums of insurance and taxes paid by him; that Shepherd had been receiving $6000 per annum as rent for the premises and the furniture in the house; that the incumbrances on the real estate in favor of Pepper and Mrs. Gray, with the arrears of taxes, amount to about $120,000, and are increasing at the rate of about $9000 a year; that the real estate is an inadequate security for the sums charged upon it, and cannot be sold for a sum sufficient to meet even the existing liens on it, and will not yield from rents an adequate income on the sum charged upon it; that Shepherd is insolvent, and there are unsatisfied judgments of record against him in the Supreme Court of the District of Columbia, besides unsecured debts estimated by Shepherd to amount to $310,000; that Shepherd is unwilling and unable to make good the deficiency due to Pepper, after properly applying the net proceeds of the sale of the property; and that Bradley refused to sell the property vested in him as trustee under the first deed of trust, and has endeavored to delay and prevent its sale.

The prayer of the bill is for the appointment of a receiver to receive the rents due and to become due for lot 3 and the improvements upon it; for the appointment of a trustee or trustees to sell the whole of such lot and improvements; that the rents and the proceeds of the sale of lot 3 be applied first to pay said indebtedness to Pepper, with all interest, costs, charges and expenses due to him by reason of the premises; that Shepherd may discover the name of the holder of the legal title to said sub-lot A, and be restrained from receiving or disposing of any part of the rent paid or to become due for lot 3 and the improvements thereon; and for general relief.

Opinion of the Court.

A restraining order against Shepherd, as prayed for, was issued on the filing of the bill.

Bradley answered the bill, and took the ground that in the first bill filed by Pepper the latter had insisted upon his right to the sale of the property as described in the two deeds of trust made in his favor, and did not ask to have the defective description corrected, and had procured the property to be sold, and had purchased it and received a deed for it, and claimed title to it, by the description contained in those two deeds of trust. Bradley's answer also set up that Pepper had brought a suit at law, on the 20th of April, 1880, against Shepherd to recover on the several promissory notes mentioned in the first two deeds of trust.

The bill was taken as confessed by Fitch, Mattingly, Alexander and Barker.

Mrs. Gray answered the bill, alleging that at the time the deed of trust in her favor was made she was informed and believed that the two prior deeds of trust covered only the property described in them, and that the deed of trust given to secure her was a second lien on the part of lot 3 described in those deeds of trust, and the first lien on the remaining part of that lot; that, relying on that information, which was true, she loaned to Shepherd the $35,000 on the security of that lot; that she had no knowledge or information that Pepper claimed that there was any accident, mistake, or fraud in connection with the first two deeds of trust, or that they should have covered any property beyond what they actually covered; and that Pepper has no right to have the first two deeds of trust amended, extended, or changed, as against her, or any right to any lien on any part of lot 3, as against her, except that part described in the first two deeds of trust. She objects to a sale of lot 3.

Cross and Bacon put in an answer to the bill; and the court, on the 1st of December, 1881, on a hearing, granted an injunction as prayed, against all of the defendants except Alexander and Barker, and appointed a receiver of the rents accrued and to become due. The order states that each of the defendants enjoined appealed from it. Johnston afterwards withdrew his

appeal; and on the motion of Pepper the appeal of the other defendants was dismissed by the general term.

Shepherd put in an answer to the bill, on the 1st of June, 1882, denying that the bill filed by him was dismissed for want of jurisdiction; denying that the omission of sub-lot A from the first two deeds of trust was an accident or a fraud on his part or on that of his agents; and denying that Pepper has the right to have the deeds corrected so as to include sub-lot A; but admitting that he (Shepherd) executed the first two deeds of trust in the belief that the whole property covered by the house was embraced in them. The answer sets up that Pepper has no right to the rents of the house or to the rent of the furniture contained in it, and no interest in the premises except to have them sold and his claims paid out of the proceeds of sale; that the subject matter of the bill is embraced in the prior suit brought by Pepper, which is still pending; and that, if Pepper has any right to relief, he must seek it in that suit by bill of review or otherwise.

On the 21st of July, 1882, Pepper amended his bill by averring that lot 3 was wholly insufficient security for the debt admitted by Shepherd to be due to Pepper and charged thereon, and could not be sold for a sum sufficient to meet the debt so admitted, and would not yield in rents an adequate income on the value of the same, even assuming such value to be equal to the amount of the debt admitted to be due to Pepper and charged on the lot. The amendment also stated that Philip died intestate, leaving surviving him a widow and four children, infants, whose names were given, and added the names of such children as defendants. It also stated that Pepper was willing to surrender, and did thereby surrender, for the purpose of a resale of the said real estate, any title in fee simple which he might have thereto by reason of the deed to him from Philip and Johnston, trustees; and that, for the purpose of reselling such real estate, he waived any interest, claim, or title vested in him by that deed, and offered to make any conveyance which the court might deem proper or necessary to accomplish the purpose indicated.

The bill and amendments were answered by Davis, Fitch

and Barker, and the amendments were answered by Cross, Bacon, Bradley and Mrs. Gray. The answer of Mrs. Gray alleged that it was not in the power of Pepper to make or carry out the offer contained in the amendments; that, if any title passed to him by the sale and the deed to him by Philip and Johnston, he had no right to bring this suit; and that if, on the contrary, no title passed to him by the sale, the offer contained in the amendments was a vain and useless form.

Shepherd also answered the amendments, alleging that the proposed offer by Pepper was no actual surrender of any interest or waiver of any right.

The order *pro confesso* as to Mattingly having been vacated, he put in a plea, setting up the sale and the deed to Pepper, the filing of the bill by Shepherd and of the cross-bill by Pepper, and the decree of October 30, 1880, and averring that Pepper, ever since the deed to him, had claimed to be the owner of the property in fee simple, and still so claimed.

The bill was taken as confessed against the wife of Shepherd; a guardian *ad litem* was appointed for the infant children of Philip, who put in an answer to the bill; Johnston and Bartlett also answered it and the amendments; issue was joined as to all the defendants who had answered; and the plea of Mattingly was ordered to stand as his answer.

Proofs were taken on both sides, the cause was heard by the court in special term, and afterwards, on the 24th of March, 1885, Shepherd presented to the court two petitions, wherein he set forth the bringing of a suit at law against him by Pepper, on the 20th of May, 1882, upon the promissory notes; that at the hearing he learned for the first time that Pepper claimed a personal decree against him, under the prayer in the bill for general relief; that, when the claim to such personal decree was made at the hearing, his personal liability upon the notes was barred by the statute of limitations, because the notes were all of them then more than three years overdue; and that he ought to be allowed to interpose that objection to a personal decree. He therefore prayed for a hearing on the subject of the right of Pepper to a personal decree against him, and to be allowed to take proof as to the

fact of the pendency of the action at law; that the plaintiff might be required to elect between the pending action at law and his claim for a personal decree for a deficiency; that, if he elected to claim such personal decree, he might be required by amendment to make his bill a bill for that purpose, and Shepherd be allowed to answer or plead to it; that Shepherd be allowed a rehearing on the questions as to the disposition of the funds in the hands of the receiver, and as to interest upon the coupon notes; and that he be allowed to interpose by plea or answer the defence of the statute of limitations to a claim for a personal decree. These petitions were dismissed by the court.

On the 26th of March, 1885, the court in special term made a decree, that unless Shepherd should pay to Pepper, on or before the 1st of July, 1885, $35,000, with interest thereon at the rate of nine per cent per annum from the 1st day of June, 1879, until paid, and the further sum of $9450, being the amount of six coupon notes, all dated June 1, 1874, signed by Shepherd, and representing six semi-annual instalments of interest due by him on the principal sum of $35,000, with interest upon them at the rate of six per cent per annum until paid, namely, upon six sums of $1575 each, one from December 1, 1876, one from June 1, 1877, one from December 1, 1877, one from June 1, 1878, one from December 1, 1878, and one from June 1, 1879, and also the sum of $10,000 due to Pepper, with interest thereon at the rate of nine per cent per annum from March 22, 1880, until paid, and the further sum of $3150, being the amount of seven coupon notes, all dated March 22, 1875, signed by Shepherd and representing seven semi-annual instalments of interest due by him on the principal sum of $10,000, with interest on them at the rate of six per cent per annum until paid, namely, upon seven sums of $450 each, one from March 22, 1877, one from September 22, 1877, one from March 22, 1878, one from September 22, 1878, one from March 22, 1879, one from September 22, 1879, and one from March 22, 1880, and also the taxed costs of the suit, lot 3 in Shepherd's subdivision of square 164, with the buildings and improvements thereon, be sold at public auction, by Henry W.

Opinion of the Court.

Garnett and John F. Hanna, as trustees. The decree prescribed what notice of sale was to be given and the terms of sale, and directed the proceeds to be brought into court. It also provided that the trustees, before July 1, 1885, should examine witnesses before the auditor of the court, to ascertain the relative values of the real estate covered by the first two deeds of trust, with the buildings and improvements thereon, and of the part described as sub-lot A in square 164, being the rear 28 feet 2½ inches of lot 3, with the buildings and improvements upon such sub-lot A; that, notwithstanding such inquiry, the sale should proceed; that the net proceeds of the sale which should appear to represent the value of that part of the real estate described in the first two deeds of trust, with the buildings and improvements thereon, after deducting therefrom the aliquot parts of the costs, commissions, expenses and charges of the suit chargeable against such part, should be applied toward the payment of the claims of Pepper, and the residue of such net proceeds should be applied toward the claims of Mrs. Gray; that, if the net proceeds of the property described in the first two deeds of trust should exceed the amount of the claims of Pepper, the excess should be applied towards paying the claims of Mrs. Gray, if the same should remain unsatisfied after applying the net proceeds of sub-lot A; that the net amount of rents in the hands of the receiver, after deducting costs, commissions, expenses and repairs, should be applied to the payment of the taxes theretofore paid by Pepper and the insurance premiums properly paid by him, and to the payment of taxes due and unpaid, and the residue of the receipts from rents should await the further order of the court; and that, if the net proceeds of the sale applicable to the claims of Pepper should prove insufficient to discharge them, he should recover from Shepherd whatever amount might remain due of the claims so decreed to be due by Shepherd to Pepper, after the application thereto of the net proceeds of sale, and should have execution therefor as at law.

Shepherd, Bartlett, Bacon and Cross appealed to the general term from this decree; Mrs. Gray appealed from so much of it as directed the sale of sub-lot A; and Pepper also appealed from it.

Opinion of the Court.

The court in general term, on the 29th of October, 1885, affirmed the decree of the special term of March 26, 1885, with these modifications: It directed that the inquiry as to the relative values of the two parcels of property should take place after the sale had been made; that, if the debt due to Mrs. Gray should be satisfied otherwise than by applying thereto her proper share of the proceeds of the sale, the entire proceeds of the sale of lot 3 should be applied to the payment of Pepper's debt and interest, or if the proportion of such proceeds set apart by the decree to satisfy Mrs. Gray's debt should more than suffice to satisfy it, then any surplus of such proceeds should be paid over to Pepper on account of his debt and interest; and that the balance of rents remaining in the receiver's hands, after deducting the payments to be made out of such rents as specified in the decree, and after paying interest to Pepper on the sums advanced by him for taxes and insurance premiums, should be paid by the receiver to Pepper on account of any balance of principal and interest, as decreed, that should remain due after applying the proceeds of lot 3, as directed by the decree to be apportioned and applied. It also affirmed the orders dismissing the two petitions filed by Shepherd on the 24th of March, 1885, and charged Shepherd with the costs of the appeal.

Shepherd, Cross, Bacon, Bartlett and Mrs. Gray appealed in open court to this court from the decree of October 29, 1885, the appeal was allowed, and the amount of the supersedeas bond on behalf of the defendants other than Mrs. Gray was fixed at $1000, and that on her behalf at $100. The appeal of Pepper was abandoned. The defendants other than Mrs. Gray gave the bond required of them. Mrs. Gray did not give the necessary bond; and, although the record was filed in this court on the 9th of October, 1886, she took no action to perfect her appeal to this court until the case came on for hearing, on the 26th of November, 1889, when she offered to the court to be filed a proper bond in the sum of $100. No citation was necessary on her appeal, as she had taken it in open court, the record had been duly filed in this court, on October 9, 1886, and, under the circumstances, we will permit the bond

on behalf of Mrs. Gray to be filed *nunc pro tunc* as of the 26th of November, 1889, and her appeal to stand as perfected.

At the time the loans were made by Pepper to Shepherd, Shepherd claimed to own and agreed to give as security therefor, the land and improvements situated at the northeast corner of Connecticut Avenue and K Street, fronting 43 feet 9 inches on K Street, and 109 feet ½ inch on Connecticut Avenue, containing 8466.22 square feet, known as lot No. 3 in Shepherd's subdivision of lots in square No. 164. The improvements covered nearly the whole of that lot, the portion not so covered being enclosed and used in connection with the house. It was the intention of both Pepper and Shepherd that the whole of this property should be included in the deeds of trust; and if Pepper had any knowledge, information or suspicion to the contrary, he would not have loaned any of the money. Shepherd testifies that when he executed the deeds of trust, he supposed that they embraced the whole property. On the piece of land known as sub-lot A, being that part of lot 3 which fronts 28 feet 2½ inches on Connecticut Avenue, and has such a depth that it contains 3656 square feet, there had been actually constructed at the time a portion of the dwelling-house, which includes the coal-vaults, the laundry, the servants' apartments, and a portion of the picture gallery.

It is not denied by Shepherd that the debts due by him to Pepper are *bona fide* debts, and are overdue; and their existence and amounts are satisfactorily proved. The sole defence of Shepherd amounts to this, that by the uncertainty and delay of the law, and by mistakes in the legal proceedings, Pepper has lost all right to the execution of the trusts created for his benefit; and it is urged that, by reason of the proceedings in the prior suit brought by Pepper, he is estopped from maintaining the present bill.

The opinion of the court in general term, delivered by Mr. Justice Merrick, is reported in 4 Mackey, 269. It states that when the decree of May 12, 1879, in the suit brought by Pepper, came to be made, there was by inadvertence an error in the description of the property in the decree, by leaving a blank in the designation of the trust deed, the result of which was

that the decree was uncertain in itself and practically void on account of the uncertainty in its description of the property. As Bradley was trustee in each of the first two deeds of trust, and as the decree appointed Johnston to be trustee in the place and stead of Bradley in but one deed of trust, which was so described that it could not be identified, the whole transaction became uncertain and void. It resulted from this, as the opinion states, that there was no effective appointment of a trustee, and no effective sale; and the bill in the suit brought by Shepherd was dismissed on the ground that there was no cloud upon the title, because the sale itself was a nullity. The opinion further states that, while Shepherd averred in his answer that the sale to Pepper was a nullity and passed no title, and Mrs. Gray by her answer averred the same thing, they were now taking the ground that Pepper had no right to have a second sale of the property, because, having bought under the first sale, he must abide thereby; in other words, that, although he acquired no title under the first sale, he is estopped by that sale, from having it sold again. The opinion adds, that this is a defence which a court of equity cannot entertain. It also considers the point taken by Mrs. Gray, that, inasmuch as she is the first encumbrancer on sub-lot A, Pepper cannot have the whole property sold without first discharging her entire claim, and says that the two pieces of property had been held in a general ownership; that the testimony showed that to sever them would be destructive of the value of both; that although Pepper had not brought home to the knowledge of Mrs. Gray the equitable mortgage as between him and Shepherd, yet the fact of the building being upon the two lots, and the further fact that, if there is to be a sale, the whole property ought to be sold together, because the value of both would be decreased if they were sold separately, constituted a case where a court of equity ought to order all the property to be sold together; that it would be inequitable to compel Pepper to redeem the whole of the debt to Mrs. Gray as a condition of the sale of sub-lot A, because Mrs. Gray is entitled to only an inconsiderable portion of the encumbered premises, except in subordination to the claims under the first

two trust deeds; and that the decree of the special term, in giving to Mrs. Gray such portion of the proceeds of sale as should be determined to be the value of her interest in sub-lot A, upon testimony as to the relative values of the two properties, gave to her all that she was entitled to in equity. As to the rents and profits, the opinion said that wherever property subject to a lien has been brought within the domain of a court of equity, and a receiver of it is appointed, the rents and profits in the hands of the receiver will be applied, along with the corpus of the fund, to satisfy the lien, after paying charges such as taxes and insurance; that the special term properly directed the application of the rents to pay off premiums of insurance and taxes which had accrued; but that the decree ought to be modified by directing that the residue of the rents should go to make up any deficiency in the proceeds of the sale of the two properties to satisfy the corpus of the debts, recognizing the right of Mrs. Gray to her share of the proceeds of sale according to the apportionment before indicated, but dedicating the rents primarily to the satisfaction of the debts due to Pepper, together with the proceeds of the sale of the primary property upon which the house is built. We concur in these views of the general term.

The bill in the first suit brought by Pepper was a bill merely to substitute a trustee in the place of the trustees in the first two deeds of trust. The prayer of the bill was that such trustee be appointed, with directions and authority forthwith to execute all the trusts reposed by the first two deeds of trust in the trustees mentioned therein. It does not pray that an officer of the court shall make the sale, or that the trustee to be appointed by the court shall make the sale under any power to be given to him by the court; but it prays that he may execute the trusts under the deeds of trust. Moreover, the decree of May 12, 1879, declares that it is made "without prejudice to all other rights of defendant." This reserved the right of Shepherd to be heard on the question of the right of Pepper to foreclose under the deeds of trust. The present suit is a suit for foreclosure, and in it all defences to the claims of Pepper were open to be made by Shepherd. In respect of

parties, in respect of subject matter and in respect of the relief prayed for, the two bills brought by Pepper are different; and none of the questions involved in the pleadings in the present suit were involved in or adjudicated in the first suit brought by Pepper. Still further, the uncertainty and inoperative character of the decree of May 12, 1879, make the whole suit fruitless and of no more effect than if it had never been commenced.

For the same reason, Pepper cannot be regarded as having made any election, in the first suit brought by him, to enforce a sale of the property described in the first two deeds of trust aside from a sale with it of sub-lot A, so as to be estopped from now asserting a lien upon sub-lot A. When the first bill was filed by Pepper, he knew that Shepherd had merely a tax title to sub-lot A; and Shepherd, in his answer to that bill, averred that the title to sub-lot A never belonged to him, and that he theretofore purchased what is called a tax title to sub-lot A, but it turned out to be void and of no effect. Therefore, Pepper could not at that time have attempted to reform the first two deeds of trust so as to include sub-lot A, because Shepherd then had no title to that sub-lot. But the fact that both Pepper and Shepherd agree that it was intended by them that the first two deeds of trust should include sub-lot A, gave Pepper a right to assert an equitable mortgage against that sub-lot; so that afterwards, when Shepherd bought in the proprietary title to it, as the evidence shows he did, Pepper was for the first time in a position to assert a lien against it.

It is, we think, very plain that Pepper acquired no title by the deed to him under the sale by the trustees, and that the decree dismissing the bill filed by Shepherd had no effect to establish any legal title in Pepper to the real estate in question. Even if resort may not be had to the opinion of Mr. Justice James, still it is manifest that the propositions stated in that opinion are sound, namely, that if the decree of May 12, 1879, was uncertain on its face, in the respects and to the extent before mentioned, the alleged title of Pepper, through the deed from the trustees to him, was not a cloud upon the title of Shepherd, and therefore the court could not grant

Shepherd the relief he prayed for in the bill filed by him, and that bill was properly dismissed.

This view of the case is taken by Pepper, in his bill in the present suit, because he says therein, in regard to the decree of May 12, 1879, and the opinion of Mr. Justice James, "that, as it appears by the said opinion of the court that the said decree did not give to the said Johnston any power to sell, said decree was in effect, an adjudication upon and favorable to the averments in said Shepherd's bill of complaint in said court that said sale was made without authority and the deed of said Philip and Johnston was null and void, and, as the said Shepherd has always averred and insisted that said decree was void and said sale a nullity, and to the end that said lot 3 of said Shepherd's subdivision may be sold as a whole, the complainant files this bill in order that an undisputed title to the whole property may be obtained by means of foreclosure proceedings under the order and decree of this court." Then the bill prays accordingly, "that a trustee or trustees may be appointed by this court to sell the whole of lot 3, in A. R. Shepherd's subdivision of square numbered 164, with the improvements thereon." Therefore, it is not true that Pepper is still asserting a legal title in himself.

We think that Pepper is entitled to have the whole of lot 3 sold. It was omitted at least by accident from the first two trust deeds, when both parties supposed they covered it. Lot 3 embraces not only sub-lot A, but the property covered by the first two deeds of trust. Shepherd, in his answer to the first bill filed by Pepper, said, "that, in his opinion, it would be impossible to make a sale and division of the said property under the said deed of trust without irreparable injury to, if not total destruction of, a large portion of the dwelling-house which is erected upon the said lot; . . . that the said dwelling-house would be entirely incomplete without the addition of that portion called the 'picture-gallery;' that the servants' apartments and the laundry and drying-room, etc., etc., are underneath the said portion of said dwelling-house, as well as the heating apparatus for a large portion of the house; and that, if the said lot A, which is not included in the deed of

trust of the said complainant, shall be separated from that portion which is included in the said deed of trust to the complainant, a dividing line would not only take off the said 'picture-gallery,' but would take off and destroy a portion of the back part of the main dwelling-house."

In regard to Mrs. Gray, the letter to her, written by Mr. Brown, of the firm of Fitch, Fox & Brown, who were negotiating for her the loan to Shepherd, the letter being dated April 18, 1876, speaks of the loan as one "to be secured by a second mortgage, the prior mortgage being for $45,000." Besides this, the first two deeds of trust were recorded respectively June 3, 1874, and March 24, 1875, and they conveyed, to secure Pepper, the premises described in them, "together with all the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in anywise appertaining, and all the estate, right, title, interest and claim, whatsoever, whether at law or in equity, of the said parties of the first part, of, in, to, or out of the said piece or parcel of land and premises." The improvements and easements in question were visibly necessary for the dwelling-house as then constructed, and were visibly upon, or required the use of, sub-lot A, as stated by Shepherd, as before recited.

Mrs. Gray is only a mortgagee, and not the owner in fee, of sub-lot A; and her interest in the property is subject to the prior and subsequent interests of other parties, as those interests are usually ascertained and administered by a court of equity for the benefit of all concerned. It is not equitable that she should be allowed to use her mortgage on sub-lot A to prevent a sale of the entire lot 3. Her only right can be to have the proceeds of sub-lot A applied first to the payment of her debt; and that right is secured by the decree appealed from.

The present bill is one to obtain a decree for the sale of encumbered premises and the application of the proceeds of sale to discharge the encumbrances according to priority. The debts to Pepper and to Mrs. Gray are overdue; and under such circumstances a court of equity, on the application of a junior encumbrancer, will provide for the sale of the entire

encumbered property, if the circumstances of the case show that the interests of the mortgagor and of the encumbrancers require the sale. *Finley* v. *Bank of the United States*, 11 Wheat. 304, 306; *Hagan* v. *Walker*, 14 How. 29, 37, 38; *Jerome* v. *McCarter*, 94 U. S. 734, 735, 736, 740; *Hill* v. *National Bank*, 97 U. S. 450, 453, 454; *Woodworth* v. *Blair*, 112 U. S. 8; *Hefner* v. *Northwestern Life Ins. Co.*, 124 U. S. 747, 754; *Vanderkemp* v. *Shelton*, 11 Paige, 28. This authority is properly exercised in the case of deeds of trust, where all the encumbrances are due and where the plaintiff has a first lien on some of the property sought to be sold, and where all the encumbrancers are parties to the suit. Here, Pepper has a first lien on the bulk of the property sought to be sold, and a second lien, as decreed, on the small remaining portion; and the debts secured by the first two deeds of trust were all overdue when the bill in this case was filed, as well as the debt due to Mrs. Gray. Under such circumstances, the mere non-assent of Mrs. Gray ought not to prevent the court from doing what is equitable in regard to the claims of Pepper, as well as those of herself.

There was no error in the dismissal of the two petitions of Shepherd, filed in March, 1885, nor in entering a personal decree against him for any deficiency which should remain after exhausting the property covered by the deeds of trust.

The fact of the bringing of the suit at law upon the notes, by Pepper against Shepherd, in April, 1880, was set up in the answer of Bradley to the bill in the present suit, and was therefore in issue; but it was not shown in defence that Shepherd had ever been served with process in any such suit at law, or had appeared in it, voluntarily or otherwise. Moreover, the principal notes given to Pepper were not barred by limitation when the bill in this case was filed. As to the interest notes or coupons, although some of the unpaid ones for each of such two principal notes had been overdue more than three years when the bill was filed, yet it makes a claim to recover all the interest, and Shepherd does not, in his answer, set up the statute of limitation as a bar to any part of the principal or interest claimed.

The bill in this suit prays for general relief, and a decree

for a deficiency is a necessary incident of a foreclosure suit in equity. It is provided as follows by section 808 of the Revised Statutes relating to the District of Columbia: "The proceeding to enforce any lien shall be by bill or petition in equity, and the decree, besides subjecting the thing upon which the lien has attached to the satisfaction of the plaintiff's demand against the defendant, shall adjudge that the plaintiff recover his demand against the defendant, and that he may have execution thereof as at law." This provision was interpreted by this court in the case of *Dodge* v. *Freedman's Savings and Trust Co.*, 106 U. S. 445, where it was held that it authorized a decree *in personam* against the debtor for the balance remaining due after the proceeds of the sale of lands covered by a mortgage or a deed of trust in the nature thereof had been applied to the satisfaction of the debt. The present cause is of the same character of foreclosure proceeding as that involved in the case cited. It was proper for the court, under the bill as it stands and the statute on the subject, to make a personal decree against Shepherd for a deficiency; and the matter of granting the prayers of his petitions filed in March, 1885, was a question of discretion in the court below, and not reviewable.

As to the question of the disposition of the rents in the hands of the receiver we think the action of the court below was proper. The pecuniary condition of Shepherd, his failure to pay taxes, premiums of insurance, or interest, the inadequacy of the property to pay the claims of Pepper and Mrs. Gray, and the diversion of the income from rents, from making such payments, to the use of Shepherd, up to the time of the appointment of the receiver, were adequate grounds for the appointment of the receiver. *Kountze* v. *Omaha Hotel Co.*, 107 U. S. 378, 395; *Grant* v. *Insurance Co.*, 121 U. S. 105. The court, through its receiver, took possession of the rents in order to preserve them for that party to the suit who should ultimately be found to be equitably entitled to them. *Hitz* v. *Jenks*, 123 U. S. 297, 306. The various reports of the receiver contained in the record, as to his payment of taxes, premiums of insurance and the expenses of repairs on the

building, show the necessity of his appointment. It would be grossly unjust, on the facts developed in this case, to appropriate the rents in the hands of the receiver to the use of Shepherd.

It is contended on behalf of Shepherd that the decree appealed from is erroneous, because it allows interest at the rate of nine per centum per annum on the principal of the notes, from June 1, 1879, and March 22, 1880, respectively, until paid; and it is urged that the interest should have been fixed at the rate of six per cent, from the date of the decree, March 26, 1885, on the ground that that was the rate of interest fixed by the statute on judgments and decrees.

Section 713 of the Revised Statutes relating to the District of Columbia provides as follows: "The rate of interest upon judgments or decrees, and upon the loan or forbearance of any money, goods or things in actions, shall continue to be six dollars upon one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time, except as provided in this chapter." Section 829 of said Revised Statutes provides as follows: "Upon all judgments rendered on the common law side of the court in actions founded on contracts, interest at the rate of six per centum per annum shall be awarded on the principal sum due until the judgment shall be satisfied, and the amount which is to bear interest and the time from which it is to be paid shall be ascertained by the verdict of the jury sworn in the cause." Section 714 authorizes parties to contract in writing for the payment of interest at the rate of 10 per cent per annum.

It is urged that the decree is a decree which fixes the amount of each of the debts due by Shepherd, and says that those sums are "hereby decreed to be due and payable" by Shepherd, to Pepper, with interest, etc.; that this is the language of a judgment; and that almost the same language is employed in reference to the accrued interest. The decree provides that, if the net proceeds of the sale shall prove insufficient to discharge the claims of Pepper, he shall have and recover of Shepherd whatever amount may remain due of the claims decreed to be due by Shepherd to him, after the ap-

plication thereto of the net proceeds of sale, and shall have execution therefor as at law. It is contended, therefore, that, as the decree ascertained the amount of the debt still due, and fixed the rate of interest on it, it thereafter drew interest by virtue of the decree, and not by virtue of the terms of the contract, because the contract was merged in the decree.

We think, however, that on the face of the decree the court did not intend to, and did not, merge the contract in the decree; but merely fixed the amount due according to the terms of the contract on the payment of which, before the day fixed, the decree would not go into effect, but the case would be dismissed. The statute has no application, except as to the rate of interest charged on the deficiency which shall be found to exist after applying the net proceeds of sale to the debt, and the decree does not provide for interest in excess of six per cent per annum on such deficiency.

In regard to allowing interest on the principal of the notes at the rate of nine per cent per annum until paid, it is to be said that such was the contract in each note.

It was stated at the bar that Hanna, one of the trustees appointed by the decree of the special term to make the sale, had died. If so, the court below will have power to appoint a new one in his place.

The decree in general term is, therefore,

Affirmed.

Mr. Justice Miller, dissenting:

I dissent from so much of the judgment of the court in this case as requires the entire property to be sold together and make provision afterwards for dividing the proceeds according to the valuation that may be made to ascertain how much of the money should go to appellant, Maria Gray.

I am of opinion that she has a right to have the piece of ground, on which her mortgage is declared to be the first lien, sold separately, so that she can bid whatever sum she may see proper in satisfaction of her mortgage. If this sum should be more than would satisfy the mortgage, of course the excess would go to the satisfaction of Pepper's debt. If it should

sell for less, then Pepper has no interest in it, and I see no reason why she should be compelled to compete with Pepper or anybody else in purchasing the entire property, which is worth four or five times as much as her single piece is worth, in order to make that piece bring its full value on the sale.

CULVER *v.* UTHE.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 191. Submitted January 27, 1890. — Decided March 3, 1890.

Swamp lands located on a military land warrant prior to the passage of the swamp land act of September 28, 1850, but patented to the locator subsequently to the passage of that act, were not included in the lands granted by it to the several States.

Section 891 of the Revised Statutes authorizes certified copies of records of the land office at Washington, concerning the location of land warrants, to be introduced in evidence.

The delivery of his warrant by the holder of a land warrant to the proper officers of the government, with direction that it be located on a designated tract of public land, constituted a sale of that tract within the meaning of the act of September 28, 1850, 9 Stat. 519, c. 84, granting the swamp lands to the States.

THE case is stated in the opinion.

Mr. Morton Culver for plaintiffs in error.

Mr. H. B. Hurd for defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

The writ of error in this case brings before us for review a judgment of the Supreme Court of the State of Illinois. The suit was brought originally by the present defendant in error, Gertrude Uthe, against Morton Culver and Michael Gormley, in which she sought to recover on eleven promissory notes made by them March 23, 1874, all of which were due and unpaid at the commencement of this action, and on which she

claimed to recover the sum of $7000. To this the defendants pleaded, among other defences, that the notes were given as the purchase price of a quarter section of land in Cook County in that State, and that the consideration for which said notes were given, namely, the title to said quarter section, had utterly failed, and that plaintiff had no title to the lands which she sold to the defendants at the time of the sale, or at any other time.

The plaintiff recovered judgment against defendants, notwithstanding this plea, which was affirmed in the Supreme Court of the State, upon a writ of error issued by that court, and it is that judgment which we are called upon to review. 116 Illinois, 643.

The facts out of which the jurisdiction of this court arises, and on which we are to determine whether there is error in the judgment of the Supreme Court, are substantially as follows: The father of the plaintiff Gertrude, in whom the title which she sold to the defendants originated, had a patent from the United States for the land in controversy, dated February 10, 1851, which purported on its face to be issued under the act of Congress of February 11, 1847, 9 Stat. 123, c. 8, on a military land warrant that he had deposited in the General Land Office.

This land warrant was located on the land in question, at the land office of the United States in Chicago, Illinois, on July 10, 1850, under the authority of Uthe himself, and the land warrant certificate was delivered up, and the patent aforesaid issued to him in due time and after the proper course of proceedings. There does not seem to be any valid objection to the mode in which this was done.

The defence relied upon the fact that the land in question was swamp land within the meaning of the act of Congress of the 28th of September, 1850, 9 Stat. 519, c. 84; that by that statute the title to the land was transferred to the State of Illinois between the time of the location of the military land warrant and the issue of the patent for it to Uthe; and that therefore the title claimed under Uthe utterly failed, being vested by that statute in the State of Illinois, the act being a grant *in præsenti*, and taking effect at its date.

The first section of that act reads as follows:

"To enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby granted to said State."

The act is extended by its fourth section to the other States of the Union in which there were swamp lands belonging to the United States, including the State of Illinois, and the argument of the defendant in error is that by reason of the location of the military land warrant of Uthe on this land on the 10th day of July, 1850, nearly three months before the passage of this act, it had been sold to Uthe, within the meaning of the statute; and this is the principal question which we have to decide.

There does not seem to be any doubt that the land in controversy was swamp land, within the meaning of the act of Congress, and if the location by Uthe of his land warrant did not create a right to the land which excludes it from the grant to the State by Congress, the plaintiff Gertrude had no title, and the defence should have been sustained.

The first objection taken to the claim of Uthe was to the introduction in evidence of the certified copy of the records of the Land Office of the United States at Washington, concerning the location of the land warrant by Uthe. This transcript is certified by L. Harrison, Acting Commissioner of the General Land Office, under the seal of his office, and contains the various acts of the register and receiver of the land office at Chicago and of Uthe, in regard to the location of the land, showing that it was subject to location at the time, and that the land warrant was properly delivered up and deposited with the Commissioner of the Land Office.

The objection made in the brief of counsel to the reception of this copy is not very clearly stated. It is said that a simple inspection both of the United States statute and of the Illinois statute would show conclusively that it could not be admitted under either of them, and reference is made to section 20,

chapter 51, of the Revised Statutes of Illinois, and section 906 of the Revised Statutes of the United States. But section 891 of the latter statutes is ample authority for the introduction in evidence of the transcript of the General Land Office in the present case. It reads as follows:

"Copies of any records, books or papers, in the General Land Office, authenticated by the seal and certified by the Commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. And literal exemplifications of such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such record."

There is therefore no error in the admission of this transcript in evidence.

As regards its effect upon the rights of the parties, it seems to us it shows that under an act of Congress which authorized it to be done, Uthe, by directing his land warrant to be located upon this land and delivering up the warrant, and by the proceedings of the land office upon that location, which resulted in issuing a patent to him for the land, had acquired an equitable title to the land, or what may be called a vested interest in it, prior to the passage of the swamp land act by Congress. He had done what by the act of Congress of 1847 entitled him to the land on which his warrant was located. He had delivered up the land warrant, the evidence of his claim against the government. He had received in exchange for it the certificate of the receiver and register of the land office, and these entitled him to a patent after such delay as was necessary to ascertain the fact that the land had been granted to no one else, and that all his proceedings were regular, which facts were to be determined by the Commissioner of the General Land Office, and which were determined in his favor. He had paid for this land. He had paid by the delivering up and cancellation of his land warrant. He had received the certificate of the register and receiver of the land office at Chicago, which, by the laws of nearly all the Western States, have been made equivalent to a title to the land in actions of ejectment,

though the strict legal title remained in the United States at the date of the passage of the swamp land act.

Are we to suppose that Congress intended to give to the State of Illinois the land which it had already, by a contract for which value was received, promised to convey to Uthe? As the grant to the States of the swamp land within their jurisdiction was a gratuity, although accompanied with a trust for the reclamation of said land, it is not easily to be supposed that Congress intended to be thus generous at the expense of parties who had vested rights in any of the lands so donated, derived from the United States. It would be a matter of considerable doubt whether such an inference, that Congress intentionally violated its contract, would be indulged, if there were no words of reservation in the statute. But when we find the broad declaration made that the grant only includes those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of the act, we do not have much difficulty in holding that this land was not unsold within the meaning of the statute. It is true that in a technical sense, and where a due regard to the intention of the parties using the word "sold" is had, it may mean a transfer of the title of property for a money consideration. Yet, it has other meanings which would include the present transaction, when it is obvious that such was the intent of the party using the phrase. We cannot doubt that the delivery by Uthe of his land warrant to the proper officers of the government, with a direction that it be located on this land, and the paper which they issued to him, showing that he had thereby acquired the right to a patent for the land, constituted a sale within the meaning of the act of Congress granting the swamp lands to the States. The cases of the *States of Iowa and Illinois* v. *McFarland*, 110 U. S. 471, 482, it is true, give a different construction to the word "sale" in an act of Congress concerning certain sales of public lands. But the intent of Congress in that case was relied on as indicating that the word "sale," as applied to a disposal of the public lands by the government, was limited to sales for cash. The following language, used in the opinion in that case, indicates this very clearly:

"When each of these acts speaks of lands 'sold by Congress,' 'five per cent of the net proceeds' of which shall be reserved and be 'disbursed' or 'appropriated' for the benefit of the States in which the land lies, it evidently has in view sales in the ordinary sense, from which the United States receive proceeds, in the shape of money payable into the treasury, out of which the five per cent may be reserved and paid to the State; and does not intend to include lands promised and granted by the United States as a reward for military service, for which nothing is received into the treasury."

In the present case, the act which we are now construing does not contemplate the receipt of any money into the treasury of the United States, nor the payment of any money out of it, in regard to these swamp lands. We feel at liberty, therefore, to construe the statute as intending to exclude from the grant all the swamp and overflowed lands for which it had, by contract, given a vested right, for a valuable consideration, to individuals before the passage of that act.

The decision of the Supreme Court of Illinois, which affirmed the action of the lower court, founded on this principle, is sound, in regard to the questions which we have power to review, and its judgment is therefore *Affirmed.*

PALMER *v.* McMAHON.

ERROR TO THE COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF NEW YORK.

No. 145. Submitted January 24, 1890. — Decided March 3, 1890.

P. was a resident in the city of New York and a stockholder in a national bank situated there. In 1881 his shares in the bank were assessed at a valuation of $247,635. This valuation was entered by the tax commissioners in the annual Record of Valuations for 1881, a book which was kept open for public inspection from the second Monday of January, 1881, to May 1, 1881, and a public advertisement thereof was made. Before April, 1881, P. appeared before the commissioners and claimed a reduction, and they reduced the valuation to $190,635. On May 1st the assessment rolls were prepared from that record, with the valuation of

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P.'s shares at the latter sum, and he was assessed at that valuation. The tax rolls were completed on this basis, and notice was given that they would be open for inspection. P.'s tax, upon the reduced valuation, was $4994.63. The tax rolls were confirmed, and due notice was given to all taxpayers that the taxes were due and payable. P. paid $1310 of this tax, but declined to pay the further sum of $3684.63. The collector of taxes thereupon proceeded against him in the Court of Common Pleas for the city and county of New York, under c. 230 of the laws of New York of 1843, for the enforcement of the payment of the sum remaining due. He appeared and answered, and judgment was given against him, which judgment was affirmed by the Court of Appeals, and the case was remanded to the Court of Common Pleas. A writ of error was sued out from this court to review that judgment; *Held*,

(1) That this court was bound by the decision of the Court of Appeals as to P.'s failure to comply with the state statute in relation to the method of procedure, form of assessment, etc.;

(2) That the assessment was not made in contravention of the Constitution or laws of the United States, and was, therefore, not void for that reason;

(3) That the mode provided by the statute of New York for the collection of the tax was "due process of law," and did not deprive P. of the equal protection of the laws; but that it was a purely executive process to collect the tax after the liability of the party was finally fixed.

When a law provides a mode for confirming or contesting an assessment for taxation, with appropriate notice to the person charged, the assessment cannot be said to deprive the owner of his property without due process of law.

Assessors should give all persons taxed an opportunity to be heard; but it is sufficient if the law provides for a board of revision, authorized to hear complaints respecting the justice of the assessment, and prescribes the time during which, and the place where, such complaints may be made.

THIS was a writ of error to the Court of Common Pleas for the city and county of New York to review a judgment and order finding Francis A. Palmer guilty of misconduct in neglecting to pay personal taxes assessed, imposed and confirmed against him for the year 1881, and ordering that he stand committed until he should have paid the amount of the said taxes, with interest and costs, unless the court should see fit sooner to discharge him, which judgment and order was rendered in a proceeding brought under the provisions of chapter 230 of the laws of the State of New York of 1843, Art. 2, §§ 12 and 13, which sections are as follows:

"§ 12. In case of the refusal or neglect of any person to pay any tax imposed on him for personal property, if there be no goods or chattels in his possession upon which the same may be levied by distress and sale according to law, and if the property assessed shall exceed the sum of one thousand dollars, the said receiver, if he has reason to believe that the person taxed has debts, credits, choses in action, or other personal property, not taxed elsewhere in this state, and upon which levy cannot be made according to law, may thereupon in his discretion make application, within one year, to the Court of Common Pleas of the county, or the Supreme Court, to enforce the payment of such tax.

"§ 13. The court may impose a fine for the misconduct mentioned in the next preceding section, sufficient in amount for the payment of the tax assessed, and of the costs and expenses of the proceedings authorized by this act to enforce such payment, or to punish such misconduct; and the amount of such tax shall be paid out of such fine to the said receiver, who shall pay the same in like manner as the tax was required to be paid; and costs and expenses of such proceedings shall be paid out of such fine to the said receiver who made the application to enforce the payment of the tax."

The record showed that on the 17th day of April, 1882, Martin T. McMahon, the receiver of taxes of the city of New York, filed a petition against Francis A. Palmer in the Court of Common Pleas, stating that in the year 1881 Mr. Palmer was a resident of the twenty-first ward in the city of New York and a stockholder in the National Broadway Bank, located in the third ward of said city; that the shares of stock in said bank owned by Mr. Palmer were duly assessed for the year 1881 at the valuation of $247,635, which valuation was entered by the tax commissioners in "The Annual Record of the Assessed Valuation of Real and Personal Estate" for the year 1881, which record was open for examination and correction from the second Monday of January until the first day of May, 1881, and the fact that the books were so open was duly advertised; that before April 30, 1881, Palmer applied for a reduction of the valuation, and it was reduced by

the commissioners to the sum of $190,635; that on May 1, 1881, the assessment rolls were prepared from the books, upon which his name was entered, with an assessment against him for his shares at the valuation last mentioned, which rolls were duly certified to the board of aldermen of the city of New York, and immediately afterwards the tax commissioners gave public notice that the tax rolls had been completed and delivered to the board, and would be open to public inspection for the period of fifteen days from the date of the notice, which notice was duly published in several newspapers in the city of New York for fifteen days consecutively, commencing July 5, 1881; that thereafter the tax upon such valuation of Palmer's shares of stock was estimated and set down upon said roll at the sum of $4994.63, and on October 13, 1881, was duly confirmed by the board of aldermen, and corrected assessment rolls showing the amount of said tax were delivered to McMahon, as receiver of taxes, with a warrant for the collection thereof; that notice was duly published in twelve New York newspapers that said assessment rolls had been delivered and that the taxes were due and payable thereon; that thereafter notice was again published in twelve newspapers that unless the taxes were paid the receiver would proceed to collect them according to law; and a fourth notice was likewise published requiring payment; that Palmer had neglected to pay the sum of $3684.63 of the tax assessed against him; that subsequently to the 15th of January, 1882, a warrant was issued by the receiver to a marshal of the city for the collection of said tax, which was returned unsatisfied, except as to the sum of $1310, after demand of payment from Palmer, which was refused as to $3684.63; that there were no goods or chattels in Palmer's possession upon which said tax might be levied by distress and sale; that one year had not elapsed since said refusal or the return of the warrant; and that the receiver had reason to believe that Palmer had debts, credits, choses in action, or other personal property, not taxed elsewhere in the State of New York, upon which levy could not be made according to law; and he applied for the enforcement of payment of the tax pursuant to the statute.

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Defendant Palmer was ordered, upon the foregoing petition, to show cause why he should not be punished for his misconduct in neglecting and refusing to pay said personal property tax, and he appeared and interposed an affidavit, in which he set up various matters in resistance to the order, and among other things insisted that his shares of stock were not lawfully assessed for the year 1881, for reasons stated in a demand theretofore served upon the commissioners of taxes in the city of New York, of which a copy was attached to the affidavit, dated April 25, 1881, and whereby the tax commissioners were requested to strike from the record the names of all the shareholders in said bank upon various grounds, and in case the foregoing demand was refused, further demanding that the assessed value of each share, which had been fixed by the commissioners at $45, be reduced to $10, by deducting the value of United States bonds held by the bank, and in the event of a refusal, that the valuation of each share should be reduced to the amount of $27, being sixty per cent of the assessed value of each share of stock exclusive of real estate. In support of the petition affidavits of the tax commissioners were presented to the court. It appeared that a deduction of $57,000 on account of debts due by Palmer had been made from the original valuation of the shares, on his application. The Court of Common Pleas thereupon made the order complained of, an opinion being given by Van Brunt, J., 11 Daly, 214, in which all the objections made by Palmer were carefully considered and overruled. From this order an appeal was taken to the general term of the Court of Common Pleas, by which said order was affirmed, the opinion of the court being delivered by Beach, J., and reported in 12 Daly, 362. From the judgment of the general term an appeal was taken to the Court of Appeals of the State of New York, the judgment affirmed, and the proceedings remitted to the Court of Common Pleas. The opinion of the Court of Appeals by Ruger, C. J., is to be found in 102 N. Y. 176, and is quoted from with approval by this court in *Mercantile Bank* v. *New York*, 121 U. S. 138, 158. To the judgment of the Court of Common Pleas this writ of error was sued out.

Mr. William Hildreth Field and *Mr. William H. Clark* for plaintiff in error.

Mr. David J. Dean for defendant in error.

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

We are bound by the decision of the Court of Appeals of the State of New York adversely to the plaintiff in error, as to failure to comply with the state statute in relation to the method of procedure, form of assessment, oath of assessors, etc., in respect to which it may be further remarked that the attack in this case is in its nature collateral. *Stanley* v. *Supervisors*, 121 U. S. 535; *Supervisors* v. *Stanley*, 105 U. S. 305. We proceed to examine, therefore, whether the assessment was invalid because the statute under which it was laid contravened the Constitution or laws of the United States, and whether the proceedings authorized by chapter 230 of the laws of 1843, operated to deprive the citizen of liberty or property without due process of law.

Section 5219 of the Revised Statutes, Title LXII, "National Banks," reads as follows:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value as other real property is taxed."

Chapter 596 of the laws of New York of 1880, is entitled "An act to provide for the taxation of banks and of moneyed capital engaged in the business of banking, receiving deposits or otherwise," and its third section reads thus:

"The stockholders in every bank, banking association or trust company, organized under the authority of this State, or of the United States, shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholders in the assessment of taxes at the place, city, town or ward where such bank, banking association or trust company is located, and not elsewhere, whether the said stockholder reside in said place, city, town or ward, or not, but in the assessment of said shares, each stockholder shall be allowed all the deductions and exemptions allowed by law in assessing the value of other taxable personal property owned by individual citizens of this State, and the assessment or taxation shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this State. In making such assessment there shall also be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank, banking association or trust company, and in which any portion of their capital is invested, in which said shares are held, to the whole amount of the capital stock of such bank, banking association or trust company; nothing herein contained shall be held or construed to exempt the real estate of banks, banking associations or trust companies from either state, county or municipal taxes; but the same shall be subject to state, county, municipal and other taxation, to the same extent and rate, and in the same manner, according to its value as other real estate is taxed." 1 Laws of New York of 1880, pp. 888, 889.

We have decided that so much of the capital of national and state banks as is invested in United States securities cannot be subjected to state taxation, *People* v. *Commissioners of Taxes for New York*, 2 Black, 620; *Bank Tax Case*, 2 Wall. 200; but that shares of bank stock may be taxed in the hands

of their individual owners at their actual instead of their par value, *People* v. *Commissioners of Taxes &c.*, 94 U. S. 415; *Hepburn* v. *School Directors*, 23 Wall. 480; without regard to the fact that part or the whole of the capital of the corporation might be so invested; *Van Allen* v. *Assessors*, 3 Wall. 573; *Bradley* v. *People*, 4 Wall. 459; *People* v. *Commissioners*, 4 Wall. 244; and that under acts permitting the deduction of debts from the value of all a person's taxable property, such deduction must be permitted from the value of such shares, *People* v. *Weaver*, 100 U. S. 539, 546; but that a statute is not void because it does not provide for a deduction, nor is the assessment void if deductions are not made, but voidable only. *Supervisors* v. *Stanley*, 105 U. S. 305. We have also held that individual instances of omission or undervaluation cannot be relied on to invalidate an assessment, *Supervisors* v. *Stanley*, *supra;* and that because a state statute does not provide for the taxation of shares in corporations other than banks, it does not follow that the tax on moneyed capital invested in bank shares is at a greater rate than that of the moneyed capital of individual citizens invested in other corporations, nor are the shareholders in national banks discriminated against, because the taxation of such other corporations is arrived at under a separate system. *Mercantile Bank* v. *New York*, 121 U. S. 138. In this last case the assessment was made in pursuance of section 312 of an act of the legislature of the State of New York, passed July 1, 1882, entitled "An act to revise the statutes of this State relating to banks, banking and trust companies," which section is identical with section 3 of the act of 1880, except that trust companies are omitted in the act of 1882, and a provision in relation to notice is added at the end of the section. The court held as follows: "The main purpose of Congress in fixing limits to state taxation on investments in shares of national banks was, to render it impossible for the State, in levying such a tax to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business, and operations and investments of like character. The term 'moneyed capital,' as used in Rev. Stat. § 5219, respecting state taxation of

shares in national banks, embraces capital employed in national banks, and capital employed by individuals when the object of their business is the making of profit by the use of their moneyed capital as money — as in banking as that business is defined in the opinion of the court; but it does not include moneyed capital in the hands of a corporation, even if its business be such as to make its shares moneyed capital when in the hands of individuals, or if it invests its capital in securities payable in money. The mode of taxation adopted by the State of New York in reference to its corporations, excluding trust companies and savings banks, does not operate in such a way as to make the tax assessed upon shares of national banks at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens." The conclusions there announced and the reasoning by which they are supported, are decisive in the disposition of the errors assigned on behalf of the plaintiff in error, on the first branch of this case. The assessment was not void because in contravention of the Constitution or laws of the United States.

But it is argued that chapter 230 of the laws of New York of 1843 is unconstitutional, as depriving the plaintiff in error of liberty and property without due process of law, and of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States. That amendment provides, that no State "shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." It is insisted that Palmer had no notice and no opportunity to be heard or to confront or cross-examine the witnesses for the taxing authorities or to subpœna witnesses in his own behalf; and had not otherwise the protection afforded in a judicial trial upon the merits. The phrase "due process of law" does not necessarily mean a judicial proceeding. "The nation from whom we inherit the phrase 'due process of law,'" said this court, speaking by Mr. Justice Miller, "has never relied upon the courts of justice for the

collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation." *McMillen* v. *Anderson*, 95 U. S. 37, 41.

The power to tax belongs exclusively to the legislative branch of the government, and when the law provides for a mode of confirming or contesting the charge imposed, with such notice to the person as is appropriate to the nature of the case, the assessment cannot be said to deprive the owner of his property without due process of law. *Spencer* v. *Merchant*, 125 U. S. 345; *Walston* v. *Nevin*, 128 U. S. 578. The imposition of taxes is in its nature administrative and not judicial, but assessors exercise *quasi* judicial powers in arriving at the value, and opportunity to be heard should be and is given under all just systems of taxation according to value.

It is enough, however, if the law provides for a board of revision authorized to hear complaints respecting the justice of the assessment, and prescribes the time during which and the place where such complaints may be made. *Hagar* v. *Reclamation District*, 111 U. S. 701, 710.

The law of New York gave opportunity for objection before the tax commissioners, Laws of New York, 1859, c. 302, § 10, p. 681, and the plaintiff in error appeared and obtained a large deduction from the original valuation. If dissatisfied with the final action of the commissioners, he could have had that action reviewed on *certiorari*. Laws of New York, 1859, c. 302, § 20, p. 684; *People* v. *Commissioners*, 4 Wall. 244. But he did not avail himself of this remedy.

The proceeding here was purely an executive process to collect the tax after the liability of the party was finally fixed.

Collection by distress and seizure of person is of very ancient date, *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272; and counsel for defendant in error cites many English statutes, commencing with the twelfth year of Henry VII, c. 13, which in their essential features resemble the New York law upon the subject, one in 6 Henry VIII, c. 26, being strikingly like it. 2 Statutes of the Realm, 644; 3 Ib. 156, 230, 516, 812; 4 Ib. 176, 334, 385, 744, 991, 1108, 1247; 5

Ib. 9, 700; 7 Ib. 567. Under the act of 1843 commitment is not resorted to until other means of collection have failed and then only upon a showing of property possessed, not accessible to levy, but enabling the owner to pay if he chooses, this constituting such misconduct as justifies the order. That law had been in existence for more than forty years at the time of this proceeding. We do not regard the collection in this way, founded on necessity and so long recognized by the State of New York as to be justifiably resorted to under the circumstances detailed in the act, and operating alike on all persons and property similarly situated, as within the inhibitions of the Fourteenth Amendment.

The judgment is

Affirmed.

MR. JUSTICE BLATCHFORD did not take any part in the decision of this case.

PETERS *v.* BAIN.

GRIFFIN *v.* PETERS.

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

Nos. 87, 198. Argued November 7, 8, 1889. — Decided March 3, 1890.

This court accepts the construction given to a state statute against fraudulent conveyances by the highest court of the State as controlling.

It is settled law in Virginia that an assignment by a debtor for the benefit of creditors will not be declared void, as given "with intent to delay, hinder or defraud creditors, purchasers," etc., unless such an inference is so irresistible as to preclude any other; that the fact that creditors may be delayed or hindered, is not, of itself, sufficient to vacate the instrument; and that one creditor may be preferred over another.

When an assignment for the benefit of partnership and individual creditors includes all the property of the grantors as partners and individually, it should be construed distributively, partnership assets being applied to the payment of partnership debts, and individual assets to individual liabilities.

As respects fraud in law, as distinguished from fraud in fact, in a conveyance, if that which is invalid can be separated from that which is valid,

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without defeating the general intent, the maxim "void in part, void *in toto*" does not necessarily apply, but the instrument may be sustained notwithstanding the invalidity of a particular provision.

An assignment for the benefit of creditors, with preferences, authorized the trustees to "make sale of the real and other personal estate hereby conveyed, at public auction or private sale, at such time or times, and place or places, and after such notice as to them shall seem best, and they may make such sale upon such terms and conditions as to them shall seem best, except that at any sale of said property, real or personal, at public auction, any creditor secured by this deed in the second class above enumerated shall have the right to purchase any part or parcel of said property so sold, and pay the said trustees therefor, at its full face value, the amount found due such purchaser secured by this deed, or so much thereof as may be necessary to enable such creditor to complete the payment of his purchase money, and to enable as many creditors as possible to become bidders on these terms, the said trustees may have the real estate hereby conveyed, or any part thereof, laid off into lots or parcels, as they may think best;" *Held,* that the deed was not void in law because of the insertion of this provision.

The individual members of a private banking house, who were also the controlling directors in a national bank, made an assignment of their property for the benefit of creditors, which assignment was assailed as fraudulent in several matters, among which were alleged frauds upon the national bank, and frauds upon their own depositors previous to the assignment; *Held,* that violations of their fiduciary relations to the bank, or their treatment of their own depositors did not render the assignment of all their property for the benefit of their creditors, fraudulent for that reason.

The knowledge by a director and stockholder in a national bank that the bank is insolvent, does not invalidate an assignment of all his property for the benefit of his creditors, with preferences, made with such knowledge.

The court below was right in finding no evidence in this case of a fraudulent intent on the part of the firm or either of its members to hinder and delay their creditors.

The individual partners in a private bank were also directors in a national bank, and, by reason of their position, became possessed of a large part of the means of the national bank which they used in their own business. They assigned all their property to trustees for the benefit of their creditors. The national bank also suspended, and went into the hands of a receiver; *Held,*

(1) That the receiver was entitled to the surrender of such of the property as had been actually purchased with the moneys of the bank as he might elect; but that purchases made and paid for out of the general mass could not be claimed by the receiver unless it could be shown that moneys of the bank in the general fund at the time of the purchase, were appropriated for that purpose.

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(2) That the receiver was not estopped by such election and taking, from receiving the full benefit of the deed of trust in favor of the national bank.

In Virginia, trustees and beneficiaries in a deed of trust to secure *bona fide* debts occupy the position of purchasers for a valuable consideration.

When the counsel of an insolvent debtor draws an assignment of his client's property to himself as trustee for the benefit of creditors, he may be presumed to have had knowledge of the dealings of the insolvent with his creditors.

Under the circumstances of this case a decree directing the payment of the costs of suit out of the trust fund is correct.

These were appeals from a final decree of the Circuit Court of the United States for the Eastern District of Virginia, entered on the 15th day of June, 1886, upon a bill in equity brought by William H. Peters, receiver of the Exchange National Bank of Norfolk, against Robert T. K. Bain, George M. Bain, Jr., and James G. Bain, late partners under the name and style of Bain & Brother, survivors of themselves and Thomas A. Bain, deceased; and John T. Griffin, William W. Old and John B. Jenkins, trustees under a deed of assignment from Bain & Brother; and upon a cross-bill filed by said trustees. The cause, after having been brought to issue, was referred to a special master, who took evidence and reported thereon, and was heard by Mr. Chief Justice Waite and the circuit judge.

The opinion of the court was delivered by the Chief Justice, and was as follows:

"This is a suit in equity begun by the receiver of the Exchange National Bank of Norfolk, an insolvent national bank, for a two-fold purpose, that is to say: 1, to set aside an assignment made by the partnership firm of Bain & Bro. and the several members thereof for the benefit of their creditors, and to subject the assigned property to the payment of debts due the bank; and, 2, to charge property in the hands of the assignees with the trust in favor of the bank because it was bought with moneys of the bank, which certain members of the firm, who were officers of the bank, had wrongfully used for that purpose.

"The material facts are these: The Exchange National Bank

was organized May 13, 1865, with a capital of $100,000, which was increased November 13, 1866, to $150,000. Its place of business was Norfolk, Va.

"The firm of Bain & Bro., composed originally of R. T. K. and James G. Bain, began business in Portsmouth, Va., as brokers and private bankers in September, 1865, with an assumed capital of $5000, placed to the credit of the two partners on the books. George M. Bain, Jr., was admitted as a partner soon after the business was started and Thomas A. Bain in 1868 or 1869; but he died in 1877. The capital was never increased, but, on the contrary, the drafts of the partners soon exhausted the original credits and much more besides. At the time of the failure, the balances against the partners respectively were as follows:

"James G. Bain	$54,796 73
"R. T. K. Bain	47,369 23
"George M. Bain, Jr.	7,146 39
"Thomas A. Bain's estate	20,028 41
"In all	$129,340 76

"Portsmouth is separated from Norfolk by the Elizabeth River, one place being on one side of the river and the other immediately opposite on the other. On the 7th of July, 1870, the firm became shareholders in the bank, and the next day George M. Bain, Jr., was elected cashier. This office he held until April 2, 1885. R. T. K. Bain was elected a director January 2, 1872, and he served in that capacity all the time thereafter during the existence of the bank. James G. Bain was elected assistant cashier August 11, 1873, and he held that office until January 11, 1881, when he was made vice-president, in which capacity he acted until the end. Thomas A. Bain was elected a director January 11, 1876, and this office he held until his death.

"On the 9th of September, 1873, the capital stock of the bank was increased from $150,000 to $200,000. The names of the subscribers are not given and no money was paid on that day, but the whole amount of $50,000 was carried in the

receiving teller's cash as a cash item until October 14, 1873, when the following parties gave their checks on the bank for the following amounts:

"Bain & Bro.	$25,000
"John B. Whitehead	15,000
"James H. Toomer	5,000
"George M. Bain, Jr.	5,000
"In all	$50,000

"Certificates of stock were issued to these parties, respectively, for the shares represented by their several checks. On the 10th of May, 1874, the stock was increased to $300,000, R. H. McDonald, of California, taking and paying for the whole of the additional amount.

"At the time of the failure of the bank the following persons held shares as follows:

"Bain & Bro.	582	shares.
"George M. Bain, Jr.	232	do.
"James G. Bain	91	do.
"R. T. K. Bain	91	do.
"Thos. A. Bain's estate	91	do.
"George M. Bain, Jr., and John B. Whitehead	100	do.
"In all	1187	do.

"Very soon after Bain & Bro. became connected with the bank they began to absorb its funds. As they wanted money they got it with or without security, as was most convenient for them. They had no direct connection in their own private banking business with the Bankers' Clearing-house at Norfolk, but they were represented in that association by the Exchange Bank, which paid all balances against them, and these at some times amounted to very large sums. The commercial and business paper which they took at their banking-house in Portsmouth was largely rediscounted for them at the bank, and on the 31st of March, 1885, their indebtedness to the bank has been stated approximately as follows:

"Bain & Bro.'s notes &c., unendorsed and unsecured	$800,000 00
"Notes of others endorsed by them	593,251 99
"Cash tickets	211 00
"Bain & Bro.'s notes endorsed by bank and discounted in New York	50,000 00
"In all	$1,443,462 99

"In addition to this George M. Bain, Jr., and James G. Bain each owed the bank very considerable sums. Such being the condition of affairs, the Comptroller of the Currency required the bank to reduce at once the unsecured debt of Bain & Bro., and to make good the deficiency in its reserve fund. In consequence of this the firm on the 31st of March sold to the bank the following stocks and bonds:

"Seaboard Compress Company stocks	$300,000
"Meherrin Valley railroad bonds	200,000
"Southern telegraph bonds, of the par value of $140,000, at	70,000
"In all	$570,000

and guaranteed that the same should yield the amount for which they were taken whenever put on the market and sold. This guaranty was secured by a transfer of the interest of the firm in the Richmond Cedar Works, and also in $80,000 of Southern telegraph bonds held as collateral security. This being done, and the firm also agreeing not to assign their other property for the benefit of creditors with preferences against the bank, notes of the firm and other indebtedness to the amount agreed on as the value of the stocks and bonds were surrendered and the unsecured debts thereby nominally reduced. While some of the stocks and bonds thus transferred had been before that time in the possession of the bank, or some of its officers, the evidence does not establish the fact that they had been in any way pledged, or that they could be legally held by the bank as security. They were all, so far as appears, the property of the firm, free of any specific claim of

the bank. The value of the stocks and bonds thus transferred falls between two and three hundred thousand dollars short of the amount for which they were taken, and the Richmond Cedar Works stock and Southern telegraph bonds, held as collateral to the guaranty against this deficiency, are of but little value.

"What was thus done did not satisfy the Comptroller, and on the 2d of April, 1885, he took possession of the bank for the purpose of winding up its affairs. The banking-house in Portsmouth closed its doors at the same time. This produced great excitement both in Portsmouth and Norfolk, and resulted in the assignment which is now attacked. Mr. Old, one of the assignees, is an attorney-at-law, and was retained as counsel for the firm. He advised them in all their matters and drafted the assignment. He was informed of the agreement which had been made not to assign with preferences against the bank, and knew generally of the large indebtedness of the firm and of its members to the bank. He also knew of the transaction between the bank and the firm on the 31st of March, and, hearing that it was the intention of the creditors of the bank to enjoin the assignment, he made haste to have it executed and recorded before anything of that kind was done.

"The actual value of the property which passed by the assignment does not exceed five hundred thousand dollars. The property consists very largely of real estate in Portsmouth and Norfolk County, the title to most of which was in R. T. K. Bain. The books of the firm are entirely unreliable. In fact, no general ledger was ever kept, and transactions to enormous amounts can only be traced by memoranda on slips of paper with the help of the explanations of R. T. K. Bain, who was the principal manager. No accounts at all were kept with the bank, and everything, so far as Bain & Bro. were concerned, was found in the greatest confusion.

"After the death of Thomas A. Bain the business of the firm was conducted in all respects as it had been before. The indebtedness of the firm to depositors and otherwise at the time of the failure has not been accurately determined, but

claims of depositors have already been proved against the trust to more than $750,000, and it is not unlikely that the entire indebtedness, other than that to the bank, may approach a million of dollars.

"The money received by the firm from the bank was generally mingled with that which was got from other sources, and it has been impossible to trace it directly into property now in the hands of the assignees, except in the following cases: —

"*Real Estate.*

"1. Inventory No. 22, bought May, 1876 . . .	$650 00
"2. Inventory No. 50, bought September, 1881 .	500 00
"3. Inventory No. 58, bought April, 1884 . . .	1,137 45
"4. Inventory Nos. 65, 66, 67, bought August, 1881, and October, 1882, $768.34 and $1865.16	2,633 50

"*Colorado Mines.*

"5. Boomerang, bought August 30, 1884 . . .	16,333 00
"6. Laura Dunmore, bought August 4, 1884 . .	5,000 00

"*Personalty.*

"7. Dismal Swamp canal bond, bought December, 1880	2,100 00
"8. Seaboard and Roanoke Railroad Co.'s stock, 1 share, bought about 1879	90 00
"9. Ocean View Railroad and hotel stock, 122 shares, bought October, 1880	6,100 00
"10. Chesapeake and Idaho Gold and Silver Mining Co.'s stock, 625 shares, bought after 1881	7,812 00
"11. Guano 'ex. Mt. Edgecomb,' paid for by Exchange National Bank, February 15, 1884, $59,725.97, part thereof on hand April 6th, 1885, and other parts in open accounts due for sales thereof	15,034 51
"12. Norfolk and Ouray Mining Co.'s stock, 6114 shares, whereof the assignees hold 3602 shares, which cost $25 per share	90,050 00
"13. Personal estate of Jas. G. Bain	1,931 25

"1. As to the trust resulting to the bank by reason of the wrongful and unlawful use of its funds by its officers in the purchase of property for the firm or the several members thereof, this branch of the case divides itself into two parts, the first relating to property which was purchased with moneys that can be identified as belonging to the bank; and, second, to that which was bought and paid for by the firm out of the general mass of moneys in their possession, and which may or may not have been made up in part of what had been wrongfully taken from the bank.

"As to the first of these classes of property we entertain no doubt that the trust exists, and that it may be enforced by the receiver unless the assignees of Bain & Bro. occupy the position of *bona fide* purchasers for a valuable consideration without notice. The evidence shows beyond doubt that the affairs of the bank were managed almost exclusively by the members of the firm. The funds of the bank were under the immediate control of its officers and agents, and consequently as its trustees. These funds were converted by them regardless of their duty as trustees into this particular property, which still exists in specie. No money was used in these purchases other than such as was taken directly from the bank for that purpose. Under these circumstances the property stands in the place of the money used, and it might have been reclaimed by the bank at its election any time before the rights of innocent third parties intervened. This is elementary. The receiver succeeded to the rights of the bank in this particular.

"The property in the second class, however, occupies a different position. There the purchases were made with moneys that cannot be identified as belonging to the bank. The payments were all, so far as now appears, from the general fund then in the possession and under the control of the firm. Some of the money of the bank may have gone into this fund, but it was not distinguishable from the rest. The mixture of the money of the bank with the money of the firm did not make the bank the owner of the whole. All the bank could in any event claim would be the right to draw out of the general mass of money, so long as it remained money, an

amount equal to that which had been wrongfully taken from its own possession and put there. Purchases made and paid for out of the general mass cannot be claimed by the bank, unless it is shown that its own moneys then in the fund were appropriated for that purpose. Nothing of the kind has been attempted here, and it has not even been shown that when the property in this class was purchased, the firm had in its possession any of the moneys of the bank that could be reclaimed in specie. To give a *cestui que trust* the benefit of purchases by his trustees, it must be satisfactorily shown that they were actually made with the trust funds.

"In Virginia an assignee for the benefit of creditors is deemed a purchaser for a valuable consideration. This, it is conceded, has been established by a long line of judicial decisions, and is now a rule of property in that State. As such it is binding on us as authority, but, we think, in this case the assignees are chargeable with notice of the equities of the bank. They may not have had actual knowledge of the wrongful conversion of the moneys of the bank into the property which has now been identified as such, but it is clear that Mr. Old, who alone of the assignees was present during the negotiations which preceded the assignment, had full notice of the confusion which existed in the affairs of the bank, as well as those of the firm, and of the intimate relations which for a long time existed between the two institutions. The assignment was hastened to prevent further complications, and we have no hesitation in holding that the assignees took title subject to any equities that might be found to exist in favor of the bank. They were put on inquiry, which they avoided to save what they could. Under these circumstances we hold that the receiver is entitled to a surrender by the assignees of such of the property which it is found had actually been purchased with the moneys of the bank as he elects to take, but of no other.

"2. As to the assignment. By a statute of Virginia, a creditor may file a bill to set aside a conveyance by his debtor on the ground of fraud without having first obtained a judgment. This suit was, therefore, properly brought. We find

no evidence whatever, of any actual fraudulent intent on the part of the firm, or either of the partners, to hinder and delay their creditors. They devoted all their property, partnership and individual, of every kind to the payment of their debts. Nothing whatever was kept back. It is true some creditors were preferred over others, but this is allowable in Virginia. From the case of *Skipwith's Executor* v. *Cunningham*, 8 Leigh, 271, decided in 1837, until now, such has been the recognized law of the State, and this was conceded in the argument.

"It is a matter of no importance in this connection that the debt to the bank was created by fraud, or that the assignors were shareholders in the bank and liable, as such, to assessments by the Comptroller of the Currency to meet its debts. Fraud in the creation of an unpreferred debt is not ground for setting aside an assignment for the benefit of creditors which is otherwise valid, and the shareholder of an insolvent bank is no more prohibited from preferring creditors as against his liability in that capacity, than he is as against any one else that he owes. The assignment does not in any respect change the liability of the shareholders; that was fixed on the failure of the bank before the transfer was made. As has already been shown, so much of the property assigned as is charged with a trust in favor of the bank can be reached in the hands of the assignees. The promise not to assign with preferences against the bank does not of itself avoid such an assignment for fraud.

"It is claimed, however, that the deed is fraudulent and void on its face — 1, because it appropriates partnership assets to the payment of individual debts, in preference to the debts of the partnership; and, 2, because of the peculiar provision which is made for bidding by the creditors of the second class at any public sale that may be made of the assigned property.

"As to the first of these objections it is sufficient to say that as early as 1837 the Supreme Court of Appeals of Virginia decided, in the case of *McCullough* v. *Sommerville*, 8 Leigh, 418, that a provision like that contained in this deed did not vitiate the assignment, but that a court of equity would, if required, so control the administration of the trust

as to apply the partnership property to the payment of the partnership debts in preference to those of the individual partners, and the individual property to individual debts. This ruling was followed in *Gordon* v. *Cannon*, 18 Gratt. 387, decided in 1868, and its authority was recognized by all the judges, though there was some difference of opinion as to its applicability to the particular facts of the latter case. We see no reason to depart from what seems now to be the recognized rule of decision in the State, and we have no hesitation in saying that if there ever can be a case where such an assignment ought to be sustained it should be in this.

"The evidence discloses such a mingling of partnership and individual assets, and of partnership and individual debts, as to make it difficult in some cases to separate the one from the other. After a long and careful investigation of the whole matter, a separation may now have been made which approximates correctness, but when the assignment was made it is not probable that this could easily have been done. All the property, including that of the firm and that belonging to the several partners individually, has been put into the trust, and in the administration may, if necessary, be so marshalled as to prevent the creditors of the individual partners from getting an illegal advantage over those of the partnership, and *vice versa;* at any rate, we find nothing which, under the circumstances of this case, viewed in the light of the decisions of the highest court of Virginia, will render the whole assignment fraudulent and void as to the bank, and subject the property to the payment of its debt in preference to all others, as it is claimed should be done.

"It will be time enough to consider in what way the trust ought to be administered when a case is made for that purpose.

"This brings us to the consideration of the bidding clause of which complaint is made, and as to this it may be said there is no provision which can in any manner result to the advantage of the assignors in opposition to the creditors, for, until the creditors are all paid in full, the assignors can get nothing. If payment is made, it matters not to the creditors

how it is done. In no event can any but the first and second-class creditors be affected injuriously, and they are not here complaining. Although the bank is named as a creditor in each of the classes, the object of the present suit is, not to control the administration of this branch of the trust, but to set aside the assignment altogether.

"The only question we have now to consider, therefore, is whether this particular provision is fatal to the whole assignment. There is nothing, whatever, in the instrument to show that if it had been supposed this direction to the assignees could not legally be followed, the assignment would not have been made in its present form with this provision left out. On the contrary, everything looks the other way, for the assignees are authorized to sell at either public or private sale, according to their discretion, and it is only when the sale is public that the bidding clause becomes operative. The evident purpose was to stimulate bidding, not to give one creditor an unconscionable preference over another, nor to secure any special advantage to the assignors. It is not such an essential part of the scheme of the trust as to make it vital.

"At most it is a mere appendage which may be lopped off without injury to the main purpose of the instrument. Its only effect, so far as the deferred creditors are concerned, must be for their advantage, because the more the property sells for, the greater will be the chances of paying those preferred in full and leaving something for those who are unpreferred.

"No creditor can have an assignment for the benefit of creditors set aside at his suit, except it be on the ground that he has been defrauded. If this particular provision operates as a fraud upon those who are affected by it, relief can undoubtedly be had in some appropriate proceeding for that purpose, but that is not, as has been seen, the purpose of the present suit.

"Our conclusion is that the assignment is valid, but that the receiver is entitled to the surrender to him by the assignees of such of the property in their hands bought and paid for with the moneys of the bank as he elects to take."

Citations for Plaintiff in Error.

A decree in accordance with the opinion was thereupon entered, and from it the receiver and the trustees respectively appealed.

The receiver assigned errors as follows: That the court erred (1) in refusing to set aside the deed of assignment of Bain & Bro. as fraudulent in fact; (2) in failing to declare the assignment void because executed in fraud of sections 5151 and 5234 of the Revised Statutes of the United States; (3) in holding that the receiver was entitled "to a surrender by the assignees of such of the property which it is found had actually been purchased with the moneys of the bank, but of no other;" (4) in holding that the assignment "was made and executed without any actual fraudulent intent on the part of the said grantors or either of them to hinder and delay their creditors;" (5) in holding "that the said deed of assignment is not fraudulent and void on its face."

The trustees assigned as error that the court erred (1) in finding that the trustees were to be considered as affected by constructive notice, as to certain of the property held by them, that it had been purchased with the money of the bank, and that the receiver was entitled to receive so much thereof as he elected to take, and was not, by making such election and receiving such property, estopped from receiving the benefit of the said deed of trust in favor of the Exchange National Bank; (2) in the amount of property decreed to have been traced; (3) in decreeing that as to property purchased with the money of the Exchange National Bank, and traced into such property, there was a resulting trust in favor of the bank, of which the trustees were to be considered as having had constructive notice; (4) in decreeing that the costs of the suit be paid out of the trust funds in the hands of the trustees.

Mr. Theodore S. Garnett and *Mr. William J. Robertson*, for Peters, cited: *Russell* v. *Wynne*, 37 N. Y. 591; *S. C.* 97 Am. Dec. 755; *Grover* v. *Wakeman*, 11 Wend. 187; *S. C.* 25 Am. Dec. 624; *Upton* v. *Tribilcock*, 91 U. S. 45; *Sanger* v. *Upton*, 91 U. S. 56; *Bowden* v. *Santos*, 1 Hughes, 158; *Adler* v. *Milwaukee Brick Co.*, 13 Wisconsin, 57; *Hightower* v. *Thornton*,

Citations for Defendants in Error.

8 Georgia, 486; *S. C.* 52 Am. Dec. 412; *Frith* v. *Cartland*, 2 Hem. & Mill. 417; *Ward* v. *Griswoldville Mfg. Co.*, 16 Connecticut, 593; *Nevitt* v. *Bank of Port Gibson*, 6 Sm. & Marsh. 513; *Wood* v. *Dummer*, 3 Mason, 308; *Frelinghuysen* v. *Nugent*, 36 Fed. Rep. 229; *Pennell* v. *Deffell*, 4 DeG. M. & G. 372; *Knatchball* v. *Hallett*, 13 Ch. D. 696; *McLeod* v. *Evans*, 66 Wisconsin, 401, and cases cited; *Metzner* v. *Bauer*, 98 Indiana, 425; *National Bank* v. *Insurance Co.*, 104 U. S. 54; *Newman* v. *Cordell*, 43 Barb. 448; *Boardman* v. *Halliday*, 10 Paige, 223; *Barnum* v. *Hempstead*, 7 Paige, 568; *Averill* v. *Loucks*, 6 Barb. 470; *Sheldon* v. *Dodge*, 4 Denio, 217; *Strong* v. *Skinner*, 4 Barb. 546; *Kercheis* v. *Schloss*, 49 How. Pr. 284; *Hyslop* v. *Clarke*, 14 Johns. 458; *Seaving* v. *Brinkerhoff*, 5 Johns. Ch. 329; *Austin* v. *Bell*, 20 Johns. 442; *S. C.* 11 Am. Dec. 297; *Gasherie* v. *Apple*, 14 Abb. Pr. 64; *Brigham* v. *Tillinghast*, 15 Barb. 618; *S. C.* 13 N. Y. 215; *A. & W. Sprague Mfg. Co.* v. *Hoyt*, 29 Fed. Rep. 421; *Shanks* v. *Klein*, 104 U. S. 19; *Allen* v. *Withrow*, 110 U. S. 119.

Mr. Richard Walke and *Mr. James Alfred Jones*, (with whom was *Mr. Legh R. Page* on the brief,) for Griffin, Old, and Jenkins, trustees, cited: *Wickham* v. *Martin*, 13 Grattan, 427; *Evans* v. *Greenhow*, 15 Grattan, 153; *Garland* v. *Rives*, 4 Randolph, 282; *S. C.* 15 Am. Dec. 756; *Skipwith* v. *Cunningham*, 8 Leigh, 271; *S. C.* 31 Am. Dec. 642; *Lewis* v. *Caperton*, 8 Grattan, 148; *Phippen* v. *Durham*, 8 Grattan, 457; *Dance* v. *Seaman*, 11 Grattan, 778; *Sipe* v. *Earman*, 26 Grattan, 563; *Shurtz* v. *Johnson*, 28 Grattan, 657; *Williams* v. *Lord*, 75 Virginia, 390; *Gordon* v. *Rixey*, 76 Virginia, 694; *Foster* v. *Goddard*, 1 Black, 506; *McCullough* v. *Sommerville*, 8 Leigh, 415; *Gordon* v. *Cannon*, 18 Grattan, 387; *Cochran* v. *Paris*, 11 Grattan, 348; *Kevan* v. *Branch*, 1 Grattan, 274; *Brockenbrough* v. *Brockenbrough*, 31 Grattan, 580; *Young* v. *Willis*, 82 Virginia, 291; *Darling* v. *Rogers*, 22 Wend. 483; *Salmon* v. *Stuyvesant*, 16 Wend. 321; *Curtis* v. *Leavitt*, 15 N. Y. 9; *Parks* v. *Parks*, 9 Paige, 107; *Pigot's Case*, 11 Rep. 27; *Patterson* v. *Jenks*, 2 Pet. 215; *Mackie* v. *Cairns*, 5 Cowen, 547; *S. C.* 15 Am. Dec. 477; *Harrison* v. *Harrison*, 36 N. Y. 543; *Post* v. *Hover*,

30 Barb. 312; 33 N. Y. 593; *Gott* v. *Cook*, 7 Paige, 521; *De Peyster* v. *Clendining*, 8 Paige, 295; *Van Vechten* v. *Van Vechten*, 8 Paige, 103; *Gilman* v. *Redington*, 24 N. Y. 9; *Everitt* v. *Everitt*, 29 N. Y. 39; *Kane* v. *Gott*, 24 Wend. 641; *S. C.* 35 Am. Dec. 641; *Williams* v. *Williams*, 4 Selden (8 N. Y.) 524; *Van Schuyver* v. *Mulford*, 59 N. Y. 426; *Manice* v. *Manice*, 43 N. Y. 303; *Denny* v. *Bennett*, 128 U. S. 489; *United States* v. *Bradley*, 10 Pet. 343; *Gregory* v. *Gates*, 30 Grattan, 83; *Dixon* v. *McCue*, 14 Grattan, 540; *Wilson* v. *Townshend*, 2 Ves. Jr. 693; *Watson* v. *Watson*, 128 Mass. 152; *Chapin* v. *Thompson*, 89 N. Y. 270; *Smith* v. *Smith*, 14 Gray, 532; *Brown* v. *Brown*, 108 Mass. 386; *Hapgood* v. *Houghton*, 22 Pick. 480, 483; *Doe* v. *Cavendish*, 3 Doug. 48, 55; *S. C.* 4 T. R. 741, 743, note; *Birmingham* v. *Kirwan*, 2 Sch. & Lef. 444, 450.

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

The opinion of the late Chief Justice clearly delineates the grounds upon which the Circuit Court proceeded and minimizes our labors in the disposition of this case.

The deed of assignment was attacked as fraudulent in law and in fact.

The statute of Elizabeth, c. 5, against fraudulent conveyances has been universally adopted in American law as the basis of our jurisprudence on that subject, (Story Eq. Jur. § 353,) and reënacted in terms, or nearly so, or with some change of language, by the legislatures of the several States.

In Virginia the statute reads as follows: "Every gift, conveyance, assignment, or transfer of, or charge upon any estate, real or personal, every suit commenced, or decree, judgment, or execution suffered or obtained, and every bond or other writing given with intent to delay, hinder, or defraud creditors, purchasers, or other persons of or from what they are or may be lawfully entitled to, shall, as to such creditors, purchasers, or other persons, their representatives or assigns, be void. This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of

the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor." Virginia Code, 1873, 896, c. 114, § 1.

In controversies arising under this statute, involving, as they do, the rights of creditors locally, and a rule of property, we accept the conclusions of the highest judicial tribunal of the State as controlling. *Jaffray* v. *McGehee*, 107 U. S. 361, 364; *Lloyd* v. *Fulton*, 91 U. S. 479, 485; *Allen* v. *Massey*, 17 Wall. 351.

We understand counsel to contend that the deed contains certain provisions which must so hinder, delay and defraud creditors that fraud in its execution is to be conclusively presumed without regard to the intention of the parties.

The doctrine in Virginia, settled by a long and uninterrupted line of decision, is that, while there may be provisions in a deed of trust of such a character as of themselves to furnish evidence sufficient to justify the inference of a fraudulent intent, yet this cannot be so except where the inference is so absolutely irresistible as to preclude indulgence in any other. Hence provisions postponing the time of the sale and reserving the use of the property to the grantor meanwhile, though perishable and consumable in the use; permitting sales on credit; for the payment of surplus after satisfaction of creditors secured; the omission of a schedule or inventory; and the like, have been regarded as insufficient to justify the court in invalidating the deed for fraud in point of law. The fraudulent intent is held not to be presumed even under such circumstances, and in its absence the fact that creditors may be delayed or hindered is not of itself sufficient to vacate the instrument, while the right to prefer one creditor over another is thoroughly established. *Dance* v. *Seaman*, 11 Grattan, 778; *Brockenbrough* v. *Brockenbrough*, 31 Grattan, 580; *Young* v. *Wilson*, 82 Virginia, 291, 293.

When, then, it is claimed in this case that the deed is fraudulent in law, "because it appropriates partnership assets to pay individual debts in preference to the debts of the partnership," we should naturally expect to find that the Supreme Court of Appeals had held that where, as here, the conveyance included all the property of the grantors as partners and indi-

vidually, for the benefit of partnership and individual creditors, it should be construed distributively, and the partnership assets be applied to the payment of partnership debts and the individual assets to individual liabilities. And such is the fact. *McCullough* v. *Sommerville*, 8 Leigh, 415; *Gordon* v. *Cannon*, 18 Grattan, 388. And, as pointed out by Mr. Chief Justice Waite, the difficulty, at the time the assignment was made, attendant upon any attempt to separate the partnership and individual assets, and the partnership and individual debts, would be considered under the view of the state courts, in passing upon the question of intent to defraud in failing to specifically distinguish between them.

The only other ground of objection on this branch of the case relates to the following clause in the deed:

"And the said trustees, for the purpose of executing this trust, shall at once take charge of all the property and effects hereby conveyed, and make an inventory thereof, and proceed to collect the choses in action and all evidences of indebtedness, and to convert the real and personal property into cash as soon as possible, and they may make sale of the real and other personal estate hereby conveyed, at public auction or private sale, at such time or times and place or places and after such notice as to them shall seem best, and they may make such sale upon such terms and conditions as to them shall seem best, except that at any sale of said property, real or personal, at public auction, any creditor secured by this deed in the second class above enumerated shall have the right to purchase any part or parcel of said property so sold and pay the said trustees therefor at its full face value the amount found due such purchaser secured by this deed, or so much thereof as may be necessary to enable such creditor to complete the payment of his purchase money, and to enable as many creditors as possible to become bidders on these terms, the said trustee may have the real estate hereby conveyed, or any part thereof, laid off into lots or parcels, as they may think best. And upon the conversion of the said property hereby conveyed into money the said trustees shall distribute the same to the creditors hereby secured in the order herein

before named with all diligence, and in the distribution between those creditors who may have purchased property and paid for the same under the provisions of this deed with a part of the money found due them respectively, and those who made no purchase, the trustees shall observe such rule of equality as will be just and proper."

But can it be properly concluded that this provision is irreconcilable with any other inference than that of fraud? And even if so much of it as allows the creditors in the second class to bid and use their claims as purchase money were invalid, ought the whole instrument to be therefore declared of no effect? We agree with the Circuit Court that, as respects fraud in law as contradistinguished from fraud in fact, where that which is valid can be separated from that which is invalid, without defeating the general intent, the maxim, "void in part, void *in toto*," does not necessarily apply, and that the instrument may be sustained notwithstanding the invalidity of a particular provision. *Denny* v. *Bennett*, 128 U. S. 489, 496; *Cunningham* v. *Norton*, 125 U. S. 77; *Muller* v. *Norton*, 132 U. S. 501; *Darling* v. *Rogers*, 22 Wend. 483; *Howell* v. *Edgar*, 3 Scammon, 417, 419.

Nor are we able, in view of the current of decisions in Virginia and all the terms of the deed taken together, to concur with the receiver's counsel that fraudulent intent is a necessary deduction from the permission to the creditors in the second class to avail themselves of their claims in bidding in the manner prescribed. The deed expressly stated that it was given to secure the costs and expenses, and then the payment of the indebtedness enumerated in the first class; "and *after* the payment of the hereinbefore mentioned sums and claims, to secure, secondly, the following creditors to be paid equally and ratably if the property hereby conveyed shall be insufficient to pay them all, but with the privilege as to bidding on such property as may be sold at auction as hereinafter provided." This contemplates the payment of the creditors in the first class before the bidding clause could take effect, and precludes the operation of that clause to the prejudice of those creditors. The record discloses that the total amount

secured in the first class was less than fifty thousand dollars, of which the bank held more than four-fifths, and that the cash assets were much more than enough to cover the costs and expenses and this amount, without any sales; so that the facts correspond with the intention deducible from the language of the deed. The first-class creditors are to be paid before the second-class creditors can exercise the right to bid if sales by public auction ever take place. The bank is a creditor in the first and second classes and the sole creditor in the third class, but it has no ground of complaint as a third-class creditor, as the operation of the clause can only be for its benefit as such.

The second-class creditors are all treated alike, and, as the counsel for the trustees says, are placed in exactly the same legal relation to the subject matter. If it could be said that the clause might operate to create a preference as between them, the grantors had a right to prefer; but inasmuch as each can bid, and the trustees have power to divide the property into parcels to enable as many creditors as possible to become bidders, and are charged with the duty to observe such rule of equality between those who purchase and those who do not, as will be just, it is not easy to see how a preference could be obtained. The question is not whether the trustees might prove unfaithful — a contingency of which there is no intimation here — but whether the provisions of the deed, if carried out according to their apparent intent, would be fraudulent in their operation. It seems to us, as it did to the Circuit Court, that such is not the reasonable inference, and that the manifest object was to stimulate bidding, prevent a sacrifice of the property, and benefit the creditors, and this without any advantage to the assignors other than that involved in having their assets go as far as possible in payment of their debts. It is not they who reap a pecuniary benefit, but their creditors.

Without further elaboration, we are of opinion that the deed is not void in law because of the insertion of the provision in question.

It should also be observed that the trustees are rendering

their reports under the direction of the court, and ask in their cross-bill "the aid and direction of this honorable court in the ascertainment of all and every the copartnership property and the individual property standing in the names of the individual members of the said copartnerships, or any of said members; and in the application of the trust funds to the payment of the debts secured; and in the administration of this their trust; and they are advised that it is their right and privilege to file this their bill, and to apply to this honorable court as a court of equity for the purpose aforesaid." So that the receiver, having invoked the interposition of a court of equity, can find there, either on his own application or that of his adversary, a remedy for any injurious results he may apprehend in the administration of the trust. The court will see to it that, as far as practicable, partnership assets are applied to partnership liabilities and individual assets to individual liabilities, and that the bidding clause shall not be put into operation unless in consonance with equity and good conscience.

It is earnestly argued, however, that the deed should be set aside because fraudulent in fact. We have patiently, but without success, examined this record in the effort to discover what specific acts are made out by the proofs establishing, in connection with the deed itself, actual fraud in its execution. The inquiry is not whether the grantors had been previously guilty of fraud or embezzlement, but whether this particular conveyance was made with a fraudulent intent known to the trustees or beneficiaries. *Evans* v. *Greenhow*, 15 Grattan, 153; *Emerson* v. *Senter*, 118 U. S. 1. It appears that the Bains were indebted to the bank and also to their depositors in several hundred thousand dollars. It is said that they indulged in wild speculations in real and personal estate, stocks, bonds, mines, railroads, etc.; but that applies as well to the squandering of the seven hundred thousand dollars and upwards of deposits with them as a banking firm, as it does to the money that they absorbed from the bank; and in any view, the violation of their fiduciary relations to the bank, of which they were officers, or their treatment of the depositors in the banking

firm of which they were members, does not render the assignment of all their property for the benefit of their creditors therefore fraudulent.

The bank and the banking house suspended on the second day of April, 1885, and the assignment was made on the sixth day of April. On the 31st day of March preceding, Bain & Bro. transferred to the bank certain securities of the estimated value of $570,000 in reduction of their indebtedness, and some other assets, as collateral to their guaranty of any deficiency which might result when the securities were realized on. When they transferred all their property, partnership and individual, of every kind, by the deed in controversy, they provided for the payment in the first instance of some $49,881.61, of which the bank held $42,288.49, and then for the payment in full, or ratably, of their own depositors, and certain notes aggregating $102,000, held by the bank; and they put the remaining indebtedness to the bank in a third class. They had a right to make preferences, and it is evident that their effort in the assignment was to equalize as between what they owed their own depositors and what they owed the bank, taking into consideration what the bank had already obtained. There was no fraud in this, of which the bank could complain as between it and the other creditors.

Counsel contends that the deed was in contravention of sections 5151 and 5234 of the Revised Statutes of the United States, which provide that the shareholders of every national banking association shall be held individually responsible for its debts to the extent of the amount of their stock, and, additional thereto, and that the Comptroller may enforce that individual liability. It is insisted that the capital stock is a trust fund of which the directors are the trustees, and that the creditors have a lien upon it in equity; that this applies to the liability upon the stock of a national bank; and that no general assignment of his property for the payment of his debts can lawfully be made by a shareholder, certainly not when he is a director. Undoubtedly unpaid subscriptions to stock are assets, and have frequently been treated by courts of equity as if impressed with a trust *sub modo*, in the sense that neither

the stockholders nor the corporation can misappropriate such subscriptions so far as creditors are concerned. *Richardson's Executor* v. *Green*, *ante*, 30, 44. Creditors have the same right to look to them as to anything else, and the same right to insist upon their payment as upon the payment of any other debt due to the corporation. The shareholder cannot transfer his shares when the corporation is failing, or manipulate a release therefrom, for the purpose of escaping his liability. And the principle is the same where the shares are paid up, but the shareholder is responsible in respect thereof to an equal additional amount. There was, however, no attempt here to avoid this liability, and the fact of its existence did not operate to fetter these assignors in the otherwise lawful disposition of their property for the benefit of their creditors.

Some other transactions are referred to in the bill as indicating fraud in fact, but they are not insisted upon in argument and require no special consideration. One of them relates to a deed of Wallace & Son to Bain & Bro., executed April 6, 1885, and referred to by counsel in another connection.

We think the Circuit Court was right in finding "no evidence whatever of any actual fraudulent intent on the part of the firm, or either of the partners, to hinder and delay their creditors."

The argument is pressed that the trustees were neither *bona fide* purchasers for value nor purchasers without notice, because they must have had knowledge, for the reasons given, of the previous conduct of Bain & Bro. But, as we have already seen, that previous conduct did not render the assignment in itself fraudulent, although it is quite true that all the circumstances should be taken into consideration in passing on that question. It is urged that the trustees knew that Bain & Bro. had no right to make the deed, because on the 31st of March, when they transferred to the bank certain stocks and bonds of the face value of $640,000 and an estimated value of $570,000, a member of the concern verbally promised that they would not make an assignment giving preferences against the bank. The transfer of these securities rendered the bank just so much better off, and counsel for the receiver concedes that

the advice of the bank's former counsel in regard to it, "in the condition of the affairs of the bank at that date . . . was wise and proper, and did secure to the bank whatever can be realized from the sale of the securities delivered under the agreement of March 31, 1885." The verbal promise not to make preferences constituted no lien upon Bain & Bro.'s property, and its disregard did not affect the validity of the deed. Nor is any issue in regard to it made upon the pleadings. It is noticeable that Bain & Bro. declined to incorporate that pledge in the written agreement transferring the securities, and we are not called upon to examine into the circumstances under which the promise so given failed to be carried out.

The receiver assigns for error that the Circuit Court held that he was entitled to a surrender of such of the property which it was found had "actually been purchased with the moneys of the bank as he elects to take, but of no other." In other words, it is insisted that the receiver is entitled to a charge upon the entire mass of the estate, with priority over the other creditors of Bain & Bro.

It was said by Mr. Justice Bradley in *Frelinghuysen* v. *Nugent*, 36 Fed. Rep. 229, 239: "Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried. The difficulty of sustaining the claim in the present case is, that it does not appear that the goods claimed — that is to say, the stock on hand, finished and unfinished — were either in whole or in part the proceeds of any money unlaw-

fully abstracted from the bank." The same difficulty presents itself here, and while the rule laid down by Mr. Justice Bradley has been recognized and applied by this court, *National Bank* v. *Insurance Company*, 104 U. S. 54, 67, and cases cited, yet, as stated by the Chief Justice, "purchases made and paid for out of the general mass cannot be claimed by the bank, unless it is shown that its own moneys then in the fund were appropriated for that purpose." And this the evidence fails to establish as to any other property than that designated in the decree, although it is claimed, on behalf of the receiver, that the sum of $105,000 due to the bank upon certain notes of Wallace & Son, which had been discounted by Bain & Bro., and which were rediscounted for the latter by the bank, should have been traced into certain property conveyed by Wallace & Son to Bain & Bro. The circumstances, so far as necessary to elucidate this claim, are as follows: Bain & Bro. owed the Richmond Cedar Works $31,885.71. The Exchange National Bank held the interest of Bain & Bro. in these works under the transfer of Bain & Bro. to the bank, of March 31, 1885. The Richmond Cedar Works owed the Exchange National Bank $140,000, upon which Wallace & Son were endorsers. Wallace & Son owed Bain & Bro. over $300,000. By a deed dated April 3, 1885, Wallace & Son conveyed certain property to the Richmond Cedar Works for $55,000, receiving in payment the Cedar Work's check on Bain & Bro. for $31,885.71, due from them to it, and the notes of the Cedar Works for the balance, which were turned over to Bain & Bro. By this transaction the indebtedness of Bain & Bro. to the Cedar Works was extinguished, and Wallace & Son's indebtedness to Bain & Bro. reduced by the sum of $55,000. This left Wallace & Son still debtors of Bain & Bro. to the extent of over $245,000, and on the 6th day of April, 1885, they executed a deed of their remaining property to Bain & Bro., for the expressed consideration of $151,800, which property has passed under the assignment in this case. None of this property, so far as appears, was purchased with the money of the bank, but counsel for the receiver contends that because Bain & Bro. had rediscounted the notes of Wallace and Son to the

amount of $105,000 at the bank, and because the deed of Wallace & Son to Bain & Bro. was in payment of their indebtedness to the latter, in whole or in part, therefore it ought to be held that the bank's money purchased Wallace & Son's property for the benefit of Bain & Bro. We do not understand that the bank was entitled to the assets of Bain & Bro.'s debtors, and can perceive no ground for holding that Bain & Bro., in receiving the deed from Wallace & Son, were purchasing property with the money of the bank.

This disposes of the errors assigned on behalf of the receiver, and leaves for consideration those assigned on behalf of the trustees upon their cross appeal. The principal contention is that it was error to decree that the receiver could take "such of the property hereinbefore set out and found to have been actually purchased with the moneys of the said bank as he elects to take; and by making said election and receiving such property the said receiver is not to be estopped from receiving the full benefit of the said deed of trust, or the provisions thereof, in favor of the Exchange National Bank." We do not concur in that view.

The doctrine of election rests upon the principle that he who seeks equity must do it, and means, as the term is ordinarily used, that where two inconsistent or alternative rights or claims are presented to the choice of a party, by a person who manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other; and so, in other words, that one cannot take a benefit under an instrument and then repudiate it.

It cannot be assumed that there was an intention on the part of Bain & Bro. to dispose of that which was not theirs, or, even if they lawfully could, to cut the bank off from participating in the property assigned, in the order mentioned, by imposing the condition that the bank should purchase its share by parting with its own property; nor does any equitable implication to that effect arise. The other creditors cannot claim compensation for being deprived of what did not belong to Bain & Bro., or of anything transferred in lieu thereof. There existed no equity on their part which can be held to

estop the bank from receiving what may come to it under the assignment, and in doing so it will not occupy inconsistent positions. That it sought to have the deed set aside does not deprive it of its rights under it, upon the failure of its attack.

It was entirely competent for the court to adjust this matter upon equitable principles, and this it has done in its decree. Under the assignment the bank gets a preference of something over $42,000, and then ranks with other creditors to the extent of $102,000, while the balance of a very large indebtedness due to it is relegated to the third class; and it appears to be entirely just that it should have in addition the benefit of that which belongs to it, and to which the other creditors have no claim. And this, though amounting on its face to $149,372.21, we are informed by counsel for the trustees, has only an actual value of $20,177.18, to three items of which, amounting to $6840, the objection is made of failure of proof of their having been purchased with the bank's money.

We have examined the record with care, and are satisfied with the conclusion arrived at by the special master and the court as to these items, and shall not disturb the decree in that regard.

The trustees also demur to being held affected with notice as to the traced property, principally because the affairs of the debtors were in such a state as to render the task of disentanglement exceedingly onerous. As inquiry would have conducted the trustees to the same conclusion as that now reached, the fact that the conduct of the Bains rendered it difficult to accurately distinguish between one class of property and another, should not absolve them from the operation of the rule as to notice, if otherwise applicable.

While it is well settled in Virginia that the trustees and beneficiaries in a deed of trust to secure *bona fide* debts occupy the position of purchasers for a valuable consideration; *Wickham* v. *Lewis Martin*, 13 Gratt. 427; *Evans* v. *Greenhow*, 15 Gratt. 153, 156; *Kesner* v. *Trigg*, 98 U. S. 50, 53; yet they cannot hold with notice of the fraudulent intent of their grantor, or of the fraud rendering his title void. And it is equally well settled in the States of West Virginia and Virginia that notice

to the trustees is notice to the beneficiaries. *Fidelity Co.* v. *Shenandoah Valley Railroad*, Supreme Court of Appeals, West Virginia, February 25, 1889, 9 Southeastern Reporter, 181, 185; *Beverly* v. *Brooks*, 2 Leigh, 446; *French* v. *Loyal Co.*, 5 Leigh, 627, 641.

The knowledge of the situation possessed by Mr. Old, one of the trustees, who was the Bains' attorney at the time of the assignment, and by whom it was drawn, was quite comprehensive, and was obtained in such a manner and under such circumstances that he must be presumed to have communicated it. It was knowledge obtained in the particular transaction. *The Distilled Spirits*, 11 Wall. 356, 366. There can be no doubt, also, respecting the duty of the trustees to inquire as to the rights of the bank, and that they are chargeable with a knowledge of all the facts that inquiry would have disclosed.

The decree directs that the costs of the suit be paid out of the trust funds in the hands of the defendant trustees, and as we agree with the results arrived at by the Circuit Court, we are of opinion that this direction was correct. The decree will be in all things

Affirmed.

MR. JUSTICE BREWER was not a member of the court when this case was argued and took no part in its decision.

BOESCH *v.* GRÄFF.

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

No. 1408. Submitted January 10, 1890.—Decided March 3, 1890.

The refusal of a circuit court to grant a rehearing is not subject to review here.

S., by an assignment absolute in form and for an expressed sum and "other valuable considerations," assigned to G. an interest in letters patent. G., by a writing executed the following day, made a further agreement with S. as to the times and modes and amounts of payments, and further agreed that if he should fail to carry out his said agreements, the title

was to revert to S.; *Held*, that the transfer was absolute, subject to be defeated by failure to perform the condition subsequent.

When an invention patented in a foreign country is also patented in the United States, articles containing it cannot be imported into the United States from the foreign country and sold here without the license or consent of the owner of the United States patent, although purchased in the foreign country from a person authorized to sell them.

To a master's report upon the damages to be awarded in an equity suit for the infringement of letters patent the exceptions raised the points: (1), that the infringement was not wilful; (2), that the reduction in price of the article manufactured by the plaintiff was not solely due to the infringement; *Held*, that this was sufficient to bring before the court the whole subject of the computation of damages.

When a plaintiff in a suit for the infringement of letters patent seeks to recover because he has been compelled to lower his prices in order to compete with the infringing defendant, he must either show that the reduction was due solely to the defendant's acts, or to what extent it was due to them, and must furnish data by which actual damages may be calculated.

In equity. The case is stated in the opinion.

Mr. J. J. Scrivner for appellants.

Mr. John H. Miller and *Mr. J. P. Langhorne* for appellees.

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

Albert Gräff and J. F. Donnell filed their bill in the Circuit Court of the United States for the Northern District of California against Emile Boesch and Martin Bauer, to recover for infringement of letters patent No. 289,571, for an improvement in lamp burners, granted on December 4, 1883, to Carl Schwintzer and Wilhelm Gräff of Berlin, Germany, assignors of one-half to J. F. Donnell & Co., of New York, all rights being averred to be now vested in the complainants. Claim 1 alleged to have been infringed reads as follows:

"In a lamp burner of the class described, the combination, with the guide tubes, of a ring-shaped cap provided with openings for the wicks, said cap being applied to the upper ends of the guide tubes, so as to close the intermediate spaces between the same, substantially as set forth."

Opinion of the Court.

The patent was granted December 4, 1883, but prior to that, November 14, 1879, January 13, 1880, and March 26, 1880, letters patent had been granted to Carl Schwintzer and Wilhelm Gräff by the government of Germany for the same invention. After a hearing on the merits, an interlocutory decree was entered, finding an infringement, and referring the case to a master for an accounting. The opinion will be found reported in 33 Fed. Rep. 279. A petition for a rehearing was filed and overruled. The case then went to the master, who reported that the infringement was wilful, wanton and persistent; that the appellees had sustained damages to the extent of $2970.50; and that they waived all claims to the profits realized by the infringement. Exceptions were filed to this report and overruled, and a final decree entered in favor of Gräff and Donnell for $2970.50, with interest, and costs, from which decree this appeal has been prosecuted.

Appellants urge three grounds for reversal:

First. That a title to the patent sufficient to maintain a suit for infringement was not at the date of filing the bill vested in the complainants.

Second. That Boesch and Bauer could not be held for infringement, because they purchased the burners in Germany from a person having the right to sell them there, though not a licensee under the German patents.

Third. That the damages awarded were excessive.

These propositions are presented by some of the errors assigned, and are the only errors alleged which require attention, that which questions the infringement not being argued by counsel, and that which goes upon the refusal of the Circuit Court to grant a rehearing not being open to consideration here. *Buffington* v. *Harvey*, 95 U. S. 99, 100; *Steines* v. *Franklin County*, 14 Wall. 15, 22; *Railway Company* v. *Heck*, 102 U. S. 120; *Kennon* v. *Gilmer*, 131 U. S. 22, 24.

The assignment by Schwintzer to Albert Gräff was dated the 22d day of April, 1885, was absolute in form and transferred title to six twenty-fourths of the patent for the expressed consideration of "the sum of one hundred dollars and for other valuable considerations;" but a contract between Schwintzer

and Albert Gräff was produced by the latter upon his examination by the respondents, which read as follows:

"S. 1. Mr. Albert Gräff binds himself to pay to Mr. Carl Schwintzer, instead of the, in the patent letter mentioned, one hundred dollars for the first year, the sum of two hundred and fifty marks, payable on the 1st February, 1886, and each following year on the same date the sum five hundred marks (not less) till the amount of four thousand marks are paid in all.

"S. 2. Should Mr. Albert Gräff, of San Francisco, not be able to sell more than one thousand burners, called Diamond or Mitrailleuse burners, No. 10,621, manufactured by Mess. Schwintzer & Gräff, of Berlin, he reserves to himself to make up a new agreement with Mr. Carl Schwintzer.

"S. 3. Should not Mr. Albert Gräff, San Francisco, against all expectations, stick to the agreements mentioned in S. 1 and 2, all titles of the patent letter ceded to him by Carl Schwintzer shall him return.

"S. 4. Mr. Carl Schwintzer, partner of the firm Schwintzer & Gräff, engages to deliver to Mr. Albert Gräff the said burners at the same price as before, if the market price of the metal does not exceed — make 150% kos., and promise likewise to effect any order promptly, if in his power."

Albert Gräff testified in respect to the words, "instead of the, in the patent letter mentioned, one hundred dollars for the first year," etc., that they meant that, instead of the one hundred dollars mentioned in the assignment, he was to pay two hundred and fifty marks the first year, and that the contract was made one day later than the assignment. Counsel contends that the two documents must be construed together, and amount simply to an executory contract to assign when Gräff shall have paid the sum of 4000 marks; that, therefore, Gräff could at most only be regarded as a licensee of the interest under the patent, until such time as his contract should be executed according to its terms; and that the legal right as to six twenty-fourths of the patent remained in Schwintzer, who was therefore a necessary party. It is evident that the agreement was not drawn by parties well versed in English,

but their intention is sufficiently apparent. The assignment being absolute in form, conveyed the legal title, and on the next day the parties signed this contract, relating to the consideration, probably, to enable Albert Gräff to pay the 4000 marks out of the sales of the burners; at all events, it provides that if Gräff failed to carry out his covenants, then the title was to return to Schwintzer, which provision was in the nature of a security to him that he should be paid. The condition that if Mr. Albert Gräff did not, "against all expectations, stick to the agreements mentioned in S. 1 & 2, all titles of the patent letter ceded to him by Carl Schwintzer shall him return," is a condition subsequent. The title had already vested, but was liable to be defeated *in futuro* on failure of the condition. There has been no such failure, but on the contrary Albert Gräff has paid the 4000 marks in full. We shall, therefore, not reverse the decree on the ground first referred to.

Letters patent had been granted to the original patentees for the invention by the government of Germany in 1879 and 1880. A portion of the burners in question were purchased in Germany from one Hecht, who had the right to make and sell them there. By section 5 of the imperial patent law of Germany, of May 25, 1877, it was provided that, "the patent does not affect persons who, at the time of the patentee's application, have already commenced to make use of the invention in the country, or made the preparations requisite for such use." 12 Off. Gaz. 183. Hecht had made preparations to manufacture the burners prior to the application for the German patent. The official report of a prosecution against Hecht in the first criminal division of the Royal District Court, No. 1, at Berlin, in its session of March 1, 1882, for an infringement of the patent law, was put in evidence, wherefrom it appeared that he was found not guilty, and judgment for costs given in his favor, upon the ground "that the defendant has already prior to November 14, 1879 — that is to say, at the time of the application by the patentees for and within the State — made use of the invention in question, especially, however, had made the necessary preparations for its use. § 5, *eodem.* Thus

Schwintzer & Gräff's patent is of no effect against him, and he had to be acquitted accordingly."

It appears that appellants received two invoices from Germany, the burners in one of which were not purchased from Hecht, but in the view which we take of the case, that circumstance becomes immaterial. The exact question presented is whether a dealer residing in the United States can purchase in another country articles patented there, from a person authorized to sell them, and import them to and sell them in the United States, without the license or consent of the owners of the United States patent.

In *Wilson* v. *Rousseau*, 4 How. 646, it was decided that a party who had purchased and was using the Woodworth planing machine during the original term for which the patent was granted, had a right to continue the use during an extension granted under the act of Congress of 1836; and Mr. Chief Justice Taney, in *Bloomer* v. *McQuewan*, 14 How. 539, 549, says in reference to it, that "the distinction is there taken between the grant of the right to make and vend the machine and the grant of the right to use it." And he continues: "The distinction is a plain one. The franchise which the patent grants consists altogether in the right to exclude every one from making, using or vending the thing patented without the permission of the patentee. This is all he obtains by the patent. And when he sells the exclusive privilege of making or vending it for use in a particular place, the purchaser buys a portion of the franchise which the patent confers. He obtains a share in the monopoly, and that monopoly is derived from, and exercised under, the protection of the United States. And the interest he acquires necessarily terminates at the time limited for its continuance by the law which created it. . . . But the purchaser of the implement or machine for the purpose of using it in the ordinary pursuits of life stands on different ground. In using it he exercises no rights created by the act of Congress, nor does he derive title to it by virtue of the franchise or exclusive privilege granted to the patentee. The inventor might lawfully sell it to him, whether he had a patent or not, if no other patentee stood in his way. And when

the machine passes to the hands of the purchaser it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress."

In *Adams* v. *Burke*, 17 Wall. 453, it was held that "where a patentee has assigned his right to manufacture, sell and use within a limited district an instrument, machine or other manufactured product, a purchaser of such instrument or machine, when rightfully bought within the prescribed limits, acquires by such purchase the right to use it anywhere, without reference to other assignments of territorial rights by the same patentee;" and that "the right to the use of such machines or instruments stands on a different ground from the right to make and sell them, and inheres in the nature of a contract of purchase, which carries no implied limitation to the right of use within a given locality." Mr. Justice Bradley, with whom concurred Mr. Justice Swayne and Mr. Justice Strong, dissented, holding that the assignee's interest "was limited in locality, both as to manufacture and use." The right which Hecht had to make and sell the burners in Germany was allowed him under the laws of that country, and purchasers from him could not be thereby authorized to sell the articles in the United States in defiance of the rights of patentees under a United States patent. A prior foreign patent operates under our law to limit the duration of the subsequent patent here, but that is all. The sale of articles in the United States under a United States patent cannot be controlled by foreign laws. This disposes of the second error relied on.

This brings us to the consideration of the damages reported by the master, which report was confirmed by the court; and we are met on the threshold by the objection that the exceptions taken in the Circuit Court were not sufficiently specific to entitle appellants to raise the questions here upon which they submit argument.

These exceptions are as follows:

"First exception. For that the said master has in and by his said report certified on page six thereof that 'the cap was

the essential feature of the Gräff burner. The respondents adopted Gräff's arrangement, and then reduced the price of the burner, forcing Gräff to do the same in order to hold his trade. The evidence shows that the reduction in prices by Gräff was solely due to the respondents' infringement. So far as the evidence shows, the only competitors with Gräff in the use of his cap arrangement during the period covered by the accounting, were the respondents;' whereas the said master ought to have certified that respondents came innocently into possession of the burners by purchase in the ordinary course of business from legitimate manufacturers thereof in Germany, and that immediately upon being notified that they were claimed to be an infringement they ceased to sell the same. The evidence shows that at about the time Gräff made the alleged reduction in the price of his burners there were thrown upon the market lamp-burners of other kinds of equal or greater power, which came directly in competition with the Gräff burner, and that the reduction in price was the result of such competition; that the sale of 14 infringing burners by respondent in the course of three years' trade could not have been a sufficient competition to plaintiff's business to cause him to make a reduction of price, where the testimony shows that during the period from March 1st, 1886, when complainant reduced the price of burners, until October 31st, 1887, he sold about 6000 of said burners.

"Second exception. For that the said master hath certified 'that the amount of damages which the complainant has suffered and sustained from and by reason of said infringement is two thousand nine hundred and seventy dollars and fifty cents;' whereas he should have reported nominal damages.

"In all which particulars the report of the said master is, as the said respondent is advised, erroneous, and the said respondent appeals therefrom to the judgment of this honorable court."

It is conceded that these exceptions raise two points, namely, that the infringement was not wilful, and that the reduction of prices was not caused solely by it. And this, as it seems to us, is quite sufficient to permit the real question

involved to be passed upon. The master awarded $2970.50 as damages for the reduction in price, which, he holds, was caused by the respondents' infringement. He says:

"After the reduction in his prices, complainant sold, at wholesale, one thousand three hundred and twelve ten-wick burners, at a price twenty-five cents less on each than his original price; four hundred and fifty twelve-wick burners, at fifty cents less; five hundred and ninety-two sixteen-wick burners, at seventy-five cents less; and seven hundred and sixteen twenty-wick burners, at seventy-five cents less; a total difference between the original and the reduced prices of one thousand five hundred and thirty-five dollars and fifty cents.

"In addition, he sold at retail, on an average, five burners on each of the five hundred and seventy-four business days between the time when his prices were first reduced and October 31st, 1887; the number of burners thus sold being two thousand eight hundred and seventy, which were sold at a minimum reduction of fifty cents each under original prices — a total difference between the original and the new prices of fourteen hundred and thirty-five dollars; which sum, added to the said sum of one thousand five hundred and thirty-five dollars and fifty cents, gives an aggregate amount of two thousand nine hundred and seventy dollars and fifty cents."

The report of a master is merely advisory to the court, which it may accept and act upon in whole or in part, according to its own judgment as to the weight of the evidence. *Kimberly* v. *Arms*, 129 U. S. 512, 523. Yet, in dealing with exceptions to such reports, "the conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part." *Tilghman* v. *Proctor*, 125 U. S. 136, 149. We think there was error here within that rule.

Where the patentee granted no licenses, and had no established license fee, but supplied the demand himself, and was able to do so, an enforced reduction of price is a proper item of damages, if proven by satisfactory evidence. *Yale Lock*

Manufacturing Co. v. *Sargent*, 117 U. S. 536. The damages must be actual damages, but where the patented feature is the essential element of the machine or article, as in the case just cited, if such damages can be ascertained they may be awarded. When, however, a plaintiff seeks to recover 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. *Cornely* v. *Marckwald*, 131 U. S. 159. There must be some data by which the actual damages may be calculated. *New York* v. *Ransom*, 23 How. 487 ; *Rude* v. *Westcott*, 130 U. S. 152.

The master reported "that the number of lamp burners proven to have been sold by respondents, containing the invention claimed in and by the first claim of complainants' letters patent, is fourteen, provided that only the capped burners sold contain said invention, and that the number is one hundred and fourteen, if the half-capped burners so sold are to be held to contain said invention."

The evidence established that the first invoice of lamp burners contained fifty 20-wick burners with caps, of which respondents sold four; and fifty 12-wick burners with half caps, of which respondents sold twelve; and fifty 16-wick burners with half caps, of which respondents sold forty-four; and that respondents altered the forty-six remaining 20-wick burners by changing their caps to half caps, and sold forty-four. This makes the one hundred with half caps, referred to by the master. Of the second invoice, the respondents sold four 20-wick capped burners and six 16-wick capped burners, making, with four 20-inch burners with caps sold out of the first invoice, the fourteen capped wick burners reported as thus disposed of. The original bill in this case was filed September 17, 1886. It had been preceded by another suit, which had been dismissed. The goods in the second invoice, it is testified, had been ordered before this suit was commenced, but the invoice is dated October 16, 1886. This invoice contained one hundred 20 and one hundred 16-wick burners with caps, of which respondents sold four 20-wick and six 16-wick burners unchanged as before

stated. Most of this lot were still on hand at the time the testimony was taken, though some had been altered into what was called the "Boesch burner," which had no caps at all, and sold as such.

The evidence tends to establish a profit of $1.85 on the 20-wick burners; $1.50 on the 16-wick; and 75 cents on the 12-wick. This would show a profit of $23.80 on the fourteen capped burners, being eight 20-wick and six 16-wick burners; and a profit of $156.40 on the one hundred half capped burners, being forty-four 20-wick, forty-four 16-wick and twelve 12-wick burners. Respondents had been advised by their counsel that the burners with half caps were not an infringement. The cap was the invention in question. The claim infringed, as already seen, was a combination, with the guide tubes, of a ring-shaped cap provided with openings for the wicks, said cap being applied to the upper ends of the guide tubes, so as to close the intermediate spaces between the same. The half cap admitted the air directly to each wick, and in that respect differed from the claim of the patent. It is argued, however, with much force on behalf of the appellees, that the difference was a difference in degree and not in kind, as the air reached the wick when the full cap was used, and the functions of the latter as a strengthening band, a protector of the tops of the tubes, and in other particulars, were performed by the half cap; and this position is not resisted by counsel for appellants. But assuming that the sale of one hundred burners with half caps was an infringement, we are not prepared to concede that the sale of one hundred and fourteen burners under the circumstances detailed could have had the effect in compelling a reduction of price which has been ascribed to it.

It is remarked by the master that "it is a fact of common knowledge that there is to be found on sale in the market a great variety of lamp burners, among which, as shown by the evidence, have been for many years burners of the same general class as complainants'." This being so, and Boesch & Bauer being dealers in burners generally, it is not to be presumed that Gräff reduced his prices, for nineteen months,

on six thousand burners, not on account of competition in burners, but because of the effect upon his particular burner created by the sale of fourteen of the same kind, and of one hundred differing but the same in principle. Conceding that as Gräff granted no licenses, and had no established license fee, but supplied the demand for his burner himself, and was able to supply that demand, and that, therefore, if he was compelled to lower the price by the infringement he could recover for the loss thus sustained, does the evidence satisfactorily establish that the reduction in prices was due solely to the acts of the defendants in infringing? The opinion of Mr. and Mrs. Gräff to that effect is not sufficient, and even that is so qualified as to fall far short of expressing it. The master allowed upon 3070 burners sold at wholesale, and on 2870 sold at retail, by the complainants, between March 1, 1886, and October 31, 1887, or 5940 in all. The sales of one hundred and four out of the one hundred and fourteen sold by the respondents apparently took place prior to the filing of the bill. Boesch had been in the business for twenty years. The firm of Boesch & Bauer carried a large stock of lamps, embracing a hundred varieties in styles and sizes, under a very large variety of names.

Gräff's burner was a "mitrailleuse" burner, and called "Diamond" as the Miller burner was. Boesch testified that there was no difference between the selling price of the Hecht, the Miller, and the Boesch burners; that there was no demand in their trade for a mitrailleuse burner with a cap; and that in his judgment the Boesch burner was better than the Hecht. This evidence may properly be considered in connection with the fact that but one hundred and fourteen were sold.

We cannot concur with the conclusion that the result of the sales of the one hundred and fourteen burners was to keep Gräff's prices for his particular burner down from March 1, 1886, to October 31, 1887. If Boesch and Bauer had a burner which satisfied the public just as well as Gräff's, and which they could sell cheaper, Gräff cannot complain of the consequences. If Gräff's burner was so much better than

any other that the public must have it he could make his own price, and, if within the bounds of reason, find a sufficient market.

In the state of the case disclosed by this record, the complainants must be content with the protection of an injunction and a recovery of the profits realized from the infringing sales.

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

APPENDIX.

I.

AMENDMENTS TO RULES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

ORDER.

Ordered that Rule 32 of the Rules of this Court is stricken out and the following is promulgated as Rule 32:

32.

WRITS OF ERROR AND APPEALS UNDER THE ACT OF FEBRUARY 25, 1889, CHAPTER 236.

Cases brought to this Court by writ of error or appeal, under the Act of February 25, 1889, Chapter 236, where the final judgment or decree rendered by the Circuit Court does not exceed the sum of five thousand dollars, will be advanced on motion, and heard under the rules prescribed by Rule 6 in regard to motions to dismiss writs of error and appeals.

Promulgated March 10, 1890.

ORDER.

Ordered that subdivision 4 of Rule 23 of this Court is amended so as to read as follows:

4. In cases in admiralty, damages and interest may be allowed if specially directed by the court.

Promulgated March 10, 1890.

II.

ASSIGNMENT TO CIRCUITS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

ORDER.

There having been an Associate Justice of this Court appointed since the commencement of this term, it is ordered that the following allotment be made of the Chief Justice and Associate Justices of said court among the Circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, HORACE GRAY, Associate Justice.

For the Second Circuit, SAMUEL BLATCHFORD, Associate Justice.

For the Third Circuit, JOSEPH P. BRADLEY, Associate Justice.

For the Fourth Circuit, MELVILLE W. FULLER, Chief Justice.

For the Fifth Circuit, LUCIUS Q. C. LAMAR, Associate Justice.

For the Sixth Circuit, DAVID J. BREWER, Associate Justice.

For the Seventh Circuit, JOHN M. HARLAN, Associate Justice.

For the Eighth Circuit, SAMUEL F. MILLER, Associate Justice.

For the Ninth Circuit, STEPHEN J. FIELD, Associate Justice.

March 10, 1890.

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ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

BANK.

BANKRUPT.

CASES AFFIRMED, APPLIED OR APPROVED.

1. *Harshman* v. *Knox County*. *Knox County* v. *Harshman*, 152.
2. *Phœnix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312. *California Ins. Co.* v. *Union Compress Co.*, 387.
3. All the questions presented and argued in this case have been often considered and decided by this court, and the court adheres to the

CONFISCATION.

A condemnation under the confiscation act of July 17, 1862, 12 Stat. 589, of real estate owned in fee by a person who had participated in the rebellion, and a sale under the decree, left the remainder, after the expiration of the confiscated life-estate, so vested in him that he could dispose of it after receiving a full pardon from the President. *Illinois Central Railroad Co.* v. *Bosworth*, 92.

CONFLICT OF LAW.

See INSOLVENT DEBTOR.

CONSTITUTIONAL LAW.

A. OF THE UNITED STATES.

1. The Constitution of the United States, in proper cases, permits equity courts of one State to control persons within their jurisdiction from prosecuting suits in another State. *Cole* v. *Cunningham*, 107.
2. It is no violation of that provision of the Constitution of the United States which requires that full faith and credit shall be given in each State to the judicial proceedings of every other State, if a court in one State, (in which proceedings have been begun, under a general insolvent law of the State, to distribute the estate of an insolvent debtor among his creditors,) enjoins a creditor of the insolvent, (who is a citizen of the same State, and subject to the jurisdiction of the court,) from proceeding to judgment and execution in a suit against the insolvent in another State, begun by an attachment of his property there, after knowledge of his embarrassment and actual insolvency, which property the insolvent law of the State of the debtor's residence requires him to convey to his assignee in insolvency, for distribution with his other assets — there being nothing in the law or policy of the State in which the attachment is made, opposed to those of the State of the creditor and of the insolvent debtor. *Ib.*
3. In an action brought in a state court against the judges of the Court of Commissioners of the Alabama Claims, by one who had been an attorney of that court, to recover damages caused by an order of the court disbarring him, the plaintiff averred and contended that the court had not been legally organized, and that it did not act judicially in making the order complained of; *Held*, that a decision by the state court that the Court of Alabama Claims was legally organized and did act judicially in that matter, denied to the plaintiff no title, right, privilege or immunity claimed by him under the Constitution, or under a treaty or statute of the United States, or under a commission held or authority exercised under the United States. *Manning* v. *French*, 186.
4. The provision in § 501, Rev. Stat. Idaho, that "no person who is a bigamist or polygamist, or who teaches, advises, counsels or encourages

CONTRACT.

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DIPLOMATIC SERVICE.

See SALARY.

DISTRICT ATTORNEY.

The amount of counsel fee to be allowed to a district attorney, under Rev. Stat. § 824, for trial before a jury of a person indicted for crime, is discretionary with the court, within the limits of the statute; and the action of the court in this respect is not subject to review by the Attorney General, or by the accounting officers of the treasury. *United States* v. *Waters*, 208.

DISTRICT OF COLUMBIA.

The District of Columbia, as a political community, is one of "the States of the Union," within the meaning of that term as used in article 7 of the Consular Convention of February 23, 1853, with France. *Geofroy* v. *Riggs*, 258.

See DESCENT;
NATIONAL BANK, 2, 6.

EJECTMENT.

See BETTERMENTS.

EMINENT DOMAIN.

In exercising the right of eminent domain for the acquisition of private property for public use, the compensation to be awarded must not only be just to the owner, but also just to the public which is to pay for it. *Searl* v. *School District No.* 2, 553.

EQUITY.

1. A bill in equity for the foreclosure of a mortgage of a railroad for non-payment of overdue interest, the principal being payable at a future day, was taken *pro confesso*, the company appearing but not answering. A sale was made under the decree of the court, and, it appearing that there was a surplus over and above what was necessary to pay the overdue interest, costs and expenses, the court ordered it to be applied to the reduction of the principal sum due upon the bonds, and entered a decree that the balance of such principal sum, remaining after such application, was due and payable from the company to the holders of the bonds, and that the trustee recover it for them, with interest until paid; *Held*, (1) That the application of the surplus was properly made; (2) That the decree, declaring the remainder of the principal sum due and immediately payable, was irregular and was not warranted by the pleadings. *Ohio Central Railroad Co.* v. *Central Trust Co.*, 83.
2. The defendant in a bill in equity, taken *pro confesso*, is not precluded

EQUITY PLEADING.

ESTOPPEL.

EVIDENCE.

1. Extrinsic evidence to aid in the interpretation of the judgment of a court or commission is inadmissible unless, after reference to the pleadings and proceedings, there remains some ambiguity or uncertainty in it. *Burthe* v. *Denis*, 514.

2. A recorder's copy of a deed is competent and sufficient evidence of its contents against the grantee in favor of a person not a party to it, after the grantee and a person who procured it to be made and to whom it was originally delivered have failed to produce it upon notice to do so. *Keller* v. *Ashford*, 610.

See BILL OF EXCHANGE AND PROMISSORY NOTE, 2, 4;
CLAIMS AGAINST THE UNITED STATES, (3), (4), (5);
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See CONSUL, 2, 3;
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See NATIONAL BANK, 6, 7.

FENCE.

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FORFEITURE.

See INTERNAL REVENUE, 2, 3, 4.

FRANCE.

See TREATY, 2, 3.

FRAUD.

As respects fraud in law, as distinguished from fraud in fact, in a conveyance, if that which is invalid can be separated from that which is valid, without defeating the general intent, the maxim "void in part, void *in toto*" does not necessarily apply, but the instrument may be sustained notwithstanding the invalidity of a particular provision. *Peters* v. *Bain*, 670.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 3, 4, 5, 6, 7, 9;
BANK, 2;
BANKRUPT;
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INSOLVENT DEBTOR.

An insolvent debtor of Louisiana, under the insolvent laws of that State, surrendered his property for the benefit of his creditors, the surrender

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INTEREST.

See JURISDICTION, A, 9;
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REBELLION.

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RECEIVER.

1. An allowance of counsel fees on behalf of a receiver is made to the receiver, and not to the counsel. *Stuart* v. *Boulware*, 78.
2. A receiver is an officer of the court, entitled to apply to the court for instruction and advice, and permitted to retain counsel, whose fees are within the just allowances that may be made by the court. *Ib.*
3. Allowances to a receiver for counsel are largely discretionary, and the action of the court below in this respect is treated by an appellate court as presumably correct. *Ib.*

See MORTGAGE, (5).

REMOVAL OF CAUSES.

A claim against a county, heard before the county commissioners, and on appeal from their decision by the circuit court of the county, under the statutes of Indiana, may be removed, at any time before trial in that court, into the Circuit Court of the United States, under Rev. Stat. § 639, cl. 3. *Delaware Co. Commissioners* v. *Diebold Safe & Lock Co.*, 473.

RIPARIAN RIGHTS.

See PUBLIC LAND, 8.

RULES.

See EQUITY PLEADING, 2.

RUNNING WATER.

See PUBLIC LAND, 8.

SALARY.

An envoy extraordinary and minister plenipotentiary of the United States to Turkey was never appointed before July 13, 1882. On that day, the claimant, being minister resident and consul general of the United States to Turkey, at a salary of $7500 a year, was appointed to the higher grade. By each of the diplomatic appropriation bills of 1882, 1883 and 1884, $7500 was appropriated for the salary of an envoy extraordinary and minister plenipotentiary to Turkey. The claimant, having been paid the $7500 salary for each of those years, sued in the Court of Claims to recover the difference between that amount and an annual salary of $10,000, claiming the latter under § 1675 of the Revised Statutes, as amended by the act of March 3, 1875, c. 153, 18 Stat. 483; *Held*, that as, under the amendment of 1875, the salary was to be $10,000, "unless where a different compensation is prescribed by law," and the office did not exist before July 1, 1882, and the first provision made by Congress for a salary for it was made by the act of

SUNDAY.

TAX AND TAXATION.

1. P. was a resident in the city of New York and a stockholder in a national bank situated there. In 1881 his shares in the bank were assessed at a valuation of $247,635. This valuation was entered by the tax commissioners in the annual Record of Valuations for 1881, a book which was kept open for public inspection from the second Monday of January, 1881, to May 1, 1881, and a public advertisement thereof was made. Before April, 1881, P. appeared before the commissioners and claimed a reduction, and they reduced the valuation to $190,635. On May 1st the assessment rolls were prepared from that record, with the valuation of P.'s shares at the latter sum, and he was assessed at that valuation. The tax rolls were completed on this basis, and notice was given that they would be open for inspection. P.'s tax, upon the reduced valuation, was $4994.63. The tax rolls were confirmed, and due notice was given to all taxpayers that the taxes were due and payable. P. paid $1310 of this tax, but declined to pay the further sum of $3684.63. The collector of taxes thereupon proceeded against him in the Court of Common Pleas for the city and county of New York, under c. 230 of the laws of New York of 1843, for the enforcement of the payment of the sum remaining due. He appeared and answered, and judgment was given against him, which judgment was affirmed by the Court of Appeals, and the case was remanded to the Court of Common Pleas. A writ of error was sued out from this court to review that judgment; *Held*, (1) That this court was bound by the decision of the Court of Appeals as to P.'s failure to comply with the state statute in relation to the method of procedure, form of assessment, etc.; (2) That the assessment was not made in contravention of the Constitution or laws of the United States, and was, therefore, not void for that reason; (3) That the mode provided by the statute of New York for the collection of the tax was "due process of law," and did not deprive P. of the equal protection of the laws; but that it was a purely executive process to collect the tax after the liability of the party was finally fixed. *Palmer* v. *McMahon*, 660.
2. When a law provides a mode for confirming or contesting an assessment for taxation, with appropriate notice to the person charged, the assessment cannot be said to deprive the owner of his property without due process of law. *Ib.*
3. Assessors should give all persons taxed an opportunity to be heard; but