UNITED STATES REPORTS

VOLUME 137

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1890

J. C. BANCROFT DAVIS

REPORTER

NEW YORK AND ALBANY
BANKS & BROTHERS, LAW PUBLISHERS
1890

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief 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.

HENRY BILLINGS BROWN, Associate Justice.[1]

WILLIAM HENRY HARRISON MILLER, Attorney General.

WILLIAM HOWARD TAFT, Solicitor General.

JAMES HALL McKENNEY, Clerk.

JOHN MONTGOMERY WRIGHT, Marshal.

---

[1] Mr. Justice Miller died at his residence in Washington, Monday evening, October 13, 1890.

The commission of Mr. Justice Brown, appointed in his place, is dated December 29, 1890. On the 5th of January, 1891, the oath of office was administered to him in open court, and he immediately took his seat upon the bench.

TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

Table of Cases.

Table of Cases.

Table of Cases.

Table of Cases.

Table of Cases.

TABLE OF CASES

CITED IN OPINIONS.

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

(B.) Statutes of the States and Territories.

(C.) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1890.

THE MAX MORRIS: Morris, Claimant.

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

No. 44. Submitted May 2, 1890. — Decided November 17, 1890.

Where a person is injured on a vessel, through a marine tort arising partly from the negligence of the officers of the vessel and partly from his own negligence, and sues the vessel in Admiralty, for damages for his injuries, he is not debarred from all recovery because of the fact that his own negligence contributed to his injuries.

Whether, in such case, the decree should be for exactly one-half of the damages sustained, or might, in the discretion of the court, be for a greater or less proportion of such damages, *quære*.

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

This was a suit in Admiralty, brought in the District Court of the United States for the Southern District of New York, by Patrick Curry against the steamer Max Morris.

The libel alleged that on the 27th of October, 1884, the libellant was lawfully on board of that vessel, being employed to load coal upon her by the stevedore who had the contract for loading the coal; that, on that day, the libellant, while on the vessel, fell from her bridge to the deck, through the negli-

gence of those in charge of her, in having removed from the bridge the ladder usually leading therefrom to the deck, and in leaving open, and failing to guard, the aperture thus left in the rail on the bridge; that the libellant was not guilty of negligence; and that he was injured by the fall and incapacitated from labor. He claimed $3000 damages.

The answer alleged negligence on the part of the libellant and an absence of negligence on the part of the claimant.

The District Court, held by Judge Brown, entered a decree in favor of the libellant for $150 damages, and $32.33 as one-half of the libellant's costs, less $47.06 as one-half of the claimant's costs, making the total award to the libellant $135.27. The opinion of the District Judge is reported in 24 Fed. Rep. 860. It appeared from that that the judge charged to the libellant's own fault all his pain and suffering and all mere consequential damages, and charged the vessel with his wages, at $2 per day, for 75 working days, making $150.

The claimant appealed to the Circuit Court, on the ground that the libel should have been dismissed. It was stipulated between the parties that the facts as stated in the opinion of the District Judge should be taken as the facts proved in the case, and that the appeal should be heard on those facts. Judge Wallace, who heard the case on appeal in the Circuit Court, delivered an opinion, in August, 1886, which is reported in 28 Fed. Rep. 881, affirming the decree of the District Court. No decree was made on that decision, but the case came up again in the Circuit Court on the 14th of March, 1887, the court being held by Mr. Justice Blatchford and Judge Wallace, when a certificate was signed by them stating as follows: "The libellant was a longshoreman, a resident of the city and county of New York, and was, at the time when the said accident occurred, employed as longshoreman, by the hour, by the stevedore having the contract to load coal on board the steamship Max Morris. The injuries to the libellant were occasioned by his falling through an unguarded opening in the rail on the after end of the lower bridge. The Max Morris was a British steamship, hailing from Liverpool, England. The defendant contends, as a matter of defence to said libel,

that the injuries complained of by libellant were caused by his own negligence. The libellant contends that the injuries were occasioned entirely through the fault of the vessel and her officers. The court finds, as a matter of fact, that the injuries to the libellant were occasioned partly through his own negligence and partly through the negligence of the officers of the vessel. It now occurs, as a question of law, whether the libellant, under the above facts, is entitled to a decree for divided damages. On this question the opinions of the judges are in conflict." On motion of the claimant, the question in difference was certified to this court, and a decree was entered by the Circuit Court affirming the decree of the District Court and awarding to the libellant a recovery of $135.27, with interest from the date of the decree of the District Court, and $26.30 as the libellant's costs in the Circuit Court, making a total of $172. From that decree the claimant has appealed to this court. Rev. Stat. §§ 652, 693; *Dow* v. *Johnson*, 100 U. S. 158.

Mr. Wilhelmus Mynderse and *Mr. William Allen Butler* for Morris, claimant and appellant.

Whether the accident was due solely to the fault of the libellant, or whether his fault merely contributed thereto, the libel should be dismissed.

The contributory fault of the libellant is established by the facts. The rule as invariably applied by Admiralty Courts in this class of cases until the recent decision of the *Explorer*, 20 Fed. Rep. 135, 139, by Judge Pardee, in the Fifth Circuit, has been the wholesome rule that the libellant cannot recover when his own negligence has contributed to the accident. Such is the rule of the common law. And the civil law from which the principles of the admiralty law are freely drawn is on this point in accord with the common law. Wharton on Negligence, § 300.

Judge Pardee finds his sole foundation for his decision in the case of the *Explorer* in certain *dicta* of Justice Story in the case of *Marianna Flora*, 11 Wheat. 1, decided by the

Supreme Court in 1826. The *Marianna Flora* was a prize case, in which the captured vessel was declared by the District Court "no prize," and the matter under the consideration of the Supreme Court was whether the captured vessel should recover damages for her arrest. The Supreme Court denied her claim for damages upon the ground that the circumstances attending the seizure were, through the indiscretions of the *Marianna Flora*, such as to justify the commander of the cruiser, in the fair exercise of his judgment, in making the seizure. In effect the Supreme Court said: the *Marianna Flora* having contributed to the seizure by her own negligence, cannot recover damages. But in the course of their opinion they made certain *dicta* respecting the power of the Court to give or to withhold damages, such as "in cases of marine torts courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity," and "they have exercised a conscientious discretion upon the subject," which Judge Pardee has construed in such manner as to sustain his decision.

Though the *Marianna Flora* was decided sixty years ago, it had never been deemed to refer to other than prize cases. It is significant that in every case in which a decree has been given in favor of a landsman for personal injuries, there is an express finding that the libellant was free from any fault. "The libellant was in no manner negligent or in fault, whereby he contributed to his said injury." *Leathers* v. *Blessing*, 105 U. S. 626. "The libellant was guilty of no negligence" (Judge Benedict). *The Calista Hawes*, 14 Fed. Rep. 493. "The libellant was not in any degree in fault for the falling of the dunnage" (Judge Benedict). *The Kate Cann*, 2 Fed. Rep. 241, affirmed, 8 Fed. Rep. 719. "The proofs do not justify an inference that the libellant was negligent" (Judge Wallace). *The Rheola*, 19 Fed. Rep. 926. Judge Deady expressly held "contributory negligence is a defense to the action," the claim being prosecuted in the Admiralty Court by a libel *in personam*. *Holmes* v. *Oregon & Colorado Railway*, 5 Fed. Rep. 523, 528. And again, Judge Deady held: "Admitting the negligence of the mate, and that the master or owner and the vessel are liable

therefor, still *if the negligence of the libellant substantially contributed to produce the injury*, he could not recover damage therefor." *The Chandos*, 4 Fed. Rep. 645, 649. Judge Blatchford has stated the rule as follows: "The owner of the vessel is liable *in personam* and the vessel is liable *in rem* for injuries done to person or property by the negligence of the master and crew of the vessel, *only where the owner would, under the same circumstances*, be liable in a suit at common law." *The Germania*, 9 Ben. 356. And in a case decided two months later than the *Explorer*, Judge Pardee seems to have modified his novel views. He says: "Nor in the admiralty should one, as a general rule, be compensated in damages who has, by his own fault, contributed to bring about his own injury." *The E. B. Ward, Jr.*, 20 Fed. Rep. 702, 704.

The admiralty rule of division of damages, applicable to collision cases, has never been applied to cases of personal injuries.

The rule of dividing damages in case of mutual fault, applies only to collision cases, and arose probably from the fact that, in such cases, damages were sustained by both parties; and that the collision occurred, not through the personal negligence of either of the ship-owners, but through the negligence of their servants.

Cleirac calls it a *judicium rusticum* (*Us et Coutumes de la Mer*), and his commentator, Mr. Bell, translates his words as follows: "This rule of division is a rustic sort of determination and such as arbiters and amicable compromisers of disputes commonly follow where they cannot discover the motives of the parties when they are faulty on both sides," Bell's Comm. 5th ed. 581.

This rule was not recognized by the Supreme Court in collision cases until 1854. Up to that time, apparently, collisions in which both vessels were in fault, were not as common as they are now-a-days, for Judge Nelson said: "It becomes necessary to settle the rule of damages in a case where both vessels are in fault. *The question, we believe, has never until now come before the Court for decision.* The rule that prevails in the District and Circuit Courts, we understand, has

been to divide the loss. This seems now to be the well-settled rule in the English admiralty. . . . *Under the circumstances usually attending these disasters*, we think the rule dividing the loss the most just and equitable." *The Schooner Catherine*, 17 How. 173. *Snow* v. *Carruth*, 1 Sprague, 324, is in no way pertinent. There was no suggestion there of contributory negligence.

Not only has the wholesome doctrine that the contributory negligence of the libellant defeats an action in the Admiralty Court for personal injuries been uniformly observed until Judge Pardee's decision in the *Explorer*, but the more severe rule that a servant cannot recover for injuries sustained through the negligence of a fellow servant has been accepted and enforced. Judge Lowell applied it in the Massachusetts Circuit. *The Victoria*, 13 Fed. Rep. 43. And in the Southern District of New York, Judge Brown followed the rule to its extremest limit. *The Harold*, 21 Fed. Rep. 428. And the municipal or common law doctrine was also applied by the Circuit Court in New York, affirming, *The Edith Godden*, 23 Fed. Rep. 43. It is inconsistent to say that a servant who has been injured through his own negligence can recover half his damages, while he who has been without fault and has been injured through the negligence of his fellow servant can recover nothing.

The learned Circuit Judge (Judge Wallace) who wrote for affirmance of the decree of the District Court apparently doubted the correctness of the rule adopted by Judge Pardee in the *Explorer*, 20 Fed. Rep. 135, and followed by Judge Brown in the District Court. He held himself bound, however, by the decision of this Court in *Atlee* v. *The Packet Co.*, 21 Wall. 389. But the language of the court, in that case (p. 395), after adverting to the fact that this action might have been brought in a common-law court instead of the Admiralty Court, is: "In the common-law court the defendant must pay all the damages or none. . . . By the rule of the admiralty court, where there has been such contributory negligence, or, in other words, when both have been in fault, the entire damages *resulting from the collision* must be equally

divided between the parties." The rule of apportionment was recognized only as a rule applicable to collisions.

The decree cannot be sustained by the rule that when a seaman falls sick or sustains injury in the service of his vessel certain responsibilities as to care and attention devolve upon the vessel. *The City of Alexandria*, 17 Fed. Rep. 390.

The learned District Judge heard argument upon this point, but very justly held that the rule was not applicable.

The rule, as respects *seamen*, is a proper one, though it seems that it is not enforceable if the sickness or injury of the seaman is occasioned by his own fault. *Curtis' Rights and Duties of Seamen*, 109.

Seamen may be injured or fall sick in a far distant foreign port, and it would be inhuman to leave them there without care.

There are even statutory provisions for the payment of their expenses home and for their support in hospitals.

But the responsibility of the ship extends only to the end of the voyage for which the seaman was shipped, or until the seaman reaches his home port. *The Atlantic*, Abbott's Admiralty, 451; *Nevitt* v. *Clarke*, Olcott, 316; *The Ben Flint*, 1 Abbott, U. S. 126. No such responsibility rests upon the *Max Morris* with reference to the libellant. The reason for the rule does not exist as to him. He was injured at his home. He was not in a foreign port. He was treated and cured at a public hospital. His engagement as a longshoreman extended only from hour to hour.

Even a seaman has no claim upon his ship for a period beyond the time for which he has shipped or contracted for. *The Atlantic*, Abbott's Adm. 451.

Mr. James A. Patrick for Curry, libellant and appellee.

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

The question discussed in the opinions of Judge Brown and Judge Wallace, and presented to us for decision, is whether

the libellant was debarred from the recovery of any sum of money, by reason of the fact that his own negligence contributed to the accident, although there was negligence also in the officers of the vessel. The question presented by the certificate is really that question, although stated in the certificate to be whether the libellant, under the facts presented, was entitled to a decree "for divided damages." It appears from the opinion of the District Judge that he imposed upon the claimant "some part of the damage" which his concurrent negligence occasioned, while it does not appear from the record that the award of the $150 was the result of an equal division of the damages suffered by the libellant, or a giving to him of exactly one-half, or of more or less than one-half, of such damages.

The particular question before us has never been authoritatively passed upon by this court, and is, as stated by the District Judge in his opinion, whether, in a court of admiralty, in a case like the present, where personal injuries to the libellant arose from his negligence concurring with that of the vessel, any damages can be awarded, or whether the libel must be dismissed, according to the rule in common law cases.

The doctrine of an equal division of damages in admiralty, in the case of a collision between two vessels, where both are guilty of fault contributing to the collision, had long been the rule in England, but was first established by this court in the case of *The Schooner Catherine* v. *Dickinson*, 17 How. 170, and has been applied by it to cases where, both vessels being in fault, only one of them was injured, as well as to cases where both were injured, the injured vessel, in the first case, recovering only one-half of its damages, and, in the second case, the damages suffered by the two vessels being added together and equally divided, and the vessel whose damages exceeded such one-half recovering the excess against the other vessel. In the case of *The Schooner Catherine* v. *Dickinson*, (*supra*,) both vessels being held in fault for the collision, it was said by the court, speaking by Mr. Justice Nelson, p. 177, that the well-settled rule in the English admiralty was "to divide the loss," and that "under the circumstances usually

attending these disasters" the court thought "the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides, in the navigation."

This rule, recognized as one of an equal division of the loss, has been applied by this court in the following cases: *Rogers* v. *Steamer St. Charles*, 19 How. 108; *Chamberlain* v. *Ward*, 21 How. 548; *The Washington*, 9 Wall. 513; *The Sapphire*, 11 Wall. 164; *The Ariadne*, 13 Wall. 475; *The Continental*, 14 Wall. 345; *Atlee* v. *Packet Co.*, 21 Wall. 389; *The Teutonia*, 23 Wall. 77; *The Sunnyside*, 91 U. S. 208; *The America*, 92 U. S. 432; *The Alabama*, 92 U. S. 695; *The Atlas*, 93 U. S. 302; *The Juniata*, 93 U. S. 337; *The Stephen Morgan*, 94 U. S. 599; *The Virginia Ehrman*, 97 U. S. 309; *The City of Hartford*, 97 U. S. 323; *The Civilta*, 103 U. S. 699; *The Connecticut*, 103 U. S. 710; *The North Star*, 106 U. S. 17; *The Sterling*, 106 U. S. 647; and *The Manitoba*, 122 U. S. 97.

It may be well to refer particularly to some of these cases, which have a bearing upon the present question. In the case of *The Washington*, two vessels were held in fault for a collision which resulted in injuries to an innocent passenger on one of them, who proceeded against both in the same libel. This court held that the damages to the passenger ought to be apportioned equally between the two vessels, with a reservation of a right in the libellant to collect the entire amount from either of them, in case of the inability of the other to respond for her portion. In that case, the rule of the equal division of damages was extended to damages other than those sustained by either or both of the vessels in fault.

In *Atlee* v. *Packet Co.*, a barge owned by the libellant was sunk by striking a stone pier owned by the respondent, built in the navigable part of the Mississippi River. Both parties being found in fault by the District Court, that court divided the damages sustained by the libellant, and rendered a decree against the owner of the pier for one-half of them. The Circuit Court held the owner of the pier to be wholly in fault, and decreed the entire damage against him. He having appealed, this court, after two hearings of the case, reversed the decree of the Circuit Court and reinstated that of the

District Court. In the opinion of this court, delivered by Mr. Justice Miller, the case is treated as one of collision. The pier having been placed by the respondent in the navigable water of the Mississippi River without authority of law, this court held him to be responsible for the damages sustained by the libellant from the striking of the pier by the barge. It held also that there was negligence on the part of the barge, and said (p. 395): "But the plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the rules of decision are different. The mode of pleading is different, the proceeding more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damages. In the common law court the defendant must pay all the damages or none. If there has been on the part of the plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the Admiralty Court, where there has been such contributory negligence, or, in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice as the other; and the plaintiff who has the selection of the forum in which he will litigate cannot complain of the rule of that forum." This court, therefore, treated the case as if it had been one of a collision between two vessels.

The case of *The Alabama* was like that of *The Washington*, where an innocent party recovered damages against two vessels, both of which were in fault in a collision. In that case, it is said in the opinion of the court, delivered by Mr. Justice Bradley (p. 697), that "the moiety rule has been adopted for a better distribution of justice between mutual wrongdoers; and it ought not to be extended so far as to inflict positive loss on innocent parties."

The case of *The Atlas* was that of a suit against the Atlas

by an insurance company for the loss of a canal-boat and her cargo while she was in tow of a tug, through a collision between the Atlas and the tug. The tug was not sued. The District and Circuit Courts, in view of the fact that the collision was caused by the mutual fault of the Atlas and the tug, decreed to the libellant, against the Atlas, one-half of its damages. This court held that, as the owner of the cargo which was on board of the canal-boat was not in fault, the libellant was entitled to recover the entire amount of its damages from the Atlas, the tug not having been brought in as a party to the suit. By Rule 59 in Admiralty, promulgated by this court, March 26, 1883, 112 U. S. 743, the claimant or respondent in a suit for damage by collision may compel the libellant to bring in another vessel or party alleged to have been in fault.

The case of *The Juniata* is worthy of attention. In that case, one Pursglove, the owner of a steam-tug, filed a libel against the Juniata to recover for damage sustained by the tug by a collision between it and the Juniata, and also damages for personal injuries to himself. The District Court held both vessels to have been in fault, and made a decree of $10,000 in favor of Pursglove, for one-half of his damages. This decree was affirmed by the Circuit Court and by this court. It is quite evident from the report of the case that damages were awarded to Pursglove for his personal injuries, although his tug was held to have been in fault.

Some of the cases referred to show that this court has extended the rule of the division of damages to claims other than those for damages to the vessels which were in fault in a collision.

In England, the common law rule that a plaintiff who is guilty of contributory negligence can recover nothing, was made by statute to yield to the admiralty rule in respect to damages arising out of a collision between two ships, by subdivision (9) of section 25 of chap. 66 of 36 & 37 *Vict.*, being the Judicature Act of August 5, 1873, L. R. 8 Stat. 321, which provides as follows: "(9) In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall

be found to have been in fault, the rules in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail." The same provision was enacted in the same language by subdivision (9) of section 28 of chap. 57 of 40 & 41 *Vict.*, being the Judicature Act in relation to Ireland, of August 14, 1877. L. R. 12 Stat. 362.

The Admiralty rule of the division of damages was laid down by Sir William Scott, in 1815, in *The Woodrop-Sims*, 2 Dodson, 83, 85, where he says that if a loss occurs through a collision between two vessels, where both parties are to blame, the rule of law is "that the loss must be apportioned between them, as having been occasioned by the fault of both of them." This rule was approved by the House of Lords, on an appeal from Scotland, in *Hay* v. *Le Neve*, 2 Shaw, 395, in 1824.

The rule of the equal apportionment of the loss where both parties were in fault would seem to have been founded upon the difficulty of determining, in such cases, the degree of negligence in the one and the other. It is said by Cleirac (*Us et Coutumes de la Mer*, p. 68) that such rule of division is a rustic sort of determination, and such as arbiters and amicable compromisers of disputes commonly follow, where they cannot discover the motives of the parties, or when they see faults on both sides.

As to the particular question now presented for decision, there has been a conflict of opinion in the lower courts of the United States. In the case of *Peterson* v. *The Chandos*, 4 Fed. Rep. 645, 649, in the District Court for the District of Oregon, which was a libel in admiralty against a vessel, for a personal injury, it was said by Judge Deady, that the libellant could not recover for an injury caused by his own negligence, which contributed to the result, even though the vessel was in fault. The same rule was recognized by him, in the same court, in a suit in admiralty, in *Holmes* v. *Oregon Railway*, 5 Fed. Rep. 523, 538,[1] and by Judge Hughes, in the District Court for the Eastern District of Virginia, in *The Manhasset*, 19 Fed. Rep. 430.

On the other hand, Judge Pardee, in the Circuit Court for

[1] In *Olsen* v *Flavel*, 34 Fed. Rep. 477, Judge Deady distinctly held the law to be in accordance with the decision in the present case.

the Eastern District of Louisiana, in *The Explorer*, 20 Fed. Rep. 135, and *The Wanderer*, 20 Fed. Rep. 140, cases in admiralty where the libellant sued for personal injuries, and he and the vessel were both held in fault, laid it down as a rule, that, in cases of marine torts, courts of admiralty could exercise a conscientious discretion, and give or withhold damages upon enlarged principles of justice and equity. In the first of those cases, the court allowed to the libellant $280 for the loss of 40 days' time, at $7 a day, and the sum of $40 paid by him for his admission to a hospital, and the costs of the case, as the vessel's share of the expenses resulting from the injury to which the vessel contributed through the negligence of her master and officers. In the other case, it was held that, while the libellant could not be rewarded for his negligence at the expense of the vessel, she should be held responsible for her negligence, to the extent of paying for the direct care, attention, medical services and expenses required for the libellant. These last two cases proceed upon the same principle that appears to have been adopted by the District and Circuit Courts in the present case; and the same view was applied by the District Court for the Eastern District of New York, in *The Truro*, 31 Fed. Rep. 158; and by the District Court for the Eastern District of Virginia, in *The Eddystone*, 33 Fed. Rep. 925. This principle, it is contended, is sanctioned by the language used by this court in *The Marianna Flora*, 11 Wheat. 1, 54: "Even in cases of marine torts, independent of prize, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law;" and in *The Palmyra*, 12 Wheat. 1, 17: "In the admiralty, the award of damages always rests in the sound discretion of the court, under all the circumstances."

The rule of giving one-half of the damages has been applied by the District and Circuit Courts in the Southern District of New York, in cases where a boat and her cargo were lost or damaged through negligence on the part of a steam-tug which towed the boat, where there was fault also on the part of the

boat. Those were not cases of collision, and there was no damage to the steam-tug, and she alone was sued for the loss. Such cases were those of *The William Murtaugh*, 3 Fed. Rep. 404, and 17 Fed. Rep. 260; *The William Cox*, 3 Fed. Rep. 645, affirmed by the Circuit Court, 9 Fed. Rep. 672; *Connolly* v. *Ross*, 11 Fed. Rep. 342; *The Bordentown*, 16 Fed. Rep. 270. Also, in cases where the vessel towed was held to be in fault for not being in proper condition, *Phila. Railroad Co.* v. *New England Transportation Co.*, 24 Fed. Rep. 505; and where a boat was injured by striking the bottom of a slip, in unloading at the respondent's elevator, the boat herself being also in fault, *Christian* v. *Van Tassel*, 12 Fed. Rep. 884; and where the vessel towed was old and unseaworthy, *The Syracuse*, 18 Fed. Rep. 828; *The Reba*, 22 Fed. Rep. 546. In *Snow* v. *Carruth*, 1 Sprague, 324, in the District Court for the District of Massachusetts, damage to goods carried by a vessel on freight was attributable partly to the fault of the carrier and partly to the fault of the shipper; and, it being impossible to ascertain for what proportion each was responsible, the loss was divided equally between them.

All these were cases in admiralty, and were not cases of collision between two vessels. They show an amelioration of the common law rule, and an extension of the admiralty rule in a direction which we think is manifestly just and proper. Contributory negligence, in a case like the present, should not wholly bar recovery. There would have been no injury to the libellant but for the fault of the vessel; and while, on the one hand, the court ought not to give him full compensation for his injury, where he himself was partly in fault, it ought not, on the other hand, to be restrained from saying that the fact of his negligence should not deprive him of all recovery of damages. As stated by the District Judge in his opinion in the present case, the more equal distribution of justice, the dictates of humanity, the safety of life and limb and the public good, will be best promoted by holding vessels liable to bear some part of the actual pecuniary loss sustained by the libellant, in a case like the present, where their fault is clear, provided the libellant's fault, though evident, is neither wilful,

nor gross, nor inexcusable, and where the other circumstances present a strong case for his relief. We think this rule is applicable to all like cases of marine tort founded upon negligence and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision. The mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery.

The necessary conclusion is, that the question whether the libellant, upon the facts found, is entitled to a decree for divided damages, must be answered in the affirmative, in accordance with the judgment below. This being the only question certified, and the amount in dispute being insufficient to give this court jurisdiction of the whole case, our jurisdiction is limited to reviewing this question. *Chicago Union Bank* v. *Kansas City Bank*, 136 U. S. 223. Whether, in a case like this, the decree should be for exactly one-half of the damages sustained, or might, in the discretion of the court, be for a greater or less proportion of such damages, is a question not presented for our determination upon this record, and we express no opinion upon it.

Decree affirmed.

YORK *v.* TEXAS.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 999. Submitted October 21, 1890. — Decided November 3, 1890.

The provisions in the Revised Statutes of Texas, Articles 1242–1245, which, as construed by the highest court of the State, convert an appearance by a defendant for the sole purpose of questioning the jurisdiction of the court, into a general appearance and submission to the jurisdiction of the court, do not violate the provision in the Fourteenth Amendment to the Constitution which forbids a State to deprive any person of life, liberty or property without due process of law.

On the 14th day of November, 1888, a personal judgment was rendered in the District Court of Travis County, Texas,

against the plaintiff in error, which judgment was subsequently affirmed by the Supreme Court of the State. Error is now alleged in this, that the District Court had no jurisdiction of the person of the defendant. The record discloses that on October 20, 1885, the defendant leased from the State certain school lands, at a stipulated rental. The lease provided that in all suits thereunder the venue should be laid in Travis County, Texas. The State filed its petition on February 15, 1888, alleging non-payment of the rent due in 1886 and 1887. The defendant being a non-resident, a citizen of St. Louis, Missouri, a notice in accordance with the provisions of the statute was served upon him personally in that city. No question is made but that the service was in strict conformity with the letter of the statute. On March 9, 1888, the defendant appeared by his counsel and filed a special plea, challenging the jurisdiction of the court, on the ground that he was a non-resident and had not been served personally with process within the limits of the State. This plea was overruled. Thereafter, and on the 5th day of October, 1888, the defendant appeared by his attorneys in open court, demanded a jury, paid the jury fee, and had the cause transferred to the jury docket. On the 6th day of October he again filed a plea to the jurisdiction, on the same ground, which was also overruled. On the 14th day of November, when the cause was reached and called for trial, he again appeared by his attorneys, waived his right of trial by a jury and his demand of a jury, and declined to further answer to the cause — relying solely upon his plea to the jurisdiction. The court thereupon proceeded to render judgment against him, which, as heretofore stated, was affirmed by the Supreme Court. 73 Texas, 651.

Mr. Rufus H. Thayer for plaintiff in error.

The District Court of Travis County had no jurisdiction over the plaintiff in error by reason of the service in St. Louis. The Supreme Court of Texas concedes this when it says: "Since the decision made in the case of *Pennoyer* v. *Neff*, 95 U. S. 714, 723, it must be held that service made without this

State, as it was upon appellant, is not sufficient to confer jurisdiction on a court of this State to render a mere personal judgment against one, a citizen of and resident in another State. *Freeman* v. *Alderson*, 119 U. S. 185; *Hart* v. *Sansum*, 110 U. S. 151; *Harkness* v. *Hyde*, 98 U. S. 476; *Cooper* v. *Reynolds*, 10 Wall. 308. One of the grounds on which the decision in *Pennoyer* v. *Neff* is based, makes it authoritative throughout all the Union in all cases to which it is applicable, and, although there may have been some decisions made in this State asserting a contrary rule, we feel bound to follow it."

The Supreme Court of Texas, however, does not stop here as we contend the court should have done, and enter a judgment reversing and dismissing this cause for want of jurisdiction, but it goes further; and while it says that a judgment entered against York before his filing his plea to the jurisdiction would have been a nullity, it also says, that by appearing for that purpose, even though the record leaves no ground for claim, appellant thereby intended voluntarily to submit himself to the jurisdiction of the court, which from first to last he resisted, and thereby submitted to the jurisdiction of the Travis County District Court. We contend that this ruling is wrong; that it is in contravention of the Constitution of the United States and the Fourteenth Amendment thereof; and that it is repugnant to the same as it thereby confers jurisdiction on the courts of Texas of citizens of other States; and that the judgment of the lower court affirmed by the Supreme Court is an absolute nullity.

I. The appearance of plaintiff in error in response to the notice served on him, and under protest for the sole purpose of questioning the jurisdiction of the District Court of Travis County, in no sense bound him to submit to the jurisdiction of that court. *Harkness* v. *Hyde*, 98 U. S. 476; *Bank of Vicksburg* v. *Slocomb*, 14 Pet. 60; *Raquet* v. *Nixon*, Dallam (Texas), 386; *De Witt* v. *Monroe*, 20 Texas, 289; *Hagood* v. *Dial*, 43 Texas, 625; *Robinson* v. *Schmidt*, 48 Texas, 13; *Ins. Co.* v. *Fitzgerald*, White & Willson (Texas), 785; *United States* v. *Yates*, 6 How. 605; *Decker* v. *Belting Co.*, 11 Blatchford, 76; *Pomeroy* v. *N. Y. & N. H. Railroad*, 4 Blatchford, 120; *Day*

v. *Newark India Rubber Co.*, 1 Blatchford, 628; *Parrott* v. *Ala. Life Ins. Co.*, 4 Woods, 353; *Cunningham* v. *Goelet*, 4 Denio, 71; *Wheelock* v. *Lee*, 74 N. Y. 495; *Sullivan* v. *Frazee*, 4 Robertson (N. Y.) 616; *McNabb* v. *Bennett*, 66 Illinois, 157; *Aultman* v. *Steinan*, 8 Nebraska, 109; *Wright* v. *Boynton*, 37 N. H. 9; *S. C.* 72 Am. Dec. 319; *Brauner* v. *Chapman*, 11 Kansas, 118; *Wynn* v. *Wyatt*, 11 Leigh, 584; *Cooper* v. *Smith*, 25 Iowa, 269.

II. The appearance of plaintiff in error under protest solely for the purpose of questioning the jurisdiction of the District Court, even in contemplation of Art. 1242 of the Revised Statutes of Texas, was not such a voluntary appearance, nor was his plea such an answer, as to make him subservient to the jurisdiction of the Travis County District Court. Such was the undoubted rule before the enactment of the Revised Statutes. *Raquet* v. *Nixon*, Dallam, 388; *De Witt* v. *Monroe*, 20 Texas, 289; *Hagood* v. *Dial*, 43 Texas, 625; *Robinson* v. *Schmidt*, 48 Texas, 19.

The learned justice who rendered the opinion in this cause, seems to concede that such was the rule in Texas prior to the adoption of the Revised Statutes, but in a very ingenious manner, after citing Arts. 1242, 1243 and 1244 of the Revised Statutes of Texas; after stating that an answer consists of *all* the defensive pleadings; after holding that a plea to the jurisdiction is therefore an answer; he invokes especially Art. 1242 of Revised Statutes, which says that the filing of an answer by the defendant shall constitute such an appearance as no longer to make necessary the issuance of a citation; and he concludes, therefore, that the plaintiff in error has voluntarily appeared, and therefore affirms the judgment.

We cannot agree with the learned judge in the conclusion that Art. 1242 of the Revised Statutes changed the law of Texas from what it was as laid down in the cases above cited before the Revised Statutes went into effect. A careful examination of the report of the commissioners to revise the statutes of Texas, which report, so far as it is pertinent to this case, is to be found in Vol. 2 of Sayles' Revision of the Texas statutes, pp. 722, 723, will show that at least in the minds of the com-

missioners, no such sweeping change was intended; for, in their report, they fail to show anywhere that the old law was in any way repealed, changed or modified, though the purpose of the report was to show this very fact. We are further borne out in this conclusion by the Revised Statutes themselves, for Art. 1262 says: "The defendant in his answer may plead as many several matters whether of law or fact as he shall think necessary for his defence and which may be pertinent to the cause, provided that he shall file them all in due order of pleading."

In this connection, we desire further to call the attention of the court to the fact, that this view of the statute in the opinion of the Supreme Court, if inference is worth anything, was certainly not in the mind of the other Texas courts, who have had occasion to pass on this question of what constitutes an appearance since the revising of the Texas statutes. *Parrott* v. *Alabama Gold Life Ins. Co.*, 4 Woods, 353; *P. & A. Life Ins. Co.* v. *Fitzgerald*, White & Willson, 784; *Liles* v. *Woods*, 58 Texas, 419; *Bradstreet Co.* v. *Gill*, 72 Texas, 115.

Mr. James S. Hogg, Attorney General of the State of Texas, for defendant in error.

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

It was conceded by the District and the Supreme Courts that the service upon the defendant in St. Louis was a nullity, and gave the District Court no jurisdiction; but it was held that, under the peculiar statutes of the State of Texas, the appearance for the purpose of pleading to the jurisdiction was a voluntary appearance, which brought the defendant into court. Plaintiff in error questions this construction of the Texas statutes; but, inasmuch as the Supreme Court, the highest court of the State, has so construed them, such construction must be accepted here as correct, and the only question we can consider is, as to the power of the State in respect thereto.

It must be conceded that such statutes contravene the estab-

lished rule elsewhere — a rule which also obtained in Texas at an earlier day, to wit, that an appearance which, as expressed, is solely to challenge the jurisdiction, is not a general appearance in the cause, and does not waive the illegality of the service or submit the party to the jurisdiction of the court. *Harkness* v. *Hyde*, 98 U. S. 476; *Raquet* v. *Nixon*, Dallam (Texas), 386; *De Witt* v. *Monroe*, 20 Texas, 289; *Hagood* v. *Dial*, 43 Texas, 625; *Robinson* v. *Schmidt*, 48 Texas, 19.

The difference between the present rule in Texas and elsewhere, is simply this: Elsewhere the defendant may obtain the judgment of the court upon the sufficiency of the service, without submitting himself to its jurisdiction. In Texas, by its statute, if he asks the court to determine any question, even that of service, he submits himself wholly to its jurisdiction. Elsewhere, he gets an opinion of the court before deciding on his own action. In Texas, he takes all the risk himself. If the service be in fact insufficient, all subsequent proceedings, including the formal entry of judgment, are void; if sufficient, they are valid. And the question is, whether under the Constitution of the United States the defendant has an inviolable right to have this question of the sufficiency of the service decided in the first instance and alone.

The Fourteenth Amendment is relied upon as invalidating such legislation. That forbids a State to "deprive any person of life, liberty or property, without due process of law." And the proposition is, that the denial of a right to be heard before judgment simply as to the sufficiency of the service operates to deprive the defendant of liberty or property. But the mere entry of a judgment for money, which is void for want of proper service, touches neither. It is only when process is issued thereon or the judgment is sought to be enforced that liberty or property is in present danger. If at that time of immediate attack protection is afforded, the substantial guarantee of the amendment is preserved, and there is no just cause of complaint. The State has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants.

Syllabus.

Antoni v. *Greenhow*, 107 U. S. 769. It certainly is more convenient that a defendant be permitted to object to the service, and raise the question of jurisdiction, in the first instance, in the court in which suit is pending. But mere convenience is not substance of right. If the defendant had taken no notice of this suit, and judgment had been formally entered upon such insufficient service, and under process thereon his property, real or personal, had been seized or threatened with seizure, he could by original action have enjoined the process and protected the possession of his property. If the judgment had been pleaded as defensive to any action brought by him, he would have been free to deny its validity. There is nothing in the opinion of the Supreme Court or in any of the statutes of the State, of which we have been advised, gainsaying this right. Can it be held, therefore, that legislation simply forbidding the defendant to come into court and challenge the validity of service upon him in a personal action, without surrendering himself to the jurisdiction of the court, but which does not attempt to restrain him from fully protecting his person, his property and his rights against any attempt to enforce a judgment rendered without due service of process, and therefore void, deprives him of liberty or property, within the prohibition of the Fourteenth Amendment? We think not.

The judgment is affirmed.

Mr. Justice Bradley and Mr. Justice Gray dissented.

BUTLER *v.* STECKEL.

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

No. 36. Argued October 24, 1890.—Decided November 3, 1890.

The claims of letters patent No. 274,264, granted to Theodore H. Butler, George W. Earhart, and William M. Crawford, March 20, 1883, for an

"improvement in bretzel-cutters," are invalid, because, in view of the state of the art, it required no invention to make a single die to cut dough, on a flat surface, into any particular shape desired, whether the shape of a bretzel or any other shape.

All that it was necessary to do was to take the bretzel as a pattern and make a die to correspond in shape with it, the bretzel presenting all the lines and creases, points and configurations, that were required in the die.

Reasons stated, why the unsuccessful results of prior attempts to make a machine to cut bretzels do not show the existence of invention in the claims of the patent.

IN EQUITY to recover for the infringement of letters patent. Decree dismissing the bill. Complainants appealed. The case is stated in the opinion.

Mr. Lysander Hill (with whom was *Mr. Joseph R. Edson* on the brief) for appellants.

Mr. Thomas A. Banning (with whom was *Mr. Ephraim Banning* on the brief) for appellees.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Northern District of Illinois, March 28, 1883, by Theodore H. Butler, George W. Earhart and William M. Crawford against George Steckel and Frederick Steckel, to recover for the infringement of letters patent No. 274,264, granted to the plaintiffs March 20, 1883, on an application filed July 6, 1882, for an "improvement in bretzel-cutters."

The specification, claims and drawings of the patent are as follows: "This invention relates to an improvement in molds or dies for stamping or cutting out bretzels, having for its object more especially to cause the product or bretzel to have the appearance of a hand-made bretzel; and it consists in the peculiar construction of the mold or die to effect this result, and other details of construction, substantially as hereinafter more fully set forth.

"In the accompanying drawings, Fig. 1 is a plan view of our improved bretzel die or mold. Fig. 2 is a side view, partly

broken away, thereof. Fig. 3 is an enlarged detailed plan view of the die proper. Figs. 4 and 5 are sectional views, taken respectively on the lines *x x* and *y y* of Fig. 3. Fig. 6 is

Fig. 1.

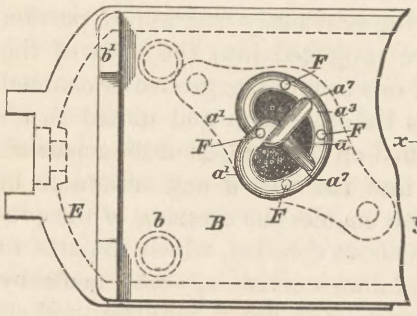


Fig. 3.

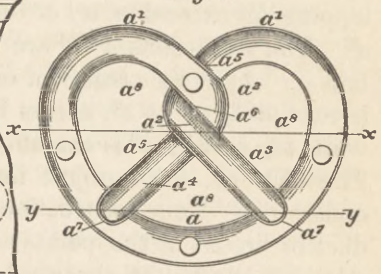


Fig. 4.

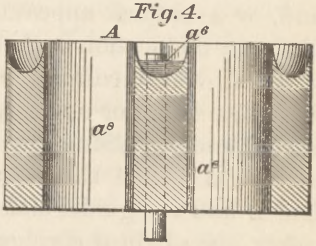


Fig. 2.

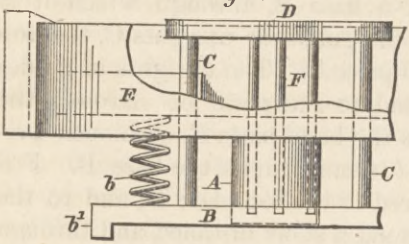


Fig. 5.

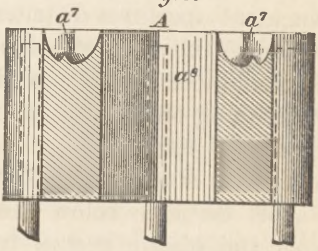
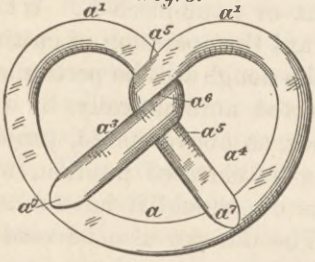


Fig. 6.



a view of the product or bretzel of our die. In carrying out our invention we construct the die A after the fashion or configuration of the ordinary bretzel in its general shape — that is, as more clearly shown in Fig. 3. For the purpose of this

specification we will describe the channel or groove constituting the bretzel-die as consisting of a bow or an approximately heart-shaped portion a, with its meeting portions a' extended so as to cross each other, as at a^2. The underlapped portion is further extended, as at a^3, said extension crossing or overlapping an extension, a^4, of the previously overlapped portion a^2. The extensions a^3 a^4 are projected into the body of the bow a. At a^2 the creaser of one arm of the groove or channel is extended, as at a^5, across its other arm and united to a^3, while the creaser a^3 is extended on one side, as at a^6, across a^2. The ends of a^3 a^4 project into the bow a and terminate in creasers a^7. This construction enables the creasing of the product or bretzel at the points above detailed, which imparts to the die-made bretzel the appearance of having been made by hand, or a natural appearance. The die A may be used, as shown, in connection with means to permit its manipulation by hand, which consists of a base B, through which it is adapted to move or operate, the guides or uprights C, the top plate D and the sliding hand-piece E. The uprights or guides C are fixed to the base B and to the plate D. Around the plate D and the guides slides the hand-piece E, cushioned preferably upon helical springs b, secured upon the base B. F F are the expelling-studs, secured to the top plate D, and to the base B, below which they extend a short distance, and through coincident apertures distributed through the die A. The die is fixed to the vertically-sliding box or hand-piece E. When the hand-piece E is pressed downward the operation of cutting or stamping out the bretzel from the dough will be performed. Upon the rising of the die, effected automatically by the spring, the studs, whose lower ends, as above stated, project a short distance below the die in its elevated position, will expel the plastic bretzel from the die should it have a tendency to adhere or stick to it. The die can also be readily applied as well to a cylindrical surface as to other surfaces, and used in any number desired. Cams or other suitable devices may be employed in lieu of the hand, for operating the dies. We are aware that the form of the creasers can be changed without departing from the principle of our inven-

tion. The product of the die herein shown is not herein claimed, as it will be made the subject matter of a subsequent application. The cutter herein shown is adapted, by means of the feet or projections b' on the base B, to be moved upon a flat surface and over the dough, and to cut from the same bretzels, which being left upon a flat surface after cutting are not so liable to become misshaped as when cut by rotary cutters as heretofore, and, by the additional creasers a^5 a^5, and the novel creasers a^7 a^7, perfect semblance to a hand-made twisted bretzel is produced, while the creaser heretofore used, as a^6, does not produce the desired result. Each die has three off-bearing scrap-passages, a^3, which pick up the internal scraps and deliver them into the box or hand-piece E. It will be observed that our dies form two kinds of scrap — to wit, connected scraps and internal scraps, the latter being picked up by the dies, and, after passing through the channels a^3, are delivered into the box E, or other suitable receiver. We are aware that it is not new to cut lozenges by means of a plate having a series of tubes which cut the lozenges, leaving a connected scrap, the lozenges being carried upward in the tubes; also, that it is old to cut bretzels by means of dies which at once deliver the internal scraps, as they are cut, into one of the cylinders which carry the dies.

"Having thus fully described our invention, we claim and desire to secure by letters patent —

"1. A flat die for cutting bretzels, having the bow a, the loops a' a', the intermediate twisted portion, and the ends a^3 a^4, and provided with the central creaser, a^6, the side creasers, a^5 a^5, and the end creasers, a^7 a^7, projecting into the bow a, substantially as shown and described.

"2. In a bretzel-cutter, the combination of the die A, perforated, as described, for the reception and passage of the scraps and for the expelling-studs F, with said studs, the guide-rods C, the base B, provided with feet or projections b', the springs b, perforated plate D, and the hand-piece E, substantially as shown and described.

"3. A flat bretzel-shaped die, having three off-bearing internal scrap passages or channels, and perforations for the

expelling-studs, in combination with the expelling-studs, substantially as shown and described."

The answer of the defendants set up, among other defences, "that bretzels, for the cutting of which from the dough said pretended invention was made, are an old and well-known article, and have been known and in common use for a great many years, and long prior to the said pretended invention; that bretzels are a kind of hard brittle cake, of a particular form, known and associated with that particular form throughout the whole civilized world, and that all that complainants claim to have done in their said invention was the making of a die for cutting them in that form; that the bretzels cut by such die are in no way improved or different from the bretzels heretofore made; that long prior to complainants' said pretended invention dies were in common and public use for cutting dough into various shapes and figures; that such dies were so used for cutting the various letters of the alphabet, different kinds of animals, birds, fishes, hearts, diamonds and any and every kind and variety of attractive or fantastic shapes that confectioners or dealers might fancy or desire; that such dies were made to cut any and every form that might be desired; that, in making such dies, the only change that would be required would be in the form of the cutter, which could be and was varied at pleasure as occasion required; that dies like those above described for cutting various forms were made in every respect like the dies shown, described, and claimed in complainants' patent, for many years before their application for letters patent, with the exception that the cutters were not perhaps of the shape shown and claimed in complainants' patent, but were shaped to cut every variety of form, except, perhaps, a bretzel; that the only difference between such dies and complainants' dies was in the form of the cutter, which form could be and was varied at pleasure; that the making a die to cut bretzels did not require and did not permit any invention, in view of the well-known existence and use of dies for cutting various forms, as above described; that the complainants' patent does not contain or claim anything that, in view of the state of the art, could form the subject of a

valid patent; and that dies like those above described for cutting various forms were, for many years before complainants' application for their patent, made and sold by Jacob Roth, of the firm of Roth, McMahan & Co., at his factory, No. 60 West Washington street, Chicago, Illinois." The answer also alleged "that dies for cutting bretzels like that described and claimed in complainants' patent have been made and publicly used in this country long before complainants' said pretended invention thereof and more than two years before their application for a patent therefor;" and "that, in view of the state of the art at and prior to the alleged invention of the plaintiffs, no invention was required in making the inventions claimed in the patent sued on."

Issue was joined and proofs on both sides were taken, and the case was heard in the Circuit Court by Judge Blodgett, who made a decree dismissing the bill, with costs, from which decree the plaintiffs have appealed to this court. His opinion is reported in 27 Fed. Rep. 219. He says: "The bretzel has heretofore been chiefly made by rolling out a strip of dough, and bending it into nearly a semi-elliptical or heart shape, and crossing the ends, and laying them upon the outer rim of the circle. This form leaves, of course, three interior openings, and in cutting the bretzel from the sheet of dough, as it passes under the cutter, provision must be made for the interior scrap which is cut from the dough, and this is done by having an opening extending through the plate and cutting dies, so that the interior scrap is carried off through the tubes connected with these openings. . . . The proof shows that it is old in the art connected with the preparation of food, to cut crackers, cookies and cakes of various sorts into many shapes, including the shapes of animals, and shows the use, for at least ten years before the application for the patent in question, of dies in bakeries, for cutting cakes in the shape of the capital letter B and the character &, with two or more scrap passages; and with dies of this character in public use, I cannot myself see any patentable novelty in the dies of the patent. They are simply made to cut a piece of dough in the shape of a hand-made bretzel, while the dies offered by the defendants

as anticipating the complainants' dies cut pieces of dough into forms corresponding with the letter B and character &, from which the internal scrap must be removed. These old dies also show expelling studs, by which the cut figure is expelled or pushed out of the die after being cut, performing the same function that is performed by the expelling studs in the patent. It is true, I doubt not, that it required considerable mechanical skill to make a die which would cut a bretzel from dough so as to imitate a hand-made bretzel, because the hand-made bretzel is somewhat clumsily shaped, as the parts are bent, twisted and laid upon each other; and it was undoubtedly a matter requiring some study, effort and experiment to make the shape of the die correspond with the external formation of the bretzel. This, however, seems to me not to involve invention, but mere mechanical skill. The cutter might be compelled to experiment some — that is, cut several dies — but that is not invention. The proof also shows that a large number of persons, before these patentees, had attempted to make a machine which would cut bretzels, and considerable money and time seems to have been expended in efforts to produce such a machine; but the noticeable thing in regard to all these early efforts was the fact that most of those engaged in them were trying to draw out and twist the dough by machinery, rather than to cut or stamp dough from a flat sheet, while others were endeavoring to cut them with dies set in revolving cylinders; and, as soon as the idea of cutting the dough from a flat sheet was conceived, the difficulty seems to have vanished, and success followed the effort, as the only change made was to adapt the old letter dies to the shape of a bretzel." The opinion further said, that it seemed, from the proof, inasmuch as the bretzel is an article of time-honored history in the German countries, connected to some extent with the older religious observances of that people, and intimately with their present social enjoyments, that, in the first efforts at making them by machinery, it was assumed that they must in every respect simulate those made by hand or they would not be acceptable to the public, and must not only simulate them in appearance, but the manipulation of the dough must be sub-

stantially the same as in those made by hand, but when the machine-made bretzels were introduced to the public, and accepted in place of the hand-made article, the problem was solved; and that the merit of these patentees seemed to have been in overcoming a fixed prejudice in favor of the hand-made goods rather than in inventing any radically new process for making the same goods by machinery. We unanimously concur with the Circuit Court in its views.

It is urged by the appellants, that the Circuit Court erred in finding, as a fact, that dies existed which cut cakes in the shape of the capital letter B and the character &, with two or more scrap passages. But we find that the evidence establishes that fact.

In view of the testimony as to the state of the art, it required no invention to make a single die to cut dough, on a flat surface, into any particular shape desired, whether the shape of a bretzel or any other shape. *Smith* v. *Nichols*, 21 Wall. 112, 119; *Dunbar* v. *Myers*, 94 U. S. 187, 199; *Pomace Holder Co.* v. *Ferguson*, 119 U. S. 335, 338, and cases there cited; *Peters* v. *Active Mfg. Co.*, 130 U. S. 626, 628, 629; *Watson* v. *Cincinnati R'y Co.*, 132 U. S. 161, 167.

All that it was necessary to do was to take the bretzel as a pattern and make a die to correspond in shape with it. The bretzel presented all the lines and creases, points and configurations that were required in the die. The question was one, not of invention, but simply of mechanical skill and imitation. The perforations in the die for the passing upward of the scraps, and the expelling studs for pushing off the bretzel from the die, and all the details specified in the second claim of the patent, were old in machines that had been used by bakers for many years. All that was necessary was to take out the old cutter and put in one in the reverse form of a bretzel. The rest of the machine had been used in the same way, in connection with other forms of dies. There is nothing in the suggestion that bretzel dough is different from other doughs, in respect to the action of a die upon it.

In regard to the point taken that the existence of invention in this case is shown by the fact that a large number of per-

sons had before attempted unsuccessfully to make a machine to cut bretzels, and had expended considerable money and time for that purpose, it is to be said, as stated by the Circuit Court, that most of them were engaged in trying to draw out and twist the dough by machinery, rather than to cut out the form of a bretzel by a single die from a flat sheet, or else were endeavoring to cut bretzels with dies set in revolving cylinders. It also appears that those efforts were largely made in attempts to cut out the bretzel by two opposite dies, and that, as soon as the idea occurred of cutting the dough by a single die from a flat sheet, success came at once, by merely changing the shape of the old single die. It also appears, as suggested by the Circuit Court, that there was a prejudice against machine-made bretzels.

The decree of the Circuit Court is

Affirmed.

HOSTETTER *v.* PARK.

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

No. 3. Argued and submitted October 21, 1890. — Decided November 3, 1890.

A bill of lading for goods shipped at Pittsburg for New Orleans, on a barge towed by a steam-tug, stated that the goods were "to be delivered without delay," "the dangers of navigation, fire, and unavoidable accidents excepted." The barge was taken safely down the Ohio River to Mt. Vernon, and was then towed up the river and took on cargo at several places not over about three miles above Mt. Vernon. After making the last landing she struck an unmarked, unknown and hidden object below the surface of the water, which caused her to sink, without negligence on her part or that of the tug, and by an unavoidable accident, thereby damaging the shipper's cargo. On a libel in admiralty, *in personam*, by the shipper against the owners of the barge and the tug, the Circuit Court, on an appeal from the District Court, which had dismissed the libel, found the foregoing facts, and that it always had been the general and established usage, in the trade in question, for a tug and barges to follow the practice adopted in this case, and that such usage tended to cheapen the cost of transportation, facilitated business, and conduced

Statement of the Case.

to the safety of the whole tow, and was, therefore, a reasonable usage. The libel having been dismissed by the Circuit Court: *Held*, on appeal,

(1) This court is concluded by the facts found by the Circuit Court;

(2) The usage in question is to be presumed conclusively to have been known to the shipper, so as to have formed part of the bill of lading, and to control its terms, and to have brought the accident within the exceptions therein;

(3) It is no deviation, in respect to a voyage named in a bill of lading, for a vessel to touch and stay at a port out of its course, if such departure is within the general and established usage of the trade, even though such usage be not known to the particular shipper;

(4) Parties who contract on a subject matter concerning which known usages prevail, incorporate such usages by implication into their agreements, if nothing is said to the contrary.

THIS was a libel in admiralty, *in personam*, brought in the District Court of the United States for the Western District of Pennsylvania, by David Hostetter and George W. Smith, copartners as Hostetter & Smith, against R. C. Gray and the executors of M. W. Beltzhoover, deceased, as owners of the steam-tug Iron Mountain and the barge Ironsides No. 3, to recover $10,182.76, with interest, for damages sustained by the libellants, by the loss of sundry boxes of bitters and other merchandise shipped by the libellants at Pittsburg on board the barge Ironsides No. 3, towed by the steam-tug Iron Mountain, to be transported from Pittsburg to New Orleans. The libel was filed March 4, 1880. The bill of lading for the shipment was made December 5, 1874, and the loss occurred December 18, 1874. The bill of lading stated that the articles shipped were "in good order and condition," and were "to be delivered without delay, in like good order, at the port of New Orleans, La. (the dangers of navigation, fire and unavoidable accidents excepted)."

The libel alleged that Gray and Beltzhoover were the owners of the tug and the barge at the time of the shipment and the loss; that the goods were shipped on board of the barge; that the tug, having the barge and other barges in tow, proceeded down the Ohio River and arrived safely at Mt. Vernon, Indiana, on December 17, 1874, and there took on board of the barge additional cargo; that the tug, instead of proceeding down the river and towards New Orleans without delay and

in accordance with the bill of lading, dropped or left all of the barges except the Ironsides No. 3, and wrongfully and without notice to the libellants deviated from and abandoned the voyage to New Orleans, by steaming up the Ohio River several miles to the town of New York Landing, in Henderson County, Kentucky, and there took on board of the barge additional cargo; that, on December 18, 1874, the voyage down the river was again undertaken, by attempting to pass for the third time over the distance between New York Landing and Mt. Vernon; that, shortly after leaving that landing, or in rounding out therefrom, or at a point about half a mile or a mile below, and before again reaching Mt. Vernon, the barge, being in tow of the tug and having on board the goods of the libellants, struck some unseen obstruction and sank in deep water, causing the loss and damage in question; and that such deviation and temporary abandonment of the voyage was contrary to the contract entered into by the bill of lading, and against the law governing common carriers.

The answer of the respondents averred that the goods were shipped by the libellants with the understanding and knowledge that the respondents had the right to complete the cargo of the barge at any place between Pittsburg and New Orleans where they might be able to secure the same, and to receive and discharge cargo upon and from the barge in accordance with the usage and custom of trade and navigation on the Ohio and Mississippi rivers. It denied that the steam-tug and the barges in tow of her abandoned their voyage and refused to proceed thereon without delay, and averred that with all possible despatch they took on said additional cargo at Mt. Vernon and at New York Landing, to which latter place, on the Ohio River, in the immediate vicinity of Mt. Vernon, the steam-tug towed the barge Ironsides No. 3, from Mt. Vernon, according to the usage and custom of navigation upon that river, and were only prevented from proceeding with the goods of the libellants towards New Orleans by reason of one of the dangers of navigation, which occasioned the loss of the goods and of the barge and its contents; that it was, at the time stated, and always since the transportation of goods by

means of barges towed by steam vessels first began on the Ohio and Mississippi rivers and their tributaries, had been, the uniform, continued, general and well and publicly known usage and custom of such vessels and barges to load partially at the port of departure, if that was necessary either by reason of the stage of water or lack of cargo, and to take on additional cargo at any place where the same might be had between the ports of departure and destination; that, on the voyage in question, the barge left Pittsburg partially laden and arrived at Mt. Vernon without having secured a full cargo; that, in securing additional cargo along the rivers navigated *en route* to the port of destination, it was at the time, and had been since barge navigation of those rivers began, the constant, general, well-known and uniform custom and usage for the owners or agents of the vessels and barges to land their fleets at the larger, safer, and more convenient landings along those rivers, and there meet and contract with shippers for the transportation of their goods, and then detach from the fleet the barge or barges designated to receive such cargo, if the cargo was not there, and send the barge or barges so designated to the place where the cargo might be stored, whether up, down or across the river, within such reasonable distance as might be reached without great or unreasonable delay or expense; that Mt. Vernon is a point where shippers within a radius of fifteen or twenty miles therefrom meet carriers upon the Ohio River, and is the place where shippers whose goods are received at New York Landing meet and contract with carriers for their transportation to points below; that, in pursuance of such general, uniform, constant and well-known usage and custom, the fleet of barges landed at Mt. Vernon, and the respondents there contracted with certain shippers whose goods were at New York Landing, a point between two and three miles above Mt. Vernon, to carry the same to New Orleans, and detached from the fleet the barge Ironsides No. 3, and the tug towed her to New York Landing, and there took on board of her additional cargo, with all possible despatch and without unreasonable delay; that, in rounding out to leave New York Landing, the barge, without fault, negligence, or want of skill

on the part of those navigating her or the steam-tug, ran upon and struck, in deep and navigable water, an obstruction unknown, unseen, unmarked and in no way indicated, and which could not have been seen, known or avoided by the exercise of any degree of skill, care or caution, by reason whereof the barge was sunk and totally lost and her cargo greatly damaged; that the voyage was not abandoned or wrongfully deviated from, but the action of the respondents in the premises was lawful, customary and right and in accordance with the established usage of the trade in which they were plying, which usage was well known to the libellants at the time of the shipment of their goods; and that the goods were damaged and lost through one of the dangers of navigation, within the exception of the bill of lading.

An amendment to the libel was afterwards filed, setting up that the sinking of the barge was not the result of an obstruction in the river, but was caused by negligent management on the part of the employés of the respondents, in that the barge, while at New York Landing, was overloaded on her port side with sacks of corn, so that she grounded, and, when pulled off by the steam-tug, careened to the port side with her cargo, so that a break occurred in her, causing her to sink.

The respondents answered this amendment by a general denial of its averments.

The District Court made a decree dismissing the libel, with costs. The opinion of Judge Acheson, the District Judge, reported in 11 Fed. Rep. 179, sustained the defence of usage. The libellants appealed to the Circuit Court, which court, held by Mr. Justice Bradley, dismissed the libel, with costs. The Circuit Court found the following facts and made the following conclusion of law:

"1. On December 6th, 1874, the steam tow-boat Iron Mountain, having in tow several barges (one called Ironsides No. 3), partly loaded with a miscellaneous cargo, left Pittsburg bound for New Orleans. The libellants shipped by the barges 2000 boxes of bitters and eighteen boxes of show-cards, which were placed on Ironsides No. 3, the bill of lading stipulating that the goods were 'to be delivered without delay, in like good

order, at the port of New Orleans, La. (the dangers of navigation, fire, and unavoidable accidents excepted).' A copy of the bill of lading is annexed to the original libel.

"2. The tow-boat and her barges, after taking on additional cargo at various intermediate places, arrived safely at Mt. Vernon, Indiana, 819 miles below Pittsburg, and landed to take on freight at the Mt. Vernon wharf-boat. The proprietors of the wharf-boat had engaged for the barges corn which lay piled in sacks at two or three farm landings on the Indiana shore, the furthest pile being about two miles above the wharf-boat. The tow-boat detached from the fleet the barge Ironsides No. 3, which was but partly loaded, and proceeded with it upstream to these piles. After loading this corn the boat crossed the river with the barge and took on corn which was offered at two landings on the Kentucky side, viz., New York Landing, about three miles above the wharf-boat, and Whitmon's Landing, which is somewhat lower down. After taking on the corn at Whitmon's the tow-boat started to return to her fleet, but while backing out in the river the barge suddenly took water and soon sank, becoming a total wreck, the cargo, including the libellants' goods, sustaining great damage. This occurred late in the evening of December 18, 1874. A protest, signed by the officers and some of the crew, was executed December 23, 1874, assigning as the cause of the disaster that the boat struck some unseen obstruction. Immediate notice by telegram of the sinking of the barge with their goods was given the libellants.

"3. That it has been the general usage in the Pittsburg and New Orleans barge trade, coeval with the commencement of the business, and constantly practised where cargo is to be taken on *en route* to the port of destination at several points in the same neighborhood, to land and tie up the tow or fleet of barges at the more commodious and safer landing, and detach from the tow the barge or barges designated to receive such cargo, and tow the same to the several points where the cargo may be stored, whether up or down stream, or across the river.

"4. That at the time of the sinking of the barge Ironsides

No. 3 it was the general and established usage for barges towed by steam vessels in the Pittsburg and New Orleans trade, having cargo to receive at New York Landing and other points between there and Mt. Vernon, Indiana, to land and tie up the fleet at the latter place and tow back for such cargo the barge upon which it was to be placed, and that the course pursued by the Iron Mountain on the occasion in question was in conformity with such usage of the trade.

"5. That the usage so practised at Mt. Vernon and elsewhere, as mentioned in the foregoing findings, tends to cheapen the cost of transportation, facilitates business, and conduces to the safety of the whole tow, and is, therefore, a reasonable usage.

"6. That while the steam tow-boat Iron Mountain, with the barge Ironsides No. 3 in tow, was backing out from Whitmon's Landing, and when out in the river, the barge struck some unmarked, unknown and hidden object below the surface of the water, which caused her to take water and sink, and this, without negligence on the part of the tow-boat, or on the part of the owners of the tow-boat and barge, their agents or servants; and that it was an unavoidable accident.

"The conclusion of law from the foregoing facts found is, that the respondents were not liable to the libellants for the loss, damage and injury complained of in the libel, and that the libel should be dismissed."

After the decree of the Circuit Court was made, George W. Smith died, and Hostetter, as surviving partner of the firm, appealed to this court from the decree of the Circuit Court. Since the appeal was taken Hostetter has died, and his administrator has been substituted as a party, and Gray has died, and his executors have been substituted as parties.

Mr. A. H. Clarke for appellant.

The questions for discussion are (1) what constitutes a deviation? and, (2), what is a custom or usage binding upon a shipper from Pittsburg to New Orleans direct?

I. Deviation is a voluntary departure without necessity from

the regular and actual course of the voyage. It must be a necessity, otherwise the carrier is responsible. *The Delaware*, 14 Wall. 579. *Phœnix Ins. Co.* v. *Cochran*, 51 Penn. St. 143. An unnecessary deviation would discharge the insurance. *Coles* v. *Marine Ins. Co.*, 3 Wash. C. C. 159. *Davis* v. *Garrett*, 6 Bing. 716. The shortness of the time or distance of the deviation is immaterial. *Maryland Ins. Co.* v. *Leroy*, 7 Cranch, 26. The law applicable to deviation applies equally to and is in full force on all river and lake navigation. *Jolly* v. *Ohio Ins. Co.*, Wright (Ohio), 539. It matters not how short may be the deviation, nor how harmless, nor, indeed, does it aid that it should be shown the alteration made a safer voyage. *Fernandez* v. *Gt. Western Ins. Co.*, 48 N. Y. 571. In *Brown* v. *Tayleur*, 4 Ad. & El. 241, Coleridge, J., says it makes a difference whether a ship stays at one place to load, or goes on a roving voyage to pick up a cargo. So in the case at bar. The carrier, after steaming eight hundred and nineteen miles, commences a roving voyage to pick up a cargo. The rule of law is that a ship must visit such ports in the geographical order of their distance from the port of departure. *Classon* v. *Simmonds*, 6 T. R. 553. *Deblois* v. *Ocean Ins. Co.*, 16 Pick. 303; *S. C.* 28 Am. Dec. 245. *Kane* v. *Columbian Ins. Co.*, 2 Johns. 264.

II. What is necessary to constitute a custom binding upon a shipper at Pittsburg? In *The Reeside*, 2 Sumner, 567, and approved in *Hone* v. *Mutual Safety Ins. Co.*, 1 Sandford, 137, Mr. Justice Story said: I own myself no friend to the almost indiscriminate habit of late years of setting up particular usages or customs in almost all kinds of business or trade to control, vary or annul the general liabilities of parties under the common law as under the commercial law. It has long appeared to me that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstanding and misrepresentation and abuse. See also *Simmons* v. *Law*, 8 Bosworth (N. Y.) 213.

When parties in the same trade or business differ as to the existence of a custom it cannot be regarded. *Collings* v. *Hope*,

3 Wash. C. C. 149. It must be known by those it will affect. *Adams* v. *Otterback*, 15 How. 539; *Dixon* v. *Dunham*, 14 Illinois, 324; *Martin* v. *Del. Ins. Co.*, 2 Wash. C. C. 255; and must be reasonable, *Coleman* v. *Chadwick*, 80 Penn. St. 81; certain and uniform, *Wallace* v. *Morgan*, 23 Indiana, 399; and limited in operation, *Daun* v. *London Brewing Co.*, L. R. 8 Eq. 155. In the case at bar it is entirely optional with the carrier whether he will go back 5, 10 or 50 miles or not; hence invalid for uncertainty. The so-called custom of steaming up and down the river, indiscriminately, with goods shipped to go through *direct* to the terminus of the voyage, must surely be deemed "bad." There is apparently no limit to it. See also *Walsh* v. *Frank*, 19 Arkansas, 270; *Strong* v. *Grand Trunk Railway*, 15 Michigan, 206; *S. C.* 93 Am. Dec. 184; *Barrett* v. *Williamson*, 4 McLean, 589; *The Albatross* v. *Wayne*, 16 Ohio, 513; *Wilson* v. *Bauman*, 80 Illinois, 493.

Mr. James H. Reed and *Mr. Philander C. Knox*, for appellees, submitted on their brief.

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

The only questions presented to us by the counsel for the libellants for consideration are as to what constitutes a deviation from the voyage, and what a custom or usage binding upon the libellants. No question of fact is open, because we are concluded by the facts found by the Circuit Court. *The Gazelle*, 128 U. S. 474, 484, and cases there cited.

The findings of fact are distinct and specific that "it has been the general usage in the Pittsburg and New Orleans barge trade, coeval with the commencement of the business, and constantly practised where cargo is to be taken on *en route* to the port of destination at several points in the same neighborhood, to land and tie up the tow or fleet of barges at the more commodious and safer landing, and detach from the tow the barge or barges designated to receive such cargo, and tow the same to the several points where the cargo may be stored, whether up or down stream or across the river;" that "at the

time of the sinking of the barge Ironsides No. 3 it was the general and established usage for barges towed by steam vessels in the Pittsburg and New Orleans trade, having cargo to receive at New York Landing and other points between there and Mt. Vernon, Indiana, to land and tie up the fleet at the latter place and tow back for such cargo the barge upon which it was to be placed, and that the course pursued by the Iron Mountain on the occasion in question was in conformity with such usage of the trade;" that "the usage so practised at Mt. Vernon and elsewhere, as mentioned in the foregoing findings, tends to cheapen the cost of transportation, facilitates business and conduces to the safety of the whole tow, and is, therefore, a reasonable usage;" that, "while the steam tow-boat Iron Mountain, with the barge Ironsides No. 3 in tow, was backing out from Whitmon's Landing, and when out in the river, the barge struck some unmarked, unknown and hidden object below the surface of the water, which caused her to take water and sink, and this, without negligence on the part of the tow-boat, or on the part of the owners of the tow-boat and barge, their agents or servants; and that it was an unavoidable accident."

The only question presented is, whether the conclusion of law made by the Circuit Court from the foregoing facts, that the respondents were not liable to the libellants for the loss and damage in question, was justified by those facts. On this point we entirely concur with the Circuit Court. It is true that that court does not find directly as a fact, what is averred in the answer, that the usage in question was well known to the libellants at the time their goods were shipped; but it does not find to the contrary; thus leaving for consideration the question of law, whether the existence of such a usage as is found as a fact, is to be presumed conclusively to have been known to the libellants, so as to have formed part of the contract of carriage created by the bill of lading, and to control its terms, and to have made the accident which caused the loss of the goods of the libellants a danger of navigation and an unavoidable accident, excepted in the bill of lading. It was distinctly found by the Circuit Court to have been "an unavoidable accident."

A deviation is defined to be "a voluntary departure, without necessity or reasonable cause, from the regular and usual course" of a voyage, in reference to the terms of a policy of marine insurance; but it is no deviation, in respect to such a voyage, to touch and stay at a port out of its course, if such departure is within the usage of the trade. *Coffin* v. *Newburyport Marine Ins. Co.*, 9 Mass. 436, 447; *Bentaloe* v. *Pratt*, 1 Wall. Jr. 58; *Bulkley* v. *Protection Ins. Co.*, 2 Paine, 82; *Oliver* v. *Maryland Ins. Co.*, 7 Cranch, 487, 491; *Columbian Ins. Co.* v. *Catlett*, 12 Wheat. 383, 387, 388; *Gracie* v. *Marine Ins. Co.*, 8 Cranch, 75, 83; *Child* v. *Sun Mutual Ins. Co.*, 3 Sandford, 26; *Lockett* v. *Merchants' Ins. Co.*, 10 Rob. (La.) 339; *Vallance* v. *Dewar*, 1 Campb. 503; *Ougier* v. *Jennings*, 1 Campb. 505; *Kingston* v. *Knibbs*, 1 Campb. 508; *Moxon* v. *Atkins*, 3 Campb. 200; *Salvador* v. *Hopkins*, 3 Burrow, 1707. Phillips on Insurance, secs. 980, 997, 1003.

The same doctrine is applicable in the case of a bill of lading, even though the usage be not known to the particular shipper, if it be established as a general usage. Phillips on Insurance, secs. 980, 1003; *Thatcher* v. *McCulloh*, Olcott, 365, 369, 370; *Lowry* v. *Russell*, 8 Pick. 360, 362; *McMasters* v. *Pennsylvania Railroad*, 60 Penn. St. 374; *Pittsburg Ins. Co.* v. *Dravo*, 2 Phil. W. N. C. 194.

It is well settled that parties who contract on a subject matter concerning which known usages prevail, incorporate such usages by implication into their agreements, if nothing is said to the contrary. *Robinson* v. *United States*, 13 Wall. 363, 366.

The contract in the bill of lading, that the goods are to be delivered at New Orleans "without delay," is qualified by the exception of "the dangers of navigation" and "unavoidable accidents;" and if the navigation was in its course according to the usage of the trade, as is found to be the fact, the loss in question occurred through a danger of navigation. *Transportation Co.* v. *Downer*, 11 Wall. 129; *The Favorite*, 2 Bissell, 502; *Williams* v. *Grant*, 1 Connecticut, 487.

The claim made in the amendment to the libel, that the sinking of the barge was caused by negligent loading of the

sacks of corn, is covered by the finding of fact that the sinking took place without negligence on the part of the steam-tug or her owners or their agents or servants, and was an unavoidable accident.

The decree of the Circuit Court is *Affirmed.*

DABLE GRAIN SHOVEL COMPANY *v.* FLINT.

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

No. 1213. Submitted October 21, 1890. — Decided November 3, 1890.

The act of March 3, 1839, c. 88, § 7, authorized persons in whose building a machine was put up by the inventor thereof, and with his knowledge and consent, while he was in their employment, and before his application for a patent, to continue to use the specific machine, without paying compensation to him or his assigns, although asked for after obtaining the patent; and is not unconstitutional as depriving him of his property without compensation.

This was an action for the infringement of two patents for improvements in machinery for unloading grain from railroad cars, issued in 1866 and 1868 to John Dable, and by him since assigned to the plaintiff.

The defendants filed several pleas, the fourth of which averred "that the only machines for unloading grain from railroad cars, ever used by them during the life of either of said patents set forth in said declaration, were constructed and put into use in their grain elevators by the said John Dable, and with his consent and allowance, while he was in their employ as superintendent of machinery, and prior to his application for either of said letters patent; and thereby, and by virtue of the statute in such case made and provided, the defendants became possessed of the right to use all said machines during the life of each of said patents, without liability to the said John Dable or the plaintiff."

The parties afterwards filed a stipulation in writing, by which

they waived a trial by jury; agreed that the facts alleged in the fourth plea were as therein stated, and also that Dable, when he obtained each of his patents, claimed of the defendants compensation for the use of the inventions covered thereby, and that the defendants refused to recognize the claim; and submitted the issue presented by this plea to the judgment of the court upon the facts so stated and admitted.

The Circuit Court held that these facts constituted a good defence to the action, and therefore entered judgment for the defendants. 42 Fed. Rep. 686. The plaintiff sued out this writ of error.

Mr. William Zimmerman for plaintiff in error.

Mr. Thomas A. Banning and *Mr. Ephraim Banning* for defendants in error.

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

The fourth plea is based upon section 7 of the act of March 3, 1839, c. 88, (in force when the patents were granted,) providing that "every person or corporation, who has or shall have purchased or constructed any newly invented machine, manufacture or composition of matter, prior to the application by the inventor and discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture or composition of matter so made or purchased, without liability therefor to the inventor or any other person interested in such invention." 5 Stat. 354. In the later statutes, this provision has been reënacted with the qualification that the machine, manufacture or composition of matter must have been purchased from the inventor, or constructed with his knowledge and consent. Act of July 8, 1870, c. 230, § 37, 16 Stat. 203; Rev. Stat. § 4899.

It is agreed that the machines in question were constructed and put in use in the defendants' grain elevators by the inventor himself, and with his knowledge and consent, while he was

in their employment as superintendent of machinery, and before his application for either patent. According to the express terms of the statute, therefore, the defendants had the right to continue to use these specific machines without paying any compensation to him or his assigns, whether asked for or not.

To the argument of the plaintiff's counsel, that the statute is unconstitutional as depriving the inventor of his property without compensation, there is a twofold answer: The patentee has no exclusive right of property in his invention, except under and by virtue of the statutes securing it to him, and according to the regulations and restrictions of those statutes. *Gayler* v. *Wilder*, 10 How. 477, 493; *Brown* v. *Duchesne*, 19 How. 183, 195; *Marsh* v. *Nichols*, 128 U. S. 605, 612. And these machines have been set free from his monopoly by his own act, consent and permission. *Wade* v. *Metcalf*, 129 U. S. 202.

Judgment affirmed.

HARDING *v.* WOODCOCK.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 29. Argued and submitted October 22, 1890. — Decided November 3, 1890.

The due and regular assessment of a distiller's tax by an internal revenue collector, properly certified, is a sufficient defence to the collector in an action on the case against him by the distiller to recover the value of property, seized and sold for the payment of the tax, upon the ground that, in a subsequent action by the United States against the distiller and the sureties on his bond, to recover the uncollected portion of the same tax, its assessment was adjudged to have been invalid: and this defence may be set up under the general issue without pleading it specially in justification.

THIS was an action against the collector of internal revenue of the fifth collection district of Tennessee, for an alleged wrongful seizure and sale of property of the plaintiff upon an assessment against him as a distiller of liquors, made by the

Commissioner of Internal Revenue. It was commenced in a state court of Tennessee, and upon application of the defendant was removed to the Circuit Court of the United States. The material facts as disclosed by the record were these: The plaintiff in 1881 and in 1882 owned and operated a distillery of liquors in the county of Robertson, Tennessee, and had executed the bond required by statute in such cases. In July, 1881, an assessment was made against him for taxes alleged to be due to the United States, amounting to $4339.37, for whiskey supposed to have been produced by him at his distillery. The plaintiff thereupon applied to the commissioner, in accordance with the statutes and the regulations of the Treasury Department, to reconsider the assessment, termed in the statute an appeal to him, but a reconsideration was refused. Upon the assessment the defendant, as collector, on the 3d of January, 1882, seized property belonging to the plaintiff consisting of 578 gallons of whiskey, and, on the 16th of that month, sold the same for $32. On the 2d of June, 1882, he seized other personal property of the plaintiff, and also levied upon the distillery premises containing ten acres, and soon afterwards sold both for $76.72. The price thus received was greatly below the actual value of the property. The plaintiff delivered the personal property and the distillery to the purchaser, with a deed of the latter premises.

In March, 1882, an action was brought by the United States against the distiller and the sureties on his bond to recover the taxes assessed, and in November, 1883, a verdict was rendered in their favor. The question in issue in the action was the validity of the taxes assessed. The verdict and the judgment thereon were produced and relied upon as establishing the invalidity of the assessment and the liability of the collector for the damage sustained by the plaintiff for the seizure and sale of his property. The first seizure and sale, as stated above, took place before the action was begun, and the second seizure and sale, though afterwards, were made before the trial in the action was had.

The declaration contained three counts. The first set forth substantially the facts as stated above, except the amount at

which the property seized was sold. It also averred that the plaintiff at the time protested against the seizure and sale in both cases, and that by them he was deprived of the use, control and ownership of his property, to his great damage. The second count was for a conversion of the property; and the third for trespass on the distillery premises. To the declaration, the defendant, in addition to the general issue of not guilty, filed several special pleas; among others, one of justification of the acts complained of, averring that they were done by him as collector in the enforcement of the assessment duly made and certified to him by the Commissioner of Internal Revenue, with a direction to collect the same by distraint. There was a replication to this plea, and a demurrer to the replication, which was finally disposed of by the court ordering the plea to be stricken out. The rulings upon the other special pleas do not require notice, as they were not material to the disposition of the question presented. The principal facts as disclosed by the pleadings were also established by the evidence on the trial, the plaintiff introducing the warrants issued to the collector for the seizure and sale of the property.

The court instructed the jury that the taxes for which the defendant, as collector, seized and sold the plaintiff's property having been assessed, and the assessment certified to him, the assessment was a complete protection to him against the suit of the plaintiff, and directed the jury to return a verdict in his favor, which was accordingly done, and judgment entered thereon. This instruction was excepted to, and constituted the alleged error for a reversal of the judgment.

Mr. S. Watson and *Mr. G. N. Tillman*, for plaintiff in error, submitted on their brief.

Mr. Solicitor General for defendant in error.

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

The plaintiff contended in the court below, and renews the contention here, that the plea of justification interposed by

the defendant for the acts complained of, the seizure and sale of the property, having been stricken out, he is left defenceless in the action. That such would be the effect of the ruling if the declaration was one in form for an ordinary trespass may be conceded. But the rule that a justification to an alleged trespass, to avail, must be pleaded, does not apply here. The striking out of the plea did not remove the fact that the seizure and sale were made under proceedings which protected the officer of the government from personal liability, because in the declaration itself his liability is charged upon a state of facts which shows that he acted in conformity with the law, and could not, therefore, be held responsible for the alleged invasion of the rights of the plaintiff in its enforcement.

When the assessment was certified to the collector, his duty in enforcing it was one which he could not refuse to perform. There was no discretion vested in him to revise or alter it in any respect. His duty was purely ministerial. In *Erskine* v. *Hohnbach*, 14 Wall. 613, 616, which, like the present action, was brought against a collector of internal revenue for the seizure and sale of property of the plaintiff upon an assessment for taxes duly made by the assessor of the district, the court held that the assessment, certified to him (the collector), was his authority to proceed, and, like an execution to a sheriff, regular on its face, issued by a tribunal having jurisdiction of the subject matter, constituted his protection. At that time, 1871, officers, termed assessors, made the assessment for taxes due to the United States on distilled spirits in their several districts, (15 Stat. 133, c. 186, § 20,) but their office was abolished in 1873, and the power to assess for such taxes vested in the Commissioner of Internal Revenue. 17 Stat. 401, 402, c. 13, §§ 1, 2. In the case referred to the liability of a ministerial officer in the enforcement of process was the subject of consideration, and it was there held that whatever may, at one time, have been the conflict in the adjudged cases as to the extent of protection afforded to such officers, acting in obedience to process or orders issued to them by tribunals or officers invested by law with authority to pass upon and determine

particular facts and render judgment thereon, it was now well settled "that if the officer or tribunal possesses jurisdiction over the subject matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer, in its regular enforcement against any prosecution the party aggrieved may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued." This doctrine was deemed applicable to collectors of internal revenue in enforcing an assessment for taxes regular on its face, made by the assessors of the district and duly certified to them.

The same doctrine was reasserted in protection of a collector of internal revenue in the subsequent case of *Haffin* v. *Mason*, 15 Wall. 671, 675, the court observing that "a ministerial officer, in a case in which it is his duty to act, cannot upon any principle of law be made a trespasser."

No question is raised as to the regularity in form of the assessment certified to the collector. It is assumed on both sides that it is not open to objection in that respect. The principal point urged by the plaintiff in error is that the defendant should not have proceeded to enforce the assessment after the action by the United States was commenced on the bond of the distiller to collect the same taxes. But it is plain that the officer had no discretion in the matter. He could not suspend or in any way delay the performance of the duty imposed upon him because the government may have judged it proper to proceed for the same taxes by action, not only against the distiller, but against the sureties on his bond also. The government may have thought that the property which could be reached by the collector would prove inadequate to meet the amount claimed. By instituting the action it did not waive its right to pursue any other remedies afforded by the law to

secure the payment of its claim. Nor could the collector consider whether in the pending action it might not be ultimately determined that the taxes were illegal which he was endeavoring to collect. He had completed his duty more than a year before that decision was rendered. Had the judgment of their illegality been pronounced before the enforcement of the assessment by the collector, and been brought to his notice, a different question might possibly be raised.

What remedy the plaintiff may have for the loss of his property or for the amount of the proceeds obtained on its sale, we are not called upon to determine in this case. There may be, perhaps, a claim against the government. All that we decide is, that a liability cannot be fastened upon the collector, a ministerial officer, for the enforcement of an assessment for taxes regular on its face, made by the Commissioner of Internal Revenue. Of such an officer the law exacts unhesitating obedience to its process.

Judgment affirmed.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* SOUTHERN PACIFIC COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 1210. Submitted October 21, 1890. — Decided November 3, 1890.

A title, right, privilege or immunity under the Constitution, or any treaty or statute of the United States, is not properly set up or claimed under Rev. Stat. § 709, when suggested for the first time in a petition for rehearing, after judgment.

The provisions of the Code of Practice of Louisiana in relation to judgments of the Supreme Court of that State, do not require the application of any different rule.

Where a decree is entered by a court of the United States, by consent, and in accordance with an agreement, between the parties referred to therein, no title or right claimed under an authority exercised under the United States is decided against by a State court in determining that the validity of a particular article of such agreement was not in controversy or passed upon in the cause in which the decree was rendered; and in the

instance of a decree similarly entered by a court of one State, due effect to the final judgment of such court is not refused to be given by a like determination by a court of another State.

MOTION TO DISMISS OR AFFIRM. The case was stated by the court as follows:

The Texas and Pacific Railway Company, represented by its receiver, filed its petition against the Southern Pacific Company in the Civil District Court for the Parish of Orleans on the 11th of April, 1888. The receiver was subsequently discharged and afterwards died, and the cause was ordered to be proceeded with in the name of the railway company as sole plaintiff. By the petition the company described itself as a corporation created by and under the laws of the United States, namely, certain enumerated acts of Congress. After stating that the plaintiff had offices in Texas and at New Orleans, and that its lines of railway extended or reached, by track-running arrangements or connections, from El Paso, Texas, to New Orleans, and to Galveston, Texas, the petition set up an agreement entered into on the 26th of November, 1881, by Huntington of New York, on behalf of himself and his associates, and certain railway corporations, with Gould of New York, on behalf of himself and his associates, and certain railway corporations, a copy of which agreement was annexed; and further alleged that thereafter, on or about February 18, 1885, this agreement was amended by a modification, a copy of which was also annexed. The object of the contract as expressed may be briefly described as in substance the settlement of pending litigation in the courts of Texas, Arizona and New Mexico, the release and relinquishment of certain disputed rights and franchises of plaintiff west of El Paso, and the construction of plaintiff's track to make a junction with the other railroads at a certain point east of El Paso. The petition further averred that the agreement and its modification had been duly adopted and ratified by the several corporations mentioned, and that it had been in all things complied with by the plaintiff as well as by the other parties of the second part.

The petition also averred: "That in pursuance of said agreement the same was duly made a decree of the court in the said litigation herein referred to, and in said courts of Texas, New Mexico and Arizona, as by duly certified copies of said decrees will appear and in the form shown by the copy hereto annexed as part hereof and marked Exhibit 'C.' Which decrees conformed with and carried out said agreement." Article VI of the agreement and the modification were then set forth, and related to the disposition of business and division of earnings between points in respect to which the lines of plaintiff and defendant were competing, as subsequently determined.

The petition then alleged that the defendant, a corporation created and organized under the laws of Kentucky, but doing business in Louisiana, and having its principal place of business in the city of New Orleans, with a general manager there authorized to receive service of process, and which company was controlled by Huntington and his associates, took possession and control about November, 1884, of the railroad companies mentioned in the agreement as represented by Huntington, etc., and adopted as its own and assumed the rights and obligations of the agreement and its modification, and since had been and was now liable as party of the first part for all the obligations of the parties thereto of the first part; that it rendered accounts of the business done by it, under the agreement and modification, down to March 31, 1887, and the defendant up to that time recognized the plaintiff as the party to whom accounting should be made; that by Article XV of the agreement it was provided that either or any of the several railroad companies, parties thereto, might maintain any action, either at law or in equity, against either, any or all of the other railroad companies, to protect any rights secured by the agreement, or to specifically enforce the same, or to recover damages for a breach of the same affecting its interest; that plaintiff was entitled to an accounting and to a decree against the defendant for the amount which would then appear to be due under said agreement, and demanded judgment against the defendant for the sum of $352,717.78, alleged

to be due up to March 31, 1887, and for a further sum of $200,000 and over from March 31, 1887, and a small additional claim for an excess of earnings in its favor in the operation of certain lines of railroad in New Mexico and Arizona, and for such additional claims as might be discovered and ascertained on trial.

Exhibit "C" purported to be a copy of the decree of the District Court of the Third Judicial District of New Mexico, which contained the following clause:

"The aforesaid decree is made to carry out the provisions in this behalf of said agreement, dated November 26, 1881, which is hereby made a part of this decree, and by consent of the parties, and upon consideration by the court, is hereby ordered to be binding upon each and all of the parties hereto in all its stipulations and agreements as therein shown, and said decree does not affect or otherwise interfere with the provisions of the agreement."

To this petition the defendant filed peremptory exceptions to the effect: That the contract sued upon being a railway pool between competing railroad companies to divide between them their earnings from competitive traffic was illegal, for the reason that it was injurious to the public interest and contrary to public policy, and hence it could not be enforced by a court of justice; that the contract contravened a clause in the constitution of Texas, in force at the time it was entered into; and that even if valid, the contract was terminated by the provisions of the act of Congress approved February 4, 1887, entitled "An act to regulate commerce," which went into effect the third of April, 1887, and was generally known as the Interstate Commerce Act.

The cause went to trial and testimony was taken on the exceptions, bearing upon the relative positions of the railroad companies that were parties to the pooling agreement, and the injury to the public from the destruction of competition arising therefrom. The acts of incorporation of the defendant, and of the various companies, parties to the contract, and represented by Huntington, were introduced in evidence, and the plaintiff offered the acts of Congress and of the State of Texas, referred to in the pleadings.

The District Court on the 21st of December, 1888, entered the following order upon its minutes:

"In these exceptions submitted to the court for adjudication, and the court considering the prohibition contained in art. 10, sec. 5, of the constitution of Texas, adopted in 1876, and, for reasons orally assigned by the court, the law and evidence being in favor of plaintiff in exceptions, it is ordered that the peremptory exceptions filed herein on May 19th, 1888, be maintained, and accordingly that plaintiff's suit be dismissed. Judgment rendered December 21st, 1888, with costs."

The plaintiff filed its motion for a new trial, enumerating various grounds therefor, which motion was overruled and judgment signed, whereupon plaintiff carried the cause by appeal to the Supreme Court of the State and there assigned numerous errors. In none of the grounds for new trial or the errors assigned were the alleged federal questions hereafter referred to specially set up. The Supreme Court held that the pooling contract sued on was illegal and void upon general principles of law and public policy, and upon that ground affirmed the judgment of the court below. The court in its opinion expressly declared that it did not find it necessary to pass upon the defences based upon the constitution of Texas and the Interstate Commerce Act.

Plaintiff thereupon filed an application for a rehearing, in which it claimed, among other things, that the court had denied plaintiff's rights under the decrees of the courts of New Mexico, Arizona and Texas; that the acts of Congress referred to in the petition conferred upon plaintiff the right to enter into the agreement, public policy to the contrary notwithstanding; and that, as the subject matter of the contract sued on related to interstate commerce and Congress had not forbidden such an agreement, "any attempt to apply State laws to annul such agreement is unlawful." The Supreme Court denied the rehearing, and an application was then made to the chief justice of Louisiana for a writ of error, which was refused, but the writ was subsequently allowed by one of the justices of this court. The cause having been docketed, the defendant in error moved to dismiss or affirm.

Mr. Henry J. Leovy and *Mr. Joseph Paxton Blair* in support of the motion.

Mr. John F. Dillon and *Mr. W. W. Howe* opposing.

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

The decision of the Supreme Court of Louisiana was not against the validity of a treaty or statute of, or an authority exercised under, the United States, nor in favor of the validity of a statute of, or an authority exercised under, any State, drawn in question on the ground of repugnancy to the Constitution, treaties or laws of the United States; and, in order to maintain jurisdiction because of the denial by the State court of any title, right, privilege or immunity claimed under the Constitution or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was "specially set up or claimed" at the proper time and in the proper way.

It is contended that the plaintiff company had the right, under the acts of Congress by which it was incorporated, to make the contract in question, and hence that the decision that such contract was illegal and contrary to public policy, constituted a denial of a right or privilege conferred by a statute of the United States: and also, that as the agreement related to earnings from interstate as well as from intrastate traffic, such decision was an interference with the freedom of interstate commerce, within the prohibition of the commerce clause of the Constitution of the United States. But it does not appear that either of these propositions was presented to the trial court in any way, or advanced in the Supreme Court, until urged in the petition for a rehearing. The title, right, privilege or immunity was not specially set up or claimed at the proper time and in the proper way. It is true that under the law of Louisiana a judgment of the Supreme Court does not become final until after six judicial days from the rendering of the judgment have elapsed, within which time a dissatisfied

party may apply for a new hearing of the cause, but it does not follow that new grounds for decision will be allowed to be presented, or will be considered on such application, and the general rule is otherwise. La. Code of Practice, Arts. 911, 912; 538, 539, 547, 548. *Rightor* v. *Phelps*, 1 Rob. La. 330; *Stark* v. *Burke*, 9 La. Ann. 344; *Caldwell* v. *Western Marine Ins. Co.*, 19 La. 48; *Hanson* v. *City of Lafayette*, 18 La. 309. And while the court is required to state the reasons of its judgments, it is not obliged to give reasons for refusing a new hearing. Code of Practice, Arts. 909, 914.

We are of opinion that in Louisiana, as elsewhere, a title, right, privilege or immunity is not properly claimed, under the act of Congress, when suggested for the first time in a petition for a rehearing, after judgment. The case of *Stewart* v. *Kahn*, 11 Wall. 493, cited for plaintiff in error, is not to the contrary. The petition referred to there seems to have been simply one for review on appeal, and not a petition filed after the case had been decided by the Supreme Court, and the record showed the decision of the federal question by both tribunals.

In the case at bar, it does not appear in direct terms or by necessary intendment that these points were brought to the attention of either of the courts prior to the entry of the judgment of affirmance.

If, therefore, the maintenance of this writ of error depended upon the questions thus raised, the motion to dismiss would be sustained; but it is insisted in addition that the State courts did not give due effect to the decrees of the courts of New Mexico and Arizona and of the State of Texas, and that a title or right claimed under an authority exercised under the United States, as well as under the Constitution of the United States, was thereby denied.

No certified copies of the decrees referred to were annexed to the petition, but there was attached an uncertified copy of what purported to have been a decree in the District Court of New Mexico, between plaintiff and sundry of the railroad companies named in the agreement, defendants. Upon the hearing plaintiff did not present certified copies of the decrees and insist upon rulings as to their effect, nor did it specifically

aver in its petition that the agreement for the division of earnings had been adjudged to be valid and binding upon the parties by those decrees. The question of the illegality of the contract seems to have been submitted upon the merits, and was so decided, so that there is ground for the argument that the right had not been properly set up or claimed in compliance with the statutory requirement. It is earnestly urged, however, that the exceptions were in the nature of demurrers, and that being treated as such, the petition, taken in connection with Exhibit C, sufficiently presented the question. And the Supreme Court in its opinion sent up as part of the record, and to be found reported in 41 La. Ann. 970, said: "A point which overshadows the discussion of all three of the exceptions is made by plaintiff's counsel, who contends that, the agreement between the parties having been sanctioned by a decree of the courts in which the litigation adjusted between the railroad companies was pending, it has now acquired the force and effect of the thing adjudged, and hence it cannot be attacked collaterally;" and it proceeded to consider and dispose of that contention.

We shall overrule the motion to dismiss; but, there having been color for it, will pass upon the motion to affirm.

In reference to the decrees, the Supreme Court of Louisiana held that the rule invoked applied only to matters of pre-existing differences, settled and compromised, and not to agreements or contracts for future action and execution; that the subject matter of Article VI of the agreement was not a subject of contention between the parties, either as a difference or in the shape of any pending litigation, at the time the agreement was entered into: that in fact it had had no existence prior to the contract itself, and had no reference to the past, but its whole operation or effect was intended exclusively for the future; that the decree carefully enumerated all the litigious matters which were in suit between the several railway companies, parties to the litigation then pending; and that no other matters in the agreement were affected by the judgment; and Mr. Justice Poché, speaking for the court, called attention as clearing away any doubt to that part of the decrees which

declared that they were made to carry out the provisions in this behalf, and did not affect or otherwise interfere with the provisions of the agreement.

It was concluded that the stipulations of Article VI had not the force and effect of the thing adjudged, and were lawfully liable to attack in the mode and manner adopted by the defendant. It was added that this conclusion was mainly predicated upon the view that the agreement in its entirety did not evidence a single and connected contract, but that the instrument was used as a means to facilitate the execution by two representatives of numerous obligors and distinct obligees of a series of varied and distinct contracts.

By this decision was the validity or due effect of either of these decrees disallowed by the state court? We do not think so.

The decrees were entered by consent, and in accordance with the agreement, the courts merely exercising an administrative function in recording what had been agreed to between the parties, and it was open to the Supreme Court of Louisiana to determine, upon general principles of law, that the validity of Article VI was not in controversy or passed upon in the causes in which the decrees were rendered. In doing so, that court did not refuse to give due effect to the final judgment of a court of the United States or of another State.

The judgment is

Affirmed.

SHENFIELD *v.* NASHAWANNUCK MANUFACTURING COMPANY.

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

No. 19. Argued October 21, 1890. — Decided November 3, 1890.

In view of the previous condition of the art, the claim patented to Abraham Shenfield by letters patent No. 169,855, dated November 9, 1875, for an improvement in suspender button straps, involved no invention.

Statement of the Case.

THIS was an appeal from a decree of the Circuit Court of the United States for the Southern District of New York, dismissing, with costs, appellant's bill of complaint filed for infringement of letters patent granted to him, dated November 9, 1875, No. 169,855, for an improvement in "suspender button straps." The cause was heard upon the pleadings and proofs. The opinion by Shipman, J., will be found reported in 27 Fed. Rep. 808; 23 Blatchford, 541.

The specification and claim, with references to the drawings, were as follows:

"Suspender-ends have been made of leather, felt, jean, and similar material, with the button-hole cut in the same, and in most instances the materials have been pasted together, in addition to lines of stitching surrounding the button-hole.

"Suspender-ends have also been made of a round cord, with the ends turned back and fastened to form loops; but this round cord is objectionable, as it does not lie flat against the person or beneath the buttons.

"I make use of a suspender-end made of a double flattened cord or strip, bent around into a loop, and united together, leaving sufficient of the loop open to form the button-hole. At the other end the suspender-end is united to a buckle or clasp by a loop, or folded piece of leather, or other material stitched to the suspender-end. My suspender-end, made as aforesaid, is a new and very useful article of manufacture.

"In the drawing Fig. 1 is a perspective view of the suspender complete, and Fig. 2 illustrates the mode of making the suspender-end.

"The straps *a* and buckles *b* of the suspender are of any usual or desired character, and the suspender-ends *c* are received between the attaching-pieces *d*, and united by sewing or otherwise. Each suspender-end is formed of a flattened cord or strip folded to form the button-hole loop 2, and the edges united together, as at 3, so as to leave the necessary opening for the button.

"The cord or strip of flat material is composed of silk, linen, cotton, worsted, or other suitable threads, or a mixture of two or more, and the threads are woven, braided, knitted, crocheted,

or otherwise laid up into the form of a complete flat cord or strip, and when the strip is folded to form the button-hole loop the seam at 3 may be made by sewing, knitting, crocheting, or otherwise; or the knitting or crocheting is commenced at the central line 3, and extended at both sides thereof and around the button-hole by the successive ranges of interlocked loops.

"This suspender-end can either be made by hand or by machinery.

"I claim as my invention —

"The suspender-end made of a flat cord or strip of fibrous material, bent into a loop, laid flatwise, united at the inner edges 3, and connected to the attaching-pieces *d*, as set forth."

It was stipulated: "That prior to the year 1870 there had frequently been publicly used in the manufacture and wearing of cloaks and jackets button-loops formed of flat braid bent edgewise upon itself and sewed together at the meeting edges, leaving an opening for the button-hole at the bend; that the ends of the braid in such button-loops were permanently attached to a button or like device which was affixed to one side of the body of the garment, and that the button-loop held the garment together by being buttoned on to a button or like device sewed to the other side of the garment, and that when in use the braid forming the button-loop rested under the button, and that such braids were made by machinery."

Various letters patent were put in evidence on defendant's behalf, as follows: To H. F. Briggs, No. 5565, dated May 16, 1848, for "Improvement in Shoulder Braces;" to J. Hotchkiss, No. 8606, dated December 23, 1851, for "Improvement in Suspenders;" to J. Hotchkiss, No. 11,160, dated June 27, 1854, for "Improvement in Manufacturing Suspender-Ends;" to D. W. Canfield, No. 37,149, dated December 16, 1862, for "Improvement in Combined Shoulder-Brace and Suspender;" to A. W. Upton, No. 47,348, dated April 18, 1865, for "Improvement in Suspenders;" and to T. J. Flagg, No. 144,970, dated November 25, 1873, for "Improvement in Suspenders." There also appeared in evidence a description and illustration of crocheted towel loops, from Harper's Bazar of September,

1868, and an extract from the same publication of July, 1871, with a design showing a crocheted suspender-end united at the inner edges just above the button-hole and attached to a crocheted attaching piece.

Mr. E. N. Dickerson for appellant.

Mr. William A. Jenner for appellees.

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

The suspender-end of the appellant's patent is a button-loop of flat cord or strip of fibrous material "bent edgewise upon itself and sewed together at the meeting edges, leaving an opening for the button-hole at the bend," as described in the instance of cloak-button loops made of flat braid. It appears from the specification, stipulation or proofs that suspender-ends of round cord, with the ends turned back and fastened to form loops, were known when this patent was procured, as were also suspender-ends of flat material and with the inner edges united by stitching, or by a clamp, just above the button-hole, so as to form it. The prior patents and the crocheted towel loops and suspender-ends also illustrate the common practice of uniting the suspender-ends to attaching pieces of leather or cloth.

We agree with the learned judge holding the Circuit Court, that it did not involve invention "to make a suspender-end of flat cord in substantially the same way that suspender-ends of round cord had been made, and in substantially the same way in which flat button ends had been made for the purpose of fastening or securing other articles of wearing apparel than trousers." The connection of the end to the attaching piece gave no patentable character to the loop and was old, as was the attachment to the buckle, nor was any new mode of operation produced by the combination of the devices in this article.

The decree of the Circuit Court is

Affirmed.

FISHBURN *v.* CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

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

No. 42. Argued October 31, 1890. — Decided November 3, 1890.

In regard to motions for new trial and bills of exceptions courts of the United States are independent of any statute or practice prevailing in the courts of the state in which the trial was had.

The overruling of a motion for a new trial is not a subject of exception, according to the practice of the courts of the United States.

This was an action to recover damages for an alleged wrongful ejectment from a railway train. The record contained a bill of exceptions in which were set forth at length (1) the pleadings; (2) the evidence at the trial with the objections to its admissibility or competency taken at the time; (3) the charge of the court, to which no exception was taken before verdict; (4) the verdict of the jury for the defendant; (5) a motion for a new trial for alleged errors in the charge set forth specifically; (6) the overruling of the motion and entry of judgment; (7) the exception to such overruling.

The court interrupted the counsel for the plaintiff in error in his opening, calling attention to the fact that the only exceptions in the record were those taken to the overruling of the motion for a new trial, and that the record raised no other question. The counsel stated that the proceedings were had in accordance with the practice prevailing in the State in which the trial was had; but the court declined to hear further argument.

Fuller, C. J. This is an action for damages brought by plaintiff in error against defendant in error for wrongfully ejecting her from one of its passenger trains, and resulted in a verdict and judgment in favor of defendant in error.

In regard to motions for new trial and bills of exceptions, courts of the United States are independent of any statute or

practice prevailing in the courts of the State in which the trial is had. *Missouri Pacific Railway Co.* v. *Chicago & Alton Railroad Co.*, 132 U. S. 191.

The only exception in respect to which plaintiff assigns error here was to the overruling of her motion for a new trial, which is not the subject of exception, according to the practice of the courts of the United States.

Various objections to the charge of the court were set out as grounds for the motion for new trial, but it nowhere appears that exceptions were taken to any of these matters, save as involved in the overruling of that motion, nor does the record show that the action of the Circuit Court was invoked upon the ground that there was no evidence to sustain the verdict.

Our right of review is limited to questions of law appearing on the face of the record, and we find none such presented here.

The judgment must therefore be *Affirmed.*

Mr. B. F. Dunwiddie (with whom were *Mr. I. C. Sloane* and *Mr. B. Dunwiddie* on the brief) for plaintiff in error.

Mr. John W. Cary and *Mr. Burton Hanson* for defendant in error.

LA CONFIANCE COMPAGNIE ANONYME D'ASSURANCE *v.* HALL.

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

No. 11. Argued and submitted October 21, 1890. — Decided November 3, 1890.

In a petition for the removal of a cause from a State court on the ground of diverse citizenship, the failure to state the existence of such citizenship at the commencement of the suit as well as when the removal was asked is a fatal defect.

THE case is stated in the opinion.

Statement of the Case.

Mr. Charles B. Alexander (with whom was *Mr. John J. McCook* on the brief) for plaintiff in error.

Mr. Given Campbell for defendant in error.

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

This action was commenced by plaintiff in error in a State court, and removed to the Circuit Court of the United States for the Eastern District of Missouri upon petition of the defendant, on the ground that the plaintiff was an alien and citizen of France and the defendant a citizen of Missouri. The existence of such diverse citizenship at the commencement of the suit, as well as when the removal was asked, did not appear affirmatively in the petition for removal or in the record when that was filed.

We are compelled to reverse the judgment, with costs, and remit the cause to the Circuit Court, with a direction to remand to the State Court. *Stevens* v. *Nichols*, 130 U. S. 230; *Crehore* v. *Ohio and Mississippi Railway Co.*, 131 U. S. 240; *Jackson* v. *Allen*, 132 U. S. 27.

Reversed and ordered accordingly.

WASHINGTON MARKET COMPANY *v.* DISTRICT OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 10. Submitted October 21, 1890. — Decided October 27, 1890.

The court dismisses without costs to either party an appeal, the subject matter of which has been settled elsewhere, leaving only the disposition of costs involved.

In equity. The case is stated in the opinion.

Per Curiam: This is an appeal from the decree of the Supreme Court of the District of Columbia dismissing the bill of

Statement of the Case.

complaint filed by appellant therein, the object of the bill having been to restrain the defendants from selling, or attempting to sell, certain property of complainant, on account of certain assessments for street improvements, and also to cancel and annul two tax lien certificates therein named; and counsel for appellant having stated in open court that such assessments and lien certificates have been, pending this appeal, quashed and annulled at law by the Supreme Court of the District of Columbia, and that only the disposition of costs is involved herein, it is ordered that said appeal be

Dismissed without costs to either party.

Mr. William Birney for appellant.

Mr. George C. Hazelton and *Mr. S. T. Thomas* for appellee.

IN RE HUNTINGTON, Petitioner.

ORIGINAL.

Not numbered. Submitted October 27, 1890.— Decided November 3, 1890.

On the authority of *Ex parte Mirzan*, 119 U. S. 584, the court denies a petition for leave to file a petition for a writ of *habeas corpus*.

This was a petition for leave to file a petition for a writ of *habeas corpus*. The petition sought to be filed set forth the issue of a writ of *dedimus potestatem* by the Circuit Court of the United States for the District of Colorado, to take the evidence of the petitioner, a resident of New York, to be used in a suit pending in that court; the execution of the writ by the commissioner named in it; the refusal of the witness to answer some of the questions propounded by the commissioner; an order of the court that he appear before the commissioner within thirty days and answer the unanswered questions, or otherwise be deemed in contempt, and stand committed till he should answer; his appearance and continued refusal to

answer; and that the marshal of the Southern District of New York had taken him into custody for the contempt, and continued to hold him. The petitioner prayed for a writ of *habeas corpus* to that officer from this court.

PER CURIAM: Petitioner alleges that he is detained by the United States marshal for the Southern District of New York, by virtue of an order purporting to be an order of the Circuit Court of the United States for the District of Colorado. The motion for leave to file a petition for the writ of *habeas corpus* is denied upon the authority of *Ex parte Mirzan*, 119 U. S. 584, and cases cited.

Denied.

Mr. Backus W. Huntington for the petitioner.

FLORSHEIM *v.* SCHILLING.

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

No. 23. Argued October 21, 22, 1890. — Decided November 10, 1890.

The claims in letters patent No. 238,100 granted to Simon Florsheim and Thomas H. Ball, February 22, 1881, for "an improvement in corsets," and claims 1 and 2 in letters patent No. 238,101 granted to the same grantees on the same day for "an improvement in elastic gores, gussets, and sections for wearing apparel," are invalid by reason of their long prior use as inventions secured by patents which cover every feature described in those claims; and the combination of those features in No. 238,100 is not a patentable invention.

The substitution in a manufactured article of one material for another, not involving change of method or developing novelty of use, is not necessarily a patentable invention, even though it may result in a superior article.

A new arrangement or grouping of parts or elements of a patented article, which is the mere result of mechanical judgment, and the natural outgrowth of mechanical skill, is not invention.

The combination of old devices into a new article, without producing any new mode of operation, is not invention.

Opinion of the Court.

In equity for an infringement of letters patent. Decree dismissing the bill. Complainants appealed. The case is stated in the opinion.

Mr. L. L. Coburn for appellants.

Mr. L. L. Bond for appellee.

Mr. Justice Lamar delivered the opinion of the court.

This is a suit in equity brought in the Circuit Court of the United States for the Northern District of Illinois, by Simon Florsheim and Thomas H. Ball against Gustav Schilling, for the alleged infringement of letters patent Nos. 238,100 and 238,101, the first of which was for an "improvement in corsets," and the second for an "improvement in elastic gores, gussets, and sections for wearing apparel," both of which were issued to the complainants February 22, 1881, on applications filed, respectively, August 12, and July 16, 1880, the invention in each purporting to have been made by the complainant Florsheim.

The material parts of the specification in No. 238,100, and its claims, are as follows:

"The object I have in view is such an improvement upon the corset shown in the patent granted November 25, 1879, to Gustav Schilling and myself, that while the same will possess all of the advantages obtained by the use of the covered and grouped metal spiral springs it will allow an easier and more equal expansion of the entire corset, will adapt itself more perfectly to the form of the wearer, and will better supply the popular want, in that it will have means for lacing the corset at the back. The improved corset also includes a better and cheaper method of securing the springs and forming the groups, whereby the elastic sections can be stitched in place on a machine without interfering with the springs, and the elasticity of the sections cannot be injured by the stitching.

"My invention consists in the peculiar means for accomplishing this object, as fully hereinafter explained, and pointed out by the claims.

"In the accompanying drawings, forming a part hereof, figure 1 is a view of the corset in position from the front; Fig. 2, a similar view from the rear; Fig. 3, an elevation of a portion of one side of the corset, showing one of the elastic side sections; Fig. 4, a detail view, showing the preferred way of arranging and forming the springs of a group, one side of the covering cloth being removed; and Fig. 5, a vertical section through a portion of one of the elastic side sections of the corset.

"Like letters denote corresponding parts in all the figures.

"The corset is composed of two separate parts, A B, which are secured together at the front, as usual, by studs and loops, and at the back have eyelets for receiving lacings. The central sections C D, at the sides of the corset, which extend from under the arms down over the hips, instead of being made as usual, are constructed of two layers or thicknesses of cloth or other material, which thicknesses are sewed or woven together a portion of their width to form horizontal tubes which receive and cover small closely coiled spiral springs E, of metal. The pieces of cloth from which the sections C D are formed are considerably wider than such sections when completed, so that when puckered laterally they will be of the desired width. The tubes are located in the centre of the sections, and do not extend to the edges of the same, as seen in Fig. 4, so that margins will be left at the ends of the tubes, which margins are lapped with the adjoining sections of the corset and stitched thereto. The springs are arranged in groups, as shown, with puckered spaces of cloth, between such groups. The number of springs composing the groups will vary according to location, so as to give the requisite stiffness and elasticity. Thus, at the top and bottom of the elastic side sections the groups of springs should not be made so stiff as at the waist of the corset. The springs are passed through the tubes which are puckered over the springs to the desired extent. The springs terminate at the ends of the tubes and are secured to the thicknesses, so as to leave clear margins of unpuckered cloth outside of such springs. This is a great advantage over the construction shown in the patent before referred to, since it enables

the elastic sections to be stitched into the corset on a sewing machine, which cannot be well done when the ends of the springs are secured by the same stitching, since the needle strikes the coils of the spring and either cuts the spring or breaks the needle. Herein also is one of the peculiar advantages over rubber cloth. Rubber cloth, when stitched into a corset, always has more or less of the rubber cords cut off by the needle, and it is thus greatly weakened, while in my corset the elasticity of the sections cannot be affected by the stitching.

"The cheapest manner of arranging and securing the groups of springs to secure the above advantages is by making all the groups of each section from a single continuous length of metal spiral spring. The spring is secured at its upper end by stitches passed through the thickness at the end of the upper tube and inclosing one or more coils of the spring. The spring is then passed back and forth through the tubes, which are puckered at the same time. After forming one group the spring extends down between the thicknesses to the next group, and so on till the lowest group (or the uppermost group, as the case may be) is finished, when the spring may be cut off, if there is more than required, and will be secured by stitches passed through the thickness. The elastic section can then be placed in the corset, the plain margins being lapped with the edges of the adjoining sections and secured by lines of machine-stitching.

"By making the groups of springs of a single piece of coiled wire passed back and forth through the tubes and from one group to the other the groups relieve each other somewhat, and when one group is subjected to great strain the springs of the adjoining groups are stretched also. In addition, by constructing the spring in this manner no ends are left to wear through the cloth, as would be the case if separate springs, sewed at their ends, were used. It would be impracticable to insert separate springs and sew them in position at the ends of tubes, and if such springs were used, they would pull away from the fastening stitches in a short time. The springs can only be stretched to the full width of the cloth composing the

side sections, and they will be thus limited in their expansion so as not to be injured by being stretched too far.

"By having the elastic sections in the sides of the corset the corset can adapt itself to different forms without the use of other elastic sections or gores, and such elastic side sections, by extending the entire length of the corset, from under the arms down over the hips, allow the front and back of the corset to expand and contract from these central side points independently of each other and more easily and freely than when a back elastic section is used.

"My side elastic sections are made continuous from the top to the bottom of the corset, leaving no open spaces.

"The covered metal springs possess great advantages over rubber cloth for this purpose other than those before mentioned. The rubber cloth is not nearly so durable, and soon wears out and loses its elasticity at points subjected to the most strain. The rubber cloth also has equal stiffness throughout, and cannot be regulated to have different degrees of elasticity at different points; and it further does not possess that independent elasticity obtained by the groups of springs, each group acting wholly independent of all the other groups. The covered metal springs also do not heat and bind the flesh, as does the rubber cloth.

"It is essential also that the springs be arranged in groups, since, if placed contiguous throughout the elastic sections, the corset would be much too heavy and expensive, and such sections would be too stiff at some points and not stiff enough at others.

"As a modification of the corset it could be made continuous at the back without any provision for lacing, or the back could be provided with an elastic section; but I prefer the construction shown, since it enables the wearer to adjust the corset by means of the lacings, so that the elastic sections will always give to the corset an easy and pleasant tension.

"What I claim as my invention is —

"1. In a corset, an elastic section composed of two thicknesses of cloth or material having tubes in combination with the spiral metal springs E, inclosed by such tubes, and arranged

in groups to regulate the elasticity of the section, such groups being all composed of a single continuous spring passed back and forth through the tubes and secured at its ends, substantially as described and shown.

"2. An elastic section or gore composed of material having tubes extending only part way across the same, and plain margins outside of said tubes, and spiral metal springs arranged in groups in such tubes, the springs of the several groups being made continuous, substantially as described.

"3. A corset laced at the back and having the elastic side sections C D, extending from under the arms down over the hips, each of such sections being composed of material having puckered tubes extending part way across the same, and plain margins outside of said tubes, and spiral metal springs arranged in groups in such tubes and made continuous, substantially as described and shown."

In No. 238,101 the specification, so far as is necessary to be considered, and the claims, are as follows:

"The substitution of spiral metal springs for india rubber as an element in elastic gores, gussets and sections for wearing apparel has not heretofore proved successful, for the reason that in all instances the springs have been stayed at their ends by the same stitching that secures the gore to the material of the article of wearing apparel to which it is applied. This stitching cannot be done by machine, since the wire of the springs would be cut by the needle when struck squarely, or the needle itself be broken; and when the elastic gore or section is sewed in position by hand, and the springs are secured by the same stitching, the seams are thick and uneven, and present a bungling appearance which destroys the salableness of the article, in addition to the fact that the hand sewing has heretofore made the use of metal springs impracticable on account of the increased cost.

"It is the object, therefore, of my invention to overcome the objections to the employment of spiral metal springs as a substitute for india rubber in elastic gores, gussets and sections for wearing apparel, and this I accomplish by extending the springs only part way across the covering material, and stay-

ing them at their ends by securing them to such covering material itself, while the covering material is extended beyond the ends of the springs to form inelastic margins, by which the gore can be secured in position by stitching these margins, on a sewing machine, to the material of the article of wearing apparel to which the gore is applied. This elastic gore is adapted more especially for corsets, for the sides of gaiters, and for use upon the waistbands of overalls and pantaloons; but it can be employed upon other articles of wearing apparel wherever rubber cloth is now used, and also, on account of its strength, durability, coolness, its independence of action, and the nicety with which its elasticity can be regulated, in many places where rubber cloth cannot be employed to advantage.

"My invention consists, first, in securing the metal springs to the covering material and extending such covering material beyond the ends of the springs to form inelastic margins; second, in puckering the centre of such covering material, while the inelastic margins are left plain and unpuckered; third, in weaving the covering material of such elastic gore with the covering tubes formed therein in the process of manufacture, such material and the tubes being woven of a particular pattern to suit the location where the elastic gore is intended to be used, the tubes not extending to the ends of the material; and fourth, in the peculiar fastening for securing the springs to the covering material, all as fully hereinafter explained and pointed out by the claims.

"In the elastic gore the covering material performs three offices, viz.: It covers the springs, limits their expansion, and furnishes means for securing the gore in position.

"What I claim as my invention is —

"1. An elastic gore, gusset, or section for wearing apparel, composed of a covering material having tubes, spiral metal springs inclosed by such tubes, and not extending to the edges of the covering material, and stayed at their ends by such covering material, and inelastic margins outside of the springs, substantially as described, for the purpose set forth.

"2. An elastic gore, gusset, or section, composed of a covering material having tubes and spiral metal springs inclosed by

such tubes, and not extending to the edges of the covering material, and stayed at their ends by such covering material, said covering material being puckered at its center over the springs, and having plain unpuckered margins extending wholly outside of the springs, substantially as described and shown.

"3. An elastic gore, gusset, or section, composed of a covering material woven with tubes therein of a particular pattern to suit the location where the elastic gore, gusset, or section is intended to be used, such tubes not extending to the edges of the covering material, and spiral metal springs inclosed by such tubes and stayed by the covering material at the ends of the tubes, substantially as described and shown.

"4. In an elastic gore, gusset, or section, the combination of the covering material made of double thickness, and having tubes not extending to the edges of the covering material, with spiral metal springs inclosed by such tubes, and fastenings extending across the ends of the tubes between the thicknesses of the covering material, substantially as described and shown."

The bill, filed June 12, 1882, contained the usual allegations as to the issue of the patents in suit, charged that the defendant had infringed both of them in the district where the suit was brought, and prayed an injunction, an accounting, and damages.

The defences pleaded were: (1) non-infringement; (2) that there is no patentable novelty in either of the alleged inventions; and (3) that the defendant himself was the original inventor of the devices in question.

Issue was joined, proofs were taken, and on the 11th of January, 1886, the court entered a decree, holding that there had been no infringement as complained of, and that the patents in suit were void for want of novelty, and ordering that the bill be dismissed for want of equity. This decree was afterwards modified so as to not apply to the last two claims in No. 238,101. From this decree the complainants have appealed. The opinion of the Circuit Court is reported in 26 Fed. Rep. 256.

In construing these patents the court below very properly

took into consideration the state of the art when the applications for them were made, and found that some of the elements were embraced in the English patent of John Mills, of March 14, 1815, others in the English patent of the Millers, of December 31, 1866, and the remainder in the American patent issued to Mary J. C. Vanorstrand, February 1, 1876. That is to say, the court found that there was no feature whatever in the patents in suit that had not been used and applied long previously in prior inventions. The court also ruled that, in this view of the case, it became unnecessary to consider the testimony taken, bearing upon the question of the defendant's alleged invention of the devices in the patents in suit.

It is assigned for error that the court erred (1) in entering a decree finding non-infringement, because it was stated in the opinion that it was unnecessary to consider the testimony bearing upon the question of infringement, under the view taken of the question of novelty; (2) in finding that there was no novelty in complainants' invention, because one feature was found in one old patent, and another feature in another, and still another feature in a third patent, all of which constituted the subject-matter of the claims in complainants' patent; and (3) in finding that the description in the English patent issued to the Millers in 1866 was sufficiently clear to enable a person to construct from it an elastic gore or gusset like the one shown and patented.

After a careful examination of the evidence relied on in support of these assignments of error we cannot assent to the positions assumed by the appellants. We concur with the Circuit Court that all the claims in these patents, except the last two claims in No. 238,101, are invalid by reason of their long prior use as inventions secured by patents which cover every feature described in those claims; and that the combination of these features in No. 238,100 is not a patentable invention.

What are the characteristic features of the device or mechanism described in No. 238,100? They are all, as a close analysis will show, limited, confessedly, to a corset constructed with an arrangement of elastic sections or gussets at the two

respective sides, extending from the arm-pits to the hips, consisting of coils of spiral wire inserted in, and passed back and forth through, tubes or channels wrought between two thicknesses of the material of the gusset. On comparing with this the gusset shown and described in the English Mills patent, set up in the answer of the defendant, we find that the latter contains the elastic section or gusset, the elasticity secured by coils of spiral wire enclosed between two thicknesses of the material out of which the said gusset or section is made, which gusset extends from the top to the bottom of the corset. Mills, in his specification, says: "My improvement of elastic stays for women and children . . . consists of the introduction of a flexible or elastic portion in those parts of the stays best calculated to give relief to the wearer, and at the same time preserving that stability and support usually given to the body by the common adoption of whale-bone, steel, and other hard or flexible materials. . . . This flexible portion is composed of springs, either of brass, copper, or iron wire, or of any other matter or thing capable of producing sufficient elasticity; but that which I recommend is small brass wire worm springs, which extend by a small degree of force. These I place close together in runners or spaces stitched in between two pieces or laying of silk, satin, or other fit material, puckered or quilted loosely to give room for expansion, the ends of the springs and their covering of silk, satin, or other matter on them sewed or otherwise fastened to and between the two half pieces of the stay previously made of the usual materials, such as jean or other cotton, linen, silk, woolen, or leather, with the proper busks or necessary portions of steel, whale-bone, or other substance commonly adopted, calculated to distend the stay and brace and support the body. . . . The manufacture of these patent stays is not confined to form or shape, neither to the use of any particular article or material of which to make the same, but adopt such as custom or propriety dictate, adhering to the principle of inserting elastic portions into the stays of such forms, agreeable to the foregoing principle, as under all circumstances may be found most eligible and best calculated to afford that relief for which the patent is granted."

The counsel for appellants contends that this Mills patent does not have a single element contained in the appellants' patent in suit. He says: "The Mills patent does not contain the spiral metal springs arranged in groups, the springs being composed of a single continuous spring passed back and forth through the tubes, nor does it have any plain margins on the sides of the sections, nor does it have elastic sections extending from under the arms down over the hips;" and that they only "extend from one end of the shoulder-strap down the back of the corset."

It may be observed, in reply to this, that the drawings of the Mills patent, according to the evidence of one of the defendant's experts, show a plain margin on each side of the elastic section or gusset for attachment to the main parts of the corset, and that the Mills specification leaves it in the discretion of the manufacturer as to where the elastic section is to be placed — whether at the sides of the corset or at the back, the statement being that it should be placed where it will be found most eligible and best calculated to give relief to the wearer, etc.

What are the particular features of the improvements which it is alleged distinguish the patent in suit from those contained in the Mills patent? According to the contention of appellants' counsel, they are, (1) the continuous spring; (2) the inelastic margin at the sides of the gusset, whereby it may be attached to the corset without the connecting stitches crossing the springs; (3) the location of the elastic gusset at the sides; and (4) the grouping arrangement of the springs. The first two of these features, *i.e.* the continuous spring and the inelastic margin, are described in the English patent of the Millers issued in 1866, as fully and explicitly as they are in the patent of the appellants in this suit.

The specification in the patent of the Millers is as follows:

"This invention has for its object improvements in the manufacture of elastic gussets suitable for use in boots and stays and for other purposes. . . .

"Now, according to our invention, we secure the vulcanized india-rubber springs between two pieces of woven fabric,

leather or other material, by stitching with a sewing machine, the stitches running in parallel lines and passing through the two pieces of fabric or material between the india-rubber springs, *and the springs, in place of being each a separate piece, are in one piece*, the length of vulcanized india-rubber cord at the end of each traverse across the gusset being turned round and caused to return parallel to itself; thus the liability of the india-rubber to slip and work out of the gusset is much reduced. When gussets made in this manner are worked into boots or other articles the stitches by which they are secured are passed through a *margin on each side of the gusset and not through the india-rubber part of the gusset, as heretofore.*

"In order that our invention may be fully understood and readily carried into effect we will describe the manner in which we prefer to proceed.

"We first cut the material — leather, silk, cotton, or any other woven fabric — and the lining to the size required for the gusset when extended and for leaving the required margin. We then turn over the top edge and baste or tack it down to the lining; we then commence to stitch with a sewing machine a series of rows in parallel lines transversely across the gusset, the stitching passing through the two materials, commencing at the top and so on from row to row until the whole of the gusset is stitched; the distance between the rows of stitches will depend on the thickness of the india-rubber thread to be inserted; about eight or ten rows to the inch is usually a convenient distance; we then pass between the two materials, into every space or cavity between the rows of stitches, wires or needles, of a length somewhat longer than the width of the gusset and of the size of the cavity; the gusset is then ready to be contracted or drawn up to the size required."

Then follows the description of the machine used for contracting the gusset, and after that there is a description of the method for inserting the elastic rubber cord, which, as before stated, is a continuous one. The specification again refers to the plain margin at the sides of the gusset and describes the method by which it may be re-enforced or rendered stronger than the ordinary margin.

There is evidence in the record tending to show that the machine used by complainants for puckering the material between which the metal springs are placed is substantially identical with the one described in the Miller patent for performing the similar function of what is there termed contracting or drawing up the gusset to the required size. And it seems perfectly clear that the method of inserting the metal springs in the one and the elastic rubber cord performing the same functions in the other is substantially the same.

Counsel for appellants discusses at some length the Miller patent, and attempts to show that the gusset is not sufficiently described therein to enable one skilled in the art to make one like that described in the Florsheim patent. We think, however, his argument does not overthrow the conclusion of the court that there is no patentable difference between the gussets described in the English patent of the Millers and those described in the Florsheim patent. It is true that in the Miller patent an india-rubber spring is used instead of a metal spiral spring as in both the Florsheim and the Mills patents. But the substitution of one material for another, which does not involve change of method nor develop novelty of use, even though it may result in a superior article, is not necessarily a patentable invention. *Hotchkiss* v. *Greenwood*, 11 How. 248; *Hicks* v. *Kelsey*, 18 Wall. 670; *Terhune* v. *Phillips*, 99 U. S. 592; *Gardner* v. *Herz*, 118 U. S. 180; *Brown* v. *District of Columbia*, 130 U. S. 87. In this particular instance the substitution itself was not new; for, as we have seen, wire coil was used for springs in corsets as early as the year 1815.

With regard to the two remaining features — the location of the elastic gusset in the side of the corset instead of the back, and the grouping of the springs, the former is found fully described in the specification of the American patent granted in 1876 to Mary J. C. Vanorstrand. A certified copy of this patent, though introduced in evidence, does not appear in the record; but we were furnished, on the argument, with a copy of it, and that corset contained elastic gussets extending on both sides from the arm-pits to the hips.

The grouping of the springs is no less distinctly described

and shown in the Schilling and Florsheim patent of 1879, a certified copy of which appears in the record. The different arrangement of these groupings as they appear in the patent sued upon is not an invention, but is a mere matter of mechanical judgment, "the natural outgrowth of the development of mechanical skill as distinguished from invention." *Burt* v. *Evory*, 133 U. S. 349, 358, and authorities there cited; *Brown* v. *Piper*, 91 U. S. 37.

The argument is advanced that the combination in this corset of the prior inventions secured and put into use by prior patents, making it a superior and cheaper article, is itself a patentable invention. We are unable to agree with appellants' counsel on this point. In *Pickering* v. *McCullough*, 104 U. S. 310, 318, this court, speaking through Mr. Justice Matthews, said: "In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other. . . . It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions." "The combination of old devices into a new article, without producing any new mode of operation, is not invention." *Burt* v. *Evory*, *supra*. See also *Hailes* v. *Van Wormer*, 20 Wall. 353; *Reckendorfer* v. *Faber*, 92 U. S. 347; *Tack Co.* v. *Two Rivers Manufacturing Co.*, 109 U. S. 117; *Bussey* v. *Excelsior Manufacturing Co.*, 110 U. S. 131; *Phillips* v. *Detroit*, 111 U. S. 604; *Stephenson* v. *Brooklyn Railroad Co.*, 114 U. S. 149; *Beecher Mfg. Co.* v. *Atwater Mfg. Co.*, 114 U. S. 523; *Thatcher Heating Co.* v. *Burtis*, 121 U. S. 286; *Hendy* v. *Miners' Iron Works*, 127 U. S. 370.

In the light of these authorities, our judgment is that the appellants' patent No. 238,100 was for a corset that had been in long and publicly known use, each part of it previously patented; that it involved nothing original in the construction of those parts nor in their relation to one another, nor any change in the function of any one of them; and that the combination of them produced no original mechanism or device.

The greater part of the foregoing observations apply equally

to the patent No. 238,101 for an elastic gore or gusset for wearing apparel, and we concur in the conclusion of the court below, that the first two claims of that patent are void for want of novelty, and all the elements in those claims are found in the English patent of the Millers already considered.

For these reasons the decree of the court below is

Affirmed.

HENNESSY *v.* BACON.

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

No. 1103. Submitted October 21, 1890. — Decided November 10, 1890.

If one party to a contract intends to rescind it on the ground of failure of performance by the other, a clear notice of such intention must be given, unless either the contract dispenses with notice, or it becomes unnecessary by reason of the conduct of the parties.

A settlement of a disputed claim between parties dealing on terms of equality and having no relations of trust or confidence to each other, each having knowledge, or the opportunity to acquire knowledge, of every fact bearing upon the validity of their respective claims, will be supported by a court of equity in the absence of fraud or of the concealment of facts which the party concealing was bound to disclose.

In equity. The case, as stated by the court, was as follows:

It was adjudged below, 35 Fed. Rep. 174, that the appellees Bacon and Rogers each owned in fee an undivided one-fourth, and the appellant Hennessy an undivided one-half, of certain lands in Washington County, Minnesota, and that partition thereof be made between them upon that basis. Of this decree the appellant complains, his contention being that he holds the legal title to an undivided half of the lands and that the appellees should be required to surrender to him the title to the other half.

It appears that the lands originally belonged to George N. Chittenden of Illinois, and that by written contract of date

March 27, 1882, he sold them to Bacon, agreeing to convey to the latter, his heirs and assigns, "by a good and sufficient deed of warranty, on or before the 27th day of June, 1882," upon the punctual payment of the consideration, $4400, at such time as Chittenden should execute a sufficient deed of general warranty. The contract provided that if Bacon failed to pay the consideration, then the contract should be void, "time being of the essence of this agreement."

On the 27th of June, 1882, Bacon, — his wife uniting with him, — for the consideration of five hundred dollars, (of which one hundred dollars was paid in cash,) assigned and transferred to Hennessy all his right, title and interest in the agreement with Chittenden. The contract of assignment provided that Hennessy should receive a good, clear and perfect title to the lands through a good warranty deed, with usual covenants, running from Chittenden and wife to Hennessy or from Bacon and wife to Hennessy, if it should be thought proper to have Bacon and wife take title from Chittenden; also, that Hennessy should pay to Bacon the remainder of the five hundred dollars upon receipt, and only upon receipt, "of such title through such deed to said lands or upon the said Hennessy accepting a deed of warranty" from Chittenden or Bacon. If Hennessy did not receive such title on account of an incurable defect in the title or other cause, the deposit made by him was to be refunded.

On the day of the execution of the contract between Bacon and Hennessy, the latter made a tender of $4400 to Chittenden's agent residing in St. Paul, in fulfilment of the contract of March 27, 1882, and demanded a conveyance in accordance with its terms. Hennessy was informed, before making the tender, that Chittenden had not executed the required deed, and it was made then only to preserve his rights under the contract. Shortly after the tender, Chittenden left with his agent a deed, in proper form, to be delivered upon the payment of the price of the land, and of this fact notice was promptly given to Hennessy and Bacon. Hennessy received in the meantime an abstract of the title, and discovering therefrom that the record did not show a clear, unencumbered title

in Chittenden, he sent to the latter's agent a memorandum of the defects therein appearing of record, and demanded that those defects be remedied. The agent wrote twice to Hennessy, at Dubuque, Iowa, where he resided, urging him to give attention to the matter — stating, in a letter of date of November 6, 1882, that unless some understanding was soon reached he would return the deed to Chittenden, who would probably decline to carry out the sale. Under date of November 16, 1882, he again wrote to Hennessy as follows: "Yours of 15th inst. received in answer to a previous letter. You instructed me to see Mr. Horn. I immediately saw him and satisfied him as to some of the objections, consulted him as to others, and left the papers with him. He expressed the wish to see you about the matter in order that he might inform me directly and positively what further would be required to make the title good. I have sought in every way since you went into this transaction to obtain an interview with you or some one authorized to act for you in order to arrive at something definite, and have found it exceedingly difficult to do so. Although instructed to refer me to Mr. Horn, Mr. Kavanagh did not do so until I wrote you, and now that I have interviewed Mr. Horn I find it difficult to reach any result. I am not accustomed to that way of doing business, and cannot say I particularly appreciate it. I would suggest that the best and quickest way to come to some definite understanding about the matter is for you to meet Mr. Horn and myself at such early time as may be designated by you. Unless this is done by Monday next (Nov. 20) I shall return the deed (which I hold ready for delivery to you) to Mr. Chittenden, and it is doubtful whether he will carry out the same. Allow me to suggest it is part of your manifest duty not to interpose interminable delays to the settlement of the matter, and that if you will appoint the above meeting or designate Mr. Horn or some other person who can act for you in your absence this transaction can speedily be finished."

The evidence is conflicting as to what passed between the parties after that date. But it is certain that the deed from Chittenden remained in the hands of his agent for more than

three years; and that Bacon repeatedly urged Hennessy to indicate more distinctly than he had done the nature of his final objections to the title, or give up his contract of purchase. Hennessy contended not only that Chittenden's agent well understood the defects in the title, but that they should be remedied. During all that period the lands were appreciating in value, and by the fall of 1885 were worth more than $30,000. Finally at the suggestion of Bacon, Rogers determined to buy them, the understanding being that Rogers was to make the purchase, allow Bacon, as commissions, the difference between $5000 and the amount paid for the lands, and, when Rogers got them, he was to give Bacon an interest of one-half upon the latter's paying half the expenses necessary to clear the title. There was an apparent cloud upon the title of record. It arose out of a mortgage in which Sanborn claimed an interest. Rogers, with knowledge of the contract between Bacon and Hennessy, paid Sanborn $1000 for that interest, and, on the 4th day of November, 1885, took a general warranty deed from Chittenden, paying the latter the sum of $4705.87. Chittenden took from Rogers a bond to indemnify him against any claim and demand made or that might be made by Bacon and Hennessy, or either of them, and against any loss or damage by reason of the conveyance to Rogers.

On the 16th of December, 1885, Rogers informed Hennessy by letter, that, Bacon having forfeited his contract, he had purchased the lands from Chittenden, and put his deed on record. He sought by letters a meeting with Hennessy that the matter might be settled between them. The latter, for some time, took no notice of these letters, but, at last, he wrote to Rogers, under date of January 21, 1886, saying that, while he was fully assured of the validity of his title to the lands, nevertheless, in the interests of peace and for the sake of avoiding what might prove a long, vexatious, and expensive litigation, to say nothing of the bitterness of feeling usually resulting from such disputes, he was willing to meet Rogers and see if some amicable adjustment of the question between them could be reached. He said: "I wish it, however,

distinctly understood that I do not, by this concession to peace and harmony or good feeling, or any thing that may result therefrom, in any way, shape, or manner, waive any right, or recognize or admit in you, or in any one else, any right, title, or interest, legal or otherwise, in or to the lands in question, or any part thereof, and that I emphatically must oppose, and in the strongest terms, forever, any such right, title, and interest in you and any and every existing person. With that understanding I shall endeavor to meet you for this purpose in the course of the coming week, at such time and place as we may hereafter agree upon. . . ."

Hennessy and Rogers finally held a conference, which resulted, March 18, 1886, in a written agreement between them, which recited their respective claims to the lands, and provided: "Now, to settle the same, the said Edward G. Rogers hereby agrees to make and execute to said David J. Hennessy a quitclaim deed of an undivided one-half of said property; and the said Hennessy agrees to execute and deliver to said Edward G. Rogers a quitclaim deed of an undivided one-half of said property; and also, in further consideration of said deed, to pay said Rogers the sum of ($2750.00) two thousand seven hundred and fifty dollars. This settlement to be in full of all claims in favor of said D. J. Hennessy and against one George V. Bacon and one George N. Chittenden growing or arising out of any contracts in regard to the sale or purchase of said land by said Hennessy from said Bacon or said Chittenden. This agreement to be executed and carried out as soon as possible, and at least within thirty days from this date, if possible. Time is not of the essence of this agreement."

Pursuant to this agreement Rogers made a deed to Hennessy for an undivided half of the lands, the latter paying therefor the sum of $2750, and Hennessy made a deed to Rogers for the other undivided one-half. Subsequently, Rogers conveyed one undivided fourth interest to Bacon, and at a later date conveyed to him the remaining one-fourth of his original one-half interest for the consideration of $10,000.

The present suit was brought by Bacon for partition between

himself and Hennessy upon the basis of the ownership by each of an undivided one-half interest. Hennessy having alleged in his answer that the settlement of March 18, 1886, was a fraud upon him, Rogers, at Bacon's request, repurchased, and took a conveyance for, the one-fourth interest he had sold to Bacon, and, with leave of the court, became a co-plaintiff in the suit with Bacon.

Mr. Martin F. Morris and *Mr. Daniel P. Lawler* for appellant.

Mr. Edward G. Rogers and *Mr. Emerson Hadley* for appellees.

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

It may be assumed, for the purposes of the present case, that upon the tender to Chittenden's agent, on the 27th of June, 1882, of the full amount Bacon had agreed to pay for the lands in controversy, Hennessy, as the assignee of Bacon, became entitled to a sufficient deed of general warranty from Chittenden; and that the conveyance from Chittenden to Rogers was so far in derogation of Hennessy's rights as such assignee, that a court of equity, in view of the relations between Bacon and Hennessy and of the knowledge Rogers had of the written agreement between them, would have compelled Rogers, at any time prior to March 18, 1886, (the date of the settlement between him and Hennessy,) to convey the title to Hennessy, upon the payment by the latter of the balance due Bacon under the contract of June 27, 1882, as well as of the amount Bacon had agreed to pay to Chittenden. As Hennessy rightfully demanded a clear, unencumbered title to the lands, and as Chittenden did not, personally or by his agent, distinctly announce his purpose to rescind altogether the contract of March 27, 1882, unless Hennessy, within a given time, would take such title as appeared of record, it may be that Chittenden was not at liberty, consistently with

Hennessy's rights and without previous notice to him, to treat that contract as abandoned, and to make the sale to Rogers; the general rule being that if a party means to rescind a contract because of the failure of the other party to perform it, he should give a clear notice of his intention to do so, unless the contract itself dispenses with such notice, or unless notice becomes unnecessary by reason of the conduct of the parties. 1 Sugden on Vendors, c. 5, § 5.

But Chittenden assumed to treat his contract with Bacon as forfeited or annulled, and executed a deed to Rogers. Of these facts Hennessy was informed. He knew that Rogers claimed the lands absolutely as his property under the purchase from Chittenden, and that the deed under which Rogers asserted title was recorded. And he had accurate knowledge of the title to the lands so far as it appeared of record. He also knew, at the time of the agreement of 1886, of Rogers' contention that the contract of 1882 had been forfeited by reason of Bacon's failure to comply with its provisions. He, nevertheless, disputed Rogers' claim to the property. But Rogers, with equal distinctness, disputed his claim. And this dispute was settled by the agreement of March 18, 1886, under which Hennessy consented to take an undivided interest of one-half at the price of $2750, and let Rogers have the other half.

He now contends that he was induced to make this settlement by false representations upon the part of Rogers, and because of the suppression of facts that ought to have been, but were not, communicated to him by Rogers. The evidence upon this point is quite conflicting, and does not justify the conclusion that Rogers made any false representations whatever, or that he withheld any facts he was under a legal obligation to disclose. Hennessy says that if he had known, when conferring with Rogers, that the latter had agreed to let Bacon have an interest in the lands, he would not have made the settlement; for that fact, he contends, would have indicated collusion between Rogers and Bacon. We do not see that ignorance of such fact affects the validity of the settlement of 1886, or that it would have prevented its consumma-

tion. If Hennessy had been informed of Rogers' promise to give Bacon an interest in the lands, he would have known that such promise could not, under the circumstances, have been enforced. The money that Rogers paid Chittenden was his own, and in the title acquired by him Bacon had no legal interest. Rogers moved in the matter of the purchase from Chittenden entirely upon his own responsibility. With full knowledge of the title that Rogers had acquired, Hennessy deliberately chose to compromise the dispute between them, as shown by the agreement of 1886, and by the deeds executed in pursuance of its provisions. No fraud was practised by Rogers. He was guilty of no unfairness. He concealed nothing that he was under legal obligation to state. His information in respect to the title was no greater than Hennessy had, or than Hennessy could easily have obtained. It is the case of the compromise of a disputed claim, the parties dealing with each other upon terms of perfect equality, holding no relations of trust or confidence to each other, and each having knowledge, or having the opportunity to acquire knowledge, of every fact bearing upon the question of the validity of their respective claims. *Cleaveland* v. *Richardson*, 132 U. S. 318, 329. Such a settlement ought not to be overthrown, even if the court should now be of opinion that the party complaining of it surrendered rights that the law, if appealed to, would have sustained. After this settlement was made, Rogers was at liberty, for any reasons deemed by him sufficient, to give Bacon an interest in the one-half acquired by him under the settlement of 1886, and the interest thus acquired by Bacon did not inure to Hennessy by reason of the relations created between them by the original contract of 1882. As between Rogers and Bacon the lands became the absolute property of the former under his purchase from Chittenden, and, under the settlement of 1886, and, so far as Hennessy was concerned, an undivided one-half interest was confirmed to Rogers, as his property, to dispose of as he deemed best.

Decree affirmed.

CROWLEY *v.* CHRISTENSEN.

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

No. 1317. Submitted October 28, 1890. — Decided November 10, 1890.

The sale of spirituous and intoxicating liquors by retail and in small quantities may be regulated, or may be absolutely prohibited, by State legislation, without violating the Constitution or laws of the United States.

The ordinances of the city and county of San Francisco, under which a license to the defendant in error to sell intoxicating liquors by retail and in small quantities was refused, having been held by the Supreme Court of California not to be repugnant to the constitution of that State, that decision is binding upon this court.

Yick Wo v. *Hopkins*, 118 U. S. 356, distinguished from this case.

In the courts of the United States the return to a writ of *habeas corpus* is deemed to import verity until impeached.

This was an appeal from an order of the Circuit Court of the United States for the Northern District of California discharging, on *habeas corpus*, the petitioner for the writ, the appellee here, from the custody of the chief of police of the city and county of San Francisco, by whom he was held under a warrant of arrest issued by the police court of that municipality, upon a charge of having engaged in and carried on in that city the business of selling spirituous, malt and fermented liquors and wines in less quantities than one quart, without the license required by the ordinance of the city and county. The ordinance referred to provided that every person who sold such liquors or wines in quantities less than one quart should be designated as "a retail liquor dealer" and as "a grocer and retail liquor dealer," and that no license as such liquor dealer, after January 1, 1886, "shall be issued by the collector of licenses, unless the person desiring the same shall have obtained the written consent of a majority of the board of police commissioners of the city and county of San Francisco to carry on or conduct said business; but, in case of refusal of such consent, upon application, said board of police commissioners

Statement of the Case.

shall grant the same upon the written recommendation of not less than twelve citizens of San Francisco owning real estate in the block or square in which said business of retail liquor dealer or grocery and retail liquor dealer is to be carried on;" and that such license should be issued for a period of only three months. The ordinance further declared that any person violating this provision should be deemed guilty of a misdemeanor.

The constitution of California provides, in the eleventh section of Article 11, that "any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

The petitioner had, previously to June 10, 1889, carried on the business of retail liquor dealer in San Francisco for some years, under licenses from the board of police commissioners, but his last license was to expire on the 17th of that month. Previously to its expiration he was informed by the police commissioners that they had withdrawn their consent to the further issue of a license to him. He afterwards tendered to the collector of license fees, through which officer it was the practice of the board to issue the licenses, the sum required for a new license, but the tender was not accepted, and his application for a new license was refused. He then applied to the police commissioners for a hearing before them on the question of revoking their consent to the issue of a further license to him. Such hearing was accorded to him, and the time fixed for it was the 24th of June. But, before any hearing was had, he was arrested upon a warrant of the police court upon the charge of carrying on the business of a retail liquor dealer without a license. He then obtained from the Supreme Court of the State a writ of *habeas corpus* to be discharged from the arrest, but that court, on the 2d of August, 1890, held the ordinance valid and remanded him to the custody of the chief of police. He then applied for the allowance of an appeal from this order to the Supreme Court of the United States, but it was refused by the Chief Justice of the state court, and the Associate Justice of the Supreme Court of the United

States assigned to the circuit, who could have allowed the appeal, was absent from the State. On the 7th of August following a new complaint was made against the petitioner, charging him with unlawfully engaging in and carrying on in San Francisco the business of a retail liquor dealer without a license under the ordinance of the city and county. Upon this complaint a warrant was issued under which he was arrested. He thereupon applied to the Circuit Court of the United States for a writ of *habeas corpus*, which was issued.

In return to the writ, the chief of police, the appellant here, stated that he held the petitioner under the warrant mentioned by the petitioner and several other warrants issued by the police court of the city and county, upon different charges, made at different times, of his conducting and carrying on the business of a retail liquor dealer in San Francisco without a license, as required by the ordinance of the city and county. He also stated, among other things, that a further license to the petitioner was refused by the police commissioners, because they had reason to believe that the business was carried on by him under his existing license in such a manner as to be offensive, and violative of the criminal laws of the State and of the rights of others. In support of this charge it was averred that in that business the petitioner was assisted by one whom he represented and claimed to be his wife, and that she had on one occasion stolen one hundred and sixty dollars from a person who visited his saloon, and been convicted of the offence in the Superior Court of the city and county, and sentenced to be imprisoned for one year, and on another occasion had stolen a watch and a scarf-pin from a person at the saloon, and was held to answer for the charge. It was also averred that there were more than sixteen citizens of San Francisco owning real estate in the block on which the petitioner carried on his business. It did not appear that on the hearing of the application any proof was offered of the facts alleged either in the petition or in the return. The case was heard upon exceptions or demurrer to the return. To that part respecting the alleged larceny by the wife and her conviction, the demurrer was on the ground that the return also showed that an

appeal had been taken from the conviction, which was then pending, and that she might be acquitted of the offence charged.

Several objections were urged by the petitioner to the ordinance. Some of them were of a technical character, and could not be considered. Of the others only one was noticed, which was, that by it "the State of California, by its officers, denies to him the equal protection of the laws, and makes and enforces against him a law which abridges his privileges and immunities as a citizen of the United States," contrary to the Fourteenth Amendment to the Constitution of the United States.

The court held that the ordinance made the business of the petitioner depend upon the arbitrary will of others, and in that respect denied to him the equal protection of the laws, and accordingly ordered his discharge. 43 Fed. Rep. 243. From that order the case was brought to this court by appeal under §§ 763 and 764 of the Revised Statutes, this latter section as amended by the act of March 3, 1885, c. 353, 23 Stat. 437.

Mr. Davis Louderback and *Mr. J. D. Page* for appellant.

Mr. Alfred Clarke and *Mr. Joseph D. Redding* for appellee.

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

It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the

equal enjoyment of the same right by others. It is then liberty regulated by law. The right to acquire, enjoy and dispose of property is declared in the constitutions of several States to be one of the inalienable rights of man. But this declaration is not held to preclude the legislature of any State from passing laws respecting the acquisition, enjoyment and disposition of property. What contracts respecting its acquisition and disposition shall be valid and what void or voidable; when they shall be in writing and when they may be made orally; and by what instruments it may be conveyed or mortgaged are subjects of constant legislation. And as to the enjoyment of property, the rule is general that it must be accompanied with such limitations as will not impair the equal enjoyment by others of their property. *Sic utere tuo ut alienum non lædas* is a maxim of universal application.

For the pursuit of any lawful trade or business, the law imposes similar conditions. Regulations respecting them are almost infinite, varying with the nature of the business. Some occupations by the noise made in their pursuit, some by the odors they engender and some by the dangers accompanying them, require regulations as to the locality in which they shall be conducted. Some by the dangerous character of the articles used, manufactured or sold require, also, special qualifications in the parties permitted to use, manufacture or sell them. All this is but common knowledge, and would hardly be mentioned were it not for the position often taken, and vehemently pressed, that there is something wrong in principle and objectionable in similar restrictions when applied to the business of selling by retail, in small quantities, spirituous and intoxicating liquors. It is urged that, as the liquors are used as a beverage, and the injury following them, if taken in excess, is voluntarily inflicted and is confined to the party offending, their sale should be without restrictions, the contention being that what a man shall drink, equally with what he shall eat, is not properly matter for legislation.

There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true,

first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are inmmediately connected with and dependent upon him. By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day and the days of the week on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the State is fully competent to regulate the business — to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the State;

nor is it one which can be brought under the cognizance of the courts of the United States.

The constitution of California vests in the municipality of the city and county of San Francisco the right to make "all such local, police, sanitary and other regulations as are not in conflict with general laws." The Supreme Court of the State has decided that the ordinance in question, under which the petitioner was arrested and is held in custody, was thus authorized and is valid. That decision is binding upon us unless some inhibition of the Constitution or of a law of the United States is violated by it. We do not perceive that there is any such violation. The learned Circuit Judge saw in the provisions of the ordinance empowering the police commissioners to grant or refuse their assent to the application of the petitioner for a license, or failing to obtain their assent upon application, requiring it to be given upon the recommendation of twelve citizens owning real estate in the block or square in which his business as a retail dealer in liquors was to be carried on, the delegation of arbitrary discretion to the police commissioners, and to real estate owners of the block, which might be and was exercised to deprive the petitioner of the equal protection of the laws. And he considers that his view in this respect is supported by the decision in *Yick Wo* v. *Hopkins*, 118 U. S. 356.

In that case it appeared that an ordinance of the city and county of San Francisco passed in July, 1880, declared that it should be unlawful after its passage "for any person or persons to establish, maintain or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone." The ordinance did not limit the power of the supervisors to grant such consent, where the business was carried on in wooden buildings. It left that matter to the arbitrary discretion of the board. Under the ordinance the consent of the supervisors was refused to the petitioner to carry on the laundry business in wooden buildings, where it had been conducted by him for over twenty

years. He had, at the time, a certificate from the board of fire wardens that his premises had been inspected by them, and upon such inspection they had found all proper arrangements for carrying on the business and that all proper precautions had been taken to comply with the provisions of the ordinance defining the fire limits of the city and county; and also a certificate from the health officer that the premises had been inspected by him and were properly and sufficiently drained and that all proper arrangements for carrying on the business of a laundry without injury to the sanitary conditions of the neighborhood had been complied with. The limits of the city and county embraced a territory some ten miles wide by fifteen or more in length, much of it being occupied at the time, as stated by the Circuit Judge, as farming and pasture lands, and much of it being unoccupied sand-banks, in many places without buildings within a quarter or half a mile of each other. It appeared also that, in the practical administration of the ordinance, consent was given by the board of supervisors to some parties to carry on the laundry business in buildings other than those of brick or stone, but that all applications coming from the Chinese, of whom the petitioner was one, to carry on the business in such buildings were refused. This court said of the ordinance: "It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupants into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of

spirituous liquors and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature."

It will thus be seen that that case was essentially different from the one now under consideration, the ordinance there held invalid vesting uncontrolled discretion in the board of supervisors with reference to a business harmless in itself and useful to the community ; and the discretion appearing to have been exercised for the express purpose of depriving the petitioner of a privilege that was extended to others. In the present case the business is not one that any person is permitted to carry on without a license, but one that may be entirely prohibited or subjected to such restrictions as the governing authority of the city may prescribe.

It would seem that some stress is placed upon the allegation of the petitioner that there were not twelve persons owners of real property in the block where the business was to be carried on. This allegation is denied in the return, which alleges that there were more than sixteen such property holders. As the case was heard upon exceptions or demurrer to the return, its averments must be taken as true. At common law no evidence was necessary to support the return. It was deemed to import verity until impeached. Hurd on Habeas Corpus, book 2, c. 3, §§ 8, 9 and 10 ; Church on Same, § 122. And this rule is not changed by any statute of the United States. It must, therefore, be considered as a fact in the case that there were more than sixteen owners of real estate in the block. But if the fact were otherwise, and there was not the number stated in the petition, the result would not be affected. If there were no property holders in the block, the discretionary authority would be exercised finally by the police commissioners, and their refusal to grant the license is not a matter for review by this court, as it violates no principle of federal law. We however find in the return a statement which would fully justify the action of the commissioners. It is averred that in the conduct of the liquor

Statement of the Case.

business the petitioner was assisted by his wife, and that she was twice arrested for larcenies committed from persons visiting his saloon, and in one case convicted of the offence and sentenced to be imprisoned, and in the other held to answer. These larcenies alone were a sufficient indication of the character of the place in which the business was conducted, for the exercise of the discretion of the police commissioners in refusing a further license to the petitioner.

The order discharging the petitioner must be

Reversed, and the cause remanded with directions to take further proceedings in conformity with this opinion, and it is so ordered.

SEEBERGER *v.* CAHN.

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

No. 47. Argued November 3, 1890. — Decided November 17, 1890.

Cloths popularly known as "diagonals," and known in trade as "worsteds," and composed mainly of worsted, but with a small proportion of shoddy and of cotton, are subject to duty as a manufacture of worsted, and not as a manufacture of wool, under the act of March 3, 1883, c. 121.

THIS was an action of assumpsit against a collector of customs to recover back duties paid under protest. Plea, non assumpsit. A jury was duly waived, and the case submitted to the court, which made the following finding of facts:

"The plaintiffs imported an invoice of cloths popularly known as 'diagonals,' which were classed by the collector as woollens, and a duty of 35 cents per pound and 35 per cent ad valorem assessed upon them under paragraph 362, new tariff index. The plaintiffs claimed that the goods should have been classed as 'manufactures of worsted not otherwise provided for' under paragraph 363, new tariff index, and the duty assessed at 24 cents per pound and 35 per cent ad valorem. The duties were paid under protest, appeal taken, and

suit brought, all in apt time. The goods in question are used mainly for the manufacture of men's wearing apparel, and are denominated or known to the trade as 'worsteds,' and are composed mainly of worsted, but the worsted fibre is mixed with at least 10 per cent of shoddy, this shoddy being made from wool, and some cotton. Worsted is made by combing the long-fibred wools, so that the fibres shall lie or be arranged alongside of each other; while wool is worked by carding, so as to interlock the fibres with each other. Shoddy is a separate manufacture of wool, and is added to the worsteds in question for the purpose of giving weight and body to the fabric."

Upon these facts the court gave judgment for the plaintiffs. 30 Fed. Rep. 425. The defendant sued out this writ of error.

Mr. Assistant Attorney General Maury for plaintiff in error.

Mr. Edwin B. Smith, (with whom was *Mr. Charles Curie* on the brief) for defendants in error.

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

The act of March 3, 1883, c. 121, under "Schedule K, Wool and Woollens," (22 Stat. 508, 509,) imposes duties as follows:

"Woollen cloths, woollen shawls, and all manufactures of wool of every description, made wholly or in part of wool, not specially enumerated or provided for in this act, valued at not exceeding eighty cents per pound, thirty-five cents per pound and thirty-five per centum ad valorem; valued at above eighty cents per pound, thirty-five cents per pound, and in addition thereto forty per centum ad valorem.

"Flannels, blankets, hats of wool, knit goods, and all goods made on knitting-frames, balmorals, woollen and worsted yarns, and all manufactures of every description, composed wholly or in part of worsted, the hair of the alpaca, goat or other animals (except such as are composed in part of wool), not specially

enumerated or provided for in this act, valued at not exceeding thirty cents per pound, ten cents per pound; valued at above thirty cents per pound, and not exceeding forty cents per pound, twelve cents per pound; valued at above forty cents per pound, and not exceeding sixty cents per pound, eighteen cents per pound; valued at above sixty cents per pound, and not exceeding eighty cents per pound, twenty-four cents per pound; and in addition thereto, upon all the above-named articles, thirty-five per centum ad valorem; valued at above eighty cents per pound, thirty-five cents per pound, and in addition thereto forty per centum ad valorem."

In the interpretation of the customs acts, nothing is better settled than that words are to receive their commercial meaning; and that when goods of a particular kind, which would otherwise be comprehended in a class, are subjected to a distinct rate of duty from that imposed upon the class generally, they are taken out of that class for the purpose of the assessment of duties.

Of the two successive paragraphs in the customs act of 1883, upon which the parties respectively rely, the first imposes a certain scale of duties on "all manufactures of wool of every description, made wholly or in part of wool, not specially enumerated or provided for in this act;" and the second imposes a lower scale of duties on "all manufactures of every description, composed wholly or in part of worsted." It is hardly necessary to observe that the subsequent words enclosed in a parenthesis "(except such as are composed in part of wool)" evidently qualify only the intervening clause "the hair of the alpaca, goat or other animals," and have no bearing upon this case.

Though worsted is doubtless a product of wool, and might in some aspects be considered a manufacture of wool, yet manufactures of worsted being subjected by the second paragraph to different duties from those imposed by the first paragraph on manufactures of wool, it necessarily follows that a manufacture of worsted cannot be considered as a manufacture of wool, within the meaning of this statute.

That shoddy, though a product, and in some sense a manu-

facture, of wool, is not to be considered as itself wool, or a manufacture of wool, within the meaning of the statute, is clearly shown by the paragraph next preceding the two above quoted, which makes the duty on "woollen rags, shoddy, mungo, waste and flocks, ten cents per pound." *Lennig* v. *Maxwell*, 3 Blatchford, 125.

It being distinctly found, as matter of fact, that the goods in question are called or known in the trade as "worsteds," and are composed mainly of worsted, but mixed with a small proportion of shoddy and of cotton, the Circuit Court rightly held that they were subject to duty as manufactures of worsted, and not as manufactures of wool.

The cases of *Elliott* v. *Swartwout*, 10 Pet. 137, and *Riggs* v. *Frick*, Taney, 100, are directly in point; and our conclusion is supported by many decisions of this court in analogous cases. *Homer* v. *The Collector*, 1 Wall. 486; *Reiche* v. *Smythe*, 13 Wall. 162; *Movius* v. *Arthur*, 95 U. S. 144; *Arthur* v. *Morrison*, 96 U. S. 108; *Arthur* v. *Lahey*, 96 U. S. 112; *Arthur* v. *Stephani*, 96 U. S. 125; *Arthur* v. *Davies*, 96 U. S. 135; *Arthur* v. *Rheims*, 96 U. S. 143; *Swan* v. *Arthur*, 103 U. S. 597; *Victor* v. *Arthur*, 104 U. S. 498; *Robertson* v. *Glendenning*, 132 U. S. 158. *Judgment affirmed.*

FITZGERALD AND MALLORY CONSTRUCTION COMPANY *v.* FITZGERALD.

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

No. 1141. Submitted October 28, 1890. — Decided November 17, 1890.

Where jurisdiction has been obtained by service of garnishee process in a proceeding *in rem*, the court has power to proceed notwithstanding defect in service on the person.

In such case, objection to jurisdiction over the person, to be availing, must not be raised in connection with denial of jurisdiction over the subject matter.

The defendant below having denied the power of the court to proceed at all, and upon decision against it having joined issue and gone to trial

Statement of the Case.

on the merits, as jurisdiction existed over the subject matter, it was properly maintained over the person, even though the service on the person might have been set aside.

Where a foreign corporation is not doing business in a State, and no officer is there transacting business for the corporation and representing it in the State, it cannot be said that the corporation is within the State so that service can be made upon it; and evidence that the president of a foreign corporation so situated was induced by false representations to come within the jurisdiction for the purpose of obtaining service of process, and that process was there served, is immaterial, inasmuch as the corporation must be held to have known that it could not be brought into court by such a service.

Where an officer of a railroad construction company has full charge for it of the location and construction of a railroad, and is authorized to draw checks and drafts, and charged with the general management of the business of the company in the absence of contrary instructions by the board of directors, notes given by him for moneys used to pay off indebtedness of the company arising in the construction of the road, cannot be held to be in excess of his powers.

It was the duty of the directors to give contrary instructions if they wished to withdraw the general management from the president, and to disaffirm the action of their agents promptly if they objected to it.

If the notes were endorsed at the request of the party to whom the general management was confided, the indorsee, if compelled to protect his endorsement, cannot be treated as a volunteer, and if he was the superintendent of the work, and the money was raised and used to pay off sub-contractors and material men employed by him, then upon the refusal of the company to pay, he had the right to take up the notes and have them assigned to him.

Compensation for official services rendered in the absence of a specified compensation, fixed or agreed upon, may not be recoverable, but in this case it was properly left to the jury to determine whether the services rendered were of such a character and rendered under such circumstances that compensation could be claimed therefor.

Action on a motion for new trial is not a subject of exception.

This was an action brought by John Fitzgerald, a citizen of Nebraska, in the District Court of Lancaster County, in that State, against the Fitzgerald and Mallory Construction Company, a corporation created under the laws of Iowa. The petition was filed December 22, 1888, and summons issued, which was served on the 24th of December, by the delivery of a copy to S. H. Mallory, described in the return as "the president and managing agent" of the defendant company.

Under Title IV of the Code of Civil Procedure of Nebraska,

section 59 provides: "An action other than one of those mentioned in the first three sections of this title, against a non-resident of this State or a foreign corporation, may be brought in any county in which there may be property of, or debts owing to, said defendant, or where said defendant may be found; . . ." Comp. Stats. Neb. (1889) p. 860. Under Title VIII, section 198, it is provided that: "The plaintiff in a civil action for the recovery of money, may, at or after the commencement thereof, have an attachment against the property of the defendant and upon the grounds herein stated: *First.* When the defendant, or one of several defendants, is a foreign corporation or a non-resident of this State; . . ." Under section 199: "An order of attachment shall be made by the clerk of the court in which the action is brought, in any case mentioned in the preceding section, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing: *First.* The nature of the plaintiff's claim. *Second.* That it is just. *Third.* The amount which the affiant believes the plaintiff ought to recover. *Fourth.* The existence of some one of the grounds for attachment enumerated in the preceding section." Then follow various sections relating to proceedings in attachment and garnishment. Comp. Stats. Neb. p. 877.

In this case, affidavit for attachment against defendant as a foreign corporation was made, order of attachment and garnishee summons issued and the latter served upon the Missouri and Pacific Railroad Company, as owing debts to the defendant. The garnishee subsequently answered that it was impossible to make a definite answer as to whether, on an accounting between it and the defendant, there would be due to the defendant any sum or sums of money whatsoever; and that litigation was pending in respect to a contract between it and the defendant for the purchase of certain securities, which it claimed might result, upon a proper accounting, in no indebtedness on its part to the defendant, and until the termination of which it could not answer more specifically.

The petition counted upon fourteen causes of action: (1) Upon a note for $5002.80, dated July 31, 1888, payable ninety

days after date, to the order of the First National Bank of Lincoln, Nebraska, with interest at the rate of ten per cent per annum until paid, signed by S. H. Mallory, its president, and endorsed by plaintiff and Mallory. Plaintiff alleged that the note not being paid at maturity, he, who had endorsed it "without any consideration," paid it with interest and it was thereupon transferred to him by the cashier of the bank; and that the sum of $5128.25, paid by him with interest from the first day of November, 1888, was now due. (2) Upon a note for $15,290.24, dated July 25, 1888, payable sixty days after date to the order of J. J. P. Odell, cashier, with interest at seven per cent, signed by the defendant corporation by Mallory, its president, endorsed by plaintiff and Mallory and taken up by Fitzgerald, who had endorsed it without consideration and paid it with interest, the full sum paid being $15,468.62, which was due with interest from September 25, 1888: (3) For services from May 1, 1885, to May 1, 1886, in doing work with the view of organizing the defendant, which had received all the benefits of the same and agreed to pay therefor, and which services were alleged to be worth $5000. Also for services from the first day of May, 1886, to the 4th of November, 1886, as superintendent, treasurer or manager of defendant, placing their value at the sum of $6000: (4) For services as general manager from November 1, 1886, to November 1, 1887, at the agreed salary of $5000: (5) For same from November 1, 1887, to May 1, 1888, $2500: (6) For scrapers and plows sold and delivered to defendant at its request, $1515: (7) For tracklaying tram sold and delivered to defendant at its request, $1500: (8) For money paid for personal expenses incurred at defendant's request during the year 1886, $396.65: (9) For same for year 1887, $227.50: (10) For balance of $1928 due on a draft for $5500, signed by defendant by C. H. Lamb, auditor, to order of S. H. Mallory, and accepted by him as president, plaintiff having taken up said draft, and $1928 being due with interest from July 30, 1888: (11) Upon note for $5000, signed by defendant by C. H. Lamb, auditor, to order of First National Bank of Chariton and endorsed to plaintiff for value, and due with interest from November 22, 1888: (12) Upon

note for $856.64, dated January 16, 1888, signed by defendant by Mallory, its president, to order of M. S. Cartter & Co., and endorsed to plaintiff and due with interest from date: (13) Upon note for $917.91, dated November 23, 1888, signed by defendant by Lamb, auditor, to order of First National Bank of Chariton and endorsed to plaintiff, with interest from date: (14) For money paid since January 1, 1888, upon request of defendant for legal services and advice, and otherwise, for defendant's benefit, $5000.

Plaintiff prayed judgment for the sum of $51,271.85, with interest on the various sums and from the various dates as demanded.

On the 4th of January, 1889, the defendant filed its demurrer to the petition, upon the grounds of insufficiency, misjoinder, and defect of parties, and on the 16th of January its petition to remove the cause into the Circuit Court of the United States for the District of Nebraska, the petition being verified by the affidavit of "the duly authorized attorney of the defendant." The cause having been removed, the defendant applied for leave to answer by a day named, and afterwards obtained leave to amend. The amended answer was filed June 19, and denied the authority of Mallory to make the notes described in the first and second counts; the contract and services set up in the third count (also pleading payment); admitted that plaintiff was employed by defendant under a salary of $5000 for part of the time referred to in the fourth count; admitted liability for salary named in the fifth count, but alleged that plaintiff failed to render the services to defendant's damage; denied that plaintiff sold and delivered the property declared on in the sixth and seventh counts; that Lamb, auditor, had authority to make the draft set up in the tenth count, alleging that its proceeds were divided between plaintiff and Mallory; that Lamb, auditor, had authority to make the note set up in the eleventh count, alleging that defendant received no benefit therefrom, and that Mallory caused the note to be transferred to plaintiff solely for the purpose of bringing suit thereon; denied that Mallory had any authority to make any of the instruments in

writing sued on, and alleged that plaintiff had full knowledge of such want of authority; and denied any liability on the fourteenth count. The two closing paragraphs are each numbered "11," the last asserting "that the District Court of Lancaster County, State of Nebraska, never had or acquired any jurisdiction of this defendant, and this court has no jurisdiction to hear, try and determine the matters and things in controversy herein." It appears from the record that on the 22d of June the parties were given leave to amend the pleadings to conform to the facts, and it is stated by counsel that this paragraph was then written in on the amended answer.

On the 11th of May the cause was set down for trial by agreement of parties, and came on for trial the 20th of June, 1889, upon the issues joined, and a jury having been empanelled, the trial continued during the 20th, 21st, 22d, and 24th days of June, when it was given to the jury, the court instructing them, among other things, to disregard the first branch of the third count and the fourteenth count. The jury returned a verdict, on the 25th of June, finding the issues for the plaintiff, and assessing the amount of his recovery "at $47,937.97 debt, and $3474.65, interest thereon at 7 % from 25th day of June, 1889, being the sum total of $51,412.62."

Motions in arrest and for new trial were made and overruled, and judgment rendered on the verdict. Pending the trial, on the 22d day of June, a plea to the jurisdiction of the court was filed, setting up that service of the summons in the action was obtained by means of a trick and fraudulent device, whereby the president of the defendant, Mallory, was induced to go from Iowa to the State of Nebraska, where, upon his arrival, he was served with process, which fraud was unknown to defendant when it filed its demurrer to the plaintiff's petition, its petition for removal, and its answer and amended answer, and that Mallory, after the service, acting in concert with the plaintiff, concealed the facts from the defendant; and praying that, therefore, proceedings be stayed and the action dismissed. This plea was overruled by the court, and the plaintiff then filed a motion for a non-suit, upon the ground that the defendant was improperly sued in Lancaster

County, Nebraska, and the District Court of that county had no authority to take jurisdiction of the action or of the defendant, and that neither that court nor the United States court had jurisdiction of the defendant; which motion was overruled. The plea to the jurisdiction and evidence bearing thereon, and the motion to dismiss, with an affidavit which accompanied it, were duly made part of the record by bill of exceptions. On the 24th of June the defendant filed a motion to dismiss, because the process of the court had been fraudulently used by plaintiff to obtain service on the defendant, defendant being in ignorance thereof until during the trial, and that at the time suit was brought and summons served on Mallory, defendant had no general managing agent, and no managing agent in Nebraska, and no office or place of business there, and that Mallory was not in Nebraska on any business for the defendant; which motion was overruled and the defendant excepted.

The trial was had upon the merits, evidence being adduced on both sides, and exceptions were taken by defendant to various parts of the charge of the court and to the refusal to give certain instructions requested on its behalf. Judgment having been rendered, defendant brought the cause to this court on writ of error.

Mr. John F. Dillon and *Mr. David D. Duncan* for plaintiff in error.

Mr. T. M. Marquett for defendant in error.

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

It is contended that the Circuit Court should have refused to proceed with the action if it appeared to its satisfaction that the service upon the defendant was obtained by means of a fraudulent device and trick; and that this question was presented by the plea to the jurisdiction, the motion for a nonsuit, the motion to dismiss, and a request, which was refused,

for an instruction to the jury to render a verdict for the defendant, if they found from the evidence that the service was fraudulently procured and that the defendant had ignorantly acquiesced therein.

If a person is induced by false representations to come within the jurisdiction of a court for the purpose of obtaining service of process upon him, and process is there served, it is such an abuse that the court will, on motion, set the process aside; but no such motion was made here, and the question as raised went deeper than objection to service merely, and attacked the power of the court to proceed at all.

Under the laws of Nebraska, actions against non-residents and foreign corporations might be brought in any county in which there might be property of, or debts owing to, the defendant; and the plaintiff in a civil action for the recovery of money might, at or after the commencement thereof, have an attachment against the property of a defendant, when such defendant was a foreign corporation or a non-resident of the State. Comp. Stats. pp. 860, 877. The plaintiff had proceeded under these provisions, an order of attachment had been made and garnishee process duly served. There was no pretence that property had been brought into the State by means of fraudulent inducement, or that the claim against the garnishee was fictitious. If the case had gone to judgment under the attachment proceedings, it would only have subjected the property of the defendant lying within the territorial jurisdiction of the court to the payment of the plaintiff's demand. The case would have been in its essential nature a proceeding *in rem*. Had defendant moved to set the service aside and the motion been sustained, the court would not have dismissed the case for want of jurisdiction. The appearance of the defendant, however, converted into a personal suit that which was before a proceeding *in rem*. By its demurrer, petition for removal, answer and amended answer, and participation in the trial, the defendant waived all question of the service of process. And the record shows a resolution adopted by the defendant authorizing the attorney who appeared for it "to appear and represent this company as its sole attorney

in all suits and proceedings at law or in equity now pending, or which may hereafter be brought."

By the amendment to its answer, its plea and motions, the defendant insisted that the court had no jurisdiction to proceed, and thereby declined to stand upon the objection to the service, and submitted itself to the decision of the court in respect to jurisdiction over the subject matter, which jurisdiction, it is entirely clear, the court possessed. These proceedings were taken by defendant after discovering the alleged ground of objection to the service and there was no action on its part confined solely to the purpose of questioning the jurisdiction over the person. That such jurisdiction resulted under the circumstances admits of no doubt, and the rule to that effect seems well settled in Nebraska, Kansas and Ohio, which all have similar codes. *Elliott* v. *Lawhead*, 43 Ohio St. 171; *Porter* v. *Chicago & Northwestern Railroad*, 1 Nebraska, 14; *Aultman* v. *Steinan*, 8 Nebraska, 112; *Meixell* v. *Kirkpatrick*, 29 Kansas, 679.

Nor are we impressed with the tenability of plaintiff's position in relation to the service in any view. Where a foreign corporation is not doing business in a State, and the president or any officer is not there transacting business for the corporation and representing it in the State, it cannot be said that the corporation is within the State, so that service can be made upon it. *St. Clair* v. *Cox*, 106 U. S. 350; *New Eng. Mut. Life Ins. Co.* v. *Woodworth*, 111 U. S. 138; *Ex parte Schollenberger*, 96 U. S. 369. So that whether the president of this company was inveigled into Lancaster County or not, the service upon him amounted to no more than an informal notice only and did not bring the company into court, and this the company was bound to know and must be held to have known. Without regard to the evidence relied on to show that there was concealment of the circumstances in relation to the service, knowledge of these circumstances was wholly immaterial, in view of the fact that the service was unavailing to bring the defendant into court unless it chose to come there. We are of opinion that no error was committed by the court in its rulings upon this subject.

Opinion of the Court.

Errors are also assigned in respect to certain instructions given or refused by the court, bearing on the question of recovery upon the notes and drafts described in the petition.

The fifth and eighth of the articles of association of the defendant, and sections three and six of its by-laws, provided as follows:

"Article fifth. The directors . . . shall manage the business of the corporation; they shall have power to sell, lease, or mortgage all their property and lands acquired by said corporation; to issue the bonds of the same, signed by the proper officers thereof, for the purpose of raising money to carry on the business of the corporation, and to secure the same by mortgage upon real estate, buildings, machinery and other property of the company. They shall also appoint a president and vice-president from their own number, a secretary and treasurer, who may or may not be directors, and such other officers as may be deemed necessary. . . ."

"Article eighth. All certificates of stock, contracts and bonds shall be signed by the president and secretary."

"Section 3. The president shall perform the duties that usually pertain to the duties of his office and be the chief executive officer of the company, and, in the absence of contrary instructions by the board of directors, shall be charged with the general management of the business of the company."

"Section 6. The treasurer shall give bonds. . . . He shall pay out money only upon the order of the president and such other officers as may be ordered by the board of directors. He shall make a statement of the financial condition of the company, etc. He shall keep in proper books a regular account of the stock of the company, etc."

Argument is made that there could be no recovery on the notes and drafts in question, because it is said they were made by the president or auditor of the company, without the knowledge or consent of the board of directors; and further, that the notes in the first two causes of action named were paid by the plaintiff when he was under no obligation to pay them and in that respect was a mere volunteer.

The evidence tended to show that Mallory was authorized to build the line of the Denver, Memphis and Atlantic Railroad Company across Kansas, and the State Line and Pueblo Railroad Company, from the State Line to Pueblo, in Colorado, being a distance in the aggregate of about six hundred miles of railroad, and which cost some seven millions of dollars; that he had full charge of the location and construction of the road; that he was authorized to draw checks and drafts, and all these notes and drafts were made, accepted, or authorized by him; that the directors not only did not give contrary instructions in the first instance, but knew of the giving of the notes and drafts, and did not disaffirm the action of the president; and that the proceeds were used for the payment of construction liabilities of the company in every instance, either directly or in taking up paper, the proceeds of which had been so used.

The court instructed the jury that if they found from the evidence that the president was given entire management in building the railroads, and in the incurring of liabilities and paying off debts incurred therein, he might appoint other agents, such as a cashier and auditor, for the purpose of making the calculations on pay-rolls and on contracts for building the roads, and might empower any one of such agents who made such calculations upon the pay-rolls of the amount due to those who did the work by contract or otherwise, to draw any checks or bills or sight drafts necessary to pay the same, and "if it became necessary for the benefit of said company to execute promissory notes or to draw sight drafts, the said president would have ample authority to do the same, and might likewise empower the cashier or the party whose duty it was to ascertain the amounts due to contractors, material men, and persons working upon the construction or building of said railroad, by the construction company, to draw drafts or checks, or even make promissory notes, and that the same, if done for the company or for its use and benefit, would be binding upon the said company, unless the president received from the directors certain instructions which limited his authority in the premises." The court also instructed the

jury: "As to the promissory notes which were endorsed by the plaintiff and upon which he was held as endorser, if the jury find from the evidence that said notes were executed in good faith by the president of the construction company, and that the proceeds or the proceeds of the notes and drafts of which the notes in question were renewals were received by and used for the benefit of the construction company, and you further find that the plaintiff is now the holder and owner of said notes, you will find for the plaintiff in the full sum of said notes with interest." And further: "And although there may be a provision in the by-laws of said construction company requiring certain formalities in the execution of a promissory note or draft, yet that does not necessarily make such formalities essential to the ratification of the contract; and if you find from the evidence that said notes were given for the purpose of paying off debts that were due by said construction company, and that the directors of said construction company had full knowledge of the same and assented to the transaction, to the signing and execution of the notes, you will find that said acts of the president have been fully confirmed, and you will find for the plaintiff the full amount of said notes with interest, provided you find the plaintiff was the owner of the same and is now the lawful holder of them."

These instructions were justified under the evidence. If the moneys were used to pay off indebtedness of the company, arising in the construction of the road, and for work done under proper authority, the transactions were in pursuance of the authorized purposes of the corporation, and occurred in its legitimate business. The execution of the paper could not be held to be in excess of the powers given, and it was clearly the duty of the directors to give contrary instructions, if they wished to withdraw the general management from the president; and to disaffirm the action of their agents promptly and at once, if they objected to it. *Indianapolis Rolling Mill* v. *St. Louis &c. Railroad*, 120 U. S. 256; *Creswell* v. *Lanahan*, 101 U. S. 347. The company was liable upon the original indebtedness, and its change of form in order to relieve the pressure of the creditors was by the direction, with the partici-

pation, and at the request of the president. We perceive no want of power and no omission of essential formalities in what was done. And the mere fact that Fitzgerald was a stockholder in and a promoter and director of the company, and, with the president, the manager of the work in the prosecution of which the indebtedness arose, would not change the binding character of the obligation. *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587; *Gardner* v. *Butler*, 30 N. J. Eq. 702, 721; *Harts* v. *Brown*, 77 Illinois, 226.

Again, there was evidence to the effect that Fitzgerald endorsed the notes at the request of the president. Inasmuch as the defendant was answerable for the indebtedness which the money received upon the notes went to pay, if in order to obtain that money Fitzgerald was called on to endorse the notes, and then compelled to protect his endorsement, he could not be treated as a volunteer. There would be no element in such a transaction of the voluntary payment by one of another's debt. So, if Fitzgerald was the manager of the work under the president, and the money was used to pay off the subcontractors, material men and hands, then, upon the refusal of the company to repay, Fitzgerald had the right to take up the notes and have them assigned to him; and whether he was the owner and holder of the notes was left to the determination of the jury.

By the first section of the by-laws, the officers of the company were declared to be "a president, vice-president, secretary and treasurer, and such other officers as may be deemed necessary to carry out the object of the articles of this incorporation."

Under the second branch of the third cause of action, plaintiff claimed to recover for services as superintendent and manager of the company, and also for expense and trouble when acting as treasurer from May 1 to November 4, 1886. On the latter date the board of directors fixed a definite sum as salary for a general manager, an office not otherwise or before created, so far as the record discloses.

The court instructed the jury that "if Fitzgerald, the plaintiff, acted as superintendent, treasurer or general manager of

said company, and transacted the usual business that devolves upon such officer of such a concern as that, with the knowledge and consent of the defendant," (during the time before compensation was fixed,) there would be an implied agreement on the part of the defendant to pay what the services were reasonably worth; and afterwards repeated this instruction more in detail, confining it to services as manager.

If strict verbal accuracy was not observed in giving this direction, in view of the general rule as to compensation for official services rendered in the absence of a specified compensation fixed or agreed upon, yet we do not think, taking all parts of the charge upon that subject together, that any substantial error was committed. The evidence tended to establish that Fitzgerald acted as treasurer for some months in 1886, and that while so acting he went to expense and trouble in the procuring of money for the company, and in the discharge of duties outside of those assigned to the treasurer as such, as defined in section 6 of the by-laws already quoted; and that as manager or superintendent he procured right of way, superintended the doing of the work, the hiring of the men, the sub-letting of the contracts, etc., which were matters not at all pertaining to his office as director. The character of all these services placed them outside of official duties proper.

The general rule is well stated by Mr. Justice Morton, (since Chief Justice of Massachusetts,) in *Pew* v. *First Nat. Bank*, 130 Mass. 391, 395: "A bank or other corporation may be bound by an implied contract in the same manner as an individual may. But, in any case, the mere fact that valuable services are rendered for the benefit of a party does not make him liable upon an implied promise to pay for them. It often happens that persons render services for others which all parties understand to be gratuitous. Thus, directors of banks and of many other corporations usually receive no compensation. In such cases, however valuable the services may be, the law does not raise an implied contract to pay by the party who receives the benefit of them. To render such party liable as a debtor under an implied promise, it must be shown, not

only that the services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or, at least, that the circumstances were such that a reasonable man, in the same situation with the person who receives and is benefited by them, would and ought to understand that compensation was to be paid for them." Tested by this rule, we think that the court fairly left it to the jury to determine whether Fitzgerald rendered services of such a character and under such circumstances that he was entitled to claim compensation therefor. It could not properly have been held as matter of law that he was not so entitled, and the reference to the treasurer, as made in one clause of the charge, even though inaccurate, was not of sufficient moment to require a reversal of the judgment.

The sums claimed in the several causes of action aggregated $56,438.57, and the prayer for judgment was for the sum of $51,271.85, with interest on the various sums from the dates when the liabilities were respectively alleged to have accrued, on some of the items at seven and on others at ten per cent. The court instructed the jury to disregard the first branch of the third cause of action, and the fourteenth cause of action, under each of which $5000 was claimed. The verdict of the jury assessed the amount of the plaintiff's recovery in two items of "$47,937.97 debt, and $3474.65 interest thereon at 7% from 25th day of June, 1889, being the sum total of ($51,412.62) fifty-one thousand four hundred and twelve and $\frac{62}{100}$ dollars." Counsel now insists that as, if from $47,937.97 the sum of $46,438.57, the aggregate of the amounts claimed in the several counts, less the amounts excluded, is taken, it will appear that the verdict exceeded the latter aggregate by $1499.40, and exceeded the principal sum prayed for, after making the same deduction, by $6666.12, the jury must have disregarded the instructions of the court, and the judgment should be reversed for that reason. The motion for new trial was filed on the 28th of June, and, after being held under advisement, was overruled on the 5th day of December, and the court then entered judgment "against the defendant for the sum of

($51,412.62) fifty-one thousand four hundred and twelve and $\frac{62}{100}$ dollars, debt, with interest from June 25, 1889," the date of the return of the verdict, and costs of suit. It thus appears that the court held that the sum total, as found by the jury, was correct, and ignored the division of that amount into two sums. If the $3474.65 was for interest, it was as much less than the interest properly calculated amounted to as the $47,937.97 was more than the aggregate of the several sums claimed, exclusive of the first branch of the third cause of action, and of the fourteenth. There was also evidence in support of some items of expenditure which apparently could have been recovered under the fourteenth cause of action, and it may be that these were allowed by the jury, and the court was of opinion that this was properly done, notwithstanding its instruction. The bill of exceptions shows that on the third day of the trial "both parties were given leave to amend their pleadings to conform to the facts," and some confusion has evidently arisen from the circumstance that what was done under that leave is not clearly shown by the record. The motion for a new trial was addressed to the discretion of the Circuit Court, and action on such a motion is not a subject of exception.

Upon the whole, we find no sufficient ground for disturbing the judgment, and it is accordingly

Affirmed.

WILLIAMS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 46. Argued October 31, November 3, 1890 — Decided November 17, 1890.

The Court of Claims disallowed the claim of the administrator *de bonis non* of Colonel Francis Taylor, for five years' full pay to Taylor, as a colonel of infantry, under the resolution of the Continental Congress of March 22. 1783, (4 Jour. Cong. 178,) holding that he was not in the military service, in the continental line, to the close of the war of the Revolution in 1783. This court affirms the judgment.

Nor was Colonel Taylor entitled to half pay for life under the resolutions of October 3 and 21, 1780, (3 Jour. Cong. 532, 538,) because he was not a "reduced" officer.

He was not entitled to recover under the provisions of the act of Congress of July 5, 1832, (4 Stat. 563.)

Under § 906 of the Revised Statutes, the decision of the governor of Virginia, made under the act of that State, of March 11, 1834, (Laws of 1834, c. 6, p. 22,) that Colonel Taylor was a "colonel in the continental line from October 1, 1775, to the close of the war," is not either obligatory in law, or conclusive as evidence, against the United States.

The Court of Claims did not err in refusing to find that Colonel Taylor "was an officer in the continental service on the 22d day of March, 1783, and continued therein as such officer to the end of the war," whether that was a conclusion of fact or one of law.

THE case is stated in the opinion of the court.

Mr. George S. Boutwell and *Mr. P. E. Dye* for appellant.

Mr. Assistant Attorney General Parker 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 of John G. Williams, administrator *de bonis non* of Francis Taylor, against the United States.

The original petition was filed by George Taylor Jenkins and others, December 8, 1865. After a traverse and an amended petition, an answer was filed to the latter, and also a special plea, and the case was submitted to the court, June 10, 1868. On June 15, 1868, a judgment was rendered dismissing the petition. A motion for a new trial was made in December, 1868, and granted in December, 1869. An amended petition was filed in December, 1877, and a traverse thereto; and in February, 1878, the court ordered that John G. Williams, as administrator *de bonis non* of Francis Taylor, be substituted as the claimant, and he filed, on the 18th of April, 1878, the petition which is now before us. A traverse was filed thereto, together with a special plea, to which latter there was a replication. The court entered a judgment on June 7, 1880, dismissing the petition, and filed certain findings of fact

and conclusions of law, with an opinion, which are set forth in the report of the case, in 15 C. Cl. 514. Those findings embrace identically the findings now before us, to and including finding 10.

On the 7th of September, 1880, at the same term, the claimant filed a motion for a new trial, on the ground of newly discovered evidence. This motion was held over until the 14th of March, 1887, when the court overruled it, giving an opinion which is reported in 22 C. Cl. 116. It also then substituted new findings of fact and conclusions of law instead of the original ones, (the findings of fact being the same as the original ones to and including finding 10, and adding finding 11.) On the 16th of May, 1887, it made an order which vacated and set aside the judgment of June 7, 1880, and entered a new judgment *nunc pro tunc* as of March 14, 1887, dismissing the petition. The appeal of the claimant is for a review of this last judgment.

The amended findings of fact, with the conclusions of law thereon, are as follows:

"1. Francis Taylor was commissioned captain in the Second State Regiment of the Virginia forces on continental establishment May 8, 1776; he continued in active service, and was promoted and commissioned major in said regiment with rank from July 12, 1778, and he became supernumerary major by the arrangement of the continental army at White Plains in September, 1778.

"2. The regiment, commonly designated as the Albemarle Guards, was originally authorized by the resolution 19th December, 1778, of the House of Delegates of the State of Virginia, but was taken up on continental establishment under and by virtue of the resolution 9th January, 1779 (3 Jour. Cong. 179). From the 9th January to the 5th March, 1779, Francis Taylor was in command of the regiment as lieutenant-colonel. On March 5, 1779, he was commissioned as colonel by the Governor of Virginia, and as such commanded said battalion up to the 15th day of June, 1781, when the battalion was disbanded by the discharge of such men as were enlisted to serve only during the continuance of the convention prisoners in the State of Virginia.

"3. There is no evidence showing that Colonel Francis Taylor ever resigned his commission in the continental service, or that he was ever otherwise than ready and willing to render service in the same or higher grade when required so to do.

"4. The acceptance of the Virginia line, and officers, of the commutation offered under the resolution of Congress of March 22, 1783, was made and duly reported as required by the resolution.

"5. Colonel Francis Taylor died on or about the 16th day of November, 1799.

"6. Colonel Francis Taylor was not paid the half-pay for life under the resolution of Congress of October 21, 1780, and no commutation certificate was issued to him or his heirs in lieu thereof.

"7. Colonel Francis Taylor, during his lifetime, and his heirs and legal representatives since, have made frequent and continuous application to the government and to Congress for the payment of this claim up to the time of bringing this suit; and on the 22d day of January, 1859, a memorial to Congress praying its payment was referred by the House of Representatives to this court for adjudication.

"Which resolution is in the words following:

"'*Ordered*, That the petitions and papers in the cases of Dr. Charles Taylor, Colonel Francis Taylor, and James Broadus be withdrawn from the files of the House and referred to the Court of Claims.' House Journal, 1858–'59, p. 241.

"8. It appears, and the court finds the fact to be, that on the 5th March, 1779, Lieutenant-Colonel Taylor, then commanding the regiment known as the Albemarle Guards, was commissioned as colonel by the Governor of Virginia, and that he continued to command the regiment with the rank of colonel until it was disbanded. It further appears that the regiment continued in the continental service after the expiration of the year's service designated in the resolution of 9th January, 1779 (3 Jour. Cong. 179), and until the 15th June, 1781, when the regiment was disbanded. It further appears that on the 13th February, 1781, while the Baron Steuben was acting as inspector-general of the continental forces, and

was charged with the duty of consolidating and reducing the regiments of the line furnished by Virginia, under the resolutions of 3d and 21st October, 1780 (3 Jour. Cong. 532, 538), Mr. Jefferson, then Governor of Virginia, addressed the following official communication to Colonel Taylor:

"'RICHMOND, *Feb.* 13, 1781.

"'SIR: . . . Congress having determined newly to model their forces, the Baron Steuben is now here on that business.

"'The Assembly have directed the Executive to have the same done as to the State troops.

"'Your regiment, being in the continental service, will be submitted to Baron Steuben. Till this be done, which, however, will be done in a few days, no promotions can take place.' . . .

"And on the 14th March, 1781, Mr. Jefferson, as Governor of Virginia, likewise addressed the following official communication to Colonel Taylor:

"'IN COUNCIL, *March* 14, 1781.

"'Col. F. TAYLOR.

"'SIR: Before this comes to hand Col. Wood will have received orders to carry the conventioners to Knowland's Ferry, thence to be guarded by the State of Maryland.

"'At that place, therefore, you will please to discharge such of your regiment as were enlisted to serve only during the continuance of the conventioners in Albemarle or in this State.' . . .

"It also appears that Mr. Jefferson, while Governor of Virginia, on the 28th of November, 1779, addressed the following communication to the commander-in-chief:

"'WILLIAMSBURG, *November* 28, 1779.

"'To his Excellency General WASHINGTON:

"'SIR: Your Excellency's letter on the discriminations which have been heretofore made between the troops raised

within this State and considered as part of our quota, and those not so considered, was delivered me four days ago. I immediately laid it before the assembly, who thereupon came to the resolution I now send you.

"'The resolution of Congress of March 15, 1779, which you were so kind as to inclose, was never known in this State till a few weeks ago, when we received printed copies of the Journal of Congress.

"'It would be a great satisfaction to us to receive an exact return of all the men we have in continental service who come within the description of the resolution, together with our State troops in continental service. Colonel Cabell was so kind as to send me a return of the continental regiments commanded by Lord Stirling, of the First and Second Virginia State regiments, and of Colonel Gist's regiment.

"'Besides these are the following, viz.: Colonel Harrison's regiment of artillery, Colonel Baylor's horse, Colonel Bland's horse, General Scott's new levies, part of which are gone to Carolina and a part are here. Colonel Gibson's regiment stationed on the Ohio, Heath and O'Hare's independent companies at the Stomel station, Colonel Taylor's regiment of guards to the convention troops, of these we have a return.

"'There may possibly be others not occurring to me.

"'A return of all these would enable us to see what proportion of the continental army is contributed by us.' . . .

"It further appears that no official records are known to exist which set forth the grounds upon which Colonel Taylor was commissioned as Colonel of the Albemarle Guards on the 5th March, 1779; nor any official record which would explain the reason why the said regiment continued in service beyond the year for which it was enlisted under the resolution of 9th January, 1779; nor any official record which would show whether the said regiment or a portion of it did or did not reenlist for the war under the resolution of January 23d, 1779 (3 Jour. Cong. 190); nor any official record which would show whether a portion of the said regiment continued in service after the regiment was disbanded on the 15th June, 1781; nor

any official record which would show that Colonel Taylor was discharged from the service when his regiment was disbanded.

"But it appears from an ancient writing found in the public archives of the State of Virginia, purporting to be the proceedings of 'a board of field officers, begun at Chesterfield, February 10, 1781, by order of Major-General Baron Steuben, for the purpose of arranging the Virginia line,' that the regiments reduced in the State of Virginia under the resolutions 3d and 21st October, 1780 (3 Jour. Cong. 532–8), were the eleven regiments of the Virginia line and one regiment of artillery, the former during the month of February being reduced to eight regiments; and that the only colonels mentioned in the said proceedings as reduced were Colonels William Heath and Abraham Buford, two of the twelve regiments being at the time without colonels. It does not appear that any other reduction of Virginia troops took place under the resolutions 3d and 21st October than that at Chesterfield; nor does it appear that the regiment known as the Albemarle Guards was reduced by the Baron Steuben or by any other official authority under the resolutions aforesaid. The ancient writing referred to is among the official papers of the first auditor's office of the State of Virginia; it is not signed or authenticated by any person, but was placed among the official records not long subsequent to the proceedings of the board, and has always been treated by the officers having it in charge as an authentic record of the proceedings of the board.

"9. No certificate of indebtedness, as prescribed by the resolution March 22, 1783 (4 Jour. Cong. 178), was ever issued to Colonel Taylor by the superintendent of finance for the commutation of five years' full pay, instead of the half-pay for life given to officers of the continental army by the previous resolution, October 21, 1780; nor by the Paymaster-General, as prescribed by the resolution 4th July, 1783 (4 Jour. Cong. 237).

"On the 30th July, 1783, the State of Virginia, by the auditor of public accounts, pursuant to an act of assembly, passed at the November session, 1781 (10 Hening Stats. Va. 462), settled the account of Colonel Taylor for the balance of his full pay, commonly known as 'depreciation pay,' and issued

to him evidence of indebtedness for £679 19*s.* 2*d.*, this being for his services as lieutenant-colonel from the 24th December, 1778, to the 5th March, 1779; and for his services as colonel from the 5th March, 1779, to the 15th June, 1781. And at various times subsequent to the 27th November, 1783, the State of Virginia, by the proper officers, issued to Colonel Taylor land warrants for eight years of service as an officer in the continental army.

"The foregoing payment of the State of Virginia of £679 19*s.* 2*d.* was one of the payments of that State to continental officers subsequently assumed and refunded to the State by the United States. On the 4th of February, 1850, the Commissioner of Pensions issued to the administrator of Colonel Taylor's estate a land warrant for services as colonel in the continental army.

"10. The five years' full pay authorized by the resolution 22d March, 1783 (4 Jour. Cong. 178), amounted, for a colonel of infantry, to the sum of $4500.

"11. On the 19th day of March, 1834, John H. Smith, commissioner, reported to the Governor of the Commonwealth of Virginia, in the case of the heirs of Francis Taylor, in the following words:

"'*Heirs of Francis Taylor, Colonel Continental.*

"'Colonel Taylor has received land for a service of eight years as major.

"'He was colonel in the continental service and ought to have been allowed land in that character.

"'There is no proof of his being entitled to land for a longer time than eight years.

"'His heirs are entitled to the difference between the bounty to a colonel and that to major for a service of eight years.

"'This claim has been reported in List No. 2, which has been printed by order of the House of Delegates.

"'Respectfully submitted, JOHN H. SMITH,

"'*March 19th*, 1834. *Com'r, &c.*

"'To His Excellency Governor FLOYD.'

"The name of Francis Taylor was reported with the rank of colonel in the continental line for a service of eight years by John H. Smith, commissioner, in List No. 2, 'of officers of the Virginia Continental and State Lines,' &c., 'whose names appear on the Army Register,' and that said List No. 2 was reported by the governor in his message to the House of Delegates of the Commonwealth of Virginia, and was by them ordered printed in 1834, as Executive Doc. No. 31.

"Subsequently the Governor of the Commonwealth of Virginia rendered his decision on the report of the commissioner in the case of the heirs of Francis Taylor in the following words:

"'To the heirs of Francis Taylor for his services as colonel in the continental line from October 1, 1775, to the close of the war:

"'*Ordered*, That the register issue warrants accordingly, if not already drawn.'

"And upon the foregoing findings of fact the court decides as conclusions of law: —

"(1.) The foregoing circumstantial facts set forth in finding 8, taken in connection with the contemporary resolutions of the Continental Congress and the historical events of the war occurring during the same period, are not sufficient evidence to authorize or sustain a finding of the ultimate fact that a portion of the soldiers of Colonel Taylor's regiment of guards re-enlisted for the war and became soldiers in the continental service without the limitations attached to their original enlistment under the resolution 9th January, 1779.

"(2.) The facts set forth in all of the findings are not sufficient to authorize or sustain a finding of the ultimate fact that Colonel Taylor's regiment of guards was reduced on the 15th June, 1781, under and in pursuance of the resolutions 3d and 21st October, 1780. 3 Jour. Cong. 532–8.

"(3.) The claimant, upon the foregoing findings, is not entitled to judgment under and by virtue of the provisions of the act 5th July, 1832. 4 Stat. 563.

"(4.) The report of the commissioner of the State of Virginia set forth in finding 11, though approved and adopted by the Governor of that State, is neither obligatory in law, nor conclusive as evidence, against the United States."

On the 14th of March, 1887, after the 11th finding of fact had been filed, the claimant moved to amend it by prefixing thereto the following:

"On the 11th day of March, 1834, the General Assembly of the Commonwealth of Virginia passed an act in these words:

"'*Be it enacted by the General Assembly*, That John H. Smith be, and he is hereby, appointed and constituted a commissioner, whose duty it shall be to continue the examination directed under a resolution of the General Assembly of the 21st day of February, 1833, touching the revolutionary documents of this Commonwealth, and he shall lay before the Governor any information he may discover as to any unsatisfied revolutionary claims of this Commonwealth on the government of the United States.

"'It shall, moreover, be the duty of the said commissioner to examine all claims for military land bounties, not heretofore decided on, which may arise under any existing law or resolution of the General Assembly, and report the facts relating to the same, together with any remarks which he may deem pertinent and proper, to the Governor of this Commonwealth, whose decision thereupon shall be final.' "

The court made on this application the following ruling: "Inasmuch as the Supreme Court takes judicial cognizance of statutes, State as well as National, and the practice of finding State laws would be an inconvenience, this request is refused."

At the same time the claimant asked the court to find the following fact: "12. Colonel Francis Taylor was an officer in the continental service on the 22d day of March, 1783, and continued therein as such officer to the end of the war." On that application the court made the following ruling: "Inasmuch as this finding involves a deduction from specific facts and circumstances which, so far as they are established by the

evidence, are set forth in the previous findings, and really involves a conclusion of law, it is refused."

The claim of the plaintiff now made before us is for the sum of $4500, being the amount of five years' full pay to Colonel Francis Taylor as a colonel of infantry, as being authorized by the resolution of the Continental Congress of March 22, 1783, (4 Jour. Cong. 178,) mentioned in finding 10, with interest thereon from September 3, 1783, the date of the final treaty of peace between the United States and Great Britain, at the rate of six per cent per annum, amounting in the aggregate to $32,310. This claim is founded upon the view that Colonel Taylor was in the military service, in the continental line, to the close of the war of the Revolution in 1783.

The resolution of Congress of March 22, 1783, was as follows: "Whereas the officers of the several lines under the immediate command of His Excellency General Washington, did, by their late memorial transmitted by their committee, represent to Congress, that the half-pay granted by sundry resolutions was regarded in an unfavorable light by the citizens of some of the States, who would prefer a compensation for a limited term of years, or by a sum in gross, to an establishment for life; and did, on that account, solicit a commutation of their half-pay for an equivalent in one of the two modes above mentioned, in order to remove all subject of dissatisfaction from the minds of their fellow-citizens; and whereas Congress are desirous, as well of gratifying the reasonable expectations of the officers of the army, as of removing all objections which may exist in any part of the United States, to the principle of the half-pay establishment, for which the faith of the United States hath been pledged; persuaded that those objections can only arise from the nature of the compensation, not from any indisposition to compensate those whose services, sacrifices, and sufferings have so just a title to the approbation and rewards of their country:

"*Therefore*, *resolved*, That such officers as are now in service, and shall continue therein to the end of the war, shall be entitled to receive the amount of five years' full pay in money, or securities on interest at six per cent per annum, as Congress

shall find most convenient, instead of half-pay promised for life, by the resolution of the 21st day of October, 1780; the said securities to be such as shall be given to other creditors of the United States, provided it be at the option of the lines of the respective States, and not of officers individually in those lines, to accept or refuse the same; and provided, also, that their election shall be signified to Congress through the commander-in-chief from the lines under his immediate command, within two months, and through the commanding officer of the Southern army, from those under his command, within six months from the date of this resolution:

"That the same commutation shall extend to the corps not belonging to the lines of particular States; and who are entitled to half-pay for life as aforesaid; the acceptance or refusal to be determined by corps, and to be signified in the same manner, within the same time as above mentioned:

"That all officers belonging to the hospital department, who are entitled to half-pay by the resolution of the 17th day of January, 1781, may collectively agree to accept or refuse the aforesaid commutation, signifying the same through the commander-in-chief within six months from this time; that such officers as have retired at different periods, entitled to half-pay for life, may collectively, in each State of which they are inhabitants, accept or refuse the same; their acceptance or refusal to be signified by agents authorized for that purpose, within six months from this period; that with respect to such retiring officers, the commutation, if accepted by them, shall be in lieu of whatever may be now due to them since the time of their retiring from service, as well as of what might hereafter become due; and that so soon as their acceptance shall be signified, the superintendent of finance be, and he is hereby, directed to take measures for the settlement of their accounts accordingly, and to issue to them certificates bearing interest at seven per cent. That all officers entitled to half-pay for life not included in the preceding resolution may also collectively agree to accept or refuse the aforesaid commutation, signifying the same within six months from this time."

The resolution of October 21, 1780, (3 Jour. Cong. 538), referred to in the resolution of March 22, 1783, was preceded by another resolution of October 3, 1780 (3 Jour. Cong. 532). The material provisions of these resolutions are set forth in the opinion of the Court of Claims, 15 C. Cl. 514, in the terms contained in the margin.[1]

---

[1] "The Continental Congress, by the *Resolutions 3d October* and *21st October*, 1780, (3 Jour. Cong. pp. 532, 538,) determined to reorganize the army in a manner which would involve the consolidation or reduction of regiments. The army, which was to be reduced, as designated by the resolutions, then consisted of sixteen 'additional regiments,' some or all of which had not been 'annexed to the line' of any 'particular State,' of certain specifically-named irregular battalions and light corps, and of eighty battalions, known as the continental line. As to the 'sixteen additional battalions,' and the irregular battalions specifically named, the resolutions directed that they 'be reduced,' and the non-commissioned officers and privates 'be incorporated with the troops of their respective States.' This provision related to troops which had been raised directly by Congress, and its purpose was threefold — to sweep them out of existence as organizations, to transfer the men to the regular regiments of the continental line, and to credit them to the quotas of their respective States.

"The resolutions next provided for the further reorganization of the army at large — of the continental line. So far as this case is concerned, it is sufficient to say that they provided, in effect, that the eleven regiments in the line furnished by Virginia should be reduced to eight, and that no mention of the Albemarle Guards is made in the resolutions.

"Having thus provided for the transfer of men and reduction of regiments, the resolutions further declared with regard to the officers who would necessarily be thrown out by the reduction:

"'And whereas, by the foregoing arrangement, many deserving officers must become supernumerary, and it is proper that regard be had to them:

"'*Resolved*, That from the time the reform of the army takes place they be entitled to half-pay for seven years, in specie or other current money equivalent, and also grants of land at the close of the war, agreeably to the resolution of the 16th of September, 1776.

"'*Ordered*, That a copy of the foregoing arrangement of the army be sent to the commander-in-chief for his opinion thereon, and that, if there shall appear no material objections, the same be carried into immediate effect.' (Resolution October 3, 1780.)"

"'Congress resumed the consideration of the report of the committee on General Washington's letter of the 11th; and thereupon . . .

"'*Resolved*, That the whole of the troops be enlisted during the war, and join their respective corps by the 1st day of January next.

"'That the commander-in-chief and commanding officer in the Southern

It is apparent from the conclusions of law (1) and (2) and the opinion of the Court of Claims, that the question litigated before that court was the ultimate fact, whether a portion of the soldiers of Colonel Taylor's regiment of Albemarle Guards (which regiment was originally raised for a service of one year, and was disbanded June 15, 1781) re-enlisted for the war and became soldiers in the continental service, without the limitations attached to their original enlistment under the resolution of the Continental Congress of January 9, 1779, (3 Jour. Cong. 179.) That resolution was as follows: "*Resolved*, That a battalion, consisting of 600 men, properly officered, be forthwith raised on continental establishment in Virginia, for the space of one year from the time of their enlistment, unless sooner discharged, under the direction of the governor and council of that State, who are hereby empowered to appoint the officers of the said battalion out of those of the Virginia line who have been left out of the late arrangement of the continental army, as far as their numbers will reach; the regiment to consist of one lieutenant colonel commandant and captain, one major and captain, six captains, one captain lieutenant, seven lieutenants, nine ensigns, one surgeon, one surgeon's mate, eight companies of 75 men each, including corporals, three sergeants, one drum and one fife to each company:

"That these troops be stationed at, and not removed (except to such distances as the duty of the post may require) from the barracks in Albemarle County, as guards over the convention troops; that they receive the usual pay of the continental army, and a suit of clothes as a bounty to each non-commissioned officer and private:

"That as soon as the said regiment shall be so far completed

Department direct the officers of each State to meet and agree upon the officers for the regiments to be raised by their respective States, from those who incline to continue in the service; and where it cannot be done by agreement, to be determined by seniority, and make return of those who are to remain, which is to be transmitted to Congress, together with the names of the officers reduced, who are to be allowed half-pay for life.' (Resolution October 21, 1780.)"

as to be able to do the duty of the post, the militia now in the service there be discharged."

It also appears that the further question was litigated, whether the court was authorized to find the ultimate fact that the regiment of guards, when it was disbanded on the 15th of June, 1781, was "reduced," within the terms of the resolutions of October 3 and 21, 1780.

The opinion of the Court of Claims says of the claim in suit that it "has regretfully reached the conclusion that the moral probabilities on which it rests do not constitute such a foundation of circumstantial evidence as would sustain a verdict in a suit at *nisi prius*, or authorize a judgment in this court."

It further says: "During the period of the revolution the term muster-out was not used, and troops, either individually or as organizations, are spoken of as 'discharged' when dismissed from the continental service. A regiment broken up and consolidated is spoken of as 'reduced,' and officers who were thereby thrown out and became unattached were designated as 'supernumeraries.' The consolidated regiments, moreover, are variously designated as 'the new arrangement,' the 'new establishment,' the 'newly constructed corps,' etc. As to the term 'disbanded,' it seems to have had no technical significance. When a regiment was disbanded some of its soldiers may have been discharged and some transferred to other regiments, the term denoting simply the dissolution of the regiment."

The opinion says, that Francis Taylor, who was then a major and supernumerary officer, thrown out by the consolidation of regiments in 1778, known as the White Plains arrangement, and liable to be called into service on the one hand and entitled to half-pay for life on the other, was assigned to the command of the Albemarle Guards with the rank of lieutenant-colonel, that body being a regiment raised for the purpose of guarding the captured army of General Burgoyne, known as "the convention troops," the duty of guarding whom had been assigned to the State of Virginia; and that Francis Taylor was commissioned as colonel of the

regiment by the Governor of Virginia on the 5th of March, 1779. It also says, that the regiment of guards was not designated in direct terms in the resolutions of October 3 and 21, 1780, nor embraced in any general classification contained in those resolutions; that it was raised for the space of one year from the time of enlistment, unless sooner discharged; that it was to be "stationed at and not removed (except to such distances as the duty of the post may require) from the barracks in Albemarle County, as guards over the convention troops;" that if it continued on that basis until it was discharged in June, 1781, its officers did not become supernumeraries under the resolutions of October 3 and 21, 1780, for reorganizing the continental army; that the guards would have passed out of existence before the time for reorganization arrived; and that, as originally constituted, it had no enlisted soldiers who could be transferred to the regiments of the line, because its soldiers were enlisted for a limited period and for a limited, designated service, which service was to be rendered within prescribed, narrow, territorial limits. The opinion states the question to be, therefore, whether the guards, or a portion of them, had re-enlisted for the war, under the resolution of Congress of January 23, 1779, (3 Jour. Cong. 190,) and became reduced, or consolidated with other regiments, under the resolutions of October, 1780.

The resolution referred to, of January 23, 1779, was "that the commander-in-chief be authorized and directed to take the most effectual measures to reinlist for the continuance of the war, all such of the continental troops as are not expressly engaged for that period," and it promised new bounties and rewards "to each able-bodied soldier now in the service and who shall voluntarily reinlist during the war."

The opinion then proceeds to consider the arguments adduced on the part of the claimant to show that the soldiers of the guards did re-enlist, and in regard to those arguments says: "The circumstances and coincidences so much relied upon, though they might appeal strongly, as establishing a moral probability, to a body possessed of legislative discretion, do not rise to the standard of legal evidence and are insuffi-

cient to authorize a judgment or sustain a verdict. No authenticated document nor official record has been produced to show that a single soldier of Colonel Taylor's regiment had re-enlisted for the war, or was liable to serve beyond the limits of the State of Virginia, or could have been transferred to regiments of the line, under the resolutions. No such averment was made by Colonel Taylor himself in his petitions to Congress and the house of delegates, nor is it alluded to in any contemporary report, letter or communication. Neither the house of delegates, in 1783, nor the Secretary of War, General Knox, in 1791, regarded the Albemarle Guards as one of the regiments which had been reduced and consolidated under the resolutions of 1780; and the silence of the resolutions themselves, with all their particularity as to other commands, indicates that the Continental Congress were not aware of there being soldiers in the guards who were liable to be transferred to the line. Moreover, the time when the regiment was disbanded, June 15, 1781, was subsequent to the consolidation of the Virginia regiments by the Baron Steuben, (February,) and the apparent cause of disbandment was not its consolidation with other regiments, but the termination of the service or duty for which it had been raised and on which it had been exclusively engaged. The mention of the guards in the resolutions 9th February, 1780, (3 Jour. Cong. 432,) and in the correspondence of Mr. Jefferson with General Washington, on which great stress was laid in the argument, was applicable to the regiment, whether its soldiers had re-enlisted or not; for it was proper and just that its soldiers, who were continuing in service beyond the period of their enlistment, and who, in all seeming likelihood, were to continue in the service of guarding the prisoners till the end of the war, should be credited to the quota of Virginia."

The opinion then gives the language of the resolutions of February 9, 1780, which are set forth in the margin,[1] and pro-

[1] "*Resolved*, That for the ensuing campaign the States be respectively required to furnish, by draughts or otherwise, on or before the first day of

ceeds: "The first purpose of the resolutions was manifestly to fix and determine the number of men which each State should contribute. The second likewise related to State quotas, being a declaration that all of the men whose terms of service would not expire before the last of September following should be credited to their respective States, accompanied by a pledge that the men (not the officers and men) of certain irregular organizations, 'including the guards,' 'should be provided for, deemed, and treated in the same manner' as the men in the line. The third provision was a recommendation to the States 'to make like provision for the officers and men' of the designated irregular corps, 'including the guards' as might be made 'for the officers and men of their respective battalions.' In the first provision the guards were referred to as a corps which had, or which might have had, men who should be credited on the quota of Virginia; in the third the

---

April next, their respective deficiencies of the number of 35,211 men, exclusive of commissioned officers, which Congress deem necessary for the service of the present year.

"That the quotas of the several States be as follows:

New Hampshire	1,215	Delaware	405
Massachusetts Bay	6,070	Maryland	3,238
Rhode Island	810	Virginia	6,070
Connecticut	3,238	North Carolina	3,640
New York	1,620	South Carolina	2,430
New Jersey	1,620		[exclusive of blacks.]
Pennsylvania	4,855		

"That all the men whose times of service do not expire before the last date of September next be counted towards the quotas of the States to which they respectively belong, whether they compose the battalions in the line of the several States, those of the additional corps, including the guards, the artillery and horse, or the regimental artificers in the departments of the quartermaster general and commissary general of military stores, who, being credited to the States respectively, should be provided for, deemed and treated in the same manner with the men in the several State lines; and it is recommended to the several States to make like provision for the officers and men of the artillery, horse, additional corps, including the guards and regimented artificers, as may be made in pursuance of any resolution of Congress, for the officers and men of their respective battalions; with such exceptions, respecting the regimented artificers, as have been made by Congress in their acts concerning them."

officers and men of the guards are designated as among those for whom the States should make the same provision which they would make 'in pursuance of any resolution of Congress' for the officers and men of their respective battalions. It is true that the language of the resolutions does seem to indicate that then, on the 9th February, 1780, there were men in the guards 'whose times of service do not expire before the last date of September next.' But it is also true that the words, 'including the guards,' in the first provision, may have been intended merely as a comprehensive, sweeping clause, equivalent to saying that all men whose times of service did not expire, in whatever corps they might be found, should be counted upon the quota of Virginia; and that the same words in the third provision were intended as new legislation, as a special provision to classify the guards, who were continuing to serve beyond their times of enlistment, with men whose enlistment would not expire 'before the last date of September next.' Be that as it may, we cannot accept the ambiguous phraseology of the resolutions as authoritatively fixing the desired fact that the guards, or a portion of them, had re-enlisted for the war, and were liable to be reduced and consolidated under the resolutions which followed in October of the same year. It was proper and just that these officers and men should be thus provided for; but it does not follow that such a recognition establishes the fact that they stood on the same basis of enlistment for the war and for service in the field that the troops of the line stood upon."

Referring to the fact of the "depreciation pay" which Colonel Taylor received for the time he served as colonel of the guards, from March 5, 1779, to June 15, 1781, under the resolution of Congress of April 10, 1780, (3 Jour. Cong. 447,) which provided that "no person shall have any benefit of this resolution, except such as were engaged during the war, or for three years, and are now in service," the opinion says: "Finally, the depreciation pay, which, under the resolution 10th April, 1780, was only to be given to persons who 'had engaged to serve during the war, or for three years,' may well have been allowed to Colonel Taylor, as a supernumerary offi-

cer in actual service, by virtue of the terms of his original enlistment. But whatever the theory upon which it was allowed, we cannot infer from it the fact that Colonel Taylor's regiment, in whole or in part, had re-enlisted for the war, and that he had been reduced under the resolutions of October, 1780. Upon the whole of the evidence we must rule that it is insufficient to sustain a verdict, and that we are not at liberty, when sitting in the stead of a jury, to pass upon it or to deduce ultimate facts from it."

In the report of the case on the motion for a new trial, 22 C. Cl. 116, it is stated that the purpose of the motion "is to establish the fact that Colonel Francis Taylor, of the Albemarle Guards, continued in the service of the Continental Congress after the disbandment of his command in June, 1781, until the end of the war." On the argument before this court, the counsel for the claimant contends that his right to recover depends upon the question whether Colonel Taylor continued in the service until the end of the war, or was retired before that time, and thereby became entitled to half-pay for life or to the commutation therefor; that, if it be found that he did not continue in the service until the end of the war, yet if he was retired or "reduced" at any time after October 21, 1780, he was entitled to half-pay for life, under the resolution of that date; that, as he was entitled to half-pay for life as a major in 1778, the burden is upon the United States to show that he did not continue in the service to the end of the war; that it is not shown that he retired from the service in June, 1781, when the regiment was disbanded, or that he again became a supernumerary; that, although the law providing half-pay for life was modified by the resolutions of October 3 and 21, 1780, while he still commanded the guards, yet the only modification was as to the time when the half-pay should begin, the modification being that it should begin at the time the officer was reduced or retired from the service; that this modification was in force in June, 1781, when the guards were disbanded; that under its provisions Colonel Taylor would have been entitled to half-pay for life in his new grade as colonel, to begin from the time the guards were disbanded,

even if he had then retired from the service; that if he had been treated, in June, 1781, as a supernumerary major, he still would have been entitled from that date to half-pay as a major; that there is no evidence that he was reduced in rank; and that he was a colonel in the continental army on the 15th of June, 1781.

In the brief presented to us on this appeal, the counsel for the claimant departs from the questions litigated in the Court of Claims, as shown by the first two conclusions of law and by the opinion of that court, and contends that the issue is as to whether or not Colonel Taylor continued in the service to the end of the war, or retired before that time; and that the ultimate fact to be proved is the duration of his own personal service, and not the duration of the service of any of the soldiers composing the guards. The contention appears to be that, under the resolutions of October, 1780, a continuous service throughout the war by Colonel Taylor, or his retirement before its close, entitled him to half-pay for life.

But this view is not tenable, because the resolution of October 3, 1780, provided for half-pay for only seven years, and only for those officers who became supernumeraries under the arrangement provided for by that resolution; and the resolution of October 21, 1780, had reference only to the same officers, whose names were to be transmitted to Congress, and who are called therein "officers reduced," that is, in the language of the resolution of October 3, 1780, officers "thrown out by the reduction." Those were the only officers who were by the latter resolution "allowed half-pay for life." It is inaccurate, therefore, to say that the only change made by the resolutions of October, 1780, was as to the time half-pay for life should begin.

Whether Colonel Taylor retired from service at the time the regiment was disbanded, or whether he continued in the service to the end of the war, he was not a "reduced" officer, within the meaning of that term, as used in the resolutions of October, 1780. The scheme of those resolutions did not apply to such organizations as that of the guards, nor to officers who were not "reduced" under those resolutions, although

they should continue in service to the end of the war. An officer who left the service at the end of the war was not "reduced."

The commission of Francis Taylor as colonel came from the Governor of Virginia, and the order to discharge the soldiers of the regiment also came from him. It was an irregular regiment created for a particular service, and charged with a specific duty, to be performed in a designated locality. Service in the regiment was inconsistent with service in the continental army. Such commission as Francis Taylor held prior to January 9, 1779, was practically revoked by the terms of the resolution of Congress of that date, which authorized the governor and council of the State of Virginia to appoint the officers of the new regiment out of those of the Virginia line who had been "left out of the late arrangement of the continental army;" and by his acceptance of the appointment of lieutenant-colonel of the new regiment. His obligation to serve in the guards disqualified him from continuing as a supernumerary in the continental service. He could not perform duty under his commission as lieutenant-colonel or colonel of the guards, and at the same time hold himself in readiness to respond to a call to the field in the continental service.

The third conclusion of law made by the Court of Claims was that, upon its findings of fact, the claimant was not entitled to judgment under and by virtue of the provisions of the act of July 5, 1832 (4 Stat. 563). In regard to that statute, the court remarks, in its opinion, that it was intended to reimburse the State of Virginia for certain judgments which had been recovered against that State in her own courts, by officers, for half-pay, and to pay directly, without waiting for judgments to be recovered against the State, similar claims covered by the decision in *Lilly's Case*, 1 Leigh, 529; that the first section of that act is limited to officers commanding in the "Virginia line;" that the second section refers to certain regiments and corps specifically designated by name, and does not specify the Albemarle Guards; that the third section directs the Secretary of the Treasury "to adjust and settle those claims" of officers "of the aforesaid regiments and

corps, which have not been paid or prosecuted to judgments against the State of Virginia;" and that the benefits of the third section are clearly limited to the regiments and corps enumerated in the second section, and cannot be extended to the officers of other regiments or corps, though they may have a valid claim for half-pay against that State. It is said in the brief of the counsel for the claimant that it was never contended by him that that act was anything more than a legislative interpretation of the several resolutions of the Continental Congress which are in question, or that it created any new liability on the part of the United States. We concur in the view of the Court of Claims.

The fourth conclusion of law of that court was, that the report of the commissioner of the State of Virginia, set forth in finding 11, although approved and adopted by the governor of that State, was neither obligatory in law upon, nor conclusive as evidence against, the United States.

The State of Virginia, on the 11th of March, 1834, (Laws of 1834, c. 6, p. 22,) passed an act appointing John H. Smith a commissioner, and making it his duty to continue an examination previously directed touching the revolutionary documents of the State, and to lay before the governor any information he might discover as to any unsatisfied revolutionary claims of the State on the government of the United States; and further making it his duty to examine all claims for military land bounties, not theretofore decided on, which might arise under any existing laws or resolutions of the general assembly, and to report the facts relating to the same, together with any remarks he might deem pertinent and proper, to the governor of the State, "whose decisions thereupon shall be final." The decision of the governor on the report of the commissioner in the case of the heirs of Francis Taylor was made in September, 1850, and speaks of Taylor "as colonel in the continental line from October 1, 1775, to the close of the war." It is contended by the claimant that, under section 906 of the Revised Statutes, this decision of the governor of Virginia is conclusive against the United States, to show that Taylor continued in the continental service until the close of the war.

The provision of section 906 is, that records and exemplifications of books kept in any public office of any State, when authenticated in the manner provided by that section, "shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State" from which they are taken. The Court of Claims, in its opinion overruling the motion for a new trial (22 C. Cl. 116,) states that the clause above quoted from section 906 did not impart to the authenticated State record anything more than "faith and credit," and did not extend the effect of a decision against a State to the United States, nor make an award or judgment which might be final against a State "either obligatory in law, or conclusive as evidence, against the United States." We concur in this view.

It is also alleged for error by the claimant, that the Court of Claims refused to find that "Colonel Francis Taylor was an officer in the continental service on the 22d day of March, 1783, and continued therein as such officer to the end of the war," stating, as the ground of its refusal, that the proposed finding involved a deduction from specific facts and circumstances which, so far as they were established by the evidence, were set forth in the previous findings, and really involved a conclusion of law. The claimant contends that the finding requested was a conclusion of fact drawn from other specific facts and circumstances established by the testimony; that he was entitled to have that conclusion of fact found by the court; that such fact was not a question of law; and that, even if it were, the court erred in not finding it as a conclusion of law.

Perhaps, under the rulings of this court in *United States* v. *Pugh*, 99 U. S. 265, 270; *Sun Mutual Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S. 485, 503; *The Belgenland*, 114 U. S. 355, 362, and *McClure* v. *United States*, 116 U. S. 145, 151, the question involved in the proposed finding which was refused, was a question of law. In *United States* v. *Pugh*, one of the issues to be determined was, whether the proceeds of the sale of certain captured property belonging to the claimant had been paid into the Treasury. No direct

proof to that effect had been given, but, if shown at all, it was by way of inference from certain circumstantial facts established by the evidence and set forth in the findings of the Court of Claims. This court said, that the Court of Claims had found all the facts which had been established directly by the evidence; that those facts were "the results of evidence, and whether they establish the ultimate fact to be reached is, if a question of fact at all, to say the least, in the nature of a question of law;" that the inquiry presented was as to the legal effect of facts proved, not of the evidence given to make the proof; that the question of practice to be settled was whether, under the rule of this court as to appeals from the Court of Claims, the judgment of the latter court as to the legal effect of what might, perhaps not improperly, be called the ultimate circumstantial facts in a case, was final and conclusive, or whether it could be reviewed by this court; that, under that rule, this court could not consider the evidence, but its attention must be confined to the legal effect on the rights of the parties of the facts found by the Court of Claims; and that, in that way, the weight of the evidence was left for the sole consideration of that court, but the ultimate effect of the facts which the direct evidence had established was left open for review here on appeal. But whether the proposed finding which was refused in the present case was a conclusion of law from the facts already found, or an additional conclusion of fact, we are of opinion that the Court of Claims was correct in refusing to find it.

In the opinion of the Court of Claims in 22 C. Cl. 116, it is stated that part of the newly discovered evidence set up as a ground for a new trial consisted of "certain resolves and proceedings of the Continental Congress, and certain resolves of the general assembly of Virginia, and official correspondence in the first and second volumes of the State Papers of Virginia." In regard to these papers the Court of Claims says that it is "of the opinion that if they had been put in evidence on the trial they would not have changed the result." We concur in this view, after having examined the papers.

This case is very much like that of Dr. Charles Taylor, re-

ported as *Williams* v. *United States*, 13 C. Cl. 395. Charles Taylor was a surgeon's mate in the continental army from 1776 to 1778, and then was reduced and became a supernumerary officer. In 1779 he was appointed a surgeon's mate in the regiment of Albemarle Guards, and accepted and held that position. In October, 1779, he was promoted to be surgeon in the regiment, and held that place until the regiment was discharged, June 15, 1781. He claimed five years' full pay as surgeon in the Virginia line of the continental army, under the same resolutions and proceedings that are now involved in the case of Colonel Francis Taylor. The Court of Claims decided that he could not have full pay as an officer of the guards and at the same time be entitled to half-pay as a reduced and supernumerary officer. The claim was rejected and there was an appeal to this court. The opinion of this court is reported as *Williams* v. *United States*, 25 L. C. P. Co. ed. 309, and 14 C. Cl. 590. It is also referred to as No. 1058 on page ccxxviii of the appendix to 131 U. S. In its opinion, this court, in affirming the judgment of the Court of Claims, said that Dr. Charles Taylor did not continue in service until the end of the war, within the meaning of the resolutions of October 21, 1780, and March 22, 1783; that, when he accepted his appointment in the regiment of the guards, in January, 1779, he ceased to be a supernumerary surgeon's mate, and became an active officer in that regiment; that, when it was discharged, because its term of enlistment had expired, he was out of service; that, when it was raised, the governor and council of Virginia were authorized by Congress to appoint its officers out of those in the Virginia line who were then supernumerary; and that the acceptance of an appointment in the new regiment took the officer out of his former position in the line.

Judgment affirmed.

LAWRENCE *v.* RECTOR.

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

No. 56. Argued November 6, 7, 1890. — Decided November 17, 1890.

The court adheres to the views of the law expressed in its opinion delivered at the former trial of this case, (*Rector* v. *Gibbon*, 111 U. S. 276,) and finds that the decree below was made in accordance with them.

Under the peculiar circumstances of this case, having reference to the doubt as to title, and to the evident good faith of the parties, the true measure of liability is the actual receipts from the property, and not its rental value; and in that respect the decree below is held to have been erroneous.

In equity. The case is stated in the opinion.

Mr. Henry A. Gardner (with whom was *Mr. Robert D. McFadon* on the brief) and *Mr. Samuel W. Williams* (with whom was *Mr. S. F. Clark* on the brief) for appellants.

Mr. U. M. Rose and *Mr. Augustus H. Garland* (with whom were *Mr. F. W. Compton* and *Mr. G. B. Rose* on the brief) for appellee.

Mr. Justice Brewer delivered the opinion of the court.

This is the second time this case has been to this court. It came first on demurrer to the bill, and the decision is reported in 111 U. S. 276. The demurrer, which had been sustained in the Circuit Court, was overruled by this, and the case remanded with instructions to permit answer and proceed to proof. Obediently thereto answer was filed in the Circuit Court, and the case proceeded to proof and hearing. The history of the "Hot Springs" litigation, of which this is but a fragment, has been so often referred to in the opinions of this court, particularly in the case in 111 U. S. *supra*, that reference thereto now is superfluous; and in reference to the principal matter in controversy here, the title to the lots, it is enough to say that every material fact alleged in the bill was proved, and that nothing was developed in answer or testimony to disturb the conclusions of law heretofore reached by

this court. The matter of title was established by the decree of the Circuit Court in accordance with the views of the law entertained and announced by this court, and there is nothing in the testimony to withdraw the case from the scope of that conclusion.

The Circuit Court entered a decree for title — also directed an accounting. That accounting, as finally settled, credited the defendant with the amount of taxes and assessments paid by him — the amount of purchase-money paid to the United States for the lots and the expenses incurred in obtaining the patent — and the amount due for improvements, on the basis of the lease which established the rights of the parties, and charged him with the money received on certificates from the government for buildings condemned and destroyed, and also the rental value of the premises from the time of the award of the commissioners to the date of the decree. We are of opinion that the rental value ought not to have been charged; that, under the peculiar circumstances of this case, having reference to the doubt that must have arisen as to the matter of title, to the *prima facie* effect of the award given by the commissioners, and to the evident good faith of all the parties in reference thereto, the true measure of liability is not the rental value, but the actual receipts. This account, as stated by the Circuit Court, was as follows:

To rent of premises		$9,541 66
To amount due on certificates for condemned buildings		10,737 86
		$20,279 52
By amount of taxes and assessments paid,	$2,306 98	
By amount purchase-money paid for lots,	1,528 00	
By amount expenses in getting patent .	112 35	
By amount for improvements as per covenant	8,666 67	
	$12,614 00	$12,614 00
Balance due Rector . .		$7,665 52

Statement of the Case.

This account should be modified so as to charge defendant with amount received on certificates for condemned buildings, $10,737.86, and other amounts actually received from the property, $5659.07; total $16,396.93. From which, deducting the credits allowed, there remains a balance of $3782.93.

The decree of the Circuit Court will therefore be modified and the case

Remanded with instructions to enter a final decree, as heretofore, establishing the title of the complainant and decreeing to him possession, and adjudging that he recover of the defendants the sum of $3782.93, *with interest from the* 11*th day of November*, 1886, *the time of the final decree.*

GURNEE *v.* PATRICK COUNTY.

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

No. 57. Argued and submitted November 7, 1890. — Decided November 17, 1890.

If a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law.

Morey v. *Lockhart*, 123 U. S. 56; *Wilson* v. *Nebraska*, 123 U. S. 286; *Sherman* v. *Grinnell*, 123 U. S. 679; and *Railroad Co.* v. *Grant*, 98 U. S. 398, affirmed.

Richmond & Danville Railroad Co. v. *Thouron*, 134 U. S. 45, affirmed.

A judgment in a Circuit Court of the United States on a general demurrer to the declaration in an action removed from a State Court, that the demurrer be sustained, and, as the record showed that the court had no jurisdiction, that the cause be remanded to the State Court, is not a judgment to which a writ of error from this court can be maintained.

This case was called when reached in the regular order upon the calendar, and argument was commenced. The court, however, on examining the record, declined to hear further argument, but granted to counsel leave to file briefs on the question of jurisdiction. The case, as stated by the court, was as follows:

Plaintiffs in error are citizens of the State of New York, and the owners and holders of certain bonds of the county of

Patrick in the State of Virginia. The record shows that at a meeting of the board of supervisors for the county of Patrick, on April 7, 1884, "the Norfolk and Great Western Railroad Company, for the use and benefit of Walter S. Gurnee, Jun'r, and Augustus C. Gurnee, and Walter S. Gurnee, Jr., and Augustus C. Gurnee, assignees thereof," presented to the board "seventeen bonds of $1000 each, executed by the county aforesaid to said railroad company and numbered, respectively, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 23, 24, 25, 29 and 30, and demanded payment of the interest due thereon to the first November, 1883, or a levy for said interest, and filed the following account for said interest, viz.: (Here follows account.) Which account said board of supervisors disallowed and refuse to levy for in whole or in part." On the same day notice of appeal to the county court of Patrick County from the decision of the board was given by the railroad company for the use and benefit of plaintiffs in error, and by plaintiffs in error as "assignees of said bonds," and the appeal perfected.

On May 6, 1884, the case was removed by plaintiffs in error into the Circuit Court of the United States for the Western District of Virginia, and on the 1st of July they filed their declaration in that court against the county. The defendant demurred, and on the 3d of May, 1887, the following order was entered: "This day came the parties, by their attorneys, and in pursuance of an agreement by counsel submitted in vacation to the judges of this court for their decision, the demurrer filed by the defendant to the plaintiffs' declaration and to each count thereof and the said defendant's demurrer to the plaintiffs' declaration and each count thereof being argued, and because it seems to the court that the plaintiffs' declaration and each and every count thereof are insufficient in law, it is considered by the court that the demurrer aforesaid be sustained, and, the record showing that this court has not jurisdiction in this case, it is ordered that the same be remanded to the County Court of Patrick County, Virginia." On the next day it was further ordered: "It being suggested to the court that it is the purpose of the plaintiffs to ask for a writ of error to the final order entered on yesterday remanding this

case to the County Court of Patrick County on the ground that this court has no jurisdiction thereof, on the motion of the plaintiffs the order herein entered on yesterday, the 3d of May, 1887, be suspended for ninety days from the rising of this court." The pending writ of error was subsequently allowed.

Mr. A. T. Britton, *Mr. A. B. Browne* and *Mr. Henry Wise Garnett* for plaintiffs in error.

Mr. John W. Daniel for defendant in error.

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

Prior to the act of March 3, 1875, there could be no appeal or writ of error from an order of a Circuit Court remanding a suit which had been removed, because such an order was not a final judgment or decree in the sense which authorized an appeal or writ of error. *Railroad Co.* v. *Wiswall*, 23 Wall. 507. But it was provided by that act that the order of a Circuit Court dismissing or remanding a cause to a State court, should be reviewable by the Supreme Court on writ of error or appeal as the case might be. 18 Stat. 471, c. 137, § 5. By section 6 of the act of March 3, 1887, (24 Stat. 552, 555, c. 373,) as corrected by the act of August 13, 1888, (25 Stat. 433, c. 866,) the provision to that effect was repealed, and it was also provided by the act that "no appeal or writ of error from the decision of the Circuit Court so remanding such cause shall be allowed." Section 6 was accompanied by the proviso "that this act shall not affect the jurisdiction over or disposition of any suit removed from a court of any State, or suit commenced in any court of the United States, before the passage hereof except as otherwise expressly provided in this act."

In *Morey* v. *Lockhart*, 123 U. S. 56, it was held that this court had no power to review on appeal or writ of error an order of the Circuit Court remanding a cause to a State court, when it was commenced, removed and remanded after the act of March 3, 1887, went into effect. In *Wilkinson* v. *Nebraska*, 123 U. S. 286, it was decided that the proviso in section six of

the act of March 3, 1887, related only to the jurisdiction of the Circuit Courts of the United States, and did not confer upon this court jurisdiction over a writ of error from a judgment remanding a cause to a State court, when the suit was begun and removed before the act of 1887, but not remanded until afterwards. In *Sherman* v. *Grinnell*, 123 U. S. 679, the order to remand was made while the act of March 3, 1875, was in force, but the writ of error was not brought until after the passage of the act of March 3, 1887, and it was held that this court could not take jurisdiction. The general rule was applied in these cases that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law. *Railroad Co.* v. *Grant*, 98 U. S. 398, 401. The opinions in all of them were delivered by Mr. Chief Justice Waite, and they are decisive upon the disposition of the case before us.

This case was commenced and removed into the Circuit Court before the act of 1887 went into effect, but the suit was remanded afterwards. In this respect the situation is the same as in *Wilkinson* v. *Nebraska*, *supra*.

By the act of February 25, 1889, (25 Stat. 693, c. 236,) it was provided that in all cases where a final judgment or decree should be rendered in a Circuit Court of the United States in which there was a question involving the jurisdiction of the court, the party against whom the judgment or decree was rendered should be entitled to an appeal or writ of error to this court, without reference to the amount of such judgment or decree, but where it did not exceed the sum of $5000, the question of jurisdiction should alone be reviewable. In *Richmond & Danville Railroad* v. *Thouron*, 134 U. S. 45, we held that a remanding order was not a final judgment or decree, within the terms of that act, and that this court had no jurisdiction to review it.

It is contended, however, that the order of the Circuit Court here was such a final judgment, because the Circuit Court sustained the demurrer in remanding the cause, but the position is untenable. The demurrer brought into consideration the contention that the plaintiffs could not maintain their

action because the court by law had no jurisdiction of their case, and thereupon the cause was remanded; and, having been remanded, this writ of error cannot be maintained, and is therefore *Dismissed.*

THE STEAMSHIP HAVERTON.

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

No. 60. Argued and submitted November 7, 1890. — Decided November 17, 1890.

In a collision case in admiralty the valuation of the sunken vessel and effects was $6057, for which amount the District Court gave judgment. The Circuit Court, on appeal, awarded one-half the valuation, viz.: $3028.50. *Held*, that this court had no jurisdiction on appeal.
The Hesper, 122 U. S. 126; and *The Alaska*, 130 U. S. 201, distinguished.

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

This was a libel filed to recover the value of the pilot-boat Mary and Catherine, sunk in a collision, and also of certain personal effects on board of her at the time. The value of the pilot-boat was determined by the Circuit Court to have been $5025, and of the personal effects, all of which were a total loss, to have been $1032. This made a total valuation, according to the findings, of $6057. For this amount a decree had been entered by the District Court, but on appeal the Circuit Court awarded the sum of $3028.50, one-half the valuation. From that decree an appeal was taken to this court by the libellants.

Mr. James Parker for libellants and appellants.

Mr. J. McConnell, for appellees, submitted on his brief.

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

Assuming, as we must do, the total value to have been $6057, the matter in dispute in this court is the difference between that value and the decree, namely, $3028.50. We have, therefore, no jurisdiction. *Dows* v. *Johnson*, 110 U. S. 223. On the argument it was urged with much earnestness on behalf of appellants, that it is within our power, upon the facts as found, to declare the Mary and Catherine entirely and solely in fault, and take away from the libellants what the Circuit Court awarded them, and that jurisdiction can be maintained by adding the amount the Circuit Court did not allow to the amount that it is suggested libellants might thus be deprived of. But as the claimants did not appeal, and as, if they had, the worst that could happen to libellants through our action on such cross appeal, would be the taking away of less than $5000, the suggestion is entitled to no consideration.

There is nothing in the cases of *The Hesper*, 122 U. S. 256, or *The Alaska*, 130 U. S. 201, to the contrary. In the former, the District Court awarded $8000, while the Circuit Court gave only $4200, but that was a case of salvage, in which the value of the property saved was over $100,000, and compensation was sought for the salvage in such sum proportioned to the value as the court might deem meet and reasonable. There was no finding of the Circuit Court that bound us, and in case of reversal a much larger sum than the jurisdictional amount might have been awarded, in addition to the sum which was. The difference between the judgments of the two courts in no respect represented the amount in dispute. Moreover, that case involved only the power of the Circuit Court on appeal, and not that of this court. In the latter case, the stipulation given to release the vessel libelled was for the sum of $25,000, for the benefit of five parties, each of whose claim for damages was $10,000, and some of whom might recover more than $5000, so that the amount involved in each case, on the question of jurisdiction, was $10,000, which was, of course sufficient.

This appeal must be dismissed, and it is so ordered.

In re GRIMLEY, Petitioner.

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

No. 761. *Submitted October 21, 1890. — Decided November 17, 1890.

Civil Courts may inquire, under a writ of *habeas corpus*, into the jurisdiction of the court over the party condemned, but cannot inquire into or correct errors in its proceedings.

An enlistment is a contract between the soldier and the government which involves, like marriage, a change in his status which cannot be thrown off by him at his will, although he may violate his contract.

An enlisted soldier cannot avoid a charge of desertion by showing that, at the time when he voluntarily enlisted, he had passed the age at which the law allows enlisting officers to enlist recruits.

A recruit who voluntarily goes before a recruiting officer, expresses his desire to enlist, undergoes a physical examination, is accepted by the officer, takes the oath of allegiance before him, signs the clothing rolls, and is placed in charge of a sergeant, has thereby enlisted and has become a soldier, in the army of the United States, although the articles of war have not been read to him.

Tyler v. *Pomeroy*, 8 Allen, 480, distinguished from this case.

HABEAS CORPUS. The prisoner, a recruit in the army of the United States, being discharged, the United States took this appeal. The objections to the validity of the enlistment are stated in the report of the argument of the appellee's counsel. The statutes regulating enlistments will be found in the opinion of the court.

Mr. Solicitor General for the United States, appellants.

Mr. Henry W. Putnam and *Mr. William H. Brown* for the petitioner, appellee.

I. Grimley's alleged enlistment, on February 18, 1888, was void. He was, at the time, over forty years of age, and therefore above the maximum age for enlistment. *Seavey* v. *Seymour*, 3 Cliff. 439, 445, 447; *In re McDonald*, 1 Lowell, 100; *In re Davison*, 21 Fed. Rep. 618; *In re Hearn*, 32 Fed. Rep.

141; *In re Lawler*, 40 Fed. Rep. 233, 235; *Goodson* v. *Caldwell*, 2 Winston (N. C.) 135.

The reasons for holding void an enlistment, like the present, above the maximum age are even stronger than in the case of one below the minimum; for the latter is a defect which time would speedily remedy, while time would only aggravate the former, by rendering the recruit constantly less "effective" and less "able-bodied." The reason and importance of the rule as to the maximum age are emphasized by the exception in sect. 1116, that "this limitation as to the age shall not apply to soldiers reënlisting," — thus negatively, as well as affirmatively, forbidding the enlistment of new men over thirty-five; and also by the fact that while the minimum age has been reduced to sixteen, even in time of peace, and the minimum height of five feet six inches is abolished (Stat. 1838, c. 162, § 30), the maximum age has never been raised above thirty-five, except temporarily in the War of 1812, when it was raised first to forty-five, and then to fifty, and was promptly restored in 1815 to thirty-five years, where it has remained since.

The declaration of the petitioner at the rendezvous as to his age is not conclusive as against the actual fact, and is immaterial if he is not in fact within the statutory age. He cannot by any declarations of his own make himself a soldier if the law says he cannot be one. *In re McDonald*, 1 Lowell, 100; *Seavey* v. *Seymour*, 3 Cliff. 439, 447. An oath as to age is not, and never has been, made by statute conclusive that a man is within the maximum.

The military authorities cannot waive the statutory maximum established by Congress, either on account of the recruit's perjury as to his age or for any other reason whatever. The legislative department, or officers expressly thereunto authorized by statute, can alone do that. Winthrop's Military Law, 769, 770. The remark of the court in *United States* v. *Wingall*, 5 Hill, 16, that an illegality can be waived by the Government is *obiter dictum*, the enlistment in that case being held not to be illegal.

Even if the government officers can waive the maximum of

age, they had already waived the enlistment itself quite as effectually by telling his mother that he need not return, and might go to work. If the officers could do the one, they could do the other, and the inchoate enlistment was waived first.

II. Independently of Grimley's age, the proceedings at the rendezvous did not constitute a valid enlistment so completed as to exchange his civil status for the military status. *United States* v. *Thompson*, 2 Sprague, 103; *Tyler* v. *Pomeroy*, 8 Allen, 480, 485, 486; *Bamfield* v. *Abbot*, 9 Law Rep. 510.

He was entitled to be allowed time to consider the subject until his mind was fully made up before the oath was administered to him, and his mind could not be intelligently made up within the meaning of the law, until all the Articles of War had been read to him, so that he could know just what his new status was. Several days out of the atmosphere of the rendezvous are deemed a reasonable time to think it over. The oath administered to Grimley was, therefore, ineffectual in law to make him a soldier. The reading of the Articles of War must *precede* the taking of the oath. "These rules and articles shall be read . . . and he shall *thereupon* take an oath, etc.," the reading being thus expressly made a condition precedent to the valid administration of the oath. It does not appear that articles 47 or 103, or any of the other Articles of War, were intelligibly explained, or even read to him at all; and it is evident that the nature of the oath, or even of oaths in general, was not explained to him during the fifteen minutes or so that he was at the rendezvous in all.

Under such circumstances Grimley evidently still had in law a *locus penitentiæ* open to him. The mere administration of the oath, even if in compliance with the law, does not make the man a soldier. *Seavey* v. *Seymour*, 3 Cliff. 439.

Mr. Justice Brewer delivered the opinion of the court.

John Grimley, the appellee, was, on the 28th day of May, 1888, found guilty by a court-martial of the crime of desertion, and sentenced to be imprisoned six months. While serving out this sentence at Fort Warren, Massachusetts, he sued out

a writ of *habeas corpus* from the District Court of the United States for the District of Massachusetts. That court, on June 25, 1888, discharged him from custody. The United States appealed to the Circuit Court for said District, which, on the 27th day of February, 1889, affirmed the decree of the District Court. 38 Fed. Rep. 84. From this decision the United States has brought this appeal.

The Circuit Court found that the petitioner was forty years of age at the time of his alleged enlistment, although he represented himself to be but twenty-eight; and, under section 1116 of the Revised Statutes, ruled that the enlistment was void, and that Grimley never became a soldier, and was not subject to the jurisdiction of the court-martial. That section reads: "Recruits enlisting in the Army must be effective and able-bodied men, and between the ages of sixteen and thirty-five years, at the time of their enlistment." It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence. And, on the other hand, it is equally clear that by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial; and that no mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdiction. That being established, the *habeas corpus* must be denied and the petitioner remanded. That wanting, it must be sustained and the petitioner discharged. If Grimley was an enlisted soldier he was amenable to the jurisdiction of the court-martial; and the principal question, the one ruled against the government, is whether Grimley's enlistment was void by reason of the fact that he was over thirty-five years of age. This case involves a matter of contractual relation between the parties; and the law of contracts, as applicable thereto, is worthy of notice. The government, as contracting party, offers contract and service. Grimley accepts such contract declaring that he possesses all the qualifications prescribed in the government's offer. The contract is duly signed. Grimley has made an untrue statement in regard to his qualifica-

tions. The government makes no objection because of the untruth. The qualification is one for the benefit of the government, one of the contracting parties. Who can take advantage of Grimley's lack of qualification? Obviously only the party for whose benefit it was inserted. Such is the ordinary law of contracts. Suppose "A," an individual, were to offer to enter into contract with persons of Anglo-Saxon descent, and "B," representing that he is of such descent, accepts the offer and enters into contract; can he, thereafter, "A" making no objection, repudiate the contract on the ground that he is not of Anglo-Saxon descent? "A" has prescribed the terms. He contracts with "B" upon the strength of his representations that he comes within those terms. Can "B," thereafter, plead his disability in avoidance of the contract? On the other hand, suppose for any reason it could be contended that the proviso as to age was for the benefit of the party enlisting, is Grimley in any better position? The matter of age is merely incidental, and not of the substance of the contract; and can a party by false representations as to such incidental matter obtain a contract, and thereafter disown and repudiate its obligations on the simple ground that the fact in reference to this incidental matter was contrary to his representations? May he utter a falsehood to acquire a contract, and plead the truth to avoid it, when the matter in respect to which the falsehood is stated is for his benefit? It must be noted here, that in the present contract is involved no matter of duress, imposition, ignorance or intoxication. Grimley was sober, and of his own volition went to the recruiting office and enlisted. There was no compulsion, no solicitation, no misrepresentation. A man of mature years, he entered freely into the contract.

But in this transaction something more is involved than the making of a contract, whose breach exposes to an action for damages. Enlistment is a contract; but it is one of those contracts which changes the status; and, where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. Marriage is a contract; but it is one which creates a status. Its contract

obligations are mutual faithfulness; but a breach of those obligations does not destroy the status or change the relation of the parties to each other. The parties remain husband and wife, no matter what their conduct to each other — no matter how great their disregard of marital obligations. It is true that courts have power, under the statutes of most States, to terminate those contract obligations, and put an end to the marital relations. But this is never done at the instance of the wrongdoer. The injured party, and the injured party alone, can obtain relief and a change of status by judicial action. So, also, a foreigner by naturalization enters into new obligations. More than that, he thereby changes his status; he ceases to be an alien, and becomes a citizen, and when that change is once accomplished, no disloyalty on his part, no breach of the obligations of citizenship, of itself, destroys his citizenship. In other words, it is a general rule accompanying a change of status, that when once accomplished it is not destroyed by the mere misconduct of one of the parties, and the guilty party cannot plead his own wrong as working a termination and destruction thereof. Especially is he debarred from pleading the existence of facts personal to himself, existing before the change of status, the entrance into new relations, which would have excused him from entering into those relations and making the change, or if disclosed to the other party, would have led it to decline admission into the relation, or consent to the change.

By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on, nor can he, the State not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the State, would not have entered into the new relations with him, or permitted him to change his status. Of course these considerations may not apply where there is insanity, idiocy, infancy, or any other disability which, in its nature, disables a

party from changing his status or entering into new relations. But where a party is *sui juris*, without any disability to enter into the new relations, the rule generally applies as stated. A naturalized citizen would not be permitted, as a defence to a charge of treason, to say that he had acquired his citizenship through perjury, that he had not been a resident of the United States for five years, or within the State or Territory where he was naturalized one year, or that he was not a man of good moral character, or that he was not attached to the Constitution. No more can an enlisted soldier avoid a charge of desertion, and escape the consequences of such act, by proof that he was over age at the time of enlistment, or that he was not able-bodied, or that he had been convicted of a felony, or that before his enlistment he had been a deserter from the military service of the United States. These are matters which do not inhere in the substance of the contract, do not prevent a change of status, do not render the new relations assumed absolutely void. And in the case of a soldier, these considerations become of vast public importance. While our regular army is small compared with those of European nations, yet its vigor and efficiency are equally important. An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other. So, unless there be in the nature of things some inherent vice in the existence of the relation, or natural wrong in the manner in which it was established, public policy requires that it should not be disturbed. Now, there is no inherent vice in the military service of a man forty years of age. The age of thirty-five, as prescribed in the statute, is one of convenience merely. The government has the right to the military service of all its able-bodied citizens; and may, when emergency arises, justly exact that service from all. And if for its own convenience, and with a view to the selection of the best material, it has fixed the age at thirty-five, it is a matter

which in any given case it may waive; and it does not lie in the mouth of any one above that age, on that account alone, to demand release from an obligation voluntarily assumed, and discharge from a service voluntarily entered into. The government, and the government alone, is the party to the transaction that can raise objections on that ground. We conclude, therefore, that the age of the petitioner was no ground for his discharge.

A minor question arises on these facts as to whether the petitioner was in fact enlisted. It appears that on Saturday, February 18, 1888, the petitioner entered the recruiting rendezvous in Boston, and expressed a desire to enlist. He underwent a physical examination. He took the oath of allegiance before the recruiting officer, signed the clothing rolls, and was placed in charge of the sergeant. The latter took him to the clothing-room, and selected for his uniform a cap, trousers, blanket, shirt and pair of stockings, and laid them before him. He put none of these articles on except the cap, and that in a few minutes he took off. He then asked permission to go away and see his friends, and the sergeant told him to go, and be back on Monday. He went away in his citizens' clothes, returned to his mother's house and told her what he had done. She was very much grieved, and after some conversation with him went to the recruiting office, and finding three men there told them her errand, and was advised substantially that Grimley need not come back, and might go to work. Who these men were is not disclosed. On the strength of that he did not return, but went off and engaged in service as a coachman. He was arrested as a deserter on May 16, 1888, brought before a court-martial and found guilty, as heretofore stated. The oath of allegiance which he took was as follows:

"The United States of America.

"State of Massachusetts, }
City or Town of Boston, } *ss:*

"I, John Grimley, born in Armagh, in the State of Ireland, aged twenty-eight years and —— months, and by occupation

a groom, do hereby acknowledge to have voluntarily enlisted, this eighteenth day of February, 1888, as a soldier in the Army of the United States of America, for the period of five years, unless sooner discharged by proper authority; and do also agree to accept from the United States such bounty, pay, rations and clothing as are or may be established by law. And I do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles of war.

"JOHN GRIMLEY. [Seal.]

"Subscribed and duly sworn to before me this 18th day of February, A.D. 1888.

"JAMES MILLER

"Captain, 2d Infantry, Recruiting Officer."

The question presented is, whether the petitioner had, in fact, enlisted and become a soldier. It will be noticed that in this oath of allegiance is an acknowledgment that he had enlisted, and that it was not an agreement to enlist. In this respect this case differs from that of *Tyler* v. *Pomeroy*, 8 Allen, 480, in which the plaintiff, with others, had signed a paper by which, in terms they agreed to serve for a period of three years "from the date of our being mustered into the United States' service." In that case, Mr. Justice Gray, then a member of the Supreme Court of Massachusetts, in an opinion reviewing all the authorities in England and in this country, drew a distinction between an agreement to enlist, which, if broken, simply gives a right of action for damages, and an enlistment, which changes the status of the party, transfers him from civil to military life, and renders him amenable to military jurisdiction. Section 1342 of the Revised Statutes provides that the Army of the United States shall be governed by certain rules and articles thereafter stated. Article 2 provides: "These rules and articles shall be read to every enlisted man, at the time of, or within six days after, his enlistment,

and he shall thereupon take an oath or affirmation," &c. Obviously the oath is the final act in the matter of enlistment. Article 47, respecting desertion, reads: "Any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same," &c. By this, either receipt of pay or enlistment determines the status; and after enlistment the party becomes amenable to military jurisdiction, although no actual service may have been rendered and no pay received.

It is insisted that the Articles of War were not read to him; but that is not a prerequisite. "Within six days after" is the statute. The reading of the one hundred and twenty-eight articles, many of which do not concern the duty of a soldier, is not essential to his enlistment. Paragraph No. 766 of the Army Regulations of 1881 is as follows: "The forms of declaration, and of consent in the case of a minor, having been signed and witnessed, the recruit will then be duly examined by the recruiting officer and surgeon, if one be present, and, if accepted, the 47th and 103d Articles of War will be read to him, after which he will be allowed time to consider the subject until his mind appears to be fully made up before the oath is administered to him." That this was complied with is probable, from the testimony.

The petitioner testifies that something was read to him out of a book, though he is unable to say what it was; and Captain Miller, the recruiting officer, testifies that he is under the impression, though not positive, that he read the 47th article to him. He also says that he had quite a conversation with him, inquiring as to his past life and why he had decided to enlist. No solicitations were used, no advantage taken of him. The enlistment was a deliberate act. No specified amount of time for the purpose of consideration is prescribed by the regulation. The oath is not to be administered until his mind is fully made up, and that is all that is required. There is nothing in the circumstances surrounding the enlistment to vitiate the transaction. We conclude, therefore, upon the whole case, that the age of the petitioner was no bar to his enlistment of which he can take advantage; that the taking

of the oath of allegiance is the pivotal fact which changes the status from that of civilian to that of soldier; that the enlistment was a deliberate act on the part of the petitioner; and that the circumstances surrounding it were not such as would enable him, of his own volition, to ignore it, or justify a court in setting it aside.

The judgment of the Circuit Court will be

Reversed and the case remanded with instructions to reverse the decree of the District Court and take such further proceedings as shall be in conformity with the opinion of this court.

In re MORRISSEY, Petitioner.

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

No. 931. Submitted October 21, 1890. — Decided November 17, 1890.

This case is rightfully brought here by appeal, and not by writ of error.

The provision in Rev. Stat. § 1117, "that no person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: *Provided* that such minor has such parents or guardians entitled to his custody and control," is for the benefit of the parent or guardian, and gives no privilege to the minor, whose contract of enlistment is good so far as he is concerned.

The age at which an infant shall be competent to do any acts, or perform any duties, civil or military, depends wholly upon the legislature.

THE case is stated in the opinion.

Mr. Henry W. Putnam and *Mr. Daniel Noyes Kirby* for the petitioner, cited the following cases in their brief: *Ex parte Mason*, 1 Murphy (N. C.) 336; *Shorner's Case*, 1 Carolina Law Repository, 55; *United States* v. *Anderson*, 1 Cooke (Tenn.) 143; *Commonwealth* v. *Harrison*, 11 Mass. 63; *Commonwealth* v. *Cushing*, 11 Mass. 67; *S. C.* 6 Am. Dec. 156; *Commonwealth* v. *Callan*, 6 Binney, 255; *Lewis' Case*, 2 Carolina

Law Repository, 47; *Carleton's Case*, 7 Cowen, 471; *Commonwealth* v. *Downes*, 24 Pick. 227; *Keeler's Case*, Hempstead, 306; *Commonwealth* v. *Fox*, 7 Penn. St. 336; *Kimball's Case*, 9 Law Rep. 500; *United States* v. *Wright*, 5 Philadelphia, 296; *In re McDonald*, 1 Lowell, 100; *In re McLave*, 8 Blatchford, 67; *Commonwealth* v. *Blake*, 8 Philadelphia, 523; *In re McNulty*, 2 Lowell, 270; *United States* v. *Hanchett*, 18 Fed. Rep. 26; *In re Baker*, 23 Fed. Rep. 30; *In re Chapman*, 37 Fed. Rep. 327; *State* v. *Dimick*, 12 N. H. 194; *S. C.* 37 Am. Dec. 197; *Telegraph Co.* v. *Davenport*, 97 U. S. 369; *United States* v. *Cottingham*, 1 Rob. (Va.) 615; *S. C.* 40 Am. Dec. 710; *Seavey* v. *Seymour*, 3 Cliff. 439; *In re Tarbell*, 25 Wisconsin, 390; *Tucker* v. *Moreland*, 10 Pet. 58; *Conroe* v. *Birdsall*, 1 Johns. Cas. 127; *S. C.* 1 Am. Dec. 105; *Merriam* v. *Cunningham*, 11 Cush. 40; *Dew's Case*, 25 Law Rep. 538.

Mr. Solicitor General opposing.

Mr. Justice Brewer delivered the opinion of the court.

This case, appealed from the Circuit Court for the Eastern District of Missouri, presents, like that of *Grimley, Petitioner*, just decided, a question arising on *habeas corpus* as to the right of the petitioner, an enlisted soldier, to be discharged from military custody. An effort was made to bring this case here by writ of error; but that was abandoned, and an appeal rightfully substituted. *In re Neagle*, 135 U. S. 1, 42. The facts differ from those in that case, in this: The petitioner was seventeen years of age, and had a mother living who did not consent to his enlistment. Upon his enlistment he drew from the United States his uniform and equipments, and continued in actual service from the 23d day of August to the 13th day of September, 1883, when he deserted. He remained in concealment until February, 1889, at which time he had become of age, and then appeared at a recruiting office and demanded his discharge from the army on the ground that he was a minor when enlisted. In his oath of allegiance he swore that he was twenty-one years and five months

old. It will be seen that the petitioner was within the ages prescribed by section 1116 of the Revised Statutes, to wit, sixteen and thirty-five years. Section 1117 provides that "no person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: *Provided*, That such minor has such parents or guardians entitled to his custody and control." But this provision is for the benefit of the parent or guardian. It means simply that the government will not disturb the control of parent or guardian over his or her child without consent. It gives the right to such parent or guardian to invoke the aid of the court and secure the restoration of a minor to his or her control; but it gives no privilege to the minor.

The age at which an infant shall be competent to do any acts or perform any duties, military or civil, depends wholly upon the legislature. *United States* v. *Bainbridge*, 1 Mason, 71; *Wassum* v. *Feeney*, 121 Mass. 93, 95. Congress has declared that minors over the age of sixteen are capable of entering the military service, and undertaking and performing its duties.

An enlistment is not a contract only, but effects a change of status. *Grimley's Case*, *ante*, 147. It is not, therefore, like an ordinary contract, voidable by the infant. At common law an enlistment was not voidable either by the infant or by his parents or guardians. *The King* v. *The Inhabitants of Rotherford Greys*, 2 Dow. & Ryl. 628, 634; *S. C.* 1 B. & C. 345, 350; *The King* v. *The Inhabitants of Lytchet Matravers*, 1 Man. & Ryl. 25, 31; *S. C.* 7 B. & C. 226, 231; *Commonwealth* v. *Gamble*, 11 S. & R. 93; *United States* v. *Blakeney*, 3 Grattan, 405, 411–413.

In this case the parent never insisted upon her right of custody and control; and the fact that he had a mother living at the time is, therefore, immaterial. The contract of enlistment was good so far as the petitioner is concerned. He was not only *de facto*, but *de jure*, a soldier — amenable to military jurisdiction. His mother not interfering, he was bound to remain in the service. His desertion and concealment for five

years did not relieve him from his obligations as a soldier, or his liability to military control. The order of the Circuit Court remanding him to the custody of the appellee was correct and must be *Affirmed.*

UNITED STATES *v.* TRINIDAD COAL AND COKING COMPANY.

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

No. 774. Argued October 29, 30, 1890. — Decided November 17, 1890.

Officers, stockholders and employés of a private corporation formed a scheme whereby they made entries in their individual names, but really for the benefit of such corporation, of vacant coal lands of the United States. The scheme was carried out, and patents were issued to such individuals, who immediately conveyed the legal title to the corporation, which bore all the expenses and cost of obtaining the lands, and some of the members of which had previously taken the benefit of the statute relating to the disposal of the public coal lands: *Held,*

(1) That such a transaction was in violation of sections 2347, 2348 and 2350 of the Revised Statutes;

(2) That it was not necessary to the right of the United States to maintain a suit to set aside such patents as void, that the government should offer to refund to the corporation the moneys advanced by it to the patentees in order to obtain the lands, and which the latter paid to the officers of the United States;

(3) That the rule that a suitor, asking equity, must do equity, should not be enforced in such a case as this;

(4) That if the corporation be entitled, upon a cancellation of the patents so obtained, to a return of such moneys, it must be assumed that Congress will make an appropriation for that purpose when it becomes necessary to do so.

A private corporation is an association of persons within the meaning of those sections.

This was a suit in equity by the United States against the Trinidad Coal and Coking Company, a corporation created under the laws of Colorado and engaged in the business of mining coal. The defendant held the legal title to six tracts of coal land within the Pueblo Land District, in the county of

Las Animas, in that State, containing in the aggregate 954 and 34-100 acres, under conveyances executed to it by various individuals to be presently named, and to whom, respectively, patents were issued.

The relief sought by the government was a decree setting aside these patents, and declaring them void and of no effect as against the United States. The defendant demurred to the bill upon the ground that it did not make a case for relief in a court of equity, nor allege that any of the entries were fraudulent or in contravention of law. The demurrer was sustained and the bill dismissed, the opinion of the court being reported in 37 Fed. Rep. 180. The sole question was whether the United States was entitled upon the showing made by the bill to the relief it asked.

Taking the allegations of the bill to be true, the case made by the government was as follows:

On or about the 4th of June, 1883, T. J. Peter and Robert Savage were officers and stockholders, and William H. Leffingwell, Milford N. Wells, Alexander Craigmyle, Charles F. Schuman and Thomas Winsheimer, were employés of the defendant corporation. Peter, Savage, and certain other officers and members of that corporation, whose names are unknown to the government, together with Leffingwell, Wells, Craigmyle, Schuman and Winsheimer, formed a scheme to procure patents for these lands "for the benefit and on behalf of said defendant corporation, and for the purpose of enabling said corporation to fraudulently obtain titles" from the United States for its "coal lands in excess of 320 acres, contrary to the statutes of the United States in such cases made and provided." In furtherance of that scheme the persons just named, and those associated with them, or some one of them, or some one acting for them and in their behalf, on or about the day above named, wrote and prepared, or caused to be written and prepared, certain affidavits, one of which was in substance and to the effect that "no portion of the tract of land described as the northeast quarter of section six, township thirty-four south, of range sixty-three, west of the sixth principal meridian, and containing one hundred and fifty-two and 53-100ths

acres, was in the possession of any other party; that said Robert Savage was twenty-one years of age, a citizen of the United States, and had never held nor purchased, as an individual or as a member of any association, lands under the laws of the United States relating to the sale of coal lands of the United States; that he, the said Savage, was well acquainted with the character of said land and with every legal subdivision thereof, and had frequently passed over the same; that his knowledge of said land was such as to enable him to testify understandingly in regard thereto; that said land contained large deposits of coal, and was chiefly valuable therefor; that there was not, to his knowledge, within the limits thereof, any vein, or lode of quartz or other rock in place, bearing gold, silver or copper; and that there was not within the limits of said land, to his knowledge, any valuable deposits of gold, silver or copper." This affidavit was subscribed and sworn to by Savage on the 4th of June, 1883, before the register of the Land Office at Pueblo. The other affidavit, subscribed and sworn to before the same officer by Leffingwell and Wells, set forth in substance the same facts as being within their knowledge.

The conspirators, or some one or more of them, or some one acting for them, on or about the same date, filed these affidavits in the Land Office at Pueblo, and made application, in the name and on behalf of Savage, to enter and purchase, under the Statutes of the United States, this tract of one hundred and fifty-two and $\frac{53}{100}$ acres, as vacant coal land; and at the same time there was paid to the receiver of public moneys at that office the sum of three thousand and fifty and $\frac{60}{100}$ dollars as the purchase price of the tract at twenty dollars per acre. Thereupon the register issued in duplicate a certificate to the effect that Savage had on that day purchased this land from that officer at the price stated; that the payment of the price had been made in full as required by law; and that, on the presentation of the certificate to the Commissioner of the General Land Office, he would be entitled to receive a patent for the land. Upon the payment of this money and the issuing of the certificate, the receiver delivered to Savage, or to the conspirators, or to some one of them, or to some one for

them, in duplicate, a receipt which in effect acknowledged that he had paid the above sum as and for the price of the land at twenty dollars per acre. This being done, the register and receiver forwarded the papers, affidavits, applications, and one of the certificates and receipts to the General Land Office at Washington, delivering the other duplicate certificate to the conspirators, or to some one of them, or to some one acting for them, "such delivery purporting to be for and on behalf of the said Robert Savage."

Similar applications and affidavits were prepared and filed, at the instance of the same persons, in behalf of Leffingwell, Wells, Craigmyle, Schuman, and Winsheimer, respectively, in reference to the remaining tracts, and they severally procured patents to be issued, as follows: To Savage for 152 and $\frac{53}{100}$ acres; to Leffingwell, Craigmyle, Schuman and Winsheimer, each, for 160 acres; and to Wells for 161 and $\frac{81}{100}$ acres. The government, relying upon such affidavits and certificates, believing that the lands were legally entered by each individual for his own use and benefit, and in ignorance of the conspiracy and its objects, issued patents for the several tracts, purporting thereby to convey all its rights, title, interest and estate therein to the parties, respectively, in whose names the entries were made. The patents were subsequently delivered to the patentees or to some one representing them and acting in their name.

It, also, appeared from the bill that Savage, Leffingwell, Wells, Craigmyle, Schuman and Winsheimer did not enter the lands for their own use and benefit, nor for the use and benefit of any of them, but for the direct use and benefit of the Trinidad Coal and Coking Company; that its officers procured the entrymen to go in a body to the city of Pueblo to file the above papers, as stated; that the papers and affidavits were drawn and prepared by its officers; that the expenses of the conspirators in going to that city to make the entries were paid by its officers, acting for it and in its behalf; that the entire purchase money for all the tracts and all land-office fees, costs and expenses were paid by the company; that immediately after the filing of the affidavits in the land office,

Counsel for Parties.

and the pretended entries, Savage, Leffingwell, Wells, Craigmyle, Schuman and Winsheimer, and each of them, executed and delivered to the company warranty deeds conveying to it each of said tracts; that the company immediately entered into possession, and has possessed and claimed the lands until the present time; that no one of the patentees had ever claimed or asserted any right or interest in them, or in any of them, by virtue of the above fraudulent and illegal entries; that the entries were in reality and effect a purchase of the lands by the company; and that the entries and purchases by the persons named were only a device to evade the laws of the United States and to procure for the defendant a greater amount of coal lands than it could legally purchase and hold.

The bill further alleged that these entries of coal lands were illegal for the additional reason that, prior to the fourth of June, 1883, Peter, being an officer and stockholder of the company, had, on the fifth day of August, 1881, entered and purchased under the laws of the United States one hundred and sixty acres of vacant coal land, and other officers and stockholders of the company, namely, Charles P. Teat, Joseph L. Prentiss, Orlando B. Wheeler and others whose names are unknown to the government, had purchased tracts of coal land of the United States, all of which, entered and purchased by T. J. Peter and by such other officers and stockholders of the company, were, on the fourth day of June, 1883, held and owned by the defendant, and were in the aggregate in excess of three hundred and twenty acres of coal land; that neither the company nor any member or officer of it, for its own benefit or in its behalf, could then legally enter or purchase additional coal lands from the government; and that when said tracts were conveyed to it by the several patentees it had full notice of the alleged fraudulent scheme, as well as of the fact that the lands were being entered and purchased for its benefit exclusively.

Mr. Assistant Attorney General Maury for appellant.

Mr. Charles E. Gast and *Mr. A. B. Browne* for appellee. *Mr. George R. Peck* and *Mr. A. T. Britton* were with them on the brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

The patents in question were based upon entries made under sections 2347, 2348, 2350 and 2352 of the Revised Statutes, which embody substantially provisions in an act of Congress approved March 3, 1873, entitled "*An act to provide for the Sale of the Lands of the United States containing Coal.*" 17 Stat. 607–8, c. 279. These sections are as follows:

"SEC. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

"SEC. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements."

"SEC. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an

individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights, and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant."

"SEC. 2352. Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver or copper."

The restrictions imposed upon the entry and purchase of the vacant coal lands of the United States have been so clearly expressed that no doubt can exist as to the intention of Congress in enacting the above sections. The statute authorizes an association of persons to enter not exceeding three hundred and twenty acres, and provides that only one entry can be made by the same person or association, and that "no association of persons, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof."

It is contended that the case made by the bill is not within the prohibitions of the statute, although the demurrer admits that the Trinidad Coal and Coking Company acquired the lands in dispute pursuant to a scheme whereby the several tracts were to be entered for its benefit, in the name of certain persons, its officers, stockholders and employés — the title, when thus obtained, to be conveyed to the company, which should, and did, bear all the expenses attending the entries and purchases from the government. This contention cannot be sustained unless the court lends its aid to make successful a mere device to evade the statute. The policy

adopted for disposing of the vacant coal lands of the United States should not be frustrated in this way. It was for Congress to prescribe the conditions under which individuals and associations of individuals might acquire these lands, and its intention should not be defeated by a narrow construction of the statute. If the scheme described in the bill be upheld as consistent with the statute, it is easy to see that the prohibition upon an association entering more than three hundred and twenty acres, or entering or holding additional coal lands, where one of its members has taken the benefit of its provisions, would be of no value whatever. It is true, in the present case, that some of the persons who made the entries in question, were not, strictly speaking, members of the corporation, but only its employés. But as they were parties to the alleged scheme, and were, in fact, agents of the defendant in obtaining from the government coal lands that could not rightfully have been entered in its own name, that circumstance is not controlling. Besides, it appears from the bill that when that scheme was formed and executed, Peter and other officers and stockholders of the association had taken the benefit of the statute, and that the lands originally entered and purchased by them were then held and owned by the company, and were in excess of three hundred and twenty acres. There is, consequently, in view of all the allegations of the bill, no escape from the conclusion that the lands in question were fraudulently obtained from the United States. We say fraudulently obtained, because if the facts admitted by the demurrer had been set out in the papers filed in the land office, the patent sought to be cancelled could not have been issued without violating the statute. The defendant would not have been permitted to do indirectly that which it could not do directly. If the patents could not have been rightfully issued upon papers disclosing the fact that Savage, Leffingwell, Wells, Craigmyle, Schuman and Winsheimer were really acting in behalf of and as the agents of an association which was to meet all the expenses attending the applications, and which already held and owned coal lands formerly belonging to the United States, and under conveyances from some

of its members who had previously taken the benefit of the statute, it is difficult to perceive why the bill does not make a case entitling the government to the relief asked. These views are in accordance with the practice in the Department of the Interior. *Adolph Petersen et al.*, 6 Land Dec. 371; *Northern Pac. Coal Co.*, 7 Land Dec. 422.

It is confidently asserted by the company that the individuals making entries who were citizens of the United States, and not members of an association of persons, had a right, under the statute, and upon their own responsibility, to enter, each, the quantity of coal lands for which they respectively received patents, and that, having obtained patents, they were at liberty to dispose of the lands as they saw proper, even to an association of persons which, or some member of which, had already taken the full benefit of the statute. Whether this be so or not, nothing else appearing than is just stated, we need not now decide. The case before us is not of that class. It is the case of an association seeking to evade an act of Congress by using, for its own benefit, the names of both its members and employés to obtain from the government vacant coal lands, which it could not legally obtain upon entries made in its own name, and which it was expressly forbidden to enter by reason of some of its members having previously taken the benefit of the statute.

In *McKinley* v. *Wheeler*, 130 U. S. 630, 636, it was decided that section 2319 of the Revised Statutes, declaring valuable mineral deposits in lands belonging to the United States to be free and open to exploration and purchase, and the lands in which they were found to occupation and purchase by citizens of the United States and those who have declared their intention to become such, did not preclude a private corporation, formed under the laws of a State, whose members were citizens of the United States, from locating a mining claim on the public lands of the United States. Thus far it has been assumed that the defendant, although an incorporated company, is an "association of persons" within the meaning of the statute relating exclusively to the vacant coal lands of the government, and, as such, is subject to the restriction as to the num-

ber of acres of such lands that may be entered in its name. We have seen that the right to enter such lands is given only to persons above the age of twenty-one years who are citizens of the United States, or have declared their intention to become such, and to associations of persons, severally so qualified; and each person of the former class is permitted to enter not exceeding one hundred and sixty acres, while "associations of persons," severally qualified as above, may enter not exceeding three hundred and twenty acres. § 2347. The object of these restrictions as to quantity was, manifestly, to prevent monopolies in these coal lands. The reasons that suggested the prohibitions in respect to associations of persons apply equally to incorporated and unincorporated associations. But the purpose of the government would be defeated altogether, if it should be held that corporations were not "associations of persons" within the meaning of the statute, and subject to the restrictions imposed upon the latter by sections 2347 and 2350. It is unreasonable to suppose that Congress intended to limit the right of entering coal lands to one hundred and sixty acres in the case of an individual, and to three hundred and twenty acres in the case of an unincorporated association, and leave the way open for an incorporated association, by means of entries made for its benefit in the names of its agents, officers, stockholders, employés and agents, to acquire public coal lands without any restriction whatever as to quantity. The language of the statute, to say nothing of the policy which underlies it, does not require or permit any such interpretation of its provisions. The words "association of persons" are often, and not inaptly, employed to describe a corporation. An incorporated company is an association of individuals acting as a single person, and by their corporate name. As this court has said, "private corporations are but associations of individuals united for some common purpose, and permitted by the law to use a common name, and to change its members without a dissolution of the association." *Baltimore and Potomac Railroad* v. *Fifth Baptist Church*, 108 U. S. 317, 330.

One other point discussed at the bar deserves consideration.

It is contended by the defendant that the United States is subject, as a suitor, to the same rules that control courts of equity when determining, as between private persons, whether particular relief should be granted; that the government, asking equity, must do equity; and, consequently, that the bill is defective in not containing a distinct offer to refund the moneys which, it is alleged, were furnished by the defendant to the several persons to whom patents were issued. The rule referred to should not be enforced in a case like the present one. In the matter of disposing of the vacant coal lands of the United States, the government should not be regarded as occupying the attitude of a mere seller of real estate for its market value. It is not to be presumed that the small price per acre required from those desiring to obtain a title to such lands had any influence in determining the policy to be adopted in opening them to entry. They were held in trust for all the people; and in making regulations for disposing of them, Congress took no thought of their pecuniary value, but, in the discharge of a high public duty and in the interest of the whole country, sought to develop the material resources of the United States by opening its vacant coal lands to entry by individuals and by associations of persons at prices below their actual value. The controlling object of this and similar suits is to enforce a public statute against those who have violated its provisions. It is not disputed that the Attorney General may, in virtue of the authority vested in him, institute this suit. According to the allegations of the bill, which are admitted to be true, the defendant is a wrongdoer against whom the government seeks to vindicate its policy in reference to the development of its vacant coal lands. Congress, when establishing that policy, was not bound to assume that individuals or associations of individuals would attempt to defeat it by means of fraudulent schemes or otherwise. If the defendant is entitled, upon a cancellation of the patents fraudulently and illegally obtained from the United States, in the name of others, for its benefit, to a return of the moneys furnished to its agents in order to procure such patents, we must assume that Congress will make an appropriation for that

purpose, when it becomes necessary to do so. The proposition that the defendant, having violated a public statute in obtaining public lands that were dedicated to other purposes, cannot be required to surrender them until it has been reimbursed the amount expended by it in procuring the legal title, is not within the reason of the ordinary rule that one who seeks equity must do equity; and, if sustained, would interfere with the prompt and efficient administration of the public domain. Let the wrongdoer first restore what it confesses to have obtained from the government by means of a fraudulent scheme formed by its officers, stockholders and employés in violation of law.

The decree is reversed, with directions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY *v.* TEXAS CENTRAL RAILWAY COMPANY; FARMERS' LOAN AND TRUST COMPANY; AND METROPOLITAN TRUST COMPANY.

TEXAS CENTRAL RAILWAY COMPANY *v.* MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY; FARMERS' LOAN AND TRUST COMPANY; AND METROPOLITAN TRUST COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

Nos. 55, 59. Argued November 4, 1890. — Decided November 24, 1890.

When a mortgage provides that the principal shall become due for the purposes of foreclosure upon a default in interest continuing for sixty days, the trustees in the mortgage may proceed for the collection of the whole amount of principal and interest by bill in equity, without a formal declaration of the maturity of such principal.

Statement of the Case.

If a mortgage contains a power of sale by advertisement at public auction for cash upon the request of the holder or holders of seventy-five per cent in the amount of the bonds secured thereby, that remedy is cumulative, and the restriction does not operate upon the right to foreclose by bill in equity, especially when in a separate clause it is provided that nothing in the mortgage contained shall be held or construed to prevent or interfere with the foreclosure of the instrument by any court of competent jurisdiction.

The mere fact that money loaned to a railroad corporation was expended in payment of interest on its first mortgage bonds or of operating expenses, does not entitle the lender to preference over the first mortgage bonds by way of subrogation, or on the ground of superior equities.

Although advances may have enabled a railroad company to maintain itself as a going concern, that fact alone does not give such advances priority over first mortgage bonds upon the theory that the interests of the public and of the bondholders were subserved by such advances.

A bill filed by a defendant, on leave, in order to a complete decree upon the whole matter in dispute, is properly styled a cross-bill; and where on the bill of the original complainant possession of property has been taken by a Circuit Court of the United States, the jurisdiction of the court in passing upon such a cross-bill in the disposition of the property does not depend upon the citizenship of the parties.

Morgan's Louisiana and Texas Railroad and Steamship Company, a corporation organized under the laws of the State of Louisiana, filed its bill on April 2, 1885, in the Circuit Court of the United States for the Northern District of Texas, against the Texas Central Railway Company, averring that the latter company was originally organized and incorporated under the general laws of Texas, on May 31, 1879, to build and operate a railroad from Ross Station, in McLennan County, to the centre of Eastland County: That on or about May 12, 1881, its charter was amended so as to authorize it to extend its railway from the latter point to a point on the north boundary line of the State, and to construct branch railways: That the company had built and owned about two hundred and twenty-eight miles of road, namely, from Ross to Albany, and from Garrett to Roberts, and was also the owner of certain town lots, and of equipment as described: That on or about the 15th of September, 1879, said Texas Company executed to the Farmers' Loan and Trust Company of New York, as trustee, a mortgage to secure the payment of a series of bonds of one

thousand dollars each, covering its railroad, built and to be built, from Ross to the centre of Eastland County, payable thirty years after November 1, 1879, with interest payable semi-annually, and bonds to the amount of $2,145,000 had been issued and were outstanding: That on May 16, 1881, the Texas Company executed to the same Trust Company, as trustee, a mortgage to secure the payment of another series of bonds of one thousand dollars each, covering its entire main line of railroad, built and to be built, and also its branch lines as described, payable in thirty years, with interest semi-annually, and bonds to the amount of $1,254,000 had been issued and were outstanding under this mortgage: That on October 1, 1884, the Texas Company executed to the Metropolitan Trust Company of New York, as trustee, a mortgage of all its railway and railway lines, whether constructed or to be constructed, to secure an issue of bonds to be known as "general-mortgage bonds" of said railway company, which bonds had been signed and sealed, but not certified by the trustee, because of delay in recording the trust deed in all the counties of the State into which the road had been actually built: That the Texas Company, finding itself in great financial embarrassment, and requiring pecuniary assistance, and being already indebted to the Houston and Texas Central Railway Company in a very large amount, obtained further advances from the latter company, making, "with amounts theretofore loaned to it" by the Houston Company, a total indebtedness from the Texas Company to the Houston Company of $761,-992.04: That for the security of "said advances then and theretofore made by said Houston and Texas Central Railway Company to said Texas Central Railway Company," the Texas Company, on the first of November, 1884, made and executed its sixteen certain promissory notes, fifteen thereof for the sum of $50,000 each, and one thereof for the sum of $11,992.04, and for the security of said sixteen notes the Texas Company pledged to the Houston Company all the "general-mortgage bonds" which it was authorized to issue for the length of road already built by it: That all of the notes were dated November 1, 1884, and all due on demand, but the Texas

Company, though requested, had refused and failed to pay the same: That in order to make the pledge of the bonds, which were not yet countersigned and certified by the trustee, the Texas Company issued and delivered to the Houston Company its certificates, obligating itself to deliver the bonds as soon as executed and signed by the trustee: That the Houston Company pledged said notes and certificates to complainant, as part security for an indebtedness exceeding one million of dollars due by the Houston Company to complainant, and complainant is now the holder, as pledgee, of all of the notes and certificates: That the deed of trust, with the certificates, constituted a full, complete and perfect equitable mortgage and lien upon the railway and the property therein described: That the advances by the Houston Company to the Texas Company were made at various times for taxes, fuel, supplies, labor, repairs, operating and managing expenses, proper equipment, useful improvements and other necessary expenditures, by which the Texas Company's railway had been kept in running order, and its business and improvements increased, and thereby rendered more beneficial to the bondholders and to all other creditors of the Texas Company: That the indebtedness was contracted by the defendant upon the consideration of its promise to pay the same out of the earnings of its railway, and the same was and is, in equity and good conscience, a first lien upon the income and property of said railway, but the defendant instead of paying the debt out of the earnings of said railway, had failed to pay any part of it, and had used a large amount, at least $500,000, of said earnings, during the years 1882, 1883 and 1884, for the payment of coupons upon its first mortgage bonds, although the holders of such coupons were only entitled to receive payment thereof after the defendant had paid the complainant the amounts advanced and expended in the manner and for the purposes in the bill set forth: That unless the relief sought was obtained, the certificates which complainant held, and the bonds when issued, would be greatly depreciated in value, and any effort to foreclose complainant's pledge would result in imposing a debt of $2,286,000 upon said defendant without any

adequate relief to complainant, and defendant had no property upon which to levy an execution save and except the properties mortgaged, and the sale of the property would be ineffectual by reason of the uncertainty as to the rights which would be acquired by the purchaser; that the Texas Company was in embarrassed circumstances, the pay-rolls for January and February, 1885, were unpaid and those for March would not be paid, and the company would default upon the interest of its bonds due May 1; that it had no money in its treasury and no credit upon which to raise it; that it had no supplies; that many suits were pending against it which would ripen into judgments for large amounts of money; that the receipts had been growing less and there was no hope of their increase in the immediate future; that the road ran through a new and undeveloped country in which great financial depression existed at the then present time, "and that unless said railway be administered in such a manner as to maintain it with unimpaired efficiency during this period of depression, its assets will be sacrificed without any adequate benefit to any of its creditors;" that the financial embarrassments of the Texas Company were aggravated by the fact that it was originally built as relying on business connections with the Houston Company; that it had always been managed and operated in connection with the latter; that it had no round-houses or repair shops, and its maintenance and transportation business had always, until recently, been conducted entirely by the officers of the operating department of the Houston Company without any additional expense to the Texas Company, but that the Houston Company had lately been placed in the hands of receivers by the order of the United States Circuit Court for the Fifth Judicial Circuit and Eastern District of Texas in a suit entitled "*The Southern Development Company* v. *The Houston and Texas Central Railway Company*," and the result of said receivership had been to deprive the Texas Company of its former operating officers and of the benefit of the harmonious business relations formerly existing with the Houston Company, and the interdependence of said two railways upon each other had been such that it was to the vital

interests of both companies that that interdependence should be maintained; that the Houston Company owned over one-third of the capital stock of the Texas Company, and the Houston Company was also obligated for the indebtedness of $761,992.04, pledged by it to complainant, and it was of vital importance to both of said roads that the management of the two should be under one common head. Complainant prayed for the appointment of one or more receivers of the property of the defendant and for a decree for the payment and satisfaction of its claims out of the rents, revenues, issues and profits coming to the receivers. Copies of the deeds of trust from the Texas Central Railway Company to the Farmers' Loan and Trust Company of September 15, 1879, and of May 16, 1881, and of that to the Metropolitan Trust Company of October 1, 1884, were attached to the bill.

On the 4th of April, 1885, the receivers of the Houston Company were appointed receivers of the Texas Company, the Texas Company appearing and submitting the motion for such action of the court as might seem just and equitable. On the 2d of May complainant filed its amended and supplemental bill against the Farmers' Loan and Trust Company, trustee, and the Metropolitan Trust Company, trustee, as well as the Texas Central Railway Company, which recapitulated the averments of the original bill and insisted that the indebtedness of $762,000 was an equitable lien upon all the property of the railway company, and entitled to be paid, in case of sale, out of the proceeds of such sale, before any money was paid to the holders of the said mortgage bonds: That the indebtedness should have been paid by the railway company out of its annual earnings, which were sufficient for that purpose, but instead of paying the debts incurred for labor, material, betterments and services necessary to the operation of the railway, and to keep the same in proper condition of repair and running order, the defendant railway company expended its revenues in paying the interest on the mortgage bonds, leaving the complainant and others similarly situated unpaid, and they were entitled, in equity and good conscience, to stand in the place and stead of said mortgage creditors for the amounts the

latter had respectively received, and to have their claims satisfied out of the property of the railway company, or out of the proceeds of any sale thereof. The bill prayed, among other things, for a decree of lien by reason of the certificates, an accounting, a sale of the property if necessary, and the payment of the amounts decreed to be due the complainant, out of the proceeds, in preference to any amounts due on the mortgage bonds, etc.

The Texas Company answered, admitting in general the allegations of the bill, but submitting to the court that the bill was destitute of equity.

The Metropolitan Trust Company filed its answer August 17, 1885, admitting the allegations in respect to the mortgage executed to it as trustee on October 1, 1884, and that it refused to certify bonds thereunder until the completion of the recording of the mortgage. The Farmers' Loan and Trust Company answered September 24, 1885, and denied, on information and belief, the allegations of the bill in respect to the advances by the Houston Company to the Texas Company, and also that the indebtedness stated in the bill was a first lien upon the income or property of the Texas Company, and averred that, if any advances were made, they were payments which, in equity, should be imputed to complainant; that the Houston Company and the complainant were the owners of the Texas Company and of its property, holding the same as a mere appendage to the Houston road, and the mortgages executed by the Texas Company were in fact mortgages procured to be made by the parties controlling the complainant and the Houston Company; and, in various averments, recited the facts and circumstances attending the formation of the Morgan Company, its ownership of the Houston Company, and the creation of the Texas Company, and of the Southern Development Company, upon whose application receivers had been appointed for the Houston Company in the suit referred to in complainant's bill; it alleged that the complainant in that suit and in this, represented practically and substantially the same interests, the two complainant corporations being owned and controlled by the same persons, and that all the

proceedings and acts of the defendant, the Texas Company, from its organization were, in fact and law, those of the complainant, and to be equitably imputed to the complainant: and it denied that the Texas Company had used its earnings for making payment of coupons upon its first mortgage bonds, and which the holders were not entitled to receive, and asserted that the bill, as framed, was open to demurrer, for reasons given.

Subsequently, the Farmers' Loan and Trust Company, upon leave duly granted, filed its cross-bill in the cause against complainant and its co-defendants. This set up the mortgages and averred that the mortgagor had failed to pay the interest on all the bonds secured by the mortgages respectively, which became due and payable May 1, 1885, and all interest since that date; that payment of such interest had been duly demanded; that said default had continued sixty days after such demand, and thereupon the principal of all the bonds was and had become immediately due and payable; that the lien of the deed of trust to the Metropolitan Company was subsequent and subsidiary to the lien of the trust deeds or mortgages made to complainant; and that, if the claim of the Morgan Company, as set forth in its bill, was a lien at all on the property, it was subject and inferior to the liens of the mortgages to complainant. The bill alleged the insolvency of the Texas Company, and the insufficiency of its net earnings to pay the floating debt and discharge the interest on the mortgage bonds, and concluded with the usual prayers for the appointment of a receiver, an injunction and an account of the bonds and the amounts due the holders; and for a decree that the amounts so found due shall constitute a first lien on the property; that the railway company pay into court the amount found due, together with costs; and that, in default of such payment, the property and franchises of the railway company be sold; and for judgment for any deficiency. The fourteenth paragraph of this cross-bill averred that the Texas Company had made default upon the first deed of trust held by it, by failing to pay the interest on the bonds which became due and payable on the first day of May, 1885; that payment of such

interest had been duly demanded, "and said default had continued sixty days after such demand;" and that "thereupon the principal of the said bonds secured by said last-mentioned mortgage or deed of trust is and has become immediately due and payable, and the same and all said interest so in arrears as aforesaid remains still due and unpaid." Paragraph fifteen made the same averments as to the second mortgage held by the cross complainant.

The Texas Company, in its answer, admitted the allegations of the bill of the Farmers' Loan and Trust Company as to the execution of the mortgages, and admitted the fourteenth paragraph of the bill to be true, except that it set up, by way of explanation, that its roads and property were placed in the hands of receivers on May 14, 1885, on the bill filed by the Morgan Company. It admitted the allegation in the fifteenth paragraph to be true, as stated.

The Morgan Company, in its answer, reiterated all the averments in its original and amended bills, and claimed that it had a lien upon the property of the Texas Company, and that, in any foreclosure proceedings, it was entitled to be paid out of the proceeds of sale by preference over the mortgage creditors. It admitted that the matters set forth in the fourteenth and fifteenth paragraphs of the cross-bill were true.

The Metropolitan Company admitted the allegations of the cross-bill respecting the mortgage executed to it, as trustee, by the railway company, in October, 1884, and alleged that no bonds had, to its knowledge or belief, been issued secured by the lien of the said mortgage.

Replications were filed and proofs were taken.

Evidence was given of the issuing of the bonds under the two mortgages to the Farmers' Loan and Trust Company, and of a request to that company for the institution of proceedings to foreclose the trust deeds, but not on behalf of the holders of seventy-five per cent of the bonds of either issue. The three trust deeds or mortgages referred to in the original bill, the sixteen notes, amounting to $761,992.04, and the certificates of the Texas Company, were also put in evidence, and a statement from the books of the Texas Company, as follows:

"TEXAS CENTRAL RAILWAY COMPANY.

"*Statement of Gross Earnings, Expenses of Operation, and Charges against Income from Commencement of Operation to Sept.* 30, 1884, *Inclusive.*

	Gross earnings.	Operating expenses.	Taxes.	Interest on bonded debt.	Total charge against income.	Deficit.
To Dec. 31, 1880.	$102,773 76	$75,360 25	$79 67	$54,250 00	$129,689 92	$26,916 16
" " " 1881.	247,707 02	115,426 83	3,603 24	140,875 00	259,905 07	12,198 05
" " " 1882.	205,887 32	157,896 73	9,626 79	218,680 00	386,203 52	180,316 20
" " " 1883.	290,262 45	248,310 73	13,440 32	237,930 00	499,681 05	209,418 60
" Sept. 30, 1884.	210,312 78	177,302 88	14,337 40	237,930 00	429,570 28	219,257 50
Total	$1,056,943 33	$774,297 42	$41,087 42	$889,665 00	$1,705,049 84	$648,106 51
Interest other than on bonded debt						70,098 85
Total deficit						$718,205 36
						70,098 85
						$648,106 51"

The Morgan Company called as a witness, E. W. Cave, treasurer for the receivers, and treasurer for the Texas Company in 1880, 1881, 1882, 1883, and 1884, and also of the Houston Company, and produced the resolution of the directors of the Houston Company of December 1, 1884, pledging the notes and certificates to the Morgan Company and the receipt of the latter therefor. Mr. Cave testified that the notes were given by the Texas Company to the Houston Company in settlement of the indebtedness of the former to the latter, which arose from cash advances and payments made by the Houston Company for the benefit of the Texas Company; that the account between the Houston Company and the Texas Company was adjusted and closed about the last of October, 1884; that there was no year during the five years mentioned when the Texas Company earned enough to pay its operating expenses and fixed charges, including taxes; that the funds advanced were used in paying the operating expenses of the Texas Company for material and supplies, for maintenance and such things as had to be done to improve or keep the property up, and some portion of it may have been applied to the maintenance of its security by the payment of interest on its bonds; that some of the money necessarily went for that, because whatever money was used by the

company out of its own gross earnings from its general business, for the payment of interest, left a deficit in its operating expenses and maintenance, which had to be covered by advances; that the officers of the Houston Company and of the Texas Company were practically the same; that no salary was paid to the officers of the Texas Company, which was organized in the interest of the Houston Company; that the Houston Company owned about two-fifths of the Texas Company's stock and the Morgan Company the other three-fifths; that the directors of the two companies were mainly the same, and the Morgan Company owned a majority of the stock of the Houston Company; that the bonds that were issued under the mortgage to the Farmers' Loan and Trust Company were negotiated by the president of the Houston Company; that the Texas Company was practically a part of the Houston Company, and the latter company collected its revenues and accounts; that the money was disbursed from the moneys that were collected, and only as the deficit arose and increased were the advances made by the Houston Company; that the road was operated practically as a division of the Houston Company; that the officers of the Houston Company acted as officers of the Texas Company; that the revenues came in and went into accounts, and then those accounts went on to the books of the Texas Company where matters were not kept direct; that the earnings went into the books of the Houston Company, and, when the Texas Company got into debt, the executive officers of the Houston Company advanced the money; that they were authorized to advance it and the debts of the Texas Company were paid; that the Houston Company collected all the earnings of the Texas Company, and when the latter was short it received help; that that was the way this balance of nearly $762,000 arose, it being the balance of running account beginning from the time the road commenced to be operated as a road; that, when the settlement was made upon which these notes were issued, the account was brought down to date, interest calculated by the auditor of the Houston Company, understood and acknowledged, and a balance of interest struck, and the balance found to be as stated, about

$762,000; that interest was computed on both sides; that there was a continual running account; that, when the Texas Company had funds and balances, it paid the interest on the bonds, and did not have to call on the Houston Company for funds, and whenever it did not have funds, as in the matter of interest or as in other matters, whatever balance was needed was supplied, but the Texas Company's coupons were paid by Cisco & Son upon separate account, that firm being the fiscal agent of both roads.

The following were questions to and answers of the witness:

"Q. The accruing funds, the income of the Central Company, was there any special use of its own funds, of its own earnings, towards paying running expenses rather than interest, or towards paying interest rather than running expenses, or was that all a matter of running account?

"A. It was all in one account, so far as the account of the Houston and Texas Central Railway Company was concerned, and whether the advances were made for one purpose or another they were charged so much cash; but the Texas Central Railway Company, of course, took cognizance of what it was used for.

"Q. So that whenever it was behindhand on its current indebtedness and needed money the Houston and Texas Central Railway Company paid it, and when it came to pay interest and did not have funds, the Houston and Texas Central Railway Company paid it?

"A. The Houston and Texas Central Railway Company let it have the money."

On the 12th of April, 1887, the Circuit Court entered its decree. The decree found the execution and delivery to the Farmers' Loan and Trust Company of the two mortgages of September 15, 1879, and May 16, 1881, and of the mortgage of the first day of October, 1884, to the Metropolitan Trust Company: That the liens and claims of the Metropolitan Company and the beneficiaries under its trust were in all respects subsequent, subsidiary and junior to the rights and equities of the Farmers' Company and its beneficiaries, both

of the mortgages to the Farmers' Company being prior liens to the mortgage to the Metropolitan Company, the first as to the property therein described, and the second as to the entire property of the defendant, the Texas Company: That the Morgan Company had an equitable lien upon all the property of the Texas Company to the amount of $761,992.04, with interest from November 1, 1884, said lien, however, being junior and subordinate in all respects to the liens under the mortgage deeds of trust to the Farmers' Company: That in each of the mortgages it was provided that in case the Texas Company, defendant, should fail to pay any of the interest on any of the bonds due under the mortgage at any time when the same might become due and payable, and said default should continue sixty days after said demand, then and thereupon the principal of all of the said bonds should become immediately due and payable; that the Texas Company was on May 1, 1885, and still was, insolvent and unable to meet or pay its obligations, including the coupons issued on its bonds secured by the said mortgages to the Farmers' Company and maturing upon that date, and that it wholly failed to pay the same, and made default in the payment of all the coupons upon said bonds, and has not paid any of the said coupons which fell due November 1, 1885, or May 1, 1886, nor any coupons which matured since that date; that payment of said interest has been duly demanded and said default has continued sixty days after such demand; and that the principal of all the bonds under both mortgages was and had become immediately due and payable. It found the amount of principal and interest due on both sets of bonds, and that by reason of the default of the Texas Company to pay the interest and any of it, and by reason of other matters and things hereinabove alleged, the conditions of the mortgages and of each of them held by the Farmers' Company had been broken, and the said mortgages and deeds of trust and both of them, had become absolute, and the trustee was entitled to a decree for the sale of all the mortgaged property to satisfy the principal and interest of the said bonds; and the decree then ordered, adjudged and decreed that the principal sums had

become due and payable, and that unless the defendant, the Texas Company, should within ten days pay into court the sum found due with interest, and an amount sufficient to defray the costs, the equity of redemption of said defendant, and of all the parties to the suit, and of all the holders of bonds or other claims secured by the mortgage to the Metropolitan Company, in or to the mortgaged property, should be barred and foreclosed, and the mortgaged premises and property should be sold to the highest bidder for cash, as provided. It further ordered, among other things, that in case the amount of the bid should be more than sufficient to pay the sums and amounts found and adjudged to the Farmers' Company, the overplus should be applied to the payment of the sums decreed to be due to the Morgan Company; and provided for deficiency decrees in favor of the Farmers' Company and the Morgan Company.

From this decree separate appeals were prosecuted by the Morgan Company and the Texas Company. On behalf of the Morgan Company it was insisted, that the court erred in adjudging that its claim was not in equity a lien and charge upon the property of the Texas Company, prior and superior in right to the lien of the mortgages of the Farmers' Company, and justly entitled to be paid out of the proceeds of the sale of the property in preference to the mortgage bonds; and in granting leave to the Farmers' Company to file the bill of complaint for the foreclosure of the mortgages, and rendering a decree thereon; and that, if it had jurisdiction to entertain the bill of the Farmers' Company, then it erred in proceeding to a decree for foreclosure and sale to pay the principal of the bonds upon a default in the payment of interest, without averring and proving that the bill had been filed for that purpose by the request of the holders of seventy-five per cent in amount of the outstanding bonds.

On behalf of the Texas Company errors were assigned to the action of the court in entertaining the bill of the Farmers' Company and rendering the decree of foreclosure and sale thereon, and also in adjudging the principal sums of the bonds to be due and payable, and in decreeing foreclosure and sale

without proof of a request to the trustee, by the holders of seventy-five per cent, in amount, of the bonds, to foreclose.

Mr. J. Hubley Ashton for Morgan's Louisiana and Texas Railroad and Steamship Company, appellant.

I. *The Priority of the lien of the appellant.*

The first three assignments of error upon the decree below, present the question as to whether or not the claim of the Morgan Company, the original complainant, constitutes, in equity, a lien and charge upon the property of the defendant Railway Company, prior and superior in right to the lien of the mortgages to the defendant, the Farmers' Loan and Trust Company, and is justly entitled to be paid out of the proceeds of the sale of that property in preference to the mortgage bonds.

It is maintained and submitted, on the part of the appellant, that this question should be answered in the affirmative upon the principles settled in this court by the case of *Fosdick* v. *Schall*, and the decisions which followed it, on the subject of the relative equitable rights of mortgage and other creditors of an insolvent railroad company, in respect to its property in the hands of a court of equity, for administration as a trust fund for the payment of incumbrances; and that, upon the authority of those adjudications, the appellant is entitled to the relief asked in respect to the advances which constitute the basis of its claim in this suit. *Fosdick* v. *Schall*, 99 U. S. 235; *Hale* v. *Frost*, 99 U. S. 389, 392; *Miltenberger* v. *Logansport Railway Co.*, 106 U. S. 286, 311; *Union Trust Co.* v. *Souther*, 107 U. S. 591, 594; *Union Trust Co.* v. *Walker*, 107 U. S. 596; *Burnham* v. *Bowen*, 111 U. S. 776; *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434, 457; *Porter* v. *Pittsburgh Bessemer Steel Co.*, 120 U. S. 649; *Penn* v. *Calhoun*, 121 U. S. 251; *Sage* v. *Memphis &c. Railroad Co.*, 125 U. S. 361; *St. Louis &c. Railroad Co.* v. *Cleveland &c. Railway*, 125 U. S. 658, 676; *Union Trust Co.* v. *Morrison*, 125 U. S. 591, 609, 612; *Toledo &c. Railroad Co.* v. *Hamilton*, 134 U. S. 296, 302. See, also, *Blair* v. *St. Louis &c. Railroad Co.*,

22 Fed. Rep. 474; *Farmers' Loan and Trust Co.* v. *Vicksburgh &c. Railroad Co.*, 33 Fed. Rep. 778.

The decisions thus cited are so recent, and the doctrines declared so familiar to the court, that it is unnecessary to present a detailed analysis of them.

It would seem to be plainly deducible from them, that where a mortgaged railroad is in the hands of a court of chancery, in foreclosure proceedings, and it appears that advances were made to the company to enable it to pay the expenses of maintenance and operation, in lieu of moneys diverted from the earnings to pay bonded interest, or to enable it to pay such interest when there were no net earnings applicable to it, or when the net earnings were insufficient to meet the bonded interest, the mortgage security is chargeable with the payment of the debt for such advances in preference to the mortgage bonds.

Under such circumstances there should be a restatement of the account, and there must be charged against that which would otherwise go to the bondholders, such amounts as they have received, which ought really to have been applied to the cost of maintaining and operating the road, or which were in excess of the amounts that upon a correct accounting they were entitled to receive in respect to the operations of the road.

Such advances constitute a debt of the mortgaged property, and are equitably entitled to be paid out of the proceeds of its sale in preference to any payment upon the mortgage bonds.

The principles thus adjudged by this court entitle the appellant to the payment of its claim in respect to the advances to the Texas Central Railway Company set forth in the bill, and shown by the proofs, in this cause, and decreed by the court below to be due to the appellant, out of the proceeds of the sale of the mortgaged property, before the mortgage bonds, and in preference to payment upon those bonds.

The aggregate amount of those advances, as shown by the testimony of Mr. Cave, and the statement annexed to his deposition, was $648,106.51, which, with interest thereon to November 1, 1884, amount to the sum of $761,992.04, repre-

sented by the sixteen notes delivered by the Texas Central Railway Company to the Houston and Texas Central Railway Company, and endorsed and pledged by the latter Company as part security for its indebtedness to the appellant, as stated in the testimony of Mr. Cave.

It is unimportant, in any view of the rights of the appellant, involved in this cause, that, as stated by Mr. Cave, the Houston and Texas Central Railway Company owned about two-fifths of the capital stock of the Texas Central Railway Company, and that one-fifth of that stock was owned by Morgan's Louisiana and Texas Railroad and Steamship Company.

It has been often said, by this court, that the stockholders are not the corporation, which is a separate, legal or political person, distinct from the stockholders, whose property and rights of contract, or otherwise, belong to "the legal entity, the artificial being, created by the charter," and not to the individual members. *Bank of Augusta* v. *Earle*, 13 Pet. 519, 587; *Pullman Car Co.* v. *Missouri Pacific Co.*, 115 U. S. 587; *Porter* v. *Bessemer Steel Co.*, 120 U. S. 649, 670.

II. *The Bill of the Farmers' Loan and Trust Company.*

The replications of Morgan's Company to the answers of the Farmers' Loan and Trust Company, and the Metropolitan Trust Company, were filed November 2, 1885, and the cause was thus at issue at that time.

The application of the defendant, the Farmers' Loan and Trust Company, whose answer was filed September 24, 1885, for leave to file a cross-bill for the enforcement and foreclosure of its mortgages, was not filed until July 3, 1886; and on July 1, 1886, it appears, the District Judge granted the Company leave to file the bill exhibited by it, as a cross-bill in the original suit.

The bill appears to have been filed July 3, 1886.

The rule of equity procedure is well settled that the proper time for filing a cross-bill, where such a bill is necessary, is at the time of putting in the answer to the original suit, and before the issue is joined by the filing of the replication. 2 Daniell's Ch. Pr., 1650.

The answer was, in fact, both an answer and a demurrer to

the bill of the Morgan Company. It was not necessary to the defence of the Farmers' Company to the claim asserted in the bill, or to a complete determination of its merits, that this foreclosure bill should be filed.

As an original bill the court below had no jurisdiction to entertain it, since the complainant (the Farmers' Loan and Trust Company) and one of the defendants, (the Metropolitan Trust Company of New York,) are citizens of the same State.

Section 738 of the Revised Statutes providing for substituted service, by publication, against non-resident defendants, "in a suit in equity to enforce any *legal or equitable lien or claim* against real or personal property in the District where the suit is brought," does not give, or purport to give, jurisdiction to the Circuit Court, in such a suit, where the complainant and one of the defendants are citizens of the same State. *Brigham* v. *Luddington*, 12 Blatchford, 237, 241; *Carpenter* v. *Talbot*, 33 Fed. Rep. 537.

As the bill for foreclosure of the Farmers' Loan and Trust Company sought to extinguish the equity of redemption of the Metropolitan Trust Company of the City of New York, as junior mortgagee, that Company was a necessary and indispensable party to the bill, or any bill for the foreclosure of the mortgages to the Farmers' Loan and Trust Company, seeking to divest its rights in the mortgaged estate. *Chicago and Vincennes Railroad* v. *Fosdick*, 106 U. S. 47.

Unless, therefore, the Farmers' Loan and Trust Company was entitled to file this bill, as a proper cross-bill, in the original suit, according to the principles applicable to such bills in the Federal Courts, the court below erred in granting leave to file the bill, and in entertaining the same, and should have dismissed the bill for want of jurisdiction to consider it.

It is submitted, on the part of the appellant, that the so-called cross-bill is not, and cannot stand, as a true or proper cross-bill in this suit, within the jurisdiction of the Circuit Court, by virtue of its jurisdiction of the original cause.

This court has adopted Judge Story's definition: "A cross-bill, *ex vi terminorum*, implies a bill brought by a defendant in a suit against the plaintiff, or against other defendants, in

the same suit, or against both, *touching the matters in question in the original bill.* Story Eq. Pl., sec. 389; Curtis, J., in *Shields* v. *Barrow*, 17 How. 130, 145. See also *Ayres* v. *Carver*, 17 How. 591; *Cross* v. *De Valle*, 1 Wall. 5, 14; *Rubber Co.* v. *Goodyear*, 9 Wall. 807, 809.

It cannot be said, we think, that within these adjudicated definitions the present bill is a true cross-bill, a mere auxiliary or ancillary suit, a graft or dependency on the original bill, which is supported by the jurisdiction of the Circuit Court over the original suit, rendering it unnecessary that it should appear that the bill could be maintained, in that court, as an original or independent suit for relief.

III. *The construction and effect of the mortgages.*

The contention, on the part of the appellant, is, that by the true construction of the foregoing conditions of the mortgages, the action of the trustee, in enforcing the stipulation that upon the prescribed default in the payment of the interest, the principal of the bonds shall become due, is subjected to the wishes of the bondholders, and the trustee is without right or power to institute proceedings for the collection of the principal sum of the mortgage debt, by foreclosure and sale, upon such default in the payment of the interest, before the day fixed by the credit, except upon the request of the holders of seventy-five per cent in amount of the bonds outstanding under the mortgages. By the true construction of the contract, the principal sum of the mortgage debt is not absolutely due, for the purpose of a foreclosure of the lien against the *corpus* of the property, by reason of default in the payment of coupon interest, until the holders of seventy-five per cent of the debt shall request the trustee to *foreclose* the mortgages.

In other words, the *right of action* for the principal debt, against the *corpus* of the mortgaged estate, does not *accrue* until the bondholders have requested the trustee to foreclose the mortgages.

Mr. Charles H. Tweed for the Texas Central Railway Company, appellant, submitted on his brief.

Mr. Herbert B. Turner for the Farmers' Loan and Trust Company, appellee.

Opinion of the Court.

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

The objection that the Farmers' Company could not proceed to a foreclosure and sale to pay the principal as well as the interest of the bonds upon a default in the payment of interest, without averring and proving that the bill had been filed for that purpose by the request of the holders of seventy-five per cent in amount of the outstanding bonds, rests upon the language of the conditions of the mortgages. Each of them, after providing that it should be void in the event that the railway company should pay the principal of the bonds and the several instalments of interest as they became due, stipulated as follows:

"But in case the Texas Central Railway Company shall fail to pay the principal or any part thereof, or any of the interest on any of the said bonds at any time when the same may become due and payable according to the tenor thereof, and if the said default shall continue sixty days after having been demanded, then and thereupon the principal of all the said bonds hereby secured shall be and become immediately due and payable, and upon the request of the holder or holders of seventy-five per cent of said bonds then outstanding, and written notice of said request being served on the New York agency of the party of the first part, at which said bonds and coupons are made payable, the said trustee (who may act by its president or attorney), or its successor or successors in this trust, may and shall take actual possession (with or without entry or foreclosure) of said railway hereby conveyed, and of all and singular the said mortgaged property, and shall manage and operate the same and receive all the income and profits of the same, together with all the books, papers, records, accounts, and money of said railway company, first defraying out of the same the expenses of the road and its needful repairs and the management of said trust, and the surplus to pay the interest and principal of all the bonds issued hereunder which may be due and outstanding and hereby secured *pro rata;* and, upon the request of the holder or

holders of seventy-five per cent in amount of the bonds so in default which may be at any time outstanding under this deed of trust, it shall be the duty of the said Farmers' Loan and Trust Company of the city of New York, by its president or agent duly appointed in its behalf, to foreclose this mortgage or deed of trust and sell the property herein and hereby conveyed, at the city of Houston, Texas, at public auction, to the highest bidder for cash, after having given at least sixty days' notice of the time, place, and terms of sale by advertisement in at least two daily newspapers published in the city of Houston, and two daily newspapers published in the city of New York," etc.

It is contended on behalf of the appellants that by the true construction of the foregoing conditions, the action of the trustee in enforcing the stipulation that, upon the prescribed default in the payment of the interest, the principal of the bonds should become due, is so far subjected to the wishes of the bondholders, that the trustee is without right or power to institute proceedings for the collection of the principal sum before the date of payment in course, by foreclosure and sale upon such default on interest, except upon the request of the holders of seventy-five per cent in amount of the bonds outstanding. We do not agree with this view. Whenever default upon the interest should continue sixty days after maturity and demand, then and thereupon it was declared that the principal of all of the bonds should be and become immediately due and payable, and that the trustee, upon the request of the holder or holders of seventy-five per cent of the outstanding bonds, and written notice thereof being served on the New York agency of the mortgagor, where the bonds and coupons were made payable, might take possession and operate the road; and upon like request it was made the duty of the trustee to foreclose the mortgage and, after advertisement, sell the property at public action to the highest bidder for cash. Hence, although, as to the particular form of foreclosure and sale at public auction by advertisement, and without the aid of the court, the proper construction would be that that course could not be taken without the request prescribed, this not

only did not limit the power of the trustee to proceed by application to a court of equity to foreclose, but each of the mortgages contained near its close the following clause: "It is hereby further agreed that nothing herein contained shall be held or construed to prevent or interfere with the foreclosure of this instrument, the appointment of a receiver, or any other act or proceeding appropriate in such cases, by any court of competent jurisdiction."

There was nothing in the mortgages which took away the inherent right of resort to the courts, and this clause did not impart what existed without it, but its insertion, evidently out of abundant caution, made it perfectly clear that the provisions relied on by appellants did not apply to foreclosure by bill in equity but to the cumulative remedy specified. It is easy to see why taking possession and selling without the intervention of the court should be guarded against, and the trustee not be required or allowed to proceed in that summary manner except on the request of a certain percentage of the holders of the bonds. Such proceedings might result in injury, which could not be predicated of those regularly taken in a court of equity. Arbitrary procedure by the trustee was not deemed desirable, in view of the interests of both mortgagor and the bondholders as a class, while each would find the protection, to which it might be entitled, at the hands of the court. *Mercantile Trust Co.* v. *Missouri, Kansas & Texas Railway*, 36 Fed. Rep. 221.

The case of *Chicago and Vincennes Railroad* v. *Fosdick*, 106 U. S. 47, is so different upon the facts from that in hand as to deprive it of the weight attributed to it by appellants. The mortgage in controversy in that suit contained no provision saving to the trustees the right to resort to the courts for a foreclosure. It provided for a remedy in case of default, by entry and sale by the trustees, and also by foreclosure and sale, but it was provided that demand for possession should not be made by the trustees until they were required to take such possession by the holders of at least one-half of the outstanding bonds, and that where there was a default on interest, continued for six months after demand, the trustees might

declare the principal due and give notice to the mortgagor, and, upon the written request of the holders of a majority of such bonds, proceed to collect both principal and interest by foreclosure and sale, or otherwise, as provided. (106 U. S. 49, 50.) This court held, that the restriction on the acceleration of the principal did not prevent a foreclosure suit for overdue interest, and that, as the company in that case was in default on some of the coupons, the trustees or any bondholder, independently of the particular provisions just referred to, on non-payment of any instalment of interest, could file a bill for the enforcement of the security and obtain a decree *nisi*, for such defaulted interest, and if the same were not paid as directed, a sale would be ordered. But as the finding of the amount due was the foundation of the right of the mortgagee to proceed, and the right to redeem would not be taken away except upon a strict compliance with the steps necessary to divest it, it became, said Mr. Justice Matthews, speaking for the court, "of the first importance to ascertain whether the decree of foreclosure and sale, in the present case, found due and required to be paid, as the condition of exercising the right to redeem, a larger sum than was then due." The evidence being examined, it was found that there was none to establish that "any coupon, not afterwards funded, was presented and payment thereof refused;" and it was pointed out, that under the eighth article of the mortgage there involved, (which provided that if default was made in the payment of any half year's interest on any of said bonds, and the coupons for such interest should have been presented, and such default should have continued for six months after such demand, without the consent of the holder of said coupon or bond, then the principal of all of the said bonds should be and become immediately due and payable, anything in said bonds to the contrary notwithstanding, and that the trustees might so declare the same and notify the party of the first part thereof,) the forfeiture must stand or fall upon the fact of such declaration and notice, as it might be justified or not by the circumstances existing when they were made, and that whether the whole debt had become due or not, must rest ex-

clusively upon the alleged default, which had been found insufficient. And it was further held that under the same article which provided for a foreclosure on the written request of the holders of the majority of the outstanding bonds, even if the principal sum of the mortgage deed had been rightfully declared due and the required notice given, nevertheless the foundation for proceeding to foreclosure would fail without proof that the bill had been filed for that purpose upon such written request.

In the case at bar, the proof of the presentation and default upon the coupons was full and was not disputed. The mortgages specifically provided that upon such default continuing for sixty days after demand, the principal of all of the bonds should become immediately due and payable. The Texas Company and the Morgan Company both admitted that the principal had become due and payable. The instruments did not require a written request for a declaration by the trustee that the principal was due, or such a declaration and notification to the defaulting company, in order to make the principal mature. That was a consequence of a default continuing sixty days after demand. Nor was there any restriction upon the power to proceed by bill in equity, but on the contrary any intention to impose such a restriction was disavowed.

The Morgan Company insisted by its pleadings that it was justly entitled to be paid out of the proceeds of the sale decreed in preference to the first mortgage bonds, because, as it alleged, the Houston Company under which it claims advanced the amount in question to the Texas Company to be used for taxes, operating expenses, equipment, improvements, and other necessary expenditures, by which the Texas Company's railway had been kept in safe running order, its business and importance increased, and it thereby rendered more valuable to the first mortgage bondholders; that the indebtedness was contracted by the Texas Company upon consideration of its promise to pay the same out of the earnings of its railway; that (as is charged upon information and belief) the company had used at least $500,000 of said earnings during the years 1882, 1883 and 1884 for the payment of coupons of its first

mortgage bonds, although the holders of the coupons were only entitled to receive payment thereof after the Texas Company had paid the amounts advanced and paid as aforesaid; and that the Morgan Company was entitled to stand in the place and stead of said mortgage creditors for the amounts received. In other words, the contention seemed to be, that the Houston Company should be awarded priority of lien because it advanced the amount in question to be used in the payment of operating expenses and taxes, and it was so used: or upon the promise that it should be so used, which was broken by its diversion to the payment of interest; or, if there were no such promise, express or implied, then that the application of the advances to the payment of interest entitled the Houston Company to preference by way of subrogation, or because by such payment the Texas Company was kept running for five years, which without such payment would have been impossible.

We do not, however, understand it to be claimed upon the evidence, that any express agreement is made out for the application of the advances to any particular purpose, or for the right of subrogation between the Houston Company and either the Texas Company or the first mortgage bondholders, or that any of the interest coupons upon the first mortgage bonds, which were paid by the Texas Company, were taken by the Houston Company as security for advances. But it is argued that the advances were for the payment of operating expenses, taxes and interest during five years, whereby the railroad property was preserved as a "going" concern; that at the time the road was constructed the country through which it ran was in a prosperous condition, but afterwards unfavorable conditions supervened and continued throughout the period covered by the advances; that "it was hoped and expected, however, that an improvement in the business of the road would take place, and that the company would be enabled to reimburse the advances;" that the advances were made to meet the particular deficits as they occurred from time to time, to pay operating expenses when there was a deficiency in the earnings, and to pay interest on the bonds when there

was not enough from the earnings to pay it, and, as a whole, constituted the ways and means of maintaining the good will and integrity of the enterprise, and preserving the property, business and franchises; and that, as all that was done by the Houston Company enured directly for the benefit of the public and of the property, it was just and equitable, "inasmuch as the expectations of the parties in regard to the enterprise were not realized, without any fault of theirs, that the mortgage securities should bear the loss which must be sustained either by the bondholders or the appellant."

From the account stated, it appears that the gross earnings were each year sufficient to pay the operating expenses and taxes, and that the deficit of each year was produced by the payment of interest on the bonded debt. But if the advances could therefore be treated as having been specifically procured for, or specifically applied to, the payment of interest as such, (although there is no evidence to that effect,) still such payment would afford no basis for the assertion of a preference as against the bondholders. So far as disclosed, the interest coupons were paid, not purchased, *Ketchum* v. *Duncan*, 96 U. S. 659; *Wood* v. *Guarantee Trust Co.*, 128 U. S. 416, and cannot be set up as outstanding; and the contention is wholly inadmissible that the bondholders, because they received what was due them, should be held to have assented to the running of the road at the risk of returning the money thus paid, if the company, by reason of unrealized expectations on the part of those who made the advances, should ultimately turn out to be insolvent and unable to go on. By the payment of interest, the interposition of the bondholders was averted. They could not take possession of the property, and should not be charged with the responsibility of its operation.

It is true that a railroad company is a corporation operating a public highway, but it does not follow that the discharge of its public excuses it from amenability for its private obligations. If it cannot keep up and maintain its road in a suitable condition, and perform the public service for which it was endowed with its faculties and franchises, it must give way to those who can. Its bonds cannot be confiscated because it

lacks self-sustaining ability. To allow another corporation, which for its own purposes has kept a railroad in operation in the hands of the original company, by enabling it to prevent those who would otherwise be entitled to take it, from doing so, a preference in reimbursement over the latter on the ground of superiority of equity, would be to permit the speculative action of third parties to defeat contract obligations, and to concede a power over the property of others which even governmental sovereignty cannot exercise without limitation. And if all these advances should be considered as applied in payment of the operating expenses only, upon the theory, where such was not literally the fact, that they supplied a deficit created by the payment of interest out of the gross earnings, the same remarks would be applicable.

The doctrine of *Fosdick* v. *Schall*, 99 U. S. 235, is that a court of equity may make it a condition of the issue of an order for the appointment of a receiver, that certain outstanding debts of the company shall be paid from the income that may be collected by the receiver or from the proceeds of sale; that the property being in the hands of the court for administration as a trust fund for the payment of incumbrances, the court, in putting it in condition for sale, may, if needed, recognize the claims of material men and laborers, and some few others of similar nature, accruing for a brief period prior to its intervention, where current earnings have been used by the company to pay mortgage debt or improve the property, instead of to pay current expenses, under circumstances raising an equity for their restoration; as for instance where the company, being insolvent and in default, is allowed by the mortgage bondholders to remain in possession and operate the road long after that default has become notorious, or where the company has been suddenly deprived of the control of its property, and the pursuit of any other course might lead to cessation of operation. *Miltenberger* v. *Logansport Railway*, 106 U. S. 286, 311, 312. If the officers of the company, remarked Mr. Chief Justice Waite, in *Fosdick* v. *Schall*, "give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so

use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. . . . Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion." *Burnham* v. *Bowen*, 111 U. S. 776; *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434.

In the light of these decisions, the inquiry before us is whether these bondholders are to be postponed in respect to the proceeds of the sale of the *corpus* of the property upon which their lien is first and paramount, to this claim of the Houston Company, upon the ground of the particular application of these moneys, or that they supplied a diversion by the officers of the Texas Company equitably binding as such upon the bondholders. Now, if these advances were made generally, as needed by the Texas Company, it matters not whether they were devoted to the payment of running expenses or not. The relation of debtor and creditor existed, and no equity could arise in favor of the creditor as against other creditors holding security prior in time, by reason of the voluntary application the debtor might make of the money borrowed. We repeat, that, so far as appears, the money advanced to one road by the other was simply a loan. The account between the companies was a running account, and the balance was only a balance for cash advances made from time to time. Moneys received from the operation of the Texas road and moneys received from the Houston Company all went into a common fund, from which payments were made for expenses, taxes, and so on. It is also shown that the Texas Company and the Houston Company had the same fiscal agent in New York, who paid the coupons of both; that the management of the Texas Company was, during its entire existence, in the hands of the same officers and directors who managed the Houston Company; that these officers derived their compensation from the Houston Company; that all receipts from the Texas Company were first received by the Houston Company

and then transferred on the books to the treasurer of both companies, as treasurer of the Texas Company; that whenever there was a deficit of funds on the part of the Texas Company, such deficit was made up by the Houston Company; and that the latter company received and disbursed everything. Under such circumstances, it cannot be maintained, against the first mortgage bondholders, that a balance of such a running account of five year's duration represents money so applied to the current expenses of the road, or so diverted therefrom to the payment of interest on the bonds, as to carry with it a superior equity for repayment. *Penn* v. *Calhoun*, 121 U. S. 251; *Kneeland* v. *American Loan and Trust Co.*, 136 U. S. 89; *St. Louis, Alton &c. Railroad* v. *Cleveland, Columbus &c. Railway*, 125 U. S. 658.

It is to be observed, also, that the Morgan Company counted upon the certificates of the Texas Company, whereby it bound itself to deliver to the Houston Company the third mortgage bonds as soon as executed by the Metropolitan Company as trustee, and asked for a decree against all the defendants, declaring the amount found due to complainant, as holder of such certificates, to be "a full, complete, perfect and equitable mortgage and lien upon said railway and upon all of the property, incomes, tolls and profits in said deed of trust of October 1, 1885, described" and prayed "that out of the proceeds of any sale which may be made to satisfy any decree of this honorable court your orator's claim for said amount be paid and satisfied." It is thus seen that the Morgan Company asserted its equities as based on the third mortgage bonds, which renders it still clearer that upon this record no reason exists for the subordination of the first and second mortgages to this claim. Our conclusion is, that the Circuit Court, while it decreed a lien to the Morgan Company, rightfully refused to give it preference over the paramount lien of the first and second mortgage bonds.

Notwithstanding the decree was properly rendered upon the merits, we are urged to reverse it upon the further ground that the bill of the Farmers' Company ought not to have been allowed to be filed, because not in time, and not a cross-bill,

and that, if treated as an original bill, it cannot be maintained, for want of jurisdiction, the Farmers' and Metropolitan Companies being citizens of New York, the Morgan Company of Louisiana, and the Texas Company of Texas.

Under the original bill filed by the Morgan Company, and on its application, the court had taken possession of the property of the Texas Company, through receivers. The Farmers' and Metropolitan Companies were then brought into court by an amended and supplemental bill, which prayed for an account of all liens and incumbrances on the property of the Texas Company and of all its assets, and for a decree adjudging the sums alleged to be due to the Morgan Company liens upon the net earnings of the Texas Company and all its property, superior in rank to the claims of the said trustees and of the holders of the mortgage bonds issued under the various deeds of trust, the giving of which had been set up in the original bill and copies thereto annexed; and that the amount due to it by reason of its advances to the Houston Company should be paid out of the net earnings, and if they proved insufficient, then that a sale be ordered of the property in bulk, and that the amount decreed to the Morgan Company be paid out of the proceeds in preference to the amounts due on the mortgage bonds. It was also specifically prayed, as has been stated, that the rights of the Morgan Company under the certificates given it by the Houston Company in lieu of the bonds issued under the third mortgage should be decreed to be an equitable mortgage upon the property of the Texas Company, and, inferentially at least, superior to the lien of the first two mortgages.

"A cross-bill," says Mr. Justice Story, (Eq. Plead. § 389,) "*ex vi terminorum*, implies a bill brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. A bill of this kind is usually brought, either (1.) to obtain a necessary discovery of facts in aid of the defence to the original bill, or (2.) to obtain full relief to all parties, touching the matters of the original bill." And, as illustrative of cross-bills for relief, he says

(§ 392): "It also frequently happens, and particularly, if any question arises between two defendants to a bill, that the court cannot make a complete decree without a cross-bill or cross-bills, to bring every matter in dispute completely before the court, to be litigated by the proper parties, and upon the proper proofs."

It seems to us that in order that a decree might be made upon the whole matter in dispute, brought completely before the court, the bill in question was necessary and was correctly styled a cross-bill. In no proper sense were new and distinct matters introduced by it, which were not embraced in the original and amended and supplemental bills, and while it sought equitable relief, it was such as, in point of jurisdiction over the subject matter, the court was competent to administer. It may be that, so far as it sought the further aid of the court beyond the purposes of defence to the original bill, it was not a pure cross-bill, but that is immaterial. The subject matter was the same, although the complainant in the cross-bill asserted rights to the property different from those allowed to it in the original bill, and claimed an affirmative decree upon those rights. A complete determination of the matters already in litigation could not have been obtained except through a cross-bill, and different relief from that prayed in the original bill would necessarily be sought. This bill was filed, on leave, before the testimony was taken, and though there should be as little delay as possible in filing bills of this kind, yet that was a matter entirely within the discretion of the court, which could have directed it to be filed even at the hearing. And whether this bill be regarded as a pure cross-bill, as an original bill in the nature of a cross-bill, or as an original bill, there is no error calling for the disturbance of the decree because the court proceeded upon it in connection with the other pleadings. The jurisdiction of the Circuit Court did not depend upon the citizenship of the parties, but on the subject matter of the litigation. The property was in the actual possession of that court, and this drew to it the right to decide upon the conflicting claims to its ultimate possession and control. *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609; *Peo-*

Syllabus.

ple's Bank v. *Calhoun*, 102 U. S. 256; *Krippendorf* v. *Hyde*, 110 U. S. 276.

The decree of the Circuit Court is

Affirmed.

JONES *v.* UNITED STATES.

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

No. 1143. Argued October 29, 1890. — Decided November 24, 1890.

The Guano Islands Act of August 18, 1856, c. 164, reënacted in Rev. Stat. §§ 5570–5578, is constitutional and valid.

Section 6 of the act of August 18, 1856, c. 164, reënacted in Rev. Stat. § 5576, does not assume to extend the admiralty jurisdiction over land, but merely extends the provisions of the statutes of the United States for the punishment of offences upon the high seas to like offences upon guano islands which the President has determined should be considered as appertaining to the United States.

Under Rev. Stat. §§ 730, 5339, 5576, murder committed on a guano island which has been determined by the President to appertain to the United States, may be tried in the courts of the United States for the district into which the offender is first brought.

By the law of nations, when citizens or subjects of one nation, in its name, and by its authority or with its assent, take and hold actual, continuous and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish, or working mines,) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired.

Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government.

Courts of justice are bound to take judicial notice of the terrritorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings.

In the ascertainment of facts of which judges are bound to take judicial

notice, as in the decision of matters of law which it is their office to know, they may refresh their memory and inform their conscience from such sources as they deem most trustworthy, and as to international affairs may inquire of the Department of State.

The determination of the President, under the act of August 18, 1856, c. 164, § 1, (Rev. Stat. § 5570,) that a guano island shall be considered as appertaining to the United States, may be declared through the Department of State, whose acts in this regard are in legal contemplation the acts of the President.

The Island of Navassa in the Caribbean Sea must, by reason of the action of the President, as appearing in documents of the Department of State, be considered as appertaining to the United States.

Under the act of August 18, 1856, c. 164, § 2, (Rev. Stat. § 5574,) a breach of condition of the bond given by the discoverer of a guano island forfeits his private rights only, and does not affect the dominion of the United States over the island, or the jurisdiction of their courts.

THIS cause was argued with No. 1142, *Smith* v. *United States*, and No. 1144, *Key* v. *United States*, *post*, 224. On the application of the counsel for the several plaintiffs in error it was ordered, that three counsel for plaintiffs in error be allowed to make oral argument herein. The case is stated in the opinion.

Mr. E. J. Waring, *Mr. John Henry Keene*, *Jr.*, and *Mr. Archibald Stirling* for plaintiffs in error. *Mr. Joseph S. Davis* and *Mr. J. Edward Stirling* were with them on the brief.

Mr. Attorney General for defendants in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This was an indictment, found in the District Court of the United States for the District of Maryland, and remitted to the Circuit Court under Rev. Stat. § 1039, alleging that Henry Jones, late of that district, on September 14, 1889, "at Navassa Island, a place which then and there was under the sole and exclusive jurisdiction of the United States, and out of the jurisdiction of any particular State or district of the United States, the same being, at the time of the committing of the

offences in the manner and form as hereinafter stated by the persons hereinafter named, an island situated in the Caribbean Sea, and named Navassa Island, and which was then and there recognized and considered by the United States as containing a deposit of guano, within the meaning and terms of the laws of the United States relating to such islands, and which was then and there recognized and considered by the United States as appertaining to the United States, and which was also then and there in the possession of the United States, under the laws of the United States then and there in force relating to such islands," murdered one Thomas N. Foster, by giving him three mortal blows with an axe, of which he there died on the same day; and that other persons named aided and abetted in the murder. The indictment, after charging the murder in usual form, alleged that the District of Maryland was the District of the United States into which the defendant was afterwards first brought from the Island of Navassa.

The defendant filed a general demurrer, which was overruled, and he then pleaded not guilty. The jury returned a verdict of guilty; and a bill of exceptions was tendered by the defendant, and allowed by the court, in substance as follows:

At the trial, the United States, to prove that Navassa Island was recognized and considered by the United States as appertaining to the United States, and in the possession of the United States, under the provisions of the laws of the United States in force with regard to such islands, offered in evidence certified copies of papers, from the records of the State Department of the United States, as follows:

A copy of a memorial addressed to the Secretary of State by Peter Duncan, signed and sworn to by him on November 18, 1857, before a commissioner of the Circuit Court of the United States for the District of Maryland, and certified by the present Secretary of State to be "a true copy from Senate Executive Document No. 37, 36th Congress, 1st session, filed in this department with papers relating to the discovery of guano on the Island of Navassa," which was in these words:

"To the Honorable the Secretary of State of the United States:

"Peter Duncan, a citizen of the United States, respectfully represents to the Department of State of the United States that on the first day of July in the year 1857 he did discover a deposit of guano on an island or key in the Caribbean Sea, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, which said island or key is called Navassa, and lies in latitude 18° 10′ north, longitude 75° west, forty-five miles or thereabouts from the island of St. Domingo, and seventy miles or thereabouts from the island of Jamaica. The said island of Navassa is about two miles in length and a mile and a half in width, apparently of volcanic origin, and elevated about three hundred feet above the surface of the sea, presenting a rocky, perpendicular cliff or shore on all sides, except for a small space to the north. It is covered with small shrubs upon the surface, beneath which is a deposit of phosphatic guano, varying in depth from one to six feet, and estimated in quantity at one million of tons.

"And said claimant further represents that on the 19th day of September, 1857, he did take peaceable possession of and occupy said island or key of Navassa in the name of the United States, and continues so to occupy the same, and is prepared to furnish satisfactory evidence thereof, and of all others the requisites and facts prescribed by the act of Congress in such case made and provided.

"Wherefore he prays that said key or island of Navassa may be considered and declared as appertaining to the United States, and that he, the said claimant, may have the rights and advantages allowed and secured to him as such discoverer, which are by the act of Congress aforesaid provided.

"Peter Duncan."

Also a copy of a proclamation, certified by the present Secretary of State to be "a copy of a proclamation issued by this Department on the 8th day of December, 1859, in respect

to the discovery of guano on the Island of Navassa by Peter Duncan," which was in these words:

"Lewis Cass, Secretary of State of the United States, to all to whom these presents shall come, greeting:

"Know ye that Peter Duncan, a citizen of the United States, has filed in this Department the required notice of the discovery of guano on and of the occupation of the Island of Navassa, in the Caribbean Sea, in the name of the United States of America, the same being in north latitude eighteen degrees and ten minutes and in longitude seventy-five degrees west; and that Edward K. Cooper, also a citizen of the United States, and the assignee of the said Peter Duncan, has entered into sufficient bonds under and according to the provisions of the act of the Congress of the United States passed on the eighteenth day of August in the year eighteen hundred and fifty-six; wherefore the said Edward K. Cooper is entitled, in respect to the guano on the said island, to all the privileges and advantages intended by that act to be secured to citizens of the United States who may have discovered deposits of guano; provided always, that the said Edward K. Cooper shall abide by the conditions and requirements imposed by the act of Congress aforesaid.

"In witness whereof I, Lewis Cass, Secretary of State of the United States of America, have hereunto set my hand and caused the seal of the Department of State to be affixed at Washington this eighth day of December, 1859.

[SEAL.] "LEWIS CASS."

The United States further proved that on September 14, 1889, the Island of Navassa was in the possession of the Navassa Phosphate Company, incorporated by the State of New York, and which held the island as assignee of Duncan and Cooper, mentioned in the foregoing papers; that the persons then "on the island consisted of 137 colored laborers of said company, and 11 white officers or superintendents, all residents of the United States, appointed by the company, the laborers, including the defendant, being employed in

digging the phosphate or guano and transporting by railroad propelled by man power and handling the phosphate or guano found on the island and putting it on shipboard, which digging and mining is carried on by digging and blasting with dynamite and working with picks and other iron tools, and which phosphate or guano so mined is the article called Navassa phosphate in the market, and is the only substance on the island which is dug, mined, worked, transported or sold, the said laborers being shipped at Baltimore under shipping articles," a copy of which is in the margin [1]; that on that day

---

[1] Navassa Phosphate Company, 20 & 22 South Street, Baltimore.

This agreement, made at Baltimore the 12th day of January, 1889, by and between the Navassa Phosphate Company, of the first part, and the undersigned laborers of the United States, of the second part, as follows:

Said laborers agree to proceed, under the orders and instructions of said Navassa Phosphate Company, or its agents, on board such vessel as shall be provided for the purpose, to Navassa Island, for the business of assisting in loading of vessels with cargo, either by working on shore or in boats; and for this purpose the parties of the second part hereby covenant and agree to devote their whole time and services in such labor as they may be directed to do by said Navassa Phosphate Company or its agents, and for as many months as the said Navassa Phosphate Company may desire, not exceeding in all fifteen months from the time of arriving at Navassa Island, until discharged therefrom, at which time their wages are to commence and cease. And the said Navassa Phosphate Company agrees on its part to pay said undersigned the monthly wages set opposite their respective names, and to furnish a free passage to and from said island of Navassa, and further to find said undersigned laborers in the usual provisions furnished to such laborers, free of all expense to the parties of the second part.

Payment of wages to be made on the return of the parties of second part to Baltimore. And should they fail to obey the orders and instructions of said Navassa Phosphate Company, or its agents, or refuse at any time to labor, they shall forfeit all claim for wages and compensation which may be due them.

If said Navassa Phosphate Company fails to comply with this agreement on its part, it shall forfeit the sum of twenty dollars, in addition to full monthly wages and free passage, to the parties of the second part to this contract. The parties of the second part further agree, in case of sickness or lost time, to pay the said Navassa Phosphate Company fifty cents per day board, and said Navassa Phosphate Company not to be liable for any wages or compensation for time lost by the parties of the second part by sickness or otherwise.

The parties of the second part agree, upon signing the contract, to obey

a riot took place there, in which a large number of laborers was engaged against the officers, and the defendant killed Thomas N. Foster, one of the officers, under circumstances which the jury found amounted to murder, as charged in the indictment; and that afterwards the defendant was first brought into the District of Maryland, as therein charged.

Evidence offered by the defendant that on April 16, 1889,

---

and abide by all the rules, regulations and laws that may now be in operation or hereafter put in force on the island of Navassa, West Indies, for the better protection of life and property, and that may be deemed necessary for police protection and discipline of the island; and release said Navassa Phosphate Company from any and all liability for any injury arising from accident, or from any acts of any officer or employé on the island of Navassa.

It is further understood and agreed to by the parties of the second part that, in case they are not competent to perform the duties as herein stated, they to pay their passage back to the United States, and the party of the first part not to be liable for any wages whatsoever. It is also understood that fifty cents per month shall be deducted from the wages of the parties of the second part for medicines and medical attention.

NAVASSA PHOSPHATE COMPANY,
Per JOHN H. HASKELL, for the Company.

In consideration to the foregoing, and the advance wages set opposite our names, the receipt whereof is hereby acknowledged, we have signed this contract, in duplicate, as witness our hands:

Signatures.	Monthly wages.	Advance paid.	Witness to signature and payment.	Age.	Place of Birth.
No. 14. Henry Jones . . .	$8.00	$10.00	4—1	22	Baltimore.
* * * * * *	* *	* *	* * *	* *	* * *
* * * * * *	* *	* *	* * *	* *	* * *

We hereby certify that we, the undersigned, were present on board the brig Romance, in the harbor of Baltimore, Md., when the above-named men acknowledged that they had signed the above contract, and that they were willing to go to Navassa Island, W. I., and obey all orders, rules and regulations; that the advance set opposite their respective names was correct, and that they had received the money.

CHARLES BROWN, Master.
FREDERICK ABBOTT, Mate.
Baltimore, January 12th, 1889. JOHN W. PEED, Shipper.

a foreign vessel was loading at Navassa with a cargo of this phosphate of lime, intended for the use of persons other than citizens or residents of the United States, and finished such loading a few days afterwards, was excluded by the court as immaterial; and the defendant excepted to its exclusion.

After verdict, the defendant moved in arrest of judgment, for various reasons, the only one of which, relied on in argument, was this: "Because the act of August 18, 1856, c. 164, now codified with amendments as Title 72 of the Revised Statutes of the United States, is unconstitutional and void, and the court was without jurisdiction to try the defendant under the indictment found against him."

The motion was overruled, and the defendant sentenced to death; and he sued out this writ of error under the act of February 6, 1889, c. 113, § 6. 25 Stat. 656.

The provisions of the act of Congress of August 18, 1856, c. 164, entitled "An Act to authorize Protection to be given to Citizens of the United States who may discover Deposits of Guano," (11 Stat. 119,) since reënacted in Title 72, §§ 5570–5578, of the Revised Statutes, are as follows:

By section 1, when any citizen of the United States shall "discover a deposit of guano on any island, rock or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and shall take peaceable possession thereof, and occupy the same, said island, rock or key may, at the discretion of the President of the United States, be considered as appertaining to the United States;" provided that the discoverer, as soon as practicable, shall give notice, on oath, to the State Department of the United States, of such discovery, occupation and possession, describing the island, its latitude and longitude, and showing that such possession was taken in the name of the United States, and shall furnish to the State Department satisfactory evidence that the island was not, at the time of his discovery, possession or occupation, in the possession or occupation of any other government or its citizens. All the facts and conditions thus specified must appear to the satisfaction of the President, in order to enable him to exercise the discre-

tionary power conferred upon him of determining that the island shall be considered as appertaining to the United States.

When the President determines that the island shall be considered as appertaining to the United States, and not before, section 2 of the statute authorizes him to allow the discoverer or his assigns the exclusive right, subject to be terminated by Congress at any time, of occupying the island for the purpose of obtaining and selling the guano, first giving bond, with such penalties and securities as may be required by the President, "to deliver the said guano to citizens of the United States, for the purpose of being used therein, and to none others," "and to provide all necessary facilities for that purpose within a time to be fixed in said bond." And, by the same section, any breach of the conditions of the bond "shall be taken and deemed a forfeiture of all rights accruing under and by virtue of this act."

The scope and effect of the first two sections, as above stated, clearly appear on the face of the act, and were pointed out in opinions given by Attorney General Black to the Secretary of State on June 2, 1857, and July 12, 1859. 9 Opinions of Attorneys General, 30, 364. See also a letter of the Secretary of State of July 1, 1857, in 3 Wharton's International Law Digest, § 311.

The other sections of the act manifestly apply only to islands which the President has determined shall be considered as appertaining to the United States.

By section 3, "the introduction of guano from such islands, rocks or keys shall be regulated as in the coasting trade between different ports of the United States, and the same laws shall govern the vessels concerned therein." By section 4, "nothing in this act contained shall be construed obligatory on the United States to retain possession of the islands, rocks or keys as aforesaid, after the guano shall have been removed from the same." And by section 5, "the President of the United States is hereby authorized, at his discretion, to employ the land and naval forces of the United States to protect the rights of the said discoverer or discoverers, or their assigns, as aforesaid."

By section 6 of the same act, reënacted in section 5576 of the Revised Statutes, all acts done, and offences or crimes committed, on any such island, rock or key, by persons who may land thereon, or in the waters adjacent thereto, "shall be held and deemed to have been done or committed on the high seas, on board a merchant ship or vessel belonging to the United States, and be punished according to the laws of the United States relating to such ships or vessels and offences on the high seas; which laws, for the purposes aforesaid, are hereby extended to and over such islands, rocks or keys."

This section does not (as argued for the defendant) assume to extend the admiralty jurisdiction over land; but, in the exercise of the power of the United States to preserve peace and punish crime in all regions over which they exercise jurisdiction, it unequivocally extends the provisions of the statutes of the United States for the punishment of offences committed upon the high seas to like offences committed upon guano islands which have been determined by the President to appertain to the United States. In either case, the crime, the punishment and the procedure are statutory, the whole criminal jurisdiction of the courts of the United States being derived from acts of Congress. *United States* v. *Hudson*, 7 Cranch, 32; *United States* v. *Britton*, 108 U. S. 199, 206.

By the Constitution of the United States, while a crime committed within any State must be tried in that State and in a district previously ascertained by law, yet a crime not committed within any State of the Union may be tried at such place as Congress may by law have directed. Constitution, art. 3, § 2; Amendments, art. 6; *United States* v. *Dawson*, 15 How. 467, 488. Congress has directed that "the trial of all offences committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought." Rev. Stat. § 730. And Congress has awarded the punishment of death to the crime of murder, whether committed upon the high seas or other tide waters out of the jurisdiction of any particular State, or "within any fort, arsenal, dock-yard, magazine or in any other place or district of

country under the exclusive jurisdiction of the United States." Rev. Stat. § 5339. Both these acts of Congress clearly include murder committed on any land within the exclusive jurisdiction of the United States and not within any judicial district, as well as murder committed on the high seas. *Ex parte Bollman*, 4 Cranch, 75, 136; *United States* v. *Bevans*, 3 Wheat. 336, 390, 391; *United States* v. *Arwo*, 19 Wall. 486.

By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name, and by its authority or with its assent, take and hold actual, continuous and useful possession, (although only for the purpose of carrying on a particular business, such as catching and curing fish, or working mines,) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands. Vattel, lib. 1, c. 18; Wheaton on International Law (8th ed.) §§ 161, 165, 176, note 104; Halleck on International Law, c. 6, §§ 7, 15; 1 Phillimore on International Law (3d ed.) §§ 227, 229, 230, 232, 242; 1 Calvo Droit International (4th ed.) §§ 266, 277, 300; *Whiton* v. *Albany Ins. Co.*, 109 Mass. 24, 31.

Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances. *Gelston* v. *Hoyt*, 3 Wheat. 246, 324; *United States* v. *Palmer*, 3 Wheat. 610; *The Divina Pastora*, 4 Wheat. 52; *Foster* v. *Neilson*, 2 Pet. 253, 307, 309; *Keane* v. *McDonough*, 8 Pet. 308; *Garcia* v. *Lee*, 12 Pet. 511, 520; *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415; *United States* v. *Yorba*, 1 Wall. 412, 423; *United States* v. *Lynde*, 11 Wall. 632, 638. It is equally well settled in England. *The Pelican*, Edw. Adm. appx. D; *Taylor* v. *Bar-*

clay, 2 Sim. 213; *Emperor of Austria* v. *Day*, 3 DeG., F. & J. 217, 221, 233; *Republic of Peru* v. *Peruvian Guano Co.*, 36 Ch. D. 489, 497; *Republic of Peru* v. *Dreyfus*, 38 Ch. D. 348, 356, 359.

In *Williams* v. *Suffolk Ins. Co.*, in an action on a policy of insurance, the following question arose in the Circuit Court, and was brought up by a certificate of division of opinion between the judges thereof:

"Whether, inasmuch as the American government has insisted and does still insist, through its regular executive authority, that the Falkland Islands do not constitute any part of the dominions within the sovereignty of the government of Buenos Ayres, and that the seal fishery at those islands is a trade free and lawful to the citizens of the United States, and beyond the competency of the Buenos Ayrean government to regulate, prohibit or punish; it is competent for the Circuit Court in this cause to inquire into and ascertain by other evidence the title of said government of Buenos Ayres to the sovereignty of the said Falkland Islands, and, if such evidence satisfies the court, to decide against the doctrines and claims set up and supported by the American government on this subject; or whether the action of the American government on this subject is binding and conclusive on this court as to whom the sovereignty of those islands belongs." 13 Pet. 417.

This court held that the action of the executive department, on the question to whom the sovereignty of those islands belonged, was binding and conclusive upon the courts of the United States, saying: "Can there be any doubt that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the

Union." "In the present case, as the executive in his message, and in his correspondence with the government of Buenos Ayres, has denied the jurisdiction which it has assumed to exercise over the Falkland Islands, the fact must be taken and acted on by this court as thus asserted and maintained." 13 Pet. 420.

All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings. *United States* v. *Reynes*, 9 How. 127; *Kennett* v. *Chambers*, 14 How. 38; *Hoyt* v. *Russell*, 117 U. S. 401, 404; *Coffee* v. *Grover*, 123 U. S. 1; *State* v. *Dunwell*, 3 R. I. 127; *State* v. *Wagner*, 61 Maine, 178; *Taylor* v. *Barclay*, and *Emperor of Austria* v. *Day*, above cited; 1 Greenl. Ev. § 6.

In *United States* v. *Reynes*, upon the question whether a Spanish grant of land in Louisiana was protected, either by the treaty of retrocession from Spain to France, or by the treaty of Paris, by which the Territory of Louisiana was ceded to the United States, this court held: "The treaties above mentioned, the public acts and proclamations of the Spanish and French governments, and those of their publicly recognized agents, in carrying into effect those treaties, though not made exhibits in this cause, are historical and notorious facts, of which the court can take regular judicial notice, and reference to which is implied in the investigation before us." 9 How. 147, 148.

In *Kennett* v. *Chambers*, a bill to compel specific performance of a contract made in the United States in September, 1836, by which a general in the Texan Army agreed to convey lands in Texas, in consideration of money paid him to aid in raising and equipping troops against Mexico, was dismissed on demurrer, because the independence of Texas, though previously declared by that State, had not then been acknowledged by the government of the United States; and the court established this conclusion by referring to messages of the

President of the United States to the Senate, a letter from the President to the Governor of Tennessee, and a note from the Secretary of State to the Mexican Minister, none of which were stated in the record before the court. 14 How. 47, 48.

So in *Coffee* v. *Grover*, upon writ of error to the Supreme Court of Florida, in a case involving a title to land, claimed under conflicting grants from the State of Florida and the State of Georgia, and depending upon a disputed boundary between those States, this court ascertained the true boundary by consulting public documents, some of which had not been given in evidence at the trial, nor referred to in the opinion of the court below. 123 U. S. 11 *& seq.*

In *Taylor* v. *Barclay*, a bill in equity, based on an agreement which it alleged had been made in 1825 by agents of "the government of the Federal Republic of Central America, which was a sovereign and independent State, recognized and treated as such by His Majesty the King of these Realms," was dismissed on demurrer by Vice-Chancellor Shadwell, who said: "I have had communication with the Foreign Office, and I am authorized to state that the Federal Republic of Central America has not been recognized as an independent government by the government of this country." "Inasmuch as I conceive it is the duty of the judge in every court to take notice of public matters which affect the government of this country, I conceive that, notwithstanding there is this averment in the bill, I am bound to take the fact as it really exists, not as it is averred to be." "Nothing is taken to be true, except that which is properly pleaded; and I am of opinion that, when you plead that which is historically false, and which the judges are bound to take notice of as being false, it cannot be said you have properly pleaded, merely because it is averred, in plain terms; and that I must take it just as if there was no such averment on the record." 2 Sim. 220, 221, 223.

That case is in harmony with decisions made in the time of Lord Coke, and in which he took part, that against an allegation of a public act of Parliament, of which the judges ought to take notice, the other party cannot plead *nul tiel record*,

but, if the act be misrecited, ought to demur in law upon it. *The Prince's Case*, 8 Rep. 14a, 28a; *Woolsey's Case*, Godb. 178.

In the ascertainment of any facts of which they are bound to take judicial notice, as in the decision of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience from such sources as they deem most trustworthy. Gresley Eq. Ev. pt. 3, c. 1; *Fremont* v. *United States*, 17 How. 542, 557; *Brown* v. *Piper*, 91 U. S. 37, 42; *State* v. *Wagner*, 61 Maine, 178. Upon the question of the existence of a public statute, or of the date when it took effect, they may consult the original roll or other official records. *Spring* v. *Eve*, 2 Mod. 240; 1 Hale's Hist. Com. Law (5th ed.) 19–21; *Gardner* v. *Collector*, 6 Wall. 419; *South Ottawa* v. *Perkins*, 94 U. S. 260, 267–269, 277; *Post* v. *Supervisors*, 105 U. S. 667. As to international affairs, such as the recognition of a foreign government, or of the diplomatic character of a person claiming to be its representative, they may inquire of the Foreign Office or the Department of State. *Taylor* v. *Barclay*, above quoted; *The Charkieh*, L. R. 4 Ad. & Ec. 59, 74, 86; *Ex parte Hitz*, 111 U. S. 766; *In re Baiz*, 135 U. S. 403.

In the case at bar, the indictment alleges that the Island of Navassa, on which the murder is charged to have been committed, was at the time under the sole and exclusive jurisdiction of the United States, and out of the jurisdiction of any particular State or district of the United States, and recognized and considered by the United States as containing a deposit of guano within the meaning and terms of the laws of the United States relating to such islands, and recognized and considered by the United States as appertaining to the United States and in the possession of the United States under those laws.

These allegations, indeed, if inconsistent with facts of which the court is bound to take judicial notice, could not be treated as conclusively supporting the verdict and judgment. But, on full consideration of the matter, we are of opinion that those facts are quite in accord with the allegations of the indictment.

The power, conferred on the President of the United States by section 1 of the act of Congress of 1856, to determine that a guano island shall be considered as appertaining to the United States, being a strictly executive power, affecting foreign relations, and the manner in which his determination shall be made known not having been prescribed by statute, there can be no doubt that it may be declared through the Department of State, whose acts in this regard are in legal contemplation the acts of the President. *Wolsey* v. *Chapman*, 101 U. S. 755, 770; *Runkle* v. *United States*, 122 U. S. 543, 557; 11 Opinions of Attorneys General, 397, 399.

On referring to the memorial sworn to by Peter Duncan on November 18, 1857, and to the Proclamation of the Secretary of State of December 8, 1859, (copies of both of which, verified by the present Secretary of State, were given in evidence at the trial of this case,) and to other papers of intermediate dates, filed in the Department of State, communicated by the President to the Senate on April 12, 1860, and printed by order of the Senate in Executive Document No. 37 of the first session of the Thirty-sixth Congress, the following facts appear in regard to the Island of Navassa:

Duncan's memorial on oath was presented to the Secretary of State on December 3, 1857. In that memorial, Duncan represented that on July 1, 1857, he discovered a deposit of guano on an island called Navassa, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government; described the island, its latitude and longitude, and the deposit of guano thereon; and further represented that on September 19, 1857, he took peaceable possession of and occupied the island in the name of the United States and continued so to occupy it, and was prepared to furnish satisfactory evidence thereof, and of all other requisites and facts prescribed by the act of Congress of 1856; and prayed that the island "may be considered and declared as appertaining to the United States, and that he, the said claimant, may have the rights and advantages allowed and secured to him as such discoverer, which are by the act of Congress aforesaid provided."

On April 23, 1858, Cooper, the assignee of Duncan, addressed a letter to the Secretary of State, requesting protection of his vessels lying and men working at the Island of Navassa against an apprehended interference by a vessel of war of the Haytian government.

. On April 24, 1858, Cooper presented to the Secretary of State an affidavit, sworn to March 15, 1858, before the United States consul at Kingston in the Island of Jamaica, of John B. Lewis, that, as Duncan's agent, he had been since September 18, 1857, "in peaceable possession of the said island, taking and shipping guano therefrom, and that said island was not, when he so took possession thereof, in the possession or occupation of any other government or its citizens, and that the possession of said Duncan through said Lewis and the said Duncan's other agents has not been in any wise interrupted or sought to be interrupted by any person whatsoever."

In June, 1858, Cooper, by letters addressed to the President and to the Secretary of State, informed them that the Haytian government, upon the pretence that the island of Navassa was a dependency of St. Domingo, had sent two vessels of war there, and forcibly interrupted and prohibited the digging of guano by Cooper's men; and solicited the interposition of the United States for the protection of his interests.

On July 7, 1858, the Secretary of State addressed a letter to the Secretary of the Navy, in which, after stating the substance of Duncan's memorial and of Cooper's application, he said: "The President being of the opinion that any claim of the Haytian government to prevent citizens of the United States from removing guano from the Island of Navassa is unfounded, and that in this case it is advisable to exercise the authority vested in him by the fifth section of the act of Congress, approved August 18, 1856, entitled 'An act to authorize protection to be given to citizens of the United States who may discover deposits of guano,' directs that you will cause a competent force to repair to that island, and will order the officer in command thereof to protect citizens of the United States in removing guano therefrom against any interference from authorities of the government of Hayti, or of any other

government. If any persons in the employment of that government should be found upon the island, an offer may be made to land them at Port au Prince, or at any other point which they may designate, and their superiors may be informed of the occasion for this proceeding, and of the determination of this government not to allow the removal of guano from that island by citizens of the United States to be interfered with in any manner by the citizens or authorities of Hayti, or by persons claiming to act under them. It is hoped that the President's object may, by firmness and discretion, be accomplished, not only without any effusion of blood, but without giving reasonable cause for offence in any quarter."

The Secretary of State, on July 8, sent to Cooper a copy of this letter; on July 12, demanded of Cooper a bond as required by the act of 1856, and on September 10, 1858, accepted such a bond; and on September 16 sent him a copy of dispatches received by the Navy Department from the commander of the vessel ordered to Navassa, including letters written by him at Port au Prince on August 16, 1858, to the Haytian Minister of Foreign Relations, to the United States consul at that port, and to Cooper's agent on the Island of Navassa, informing each of them of the object of his mission.

In the letter to the Haytian Minister of Foreign Relations, the commander said: "I am authorized to say to you that the President of the United States is of opinion that, in this case, it is advisable to exercise the authority vested in him by the fifth section of this act, and I am directed by him to repair to that island to protect our citizens in removing guano therefrom against any interference from the authorities of any government whatever; which he hopes I may be able to do without giving reasonable cause of offence in any quarter."

On November 13, 1858, Mr. B. C. Clark, the commercial agent of Hayti at Boston, in behalf of the Haytian government, (intercourse between that government and the United States being at that time conducted through consuls or commercial agents only,[1]) addressed to the Secretary of State a

[1] Acts of August 18, 1856, c. 127, 11 Stat. 52, 54; June 5, 1862, c. 96, and July 11, 1862, c. 143, § 1, 12 Stat. 421, 534.

letter in relation to the occupancy of the Island of Navassa by citizens of the United States, in which he said: "The territory over which Hayti now claims sovereignty was once the property of Spain, who, in the exercise of an undisputed right, ceded said territory to France. France, in 1825, through her chief, Charles X, acknowledged the independence of Hayti, and thereby vested her with a perfect title to the 'French part' (popularly termed) and all its dependencies, among which dependencies the islands of Tortugas, La Vache, Cayemete, Navassa and Gonaive Island are declared to be. The government of Hayti, although frequently importuned, has never ceded, sold or leased either of these dependencies to any nation, company or individual. I therefore most respectfully ask, in behalf of the government of Hāyti, the attention of the government of the United States to the infringement on the rights of Hayti, involved in the unauthorized occupancy of Navassa Island by citizens of the United States."

On November 17, 1858, the Assistant Secretary of State replied to Mr. Clark, saying: "I am directed to inform you that a citizen of the United States having exhibited to this department proofs which were deemed sufficient that that island was derelict and abandoned, with guano of good quality, and having applied for the protection of this government in removing the guano therefrom, pursuant to the act of Congress of the 18th of August, 1856, a copy of which is inclosed, that application has been granted. You will notice, however, that the act does not make it obligatory upon the government to retain permanent possession of the island."

On December 8, 1859, the Secretary of State issued a proclamation, addressed "to all to whom these presents shall come," declaring that Duncan, a citizen of the United States, had filed in the Department of State the required notice of the discovery of guano on, and of the occupation of, the Island of Navassa, in the name of the United States; and that Cooper, his assignee, also a citizen of the United States, had entered into sufficient bonds under and according to the act of Congress of August 18, 1856; and therefore that Cooper was "entitled, in respect to the guano on the said

island, to all the privileges and advantages intended by that act to be secured to citizens of the United States who may have discovered deposits of guano," provided that he should abide by the conditions and requirements of that act.

The opinion submitted by Attorney General Black to the Secretary of State on December 14, 1859, (9 Opinions of Attorneys General, 406,) to the effect that the President has no right under the law to annex a guano island to the United States, or to put American citizens in possession of it, while a diplomatic question as to the jurisdiction over it is pending between the United States and a foreign nation, cannot influence our decision in this case, for several reasons. In the first place, that opinion was given six days after the proclamation regarding the Island of Navassa, and concerned only a distinct island, Cayo Verde, claimed by the British government as within its jurisdiction and belonging to the Bahamas. In the next place, no diplomatic question was then pending as to the jurisdiction over the Island of Navassa; on the contrary, the President had repeatedly declared that the claim of Hayti was unfounded. Lastly, the office of the Attorney General was to advise the President what he ought to do; the duty of the judiciary is to decide in accordance with what the President, in the exercise of a discretionary power confided to him by the Constitution and laws, has actually done. As was adjudged, under like circumstances, in *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420, before quoted, if the executive, in his correspondence with the government of Hayti, has denied the jurisdiction which it claimed over the Island of Navassa, the fact must be taken and acted on by this court as thus asserted and maintained; it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong; it is enough to know that in the exercise of his constitutional functions he has decided the question.

The documents from the State Department, above mentioned, show the following action of the President, through the Secretary of State, with regard to the Island of Navassa:

In the order of July 7, 1858, sending out an armed vessel under section 5 of the act of 1856 to protect Cooper in removing

the guano, the President unequivocally declared his "opinion that any claim of the Haytian government to prevent citizens of the United States from removing guano from the island of Navassa is unfounded," and "the determination of this government not to allow the removal of guano from that island by citizens of the United States to be interfered with in any manner by the citizens or authorities of Hayti."

In the response of November 17, 1858, to the letter of the Haytian government, through its commercial agent, claiming the Island of Navassa as a dependency of Hayti, the President declared that a citizen of the United States had exhibited proofs which were deemed sufficient that "that island was derelict and abandoned, with guano of good quality;" and that his application for the protection of the government in removing the guano therefrom, pursuant to the act of Congress of 1856, had been granted. The reference, at the close of this response, to the provision in section 4 of that act, reserving the right of the United States to discontinue its possession of the island after, by the removal of the guano, it shall have ceased to be of any value, has, to say the least, no tendency to show that the United States had not for the time being assumed dominion over the island.

In the proclamation of December 8, 1859, after reciting the discovery and occupation of the island by Duncan, and the giving of a bond by his assignee Cooper, pursuant to the act of 1856, Cooper was declared to be "entitled, in respect to the guano on the said island, to all the privileges and advantages intended by that act to be secured to citizens of the United States who may have discovered deposits of guano." Although this proclamation does not in terms follow the first clause of the prayer of Duncan's memorial, "that said key or island of Navassa may be considered and declared as appertaining to the United States," the declaration of the President, in accordance with the conclusion of that prayer, that Cooper, as Duncan's assignee, was entitled, in respect to the guano upon that island, to the privileges and advantages secured by the act of Congress to citizens of the United States discovering deposits of guano, is equivalent to a declaration that the Pres-

ident considered the island as appertaining to the United States.

Seeing that the act of Congress had not authorized any rights or privileges to be allowed to the discoverer of a guano island, or any bond to be required of him, or any protection to be given to him, by the United States, unless the President was of opinion that the island should be considered as appertaining to the United States, the terms of the order of the President of July 7, 1858, of his response of November 17, 1858, to the protest of the official representative of Hayti, and of his proclamation of December 8, 1859, clearly show, or necessarily imply, that the President, exercising the discretionary power conferred upon him by the Constitution and laws, was satisfied that the Island of Navassa was not within the jurisdiction of Hayti, or of any foreign government, and that it should be considered as appertaining to the United States.

But the case does not rest here. The subsequent action of the President, through the appropriate departments, has put the matter beyond all question.

In a circular of the Treasury Department of February 12, 1869, "relative to the Guano Islands appertaining to the United States," and addressed "to collectors of customs," the Secretary of the Treasury said: "You will find hereto annexed a corrected list of the Guano Islands, bonded under the act of August 18, 1856, as appears by the bonds and papers, transmitted from the Department of State, now on file in the office of the First Comptroller of the Treasury. The several islands named and described in said list having been duly bonded, and considered by the President of the United States 'as appertaining to the United States,' in manner and form prescribed by said act, and, as a consequence thereof, brought under the laws regulating the coasting trade, your attention is directed to the same with a view to the proper enforcement of the laws regulating intercourse with said islands." The list, annexed to that circular, of "Guano Islands pertaining to the United States and bonded under the act of August 18, 1856," included the Island of Navassa.

Finally, by letters from the Secretary of State to the Haytian minister on December 31, 1872, and on June 10, 1873, (mentioned, under mistaken dates, in 3 Wharton's International Law Digest, § 312, and copies of which have been obtained from the Department of State,) it appears that, upon the Haytian government renewing its claim to the Island of Navassa, the United States utterly and finally denied the validity of the claim, and reasserted and maintained their exclusive jurisdiction of that island, by reason of its discovery and occupation by Duncan and Cooper, and under the act of Congress of 1856.

The only other point presented by the record and argued in behalf of the defendant is his exception to the exclusion of evidence that in April, 1889, a foreign vessel was loaded at Navassa with guano intended for the use of persons other than citizens or residents of the United States. It was argued that this evidence was admissible, as showing a breach of condition of Cooper's bond, and a consequent forfeiture of his rights, under the provision of section 2 of the act of 1856, reënacted in Rev. Stat. § 5574. It does not distinctly appear whether such breach took place before or after April 18, 1889. If it took place before, it was within the period of five years, during which the operation of that provision of the statute was suspended by the act of April 18, 1884, c. 24. 23 Stat. 11. But, whenever the breach took place, it affected the private rights only of the delinquent, and did not impair the dominion of the United States or the jurisdiction of their courts.

For the reasons above stated, our conclusion is that the Guano Islands Act of August 18, 1856, c. 164, reënacted in Title 72 of the Revised Statutes, is constitutional and valid; that the Island of Navassa must be considered as appertaining to the United States; that the Circuit Court of the United States for the District of Maryland had jurisdiction to try this indictment; and that there is no error in the proceedings.

Judgment affirmed.

No. 1142, Edward Smith *v.* United States, and No. 1144, George S. Key *v.* United States, argued and decided at the same time, are substantially similar, and in those cases also

The judgments are affirmed.

FALK *v.* ROBERTSON.

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

No. 35. Argued October 30, 31, 1890. — Decided November 24, 1890.

Schedule F of section 2502 of Title 33 of the Revised Statutes, as enacted by section 6 of the act of March 3, 1883, c. 121, (22 Stat. 503,) provided as follows, in regard to duties on imported tobacco: "Leaf tobacco, of which eighty-five per cent is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound; if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound. All other tobacco in leaf, unmanufactured, and not stemmed, thirty-five cents per pound." Tobacco was imported in bales, each of which contained a quantity of Sumatra leaf tobacco answering the description in the statute of that dutiable at 75 cents per pound, except that it formed only about 83 per cent of the contents of the bale. The rest of the bale consisted of inferior leaf tobacco, called "fillers," which was separated from the 75-cent tobacco by strips of paper or cloth, making the one kind readily separable from the other, on the opening of the bale. More than 85 per cent of the 75-cent tobacco answered the description of tobacco dutiable at that rate: *Held*, that the whole of the 75-cent tobacco was dutiable at that rate, and that the contents of the bale, as a whole, were not dutiable at 35 cents per pound.

The unit upon which the 85 per cent was to be calculated was not the entire bale.

The case of *Merritt* v. *Welsh*, 104 U. S. 694, distinguished.

This was an action at law, brought in the Supreme Court of the State of New York, by Gustav Falk and Arnold Falk against William H. Robertson, late collector of the port of New York, and removed by the defendant into the Circuit Court of the United States for the Southern District of New York, to recover back duties paid under protest on certain importations of leaf tobacco into the port of New York from Hamburg and Holland, in January and April, 1884. The amount of duty exacted by the collector was $8408. The plaintiffs contended that the proper duty was only $5113.85; and they sued to recover back the difference, $3294.15. They made due protest and appeal.

Argument for Plaintiffs in Error.

It was claimed by the government and conceded by the plaintiffs that the tobacco was dutiable under the following provisions of Schedule F of section 2502 of Title 33 of the Revised Statutes, as enacted by section 6 of the act of March 3, 1883, c. 121, 22 Stat. 503: "Leaf tobacco, of which eighty-five per cent is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound. All other tobacco in leaf, unmanufactured, and not stemmed, thirty-five cents per pound." The question in issue was whether any of the tobacco was dutiable at seventy-five cents a pound; and the court at the trial, before Judge Shipman, directed a verdict for the defendant. Judgment was entered accordingly, to review which the plaintiffs brought a writ of error.

The tobacco in question was imported into the United States in bales. In each bale was a quantity of leaf tobacco answering the description in the statute of that dutiable at 75 cents per pound, except that it formed only about 83 per cent of the contents of the bale. It was Sumatra tobacco, imported from Sumatra into Europe in the same bale in which it was imported into this country. When the bale arrived in Europe, the entire contents of it were within the description of that dutiable here at 75 cents a pound; but in Europe the bale was repacked, by taking out of it a quantity of its contents and substituting therefor a sufficient quantity of inferior tobacco, called "fillers," to reduce the proportion of the 75-cent tobacco in the entire bale to less than 85 per cent of the contents of the bale, as imported into the United States. The 75-cent tobacco was separated from the other by strips of paper or cloth, so that the one kind was readily distinguishable and separable from the other when the bale was opened in the United States.

Mr. Joseph H. Choate, (with whom was *Mr. Charles C. Beaman* on the brief,) for plaintiffs in error.

Argument for Plaintiffs in Error.

I. The Act of March 3, 1883, clearly requires, in any case, that only one rate of duty shall be imposed upon the leaf tobacco in question, considered and appraised, bale by bale, each bale being taken as a unit, and not one rate of duty on so much of the leaf tobacco, in a particular bale, as may be suitable for wrappers, and another rate on so much of such tobacco as may not be suitable for wrappers under the standards fixed by the statute.

The article or thing imported, in this case, upon which the duty is imposed, is "leaf tobacco," and Schedule F of section 2502 of the Revised Statutes, as amended by the Act of 1883, 22 Stat. 503, provides for the duty thereon as follows: "Leaf tobacco, of which eighty-five per cent is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed one dollar per pound. All other tobacco in leaf, unmanufactured, and not stemmed, thirty-five cents per pound." This eighty-five per cent standard and the standard of weight fixed by the statute refer to the leaf tobacco imported, to be appraised and classified as a whole, and bale by bale.

It is a cardinal rule that, in construing statutes imposing duties upon imports, that construction will be adopted, when the phraseology is doubtful or ambiguous, which is most favorable to the importer. *Powers* v. *Barney*, 5 Blatchford, 202; *Adams* v. *Bancroft*, 3 Sumner, 384; *United States* v. *Wigglesworth*, 2 Story, 369; *United States* v. *Ullman*, 4 Ben. 547; *Hartranft* v. *Wiegmann*, 121 U. S. 609; *Merritt* v. *Welsh*, 104 U. S. 694, 702.

The statute must, therefore, be so construed as to admit of the imposition of but one rate of duty upon the leaf tobacco in question, and that rate must be determined by an examination and appraisement of the invoice, bale by bale, each bale being treated as a unit for the purposes of appraisement.

It is a well-established rule of construction, that the language of all statutes levying duties on imports will be presumed to

have been used in an ordinary commercial and popular sense. 200 *Chests of Tea*, *Smith Claimant*, 9 Wheat. 430; *Barlow* v. *United States*, 7 Pet. 404; *United States* v. *112 Casks of Sugar*, 8 Pet. 277; *Elliott* v. *Swartwout*, 10 Pet. 137; *Curtis* v. *Martin*, 3 How. 106; *Arthur* v. *Cumming*, 91 U. S. 362; *Tyng* v. *Grinnell*, 92 U. S. 467; *Arthur* v. *Morrison*, 96 U. S. 108; *Arthur* v. *Lahey*, 96 U. S. 112; *Greenleaf* v. *Goodrich*, 101 U. S. 278; *Recknagel* v. *Murphy*, 102 U. S. 197; *Robertson* v. *Salomon*, 130 U. S. 412, 415.

Not only so, but it is also true that the construction of a tariff act adopted by the Treasury Department, while not conclusive upon the courts, is entitled to weight and respectful consideration. *United States* v. *Moore*, 95 U. S. 760; *Brown* v. *United States*, 113 U. S. 568; *United States* v. *Hill*, 120 U. S. 169; *United States* v. *Johnston*, 124 U. S. 236; *McCall* v. *Lawrence*, 3 Blatchford, 360, 363; *Smythe* v. *Fiske*, 23 Wall. 374, 382.

It is true that in recent cases, arising since this importation, the Department and its officials have vacillated over the construction of this act. But, from the very beginning of tariff legislation, in respect to tobacco and all merchandise coming in bales or packages, it has been the uniform practice and usage of the customs officials to treat the bale or package as a unit for purposes of appraisal and classification. That has likewise been the uniform commercial usage. It is uncontradicted testimony in this case that tobacco has always been bought and sold, imported, invoiced, and entered by the bale; and, as the expert appraiser tells us in this case, it has always been "received and disposed of under the Treasury regulations, by the bale, as to appraisal, and as to warehousing and as to withdrawal."

The bale or package of merchandise is, and always has been, the unit for purposes of appraisement, and it must, we believe, be so regarded in this instance. When the statute refers to 85 per cent of the tobacco, as the "article imported," it must be assumed that Congress had in mind some definite and distinct unit or quantity from which that percentage was to be computed. Of course, the duty being levied upon the

article imported — the leaf tobacco in question — the entire invoice or importation might, ordinarily speaking, be regarded as the unit upon which the duty is to be levied; but in practice, where the merchandise is imported, as here, in separate bales and packages, some smaller and component unit must be used in making the appraisement and arriving at the percentage; and the bale has, as we have seen, been uniformly adopted and accepted as that unit. This act must be deemed to have been passed, and must be read, in the light of that usage.

This contention, that Congress regarded the bale or package as the unit from which to compute the percentage, is not only strengthened, but is rendered almost indisputable, by a consideration of the history of the enactment, and of the amendments proposed thereto from time to time during its progress toward final passage by the Senate, to which body it had been sent from the House. As to the propriety of making that reference in case of doubt, see *Merritt* v. *Welsh*, 104 U. S. 694, 702; *Blake* v. *National Banks*, 23 Wall. 307, 319.

Still further light is furnished us by other provisions of the Revised Statutes on the general subject of appraisal and the levying of duty on imports. Section 2901 declares that: "The collector shall designate on the invoice at least one package of every invoice, and one package at least of every ten packages of merchandise . . . to be opened, examined and appraised." Section 2911 directs the appraisers, when there are articles of a different quality in the same package, to adopt the value of the best article; and section 2912 provides for appraisement of wool when there are different qualities in the same bale, or in different bales in the same invoice. See also the act of May 1, 1876, 19 Stat. 49.

That this rule of appraisement established by the Revised Statutes is general, and is to be applied to all parts of the various statutes constituting our system of tariff legislation, can hardly be disputed. *Saxonville Mills* v. *Russell*, 116 U. S. 17. In short, commercial usage, the practice of the customs' officials and the language of all statutes, constituting a part of the same system, all point to the bale or package as the only unit upon which to estimate this 85 per cent, the whole bale or package to be rated and appraised accordingly.

In recognition of this usage and practice, and as a most important further legislative declaration of intention, reference may be made to the Tariff Law of 1890, approved October 1, 1890. Paragraph 242 of that act reads as follows:

"Leaf tobacco suitable for cigar-wrappers, if not stemmed, two dollars per pound; if stemmed, two dollars and seventy-five cents per pound: *Provided*, that if any portion of any tobacco imported in any bale, box or package, or in bulk, shall be suitable for cigar-wrappers, the entire quantity of tobacco contained in such bale, box or package, or bulk, shall be dutiable; if not stemmed, at two dollars per pound; if stemmed, at two dollars and seventy-five cents per pound." Sess. Laws, 585.

This act was framed and passed while the case at bar was pending in this court, and, indeed, after all the briefs in the case had been filed with the clerk, and while they were in the possession of the Government Departments, and is a legislative declaration of a very suggestive, if not conclusive, character.

It has been said, however, but in quite another connection, that each invoice or entry is a separate transaction for purposes of appraisement. *Sampson* v. *Peaslee*, 20 How. 571, 580. That decision is not applicable here, for it was there held simply that two or more separate invoices could not be put together for the purpose of reaching an aggregate value, which should not be exceeded by the prescribed ten per cent upon the appraisement, although one of the invoices, taken alone, would be so exceeded.

It is also suggested that the individual leaf should be taken as a unit. It is not disputed that the leaf cannot in practice be adopted as a unit. It is not practicable to separate the hands of tobacco. After several fluctuating decisions, eight in all, the Treasury finally, in August, 1887, reached the decision of which we complain: that "Every leaf, 85 per cent of which is suitable for wrappers, and the weight of which is such that more than one hundred of such leaves would be required to weigh a pound, is liable to the high rate of duty:" a rule which strains after an interpretation which violates every canon

of construction, and every known commercial and official usage and practice. As a whole this group of decisions, owing to their inconsistency, cannot be accorded any weight in this Court as establishing either a uniform official usage or an official construction, which, under different circumstances, might be received as an aid in construing the act.

II. In the construction of this statute, and in applying it to the present importation of leaf tobacco, the fact that the bales in question were repacked in Holland, and that they contained some leaf tobacco, not suitable for wrappers, is wholly immaterial. There can be no pretence that there was any fraudulent evasion on the part of these plaintiffs in error.

In *Falk* v. *Robertson*, 25 Fed. Rep. 897, 898, the Court, while deciding against the plaintiffs in reference to this very importation, and on the very ground that they had introduced inferior leaf tobacco into the bales in order to lower the quality of the whole of each bale and of the invoice, said: "Justice to the plaintiffs, however, requires that they should be entirely acquitted of any attempt to deceive the customs officers by what they did; for it was done with their full knowledge, and partly at their suggestion, and after a like importation, with the full knowledge of all, had been passed, as a test case, at the lower rate. Still the Department is not estopped, nor claimed to be, from changing its decision, although it may work a hardship."

Mr. Assistant Attorney General Maury for defendant in error.

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

Leaf tobacco consists of three classes, "wrappers," "fillers," and "binders." "Wrappers" are leaves suitable for the outside finish of a cigar. "Fillers" are leaves that make up the main body of the cigar; and "binders" are the secondary or inside wrapper, and hold together the loose material which constitutes the filling. Prior to the passage of the act of

1883, the various grades of leaf tobacco — wrappers, fillers, and binders — were applied to different uses, were bought and sold under their several names and were of different value in the market; and prior to that time bales of leaf tobacco in the trade were, as a rule, homogeneous as to their contents, each one consisting of only one of these three classes.

The plaintiffs claim that, upon the addition to the bale of enough inferior tobacco to reduce the proportion, in the entire bale, of the fine wrapper tobacco below 85 per cent, the whole of the tobacco in the bale was made dutiable at only 35 cents per pound. They contend that the unit upon which the 85 per cent is to be calculated is the entire bale. But we cannot agree with this view. The statute does not refer to tobacco in bales. It does not say that the 85 per cent is to be 85 per cent of the contents of a bale; but the duty of 75 cents per pound is imposed upon any quantity of leaf tobacco of the specified quality and weight, if not stemmed. In the present case, the carefully separated and distinguishable quantity of tobacco in the bale which was of the specified size, fineness and weight, was the whole of it, that is, 100 per cent, and more than 85 per cent, of that size, fineness and weight; and all of it fell under the description of what was dutiable at 75 cents a pound. The unit is not the bale, but is the separated quantity of such leaf tobacco. That quantity stands, for the purposes of duty, as if it had been imported in a bale which contained nothing but itself. By the method of packing, the wrapper tobacco and the filler tobacco remained entirely distinct. The association of them in the bale was, evidently, only for the purpose of avoiding the higher duty imposed upon the superior tobacco. This association was to be dissolved the moment the bale was opened in the United States, because the two grades of tobacco sold for different prices in the market. It appears from the testimony of one of the plaintiffs that, prior to the act of 1883, the bale of Sumatra tobacco that was known and dealt in was a bale containing about 160 or 170 pounds of that tobacco, and inferior tobacco was not imported in the same bale with such Sumatra tobacco. The unit of the statute, therefore, must be held to be leaf

tobacco wrappers answering the description which, when reaching the named percentage, is subject to the duty of 75 cents a pound.

It is argued for the plaintiffs that the bale must be considered as the unit, because it is required by section 2901 of the Revised Statutes that, for the purpose of appraisement, the collector shall designate at least one package of every invoice, and at least one package of every ten packages. Reference is made also to sections 2911 and 2912, which provide what shall be done in case the appraisers find in a given package articles of wool or cotton of similar kind but different quality; and to section 2915, which provides for the taking of samples from packages of sugar, to ascertain the quality; and to the act of May 1, 1876, c. 89, (19 Stat. 49,) providing for the separate entry of one or more packages contained in an importation of packed packages, consigned to one importer or consignee, and of which there is no invoice. But we do not perceive that these statutory provisions affect the question in hand. They refer only to what is to be done as to appraisement, when two articles of different quality are imported in the same package, and to the separate entry of a package packed in a larger package; but there is nothing in these provisions which shows that the 85 per cent in question is to be regarded as meaning 85 per cent of the entire contents of a package containing separable and separated quantities of leaf tobacco of two different qualities, and subject to two different duties.

In the view which we thus take of this case, there is nothing which conflicts with the decision in *Merritt* v. *Welsh*, 104 U. S. 694. In that case, under Schedule G of section 2504 of the Revised Statutes, the sole test of the dutiable quality of sugars was held to be their actual color, as graded by the Dutch standard; and it was held that if the particular color was given to the sugar in and by the process of manufacture, and was not artificially given to it after it had been manufactured, it was subject only to the duty imposed upon sugar of a specified color. The question there decided was whether, in case the sugar was not artificially colored, for the purpose of avoid-

ing duties, after it was manufactured, its dutiable quality was to be decided by its actual color, graded by the Dutch standard, or by its saccharine strength as ascertained by chemical tests; and it was held that the actual color was the test. So, in the present case, the actual qualities belonging to the given separable quantity of leaf tobacco which is made dutiable at 75 cents a pound, determine the rate of duty.

The present case was tried twice. At the first trial, before Judge Wheeler, he directed a verdict for the plaintiffs; but he subsequently granted a new trial. In his opinion granting it, 25 Fed. Rep. 897, he said: "Justice to the plaintiffs, however, requires that they be entirely acquitted of any attempt to deceive the customs officers by what they did; for it was done with their full knowledge, and partly at their suggestion, and after a like importation, with the full knowledge of all, had been passed, as a test case, at the lower rate." We concur in this view. *Judgment affirmed.*

FOURTH NATIONAL BANK OF NEW YORK *v.* AMERICAN MILLS COMPANY.

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

No. 62. Argued November 10, 1890. — Decided November 24, 1890.

A New York corporation consigned goods to G., a commission merchant in New York city, for sale. He advanced to it thereon, in cash and negotiable acceptances, more than the value of the goods, it having the benefit of the acceptances, which passed into the hands of *bona fide* holders. It then transferred the goods to him, as absolute owner, in discharge *pro tanto* of its debt to him. He then sold the goods to his wife, for full value, in part payment of money he owed her, and she resold them and received the proceeds. A creditor who had recovered judgments on some of the acceptances against G. and the corporation, brought a bill in equity against them and the wife of G. to have such proceeds applied on his judgments: *Held*,

(1) G. had a lien on the goods, which was foreclosed by the transfer of them to him;

(2) G. had a right to treat the goods as his own, so long as the acceptances were outstanding and his lien was unsatisfied;
(3) The creditor could not have the relief asked.

In equity. The case is stated in the opinion.

Mr. David Willcox, (with whom was *Mr. William S. Opdyke* on the brief,) for appellant.

Mr. Alexander Thain for appellees, Mary J. Graeffe and William H. Garner.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Southern District of New York, by the Fourth National Bank of the city of New York, a national banking association, against the American Mills Company, (a New York corporation,) Albert J. Graeffe, Mary J. Graeffe, (his wife,) William H. Garner, and William H. Bowen. Its object was to procure the application upon judgments recovered by the plaintiff against the American Mills Company and Albert J. Graeffe, of the proceeds of certain merchandise which had been transferred by Albert J. Graeffe to Garner, as trustee for Mary J. Graeffe, to be applied upon debts due by Albert J. Graeffe to Mary J. Graeffe. After issue joined, proofs were taken, and the case was heard by Judge Coxe, who entered a decree dismissing the bill as to Albert J. Graeffe, Mary J. Graeffe, Garner and Bowen. Albert J. Graeffe, Bowen and the American Mills Company had joined in an answer to the bill, and Garner and Mary J. Graeffe had each put in a separate answer. The opinion of the Circuit Court is reported in 29 Fed. Rep. 611. An application for a rehearing was made by the plaintiff and denied, the opinion on the same being reported in 30 Fed. Rep. 420. The plaintiff has appealed from the decree. The suit was brought in December, 1881, before the passage of the act of July 12, 1882, (22 Stat. 163, c. 290, § 4.) *Charlotte Nat. Bank* v. *Morgan*, 132 U. S. 141.

Opinion of the Court.

The facts of the case are as follows, as stated by the Circuit Court in its opinion: The American Mills Company was a manufacturing corporation, having its principal office in the city of New York, and its manufactory at Warwick, Rhode Island. Albert J. Graeffe was the treasurer of the company and one of its trustees, and the commission merchant in the city of New York to whom its goods were consigned for sale. On February 28, 1881, he had in his possession merchandise of the company of the value of about $45,000. Prior to that time, he had accepted for the benefit of the company twenty-three drafts drawn upon him by the company, against the consignments, for $57,600.40. Of these twenty-three drafts, eleven, amounting to $27,600.40, were, after acceptance, returned by Graeffe to the company and used by it. The remaining twelve drafts, amounting to $30,000, were, after acceptance, discounted by Graeffe, and the proceeds were remitted by him to the company. Eleven other drafts, amounting to $32,500, drawn by the company upon Graeffe, were accepted by him, but the company did not have the benefit of any of them, because they were retained by Graeffe and used by him in his own business. None of these thirty-four drafts were due on the 28th of February, 1881. On that day, the company transferred to Graeffe, as absolute owner, the goods which he so had in his possession, he taking them in discharge *pro tanto* of the company's indebtedness to him. On the following day, he sold the goods to Garner, as trustee for Mary J. Graeffe, for $45,064.30, in part payment of debts due from him to her. They were afterwards sold through Bowen, and the proceeds were paid to Mrs. Graeffe, or to Garner for her. On the 3d of March, 1881, Graeffe made a general assignment for the benefit of his creditors, and the American Mills Company failed at the same time. On the 30th of March, 1881, the plaintiff recovered a judgment against the Mills Company and Graeffe, in the Supreme Court of the State of New York, on one of the acceptances for $2500, which formed part of the $30,000 of acceptances; and on the 22d of June, 1881, it recovered another judgment against the same parties, in the Court of Common Pleas for the city and county of New

York, on six others of the acceptances, being one for $2500 and one for $3000, forming part of the $30,000 of acceptances, and four for $3000 each, forming part of the $32,500 of acceptances. Executions upon these judgments were returned unsatisfied in September, 1881. Subsequently to the failure of the company, and before July 1, 1881, other judgments were obtained against it in New York and Rhode Island for over $70,000.

The theory of the bill is, that Mary J. Graeffe is indebted to the American Mills Company for the value of the goods embraced in the transfer to her, on the ground that such transfer was without consideration and constructively fraudulent. No allegation of actual fraud is made against any person, and it is clear that there was a *bona fide* indebtedness from Graeffe to his wife of over $100,000, created by loans to him of her own money.

It is contended by the plaintiff that the transfer of the goods by the company to Graeffe was made in contemplation of insolvency, and therefore was void by virtue of the provision of section 4, title 4, chapter 18, part 1, of the Revised Statutes of New York (1 Rev. Stats. N. Y., 603), which declares that it shall not be lawful for any incorporated company to "make any transfer or assignment in contemplation of the insolvency of such company, to any person or persons whatever;" that Graeffe had no right in the goods which he could transfer in payment of his debt to his wife, and to the exclusion of the debt of the company and himself to the plaintiff; that Mrs. Graeffe acquired no right in the goods by virtue of the transfer, and was liable for their value; and that, at all events, as to the three acceptances amounting to $8000, and forming part of the $30,000 of acceptances, of which the company had the benefit, the sole right of Graeffe in the goods was to apply their proceeds to the payment of those three acceptances.

But it appears in evidence that, by the 28th of February, 1881, at which time Graeffe had in his possession the goods in question, of about the value of $45,000, he had advanced, as against those goods, by cash and acceptances, the sum of about

$54,000. The acceptances were negotiable securities, which had passed in the market into the hands of *bona fide* holders, and on which Graeffe was primarily liable. He had a valid lien on the goods for the $54,000. The legal title to them, which the American Mills Company held when it gave the bill of sale to Graeffe, on the 28th of February, 1881, was, therefore, of no value, because the goods were then encumbered for more than they were worth. That company, in transferring the goods to Graeffe, as absolute owner of them, on the 28th of February, 1881, recognized the lien and admitted that its liability to Graeffe exceeded the value of the goods; and the transaction was in effect a foreclosure of the lien. The interest of the American Mills Company in the goods was only contingent, and no court of equity, in a case like the present, can declare that Graeffe could not transfer the goods to Mrs. Graeffe, as against his other creditors and those of the company.

Under the statute of New York of April 16, 1830, (Laws of 1830, c. 179, p. 203,) Graeffe had a right to treat the goods as his own, so long as his negotiable acceptances, of which the company had had the benefit, were outstanding, not taken up by it, and his lien on the goods was unsatisfied. *Cartwright* v. *Wilmerding*, 24 N. Y. 521, 530.

The cases cited by the plaintiff are cases where the question as to the right of property in the goods, as between the consignor and the factor, was raised by the consignor, or where the consignor had not conveyed all his title in them to the factor.

It is contended by the plaintiff that the lien of Graeffe did not exceed $21,715.58. Graeffe at that time claimed a lien for advances, which was conceded by the company, for the amount of, at least, $54,215.58. The plaintiff claims that the $32,500 of acceptances outstanding, of which Graeffe had had the benefit, and from which the company had derived no benefit, should be deducted from the $54,215.58, leaving a balance of $21,715.58. But it appears that the items composing the $32,500, and which were accommodation drafts of the company on Graeffe, accepted and used by him, were neither

charged on the one side of his account with the company nor credited on the other. These accommodation acceptances were not due on the 28th of February, 1881, and have never been paid by the company. Graeffe was not bound to give credit for them to the company until the company had paid them and surrendered them to him.

As to the three acceptances, amounting to $8000, they formed part of the acceptances of which the company had the benefit, and, while the plaintiff holds those acceptances against Graeffe, it cannot take from him, or from Mrs. Graeffe, the property which he held as security against them. Its position is no better than that of the company would have been, and the company could not have deprived Graeffe of the goods without discharging his obligation on those particular acceptances. Moreover, even regarding the $8000 of acceptances as surrendered and cancelled, and deducted from the $54,215.58, there is left $46,215.58, which amount exceeds the value of the goods transferred to Mrs. Graeffe.

Decree affirmed.

FRENCH *v.* CARTER.

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

No. 68. Argued November 12, 1890. — Decided November 24, 1890.

Letters patent No. 244,224, granted to Hamline Q. French, July 12, 1881, for an improvement in "roofs for vaults" are invalid, in view of the state of the art, for want of patentable invention, it requiring only mechanical skill to pass to the patented device from what existed before, the question being one of degree only, as to the size of the component stones.

A prior foreign publication is competent as evidence in regard to the state of the art, and as a foundation for the inquiry whether it required invention to pass from a structure set forth in the publication to the patented structure.

IN EQUITY. The case is stated in the opinion.

Mr. George H. Fletcher, (with whom was *Mr. L. B. Bunnell* on the brief,) for appellant.

Mr. James W. Perry, (with whom was *Mr. Philip J. O'Reilly* on the brief,) for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Southern District of New York, by Hamline Q. French against Oliver S. Carter, George Mark, and Milton H. St. John, to recover for the infringement of letters patent No. 244,224, granted to the plaintiff July 12, 1881, for an improvement in "roofs for vaults." Issue was joined, proofs were taken, and the case was heard by Judge Shipman, resulting in a decree dismissing the bill, from which the plaintiff has appealed. The opinion of Judge Shipman is reported in 25 Fed. Rep. 41.

The specification, claims, and drawings of the patent are as follows: "My improvements relate to the construction of roofs for vaults, mausoleums, and structures of similar character, built of stone and intended for burial purposes; and the object of my invention is to obtain a building without vertical joints, and one held together and locked at the roof, so that by the locking and the weight of the roof the structure shall be made as enduring as the material of which it is built. My improved roof consists of the front and rear gable-stones, the roof-stones, which are continuous from one gable-stone to the other at each side, and held to the gable-stones by mortise and tenon or equivalent connections, and the cap-stone, which is formed with a rabbet to lap upon the roof-stones and rests upon the gables, by which construction the stones forming the complete roof are securely locked, and without possibility of dislocation without being raised bodily upward.

"My invention is shown in the accompanying drawings, forming part of this specification, wherein Fig. 1 is a front elevation, partially in section, of a vault constructed in accordance with my invention. Fig. 2 is a plan view of the same,

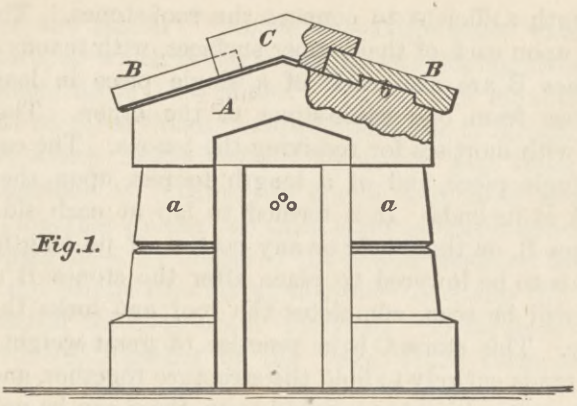


Fig. 1.

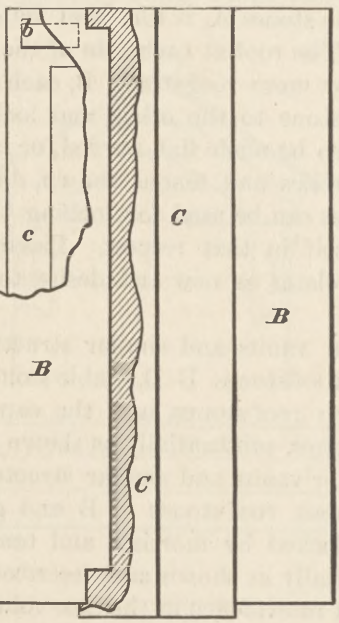


Fig. 2. c

with the cap-stone partially removed. Similar letters of reference indicate corresponding parts. The side walls, *a a*, of the vault are laid up in the usual manner. A A are the gable-stones, B B the roof-stones, and C the cap-stone. The gables A are each a single stone of any required shape and size, and

of a length sufficient to connect the roof-stones. They are formed, upon each of their upper surfaces, with tenons *b*. The roof-stones B are also each of a single piece in length, or continuous from one gable-stone to the other. These are formed with mortises for receiving the tenons. The cap-stone C is a single piece, and of a length to rest upon the gable-stones A at its ends. It is formed to lap at each side upon the stones B, on the whole or any portion of its length. The stone C is to be lowered to place after the stones B are set, and, as will be seen, completes the roof and locks the parts together. This stone C is in practice of great weight, which weight tends entirely to hold the structure together, and, there being no vertical joints to spread open, there can be no disruption or displacement by ordinary means. The space at the sides, between the stones A, is filled out by stones *c* set upon the side walls. The roof at each side of the cap-stone is to be formed of one or more roof-stones B, each being continuous from one gable-stone to the other, and locked, as described. The roof may also be made flat, curved, or inclined. In place of using the mortises and tenons shown, dowel-pins or other equivalent devices can be used for locking the roof-stones. I do not limit myself in that respect. Having thus described my invention, I claim as new and desire to secure by letters patent —

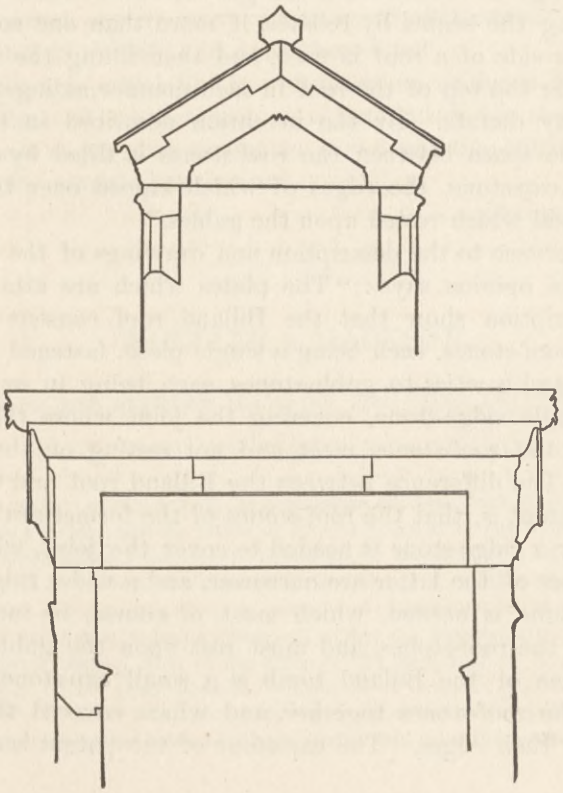
"1. A roof for vaults and similar structures, consisting of the continuous roof-stones B B, gable-stones, A, connecting and locked to the roof-stones, and the cap-stone, C, lapping upon the roof-stones, substantially as shown and described.

"2. In roofs for vaults and similar structures, the combination of continuous roof-stones B B and gable-stones A A, connected and locked by mortises and tenons, or equivalent devices, substantially as shown and described."

There was put in evidence in the case volume 13, with plates 39 to 44, both inclusive, of a public work, published in France, in 1855, called "Revue Générale de l'Architecture et de Travaux Publics," containing a description and illustration of a monument erected in 1847, as a place of burial for the family of Alc. Billaud. This very imperfect translation of the text is

found in the record: "Above this ordonnance extends an entablature, on which is supported the two sloping sides of the roof, which finish the edifice. . . . The entablature is composed of three stones, hollowed out so as to form a species of vault, which masks the size (édicule); and these stones joined together by rebates, are bound, and, as it were, tied (hooped) together by the two thick slabs of stone which cover their sloping sides, by means of the hollow made on the lower sides of the former (the slabs), in order to clamp the projections retained on the stones of the vault. These stones are, in their turn, tied together by the ridge which surmounts the building."

Two drawings on one of the plates are as follows, one being a cross-section and the other a longitudinal section:



The opinion of the Circuit Court proceeds upon the ground that, in view of the description of the Billaud tomb, there was no invention in the patented device, and that in order to produce that device the customary skill of the worker in stone neither needed nor received any aid from the inventive faculty. The opinion says: "The difficulty in vault stone roofs which was to be remedied was the exposed or open seams between the stones, into which water can enter and become frozen, and thus, by the action of frost, the stones are separated. Freedom from vertical joints and the locking of roof-stones and cap-stones to the gable-stones are the features of the improvement. . . . By the invention described in the second claim, the difficulty is remedied by connecting, in the ordinary way, to gable-stones, made of one piece, roof-stones which are long enough to extend from one gable-stone to the other, and protecting the seams by rebates, if more than one roof-stone upon one side of a roof is used, and then filling the space or ridge near the top of the roof in such manner as ingenuity or taste may dictate. By the invention described in the first claim, the space between the roof-stones is filled by a single massive cap-stone, the edges of which lapped over the roof-stones, and which rested upon the gables."

In reference to the description and drawings of the Billaud tomb, the opinion says: "The plates which are attached to the description show that the Billaud roof consists of two sloping roof-stones, each being a single piece, fastened by projections and cavities to gable-stones, each being in one piece, and a single ridge-stone, covering the joint where the upper edges of the roof-stones meet, and not resting on the gable-stones. The difference between the Billaud roof and the roof of the patent is, that the roof-stones of the former are so wide that only a ridge-stone is needed to cover the joint, while the roof-stones of the latter are narrower, and a wider ridge-stone or cap-stone is needed, which must, of course, be interposed between the roof-stones, and must rest upon the gable. The ridge-stone of the Billaud tomb is a small cap-stone, which bound the roof-stones together, and which covered the joint made by their edges. The cap-stone of the patent is a larger

and wider ridge-stone than that of Billaud, and, by its great weight, is more efficient in holding the structure together."

We concur with the Circuit Court in its views. Where the roof-stones are wider, as in the Billaud roof, there need be only a narrow ridge-stone, while where the roof-stones are narrower, as in the patented device, a wider ridge-stone or cap-stone is necessary. In the latter case the cap-stone must rest upon the gable-stones. In the former case it need not do so. But, in each case, the vertical seam into which water could enter, is covered, and the structure is held together and locked at the roof, so as to be made enduring by the locking and the weight of the roof. The question is one of degree only, as to the size of the ridge-stone or cap-stone and the corresponding width of the roof-stones. The difference between mechanical skill and the exercise of the inventive faculty has been pointed out in many decisions of this court. *Burt* v. *Evory*, 133 U. S. 349, and cases there cited.

The foreign publication is competent as evidence in regard to the state of the art, and as a foundation for the inquiry whether it required invention to pass from the Billaud structure to the patented structure.

Decree affirmed.

WHEELER *v.* JACKSON.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 65. Argued November 11, 1890. — Decided November 24, 1890.

The 15th section of the act of the legislature of New York, approved June 6, 1885, provides that no action or special proceeding shall thereafter be maintained against the city of Brooklyn, or the Registrar of Arrears of that city, to compel the execution or delivery of a lease upon any sale for taxes, assessments or water rates, made more than eight years prior to the above date, unless commenced within six months after that date, and notice thereof filed in the office of the Registrar of Arrears; also, that that officer shall, upon the expiration of such six months, cancel in his office all sales made more than eight years before the passage of the act, upon which no lease had been given, and no action commenced and

notice thereof filed, within the period limited as aforesaid, and that thereupon the lien of all such certificates of purchase should cease and determine. *Held*,

(1) That this section is not repugnant to the clause of the Constitution of the United States forbidding a state to pass any law impairing the obligation of contracts, or to the clause declaring that no state shall deprive any person of property without due process of law;

(2) That, consistently with those clauses, the legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced, provided, in each case, a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect.

THIS action was brought in the Supreme Court of the State of New York by the plaintiff in error, plaintiff below, against the defendant in error, Registrar of Arrears of the city of Brooklyn, to restrain him from cancelling in his office a number of sales of lots of land for non-payment of taxes, which lots had been purchased by the plaintiff.

One part of the sales was alleged to have been made for non-payment of taxes, assessments and water rates, pursuant to the provisions of c. 384 of the laws of New York of 1854, and the acts amendatory thereof. These statutes are stated in full in the opinion, *infra*.

Another part was alleged to have been made for unpaid taxes, assessments and water rates pursuant to the provisions of c. 863 of the laws of New York of 1873, and the acts amendatory thereof. These also will be found in the opinion.

By c. 405, § 15 of the laws of New York of 1885, which will also be found in the opinion, provision was made for the cancellation of such sales made more than eight years prior to the passage of that act, upon which no leases should have been given and no action commenced. The plaintiff alleged that this statute, so far as it affected his rights under the several purchases, was "wholly unconstitutional and void."

The defendant demurred to the complaint. The demurrer was sustained and the complaint dismissed. This judgment was affirmed by the Supreme Court in general term, and by the Court of Appeals, 105 N. Y. 681. The plaintiff sued out this writ of error.

Argument for Plaintiff in Error.

Mr. John J. Townsend for plaintiff in error.

I. The plaintiff's rights under the tax sale constitute a contract.

Under the statutes of New York, the city, being the owner of an uncollected tax or assessment, invites the plaintiff to advance the amount of the tax or assessment with interest and expenses.

The money paid in by the tax sale purchaser does not pay the tax; the tax remains as the foundation of his title. *Clementi* v. *Jackson*, 92 N. Y. 591.

The purchaser under these statutes in consideration of advancing the amount of the unpaid tax, interest and expenses becomes possessed of two rights defined in the statute: the right to have a lease for a stated term of years, and an action at law of ejectment or summary proceedings to obtain possession of the land; the further right to bide his time, not to take out a lease and engage in a litigation to secure the land itself, but, as the easier course, to wait and to rely on securing, through the operation of the record of the sale in the office of the Registrar, the very profitable return on his money provided by the percentage of fifteen per cent, which along with the amount of the purchase money the owner of the land is by the statute compelled to pay on redeeming the property in order to clear his title.

This latter is the right usually availed of by the tax sale purchaser. It is of no prejudice to the city, because the city has already received the advance of the amount of the tax, and in the absence of a lease can be drawn into no possible complication after the sale. It is useful to the owner of the land, because it keeps open for him the valuable privilege of redemption.

The two rights, that of taking out a lease and enforcing it, and that of awaiting redemption by the owner of the land, are separate and distinct rights, belonging to and vested in the tax sale purchaser.

These two rights are recognized by this court in *Curtis* v. *Whitney*, 13 Wall. 68.

These rights acquired by a purchaser at a tax sale amount to, and are, a contract within the meaning of the clause of the Constitution. *Corbin* v. *Comrs. of Washington County*, 3 Fed. Rep. 356; 1 McCrary, 521.

II. The operation of c. 405, § 15 of the laws of 1885, impairs the validity of the purchaser's contract, and is therefore unconstitutional.

That portion of the section following the proviso divides itself into two clauses, the first beginning with the word "provided," and the second beginning with the words, "And after the expiration of six months."

These two clauses relate respectively to the two rights specified in point I as being acquired by the tax sale purchaser under the statutes regulating the sale. It is with the second clause printed in italics, that this appeal is more particularly concerned.

The clause is not a statute of limitation in any sense; it is baldly a statute impairing the obligation of a contract, destroying the rights acquired by the plaintiff as purchaser at the tax sale. It operates to destroy the security upon which the purchaser relied when advancing his money at the sale; the security which formed part of the contract represented by that sale. That security is purely *in rem* and depends on the lien of the record after sale. See § 34 of the statute; and *Haight* v. *The Mayor*, 99 N. Y. 280.

There is no escape from this conclusion. The purchaser will have lost his purchase money and the delinquent owner will have his land free from the plaintiff's claim. This was not the result contemplated at the time of the sale. The law in force at the time of the sale and defining the plaintiff's rights entered into and became a part of the contract. When the law at that time said that the sale should be recorded and should constitute a lien upon the land, this was the security held out to intending purchasers to induce them to advance their money. The legislature cannot by subsequent legislation impair or destroy this security.

Remedies for the enforcement of rights may be regulated, but the legislature under the guise of regulating the remedy

Counsel for Defendant in Error.

may not impair the obligation of the contract. *Nelson* v. *St. Martin's Parish*, 111 U. S. 716, 720; *Gunn* v. *Barry*, 15 Wall. 610, 622; *Edwards* v. *Kearzey*, 96 U. S. 595, 600; *Von Hoffman* v. *Quincy*, 4 Wall. 535; *McCracken* v. *Hayward*, 2 How. 608; *Green* v. *Biddle*, 8 Wheat. 1; *Planters' Bank* v. *Sharp*, 6 How. 301; *Dikeman* v. *Dikeman*, 11 Paige, 484; *Robinson* v. *Howe*, 13 Wisconsin, 341; *Bruce* v. *Schuyler*, 4 Gilman (Ill.) 221; *S. C.* 46 Am. Dec. 447; *Damman* v. *Commissioners of Schools*, 4 Wisconsin, 414; *Robinson* v. *Magee*, 9 California, 81; *S. C.* 70 Am. Dec. 638.

III. The court below at special term relied upon *Butler* v. *Palmer*, 1 Hill, 324. That case distinctly recognizes that the legislature may act upon the remedy, but may not tamper with the contract. In this case the legislature did not touch the remedy, but nullified the plaintiff's contract. The converse of *Butler* v. *Palmer* has been decided in *Cargill* v. *Power*, 1 Michigan, 369; and *Willis* v. *Jelineck*, 27 Minnesota, 18. *Fisher* v. *Mayor*, *&c.*, 67 N. Y. 73; and *Jenkins* v. *Fahey*, 73 N. Y. 355, 364, were also cited to show what no one disputes, that a tax may be presumed to be satisfied, and that the claims of a tax purchaser may be barred by lapse of time.

What is denied is the right of the State to abrogate the contract — to cancel the sale or interfere with the record which is necessary to the lien, and all of which entered into and formed part of the contract.

IV. The second clause of section 15 destroys and cuts off the tax sale purchaser's rights without a hearing or opportunity to defend or to plead any excuse, and without compensation.

The proprietary right in the record of the sale of which the plaintiff became the purchaser at the tax sale — whether enforceable or not, whatever its value, whether the cloud it creates is a detriment to the owner of the land or not, — cannot be destroyed by act of the legislature without provision for compensation, and certainly not without provision for notice to those whose rights may be affected. The plaintiff is entitled to the record of the sale for what it is worth.

Mr. Almet F. Jenks for defendant in error.

Opinion of the Court.

Mr. Justice Harlan delivered the opinion of the court.

The question upon this writ of error is, whether certain provisions of a statute of New York passed in 1885, and relating to sales of land in the city of Brooklyn for taxes, assessments and water rates, are repugnant to the Constitution of the United States. It arose upon a demurrer to the complaint filed by Wheeler against Jackson, as Registrar of Arrears of that city. The demurrer was sustained by the Supreme Court of the State, and the complaint dismissed. That judgment was affirmed in general term, and the latter judgment was affirmed by the Court of Appeals of New York. 105 N. Y. 681.

Upon examining the legislation of New York prior to the passage of the act of 1885, we find that the charter of Brooklyn, passed in 1854, provided that if any tax or assessment remained unpaid on the day specified in the published notice given by the collector of taxes, that officer should sell at public auction the property on which the tax or assessment was imposed "for the lowest term of years for which any person will take the same, and pay the amount of such tax or assessment with the interest and expenses;" the purchaser to receive a certificate of sale, which should be noted on the original tax or assessment rolls, as well as on the abstracts kept in the collector's office. The statute directed this certificate to be recorded in the collector's office, and declared that it should constitute "a lien upon the lands and premises therein described after the same shall have been so recorded;" and that no assignment of a certificate should have any effect until the notice of the same, with the name and residence of the assignee, was filed in the office of the collector of the district in which the lands were situated. The owner, mortgagee, occupant, or other person interested in the land, was given the right to redeem "at any time within two years after the sale for either tax or assessment," by paying to the collector for the use of the purchaser, "the said purchase-money, together with any other tax or assessment which the said purchaser may have paid, chargeable on said land, and which he is hereby

authorized to do, provided a notice thereof has been filed in the office of such collector, with fifteen per cent per annum in addition thereto, and the certificate of such collector, stating the payment and showing what land such payment is intended to redeem, shall be evidence of such redemption." Upon receipt of the moneys it became the duty of the collector to cause them to be refunded to the purchaser, his legal representatives or assigns, and all proceedings in relation to the sale were to cease. If the moneys were not paid according to the exigency of the notice, the collector was required to execute a conveyance of the property so sold. The statute contained this further provision: "§ 33. The collector of the district where the land sold for any tax or assessment shall not have been redeemed, as by this act provided, shall execute to the purchaser or his assigns, pursuant to the terms of sale, a proper conveyance of the lands so sold by him, which shall contain a brief statement of the proceedings had for the sale of said lands, and shall be evidence that such sale and other proceedings were regularly made and had according to the provisions of this act. He shall also forthwith note the same on the assessment rolls and abstract kept in his office. The grantee shall be entitled as against all persons whomsoever to the possession of said premises, and to the rents, issues and profits thereof, pursuant to the terms of his conveyance, and shall be entitled to obtain possession of his lands by summary proceedings, in the same manner as is provided by law for the removal of persons who hold over or continue in possession of real estate sold by virtue of an execution against them." Laws of N. Y. 1854, pp. 874, 878 to 881, c. 384, §§ 24, 26, 29, 30, 33, Title V. Of the Collection of Taxes and Assessments.

An amended charter of Brooklyn, passed June 28, 1873, repealed all former acts inconsistent with its provisions, and created for that city the Department of Arrears, with a chief officer named the Registrar of Arrears, upon whom were imposed all the duties theretofore required to be performed by any city officer or department in relation to advertising, selling and leasing property for assessments, taxes and water rates, and for the redemption of property sold therefor. Laws

of New York, 1873, p. 1318, c. 863, Title VIII, § 1. Sections 24, 26, 29, 30 and 33 of the act of 1854 were substantially re-enacted in sections 1, 3, 5, 6, 8 and 10 of that of 1873. The differences between the two acts do not affect the present controversy.

An act of June 6, 1885, amended that of 1873. The constitutionality of the 15th section of the former act is questioned in this case. That section is as follows:

"§ 15. None of the provisions of this act hereinbefore contained shall affect any sale for taxes, assessments or water rates heretofore made in said city, or the rights of the parties or the proceedings thereunder, but the same shall remain the same as though this act had not been passed; provided, however, that no action or special proceeding shall hereafter be brought or maintained against the city of Brooklyn, or the Registrar of Arrears of said city, to compel the execution or delivery of a lease upon any sale for taxes, assessments or water rates, made more than eight years prior to the passage of this act, unless such action or special proceeding is commenced within six months after the passage of this act, and notice thereof filed in the office of Registrar of Arrears, but this provision shall not operate to extend any statute of limitations now applicable in such cases. And after the expiration of six months from the passage of this act, it shall be the duty of the Registrar of Arrears, to cancel in his office all such sales made more than eight years prior to the passage of this act, upon which no lease shall have been given, and no action commenced, and notice thereof filed as aforesaid, within the period hereinbefore limited therefor, and thereupon the lien of all such certificates of sale shall cease and determine." Laws of New York, 1885, c. 405, § 15, p. 702.

The complaint shows that at divers times between September 22, 1856, and May 25, 1873, inclusive, at public auction held by the proper officer of Brooklyn, pursuant to the above act of 1854, and the acts amendatory thereof, the plaintiff Wheeler purchased, each for a term of years, 1253 different lots that were sold for the non-payment of taxes, assessments and water rates, and paid for each the amount set opposite its

number, as specified in a schedule filed with the complaint — receiving from the collector a certificate of sale of each lot. Each certificate declared that he was entitled, after the expiration of two years from its date, to a lease of the lot mentioned for a named term of years, unless the premises were sooner redeemed. The total amount of those purchases was $28,516.69.

The complaint also shows that at divers times, from September 29, 1874, to February 23, 1875, inclusive, at public auction held by the Registrar of Arrears of Brooklyn for like purposes, pursuant to the act of 1873, and the acts amendatory thereof, the plaintiff purchased, each for a term of years, 61 different lots sold for the non-payment of taxes, assessments and water rates, paying for each the sum specified in a schedule filed with the complaint, and receiving from the Registrar similar certificates of sale. Each certificate was recorded in the defendant's office. The total amount of the purchases named in that schedule was $3611.17.

None of the lots purchased by Wheeler were redeemed from sale; he is still the legal owner and holder of the certificates; nevertheless, the defendant was about to cancel the sales, pursuant to the 15th section of the act of 1885, whereby, the complaint alleges, "all public notice of the rights and lien of the plaintiff will be wholly destroyed," and he will sustain irreparable injury and damage. Alleging that such section is unconstitutional and void, the plaintiff prays that the defendant, his successors, agents, clerks and servants, be perpetually enjoined from cancelling the sales or the record thereof. Such is the case made by the complaint.

Is the above section of the act of 1885 repugnant to the clause of the Constitution protecting the obligation of contracts against impairment by state legislation? On behalf of the plaintiff it is insisted that, under the statutes of 1854 and 1873, the purchaser, in consideration of his advancing the amount of the unpaid taxes and interest, together with the expenses of sale, became entitled to something more than a conveyance or lease for a stated number of years, with the right to maintain ejectment or summary proceedings to ob-

tain possession of the land purchased. He acquired, it is contended, the further right "to bide his time, not to take out a lease and engage in litigation to secure the land itself, but, as the easier course, to wait and rely on securing, through the operation of the record of sale in the office of the Registrar, the very profitable return on his money, provided by the percentage of fifteen per cent, which, along with the amount of the purchase money, the owner of the land is, by the statutes, compelled to pay, on redeeming the property, in order to clear his title." The latter right, we are informed by the plaintiff, is the one usually exercised by purchasers at tax sales in Brooklyn. Any interference with it, he contends, impairs the obligation of his contract with the city.

We cannot assent to this view. The plaintiff was entitled, by the contract, to a return of the amount paid by him, together with any other tax or assessment chargeable on the land and paid by him, with fifteen per cent per annum in addition thereto; and, if such amounts were not paid to the collector for him within two years after the sale, he could demand a conveyance according to the terms of his purchase, and obtain possession by summary proceedings. As none of the lots purchased were redeemed, the plaintiff became entitled, when the time for redemption passed, to a lease of each lot for the term of years specified in the respective certificates of sale. Now, the right to such leases was not taken away by the act of 1885. Nothing in that act prevented the plaintiff from obtaining them on the day after its passage. But, as we have seen, it did provide that no action or special proceeding should be brought or maintained to compel the execution of conveyances or leases in respect to any sale for taxes, assessments or water rates made more than eight years prior to June 6, 1885, unless instituted within six months after that date, and notice thereof filed in the office of the Registrar of Arrears.

Whatever was the period prescribed by the laws of New York prior to June 6, 1885, for such actions or special proceedings — and it is not disputed that there was a limitation under the local law for suits of that character — the time was reduced by the act of that date. Can this enactment be

assailed simply upon the ground that it prescribes a shorter time for the bringing of actions to compel the execution of such conveyances than was given when the contracts therefor were made? Clearly not. It is the settled doctrine of this court that the legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced, provided, in each case, a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect. *Terry* v. *Anderson*, 95 U. S. 628, 632; *Koshkonong* v. *Burton*, 104 U. S. 668, 675; *Mitchell* v. *Clark*, 110 U. S. 633, 643. The latest case upon the subject in this court is *McGahey* v. *Virginia* (*In re Brown*), 135 U. S. 662, 701, 705, 706, 707, in which the above principle is affirmed, the court saying: "No one rule as to the length of time which will be deemed reasonable can be laid down for the government of all cases alike. Different circumstances will often require a different rule. What would be reasonable in one class of cases would be entirely unreasonable in another." We cannot say that the limitation prescribed by the act of 1885 is unreasonable when applied to those who neglected for eight years prior to its passage to demand the conveyances or leases to which they were entitled. On the contrary, considerations of public policy required that the records of the sale of real property in Brooklyn for taxes, assessments and water rates, should no longer remain in the condition to which they had been brought in 1885 by reason of purchasers having forborne, for an unreasonably long period, to obtain leases, that they might realize interest upon their investments in tax titles, at the rate of fifteen per cent per annum. By not taking a lease, when entitled to it, the purchaser put the taxpayer in a position where the latter would be compelled, if he desired to sell or mortgage the property to another, to pay not only the amount advanced by the former, but interest at the above rate for the whole time subsequent to the sale. The legislature did not intend, by the acts of 1854 and 1873, to establish any such relations between the taxpayer and the purchaser, or to put

the former at the mercy of the latter for an indefinite period; for both acts contemplated the execution by the collector of a lease immediately upon the expiration of the time for redemption — giving the purchaser, in that way, precisely what he bought. But whatever may have been the reasons that induced the enactment of the statute of 1885, the period within which actions must be brought was a matter resting primarily with the legislative department of the state government; and as statutes of limitation have for their object, and are deemed necessary to, the repose and security of society, the determination of that department should not be interfered with by the courts, unless the time allowed to bring suits upon existing causes of action is, in view of all the circumstances, so short as not to give parties affected by it a reasonable opportunity to protect their rights under the new law.

It is further contended that, even if the statute is sufficient to bar an action to compel the execution of a conveyance to the purchaser, unless brought within the time prescribed, it is unconstitutional in that it requires the Registrar — after the expiration of six months from its passage without any such action being commenced and notice thereof given within that period — to cancel in his office all sales made more than eight years prior to June 6, 1885, and provides that "thereupon the lien of all such certificates of sale shall cease and determine." That provision, it is said, destroys the security upon which the purchaser relied when he advanced his money, namely, the lien of the record after sale. This position is untenable. The substantial rights acquired by the purchaser was a return of his money, with interest, *or*, after a certain time, a lease of the premises for the term named in the certificate of sale. The lien created by the certificate of sale protected him during the period within which the owner of the property was permitted to redeem; and if the latter redeemed, he could only do so, of strict right, within a given time; and then only by reimbursing the purchaser all he had paid, with the addition of fifteen per cent per annum. If there was no redemption, the purchaser was entitled to a lease that would give him all for which he bargained. The lien, consequently, would cease

upon the execution and delivery to the purchaser of a lease. If the lien was of such character that the purchaser, not having received a conveyance, could enforce it by suit or special proceeding commenced for that specific purpose, the power of the legislature to prescribe a period within which such a suit or proceeding must be commenced, or the lien be lost, is as clear as its power to fix the time within which the purchaser must sue to compel the execution of a conveyance or lease. If, on the other hand, the lien was given only to protect the purchaser, in respect to his outlay, with interest, until he was entitled to demand a conveyance, or until a conveyance was actually made, the power of the legislature to require the record of sale to be cancelled and the lien to cease, when the purchaser, by not suing within the prescribed time, had lost his right to a conveyance or lease, cannot be questioned. The limitation prescribed by the statute applies equally to a suit to compel a conveyance, and to a proceeding (if a separate suit for that purpose could be maintained) to enforce the alleged lien. It declares, in effect, that the right to the lien and the right to a conveyance shall, in the cases specified, depend upon a suit being brought within a certain time to compel the execution of a conveyance in accordance with the terms of sale. In other words, that the record of a sale, including the certificate of sale, shall not remain a cloud upon the title, after the purchaser has failed, for six months after the passage of the act, to obtain, or to demand by suit — the time for redemption having passed — what, in view of the statute, must be regarded as the principal object of his purchase, namely, a conveyance or lease, with the right, by means of summary proceedings, to obtain possession of the premises sold to him for a term of years. We are of opinion that such legislation did not impair the obligation of the plaintiff's contract.

What has been said is sufficient to dispose of the additional suggestion to the effect that the cancellation of the record of sales at which the plaintiff purchased deprived him of his property without due process of law, in violation of the Fourteenth Amendment. He asserts a proprietary right in such record for what it was worth. But, if the observations made

by us in respect to the first point be sound, he had no such right, after permitting the period to elapse within which he could bring suit to compel the execution of a conveyance or lease. A statute of limitation cannot be said to impair the obligation of a contract, or to deprive one of property without due process of law, unless, in its application to an existing right of action, it unreasonably limits the opportunity to enforce that right by suit.

Judgment affirmed.

MacFarland *v.* Jackson. Error to the Supreme Court of the State of New York. No. 66. Argued November 11, 1890. Decided November 24, 1890. Mr. Justice Harlan delivered the opinion of the court. This case presents the same questions that are disposed of in the above opinion. For the reasons therein stated the judgment is

Affirmed.

Mr. John J. Townsend for plaintiff in error.

Mr. Almet F. Jenks for defendant in error.

DOBSON *v.* LEES.

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

No. 43. Argued October 31, 1890. — Decided December 1, 1890.

A reissue of letters patent is an amendment, and cannot be allowed to enlarge the claims of the original by including matter once intentionally omitted.

Such intentional omission may be shown by conduct, and the inventor cannot be permitted to treat deliberate and long continued acts of his attorney as other than his own.

In this case there is no room for the contention that there was any inadvertence, accident or mistake attending the issue of the original patent, and the reissue was correctly held to be invalid.

In equity for the infringement of letters patent. Decree dismissing the bill. Plaintiffs appealed. The case is stated in the opinion.

Mr. Francis T. Chambers for appellants.

Mr. Hector T. Fenton for appellees.

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

This was a bill exhibited by John Dobson, James Dobson and James Greaves against James Lees and others, for infringement of reissued letters patent No. 10,054, Division A, dated March 7, 1882, in the Circuit Court of the United States for the Eastern District of Pennsylvania, and upon hearing on pleadings and proofs dismissed by the court. The opinion will be found reported in 30 Fed. Rep. 625.

It appears from the record that James Greaves applied September 30, 1872, for a patent for an "improvement in condensing cylinders for carding engines," the proposed claim being: "The application, as described, of cast iron spindles to the condensing cylinders of carding engines." He stated in the specification: "The object of my invention is to furnish the condensing cylinders of carding engines with spindles of a more durable character than those in common use, and this object I attain by making such spindles of cast iron instead of wrought iron or steel. . . . It is not essential that the spindle, when it passes through the wheel, should in all cases be round. It may, for instance, be square, in which case the feather may be dispensed with."

This application was rejected October 29, 1872, and again rejected December 7, 1872. On the 7th of December, 1874, the following was substituted for the claim: "A spindle for carding machine rollers, rectangular in form, for the purpose set forth." This amendment was followed by a redrawn specification, the claim of which was as follows: "The combination, substantially as described, of the condensing cylinder of a carding engine, the driving wheel A, the hub of which has a square or angular aperture, and the spindle X, having a corresponding shape imparted to that portion of it which slides through the said hub, all as set forth." This specifica-

tion was accompanied by a new sheet of drawings marked "sheet 2," the drawings originally filed being marked "sheet 1," and by a new model. A new oath of invention was required and made, dated January 22, 1875. On the 27th of January the claim of the amended specification was rejected upon reference to Davison and Crowther's English patent No. 2885 of 1856, and others; again rejected on the 26th of February in view of that reference, and also of the patents of Harraday, of May 30, 1854, No. 10,986, and of Warth, of August 6, 1872, Nos. 130,343 and 130,344; again, on March 31, 1875; again, on appeal to the board of examiners in chief, August 7, 1875; and again, by the Commissioner on appeal to him, November 11, 1875. There having been a change of attorneys, on the 12th of October, 1876, an amended specification was filed, and rejection again followed, November 27, 1876. The specification was again amended November 29, so as to set up these two claims:

"1st. The combination, in a carding engine, of a condensing or rubber cylinder, a driving wheel, and a polygonally-shaped horizontal shaft or spindle, the latter being adapted to be revolved and at the same time to be continuously reciprocated in a correspondingly polygonally-shaped bearing, and a continuously reciprocating rubber, substantially as and for the purposes described.

"2d. In a carding engine, the combination of a continuously reciprocating rubber, a driving wheel to turn said rubber, and a horizontal shaft or spindle connecting the two together, said shaft or spindle and the bearing in which it reciprocates being both made of cast iron, or both of metal having the same crystalline structure, whereby in the reciprocating action the tendency of the crystalline particles of cast metal in the bearing to wear the spindle will be resisted by the crystalline particles of the latter, substantially as and for the purposes described."

This application was rejected December 1. The applicant appealed, and on December 2 the examiner reported that he had rejected the first claim, which did not then require that the spindle and bearing should be of cast iron, upon the

ground that its non-patentability was *res adjudicata* so far as the examiner was concerned; and that the second claim was rejected because the substitution of the cast metal shaft for the wrought metal or steel shaft, before employed, required no invention. The examiners in chief, on the 15th of December, reversed the examiner's decision as to the second claim, but affirmed it as to the first, holding, however, that if the first claim were amended so as to include "cast iron or metal of the same crystalline structure" for bearing and spindle, they thought it would be admissible. The first claim was accordingly amended by the insertion, after the word "bearing," of the words "said bearing and said shaft or spindle being of cast iron or of metal of the same crystalline structure."

On the 11th of January, 1877, an interference was declared between these claims and the application of one Stone, and on the 8th of February, 1877, the examiner refused a motion to dissolve the interference, upon the ground that the feature which Greaves relied on as not shown in the Stone invention was that Greaves' shaft and bearing were made of cast iron or metal having the same crystalline structure, while Stone's were of cast brass, which would come within the scope of Greaves' claims. It was held by the Assistant Commissioner, on appeal, on the 9th of February, that "as cast brass has not the same crystalline structure as cast iron, the application of Greaves, if so amended in its claims as to restrict him to the use of metal having the same crystalline structure 'as cast iron,' will not interfere with an application showing and describing 'cast brass,' if the material is of the essence of the invention." Applicant accordingly so amended February 9, the interference was dissolved February 10, and the patent was issued February 20, 1877.

The result of all this was, that after repeated attempts and repeated rejections, the patent was allowed, containing two claims, limited strictly to a shaft and bearing of cast iron or of metal of the same crystalline structure as cast iron. These claims were as follows:

"1. The combination, in a carding engine, of a condensing or rubber cylinder, a driving wheel, and a polygonally-shaped

horizontal shaft or spindle, the latter being adapted to be revolved, and at the same time to be continuously reciprocated in a correspondingly polygonally-shaped bearing, said bearing and said shaft or spindle being of cast iron or of metal of the same crystalline structure as cast iron, and a continuously reciprocating rubber, substantially as and for the purposes described.

"2. In a carding engine, the combination of a continuously reciprocating rubber, a driving wheel to turn said rubber, and a horizontal shaft or spindle connecting the two together, said shaft or spindle and the bearing in which it reciprocates being both made of cast iron, or both of metal having the same crystalline structure as cast iron, whereby in the reciprocating action the tendency of the crystalline particles of cast metal in the bearing to wear the spindle will be resisted by the crystalline particles of the latter, substantially as and for the purposes described."

Applications were then filed for a reissue in two divisions, A and B — for division A on March 24, 1877, and for division B on March 15, 1877.

Division B contained both of the claims of the original patent, and reissued letters patent No. 9477 were granted therefor under date of November 23, 1880.

The claim in Division A was as follows:

"In a carding engine, a condensing or rubber cylinder mounted on a polygonally-shaped horizontal shaft, in combination with a driving gear, A, having a sleeve-shaped bearing, *b*, said shaft and cylinder being adapted to be revolved by the drive-wheel A, and at the same time to be rapidly and continuously reciprocated by suitable mechanism, substantially as and for the purposes described."

And for this, reissued letters patent No. 10,054 were granted March 7, 1882, and this is the patent in controversy. Before it was passed for issue, various proceedings were had in the Patent Office, including rejections, appeals, and disposal of an interference between this application and that of Stone, and it appears by the statement of Examiner Appleton, under date of December 5, 1881, that after the determination of the

interference the application was returned to the examiner, "with instructions to consider whether or not, in view of certain recent decisions of the Supreme Court of the United States, the same in its present form can properly be allowed." The examiner was clearly of opinion that under the decisions of this court in *Powder Company* v. *Powder Works*, 98 U. S. 126; *Leggett* v. *Avery*, 101 U. S. 256; *Manufacturing Co.* v. *Ladd*, 102 U. S. 408; and *Goodyear Dental Vulcanite Rubber Co.* v. *Davis*, 102 U. S. 222, the applicant was not entitled to the claim presented, "said applicant having withdrawn a similar claim in his original application in order to obtain his original patent, and the present claim being for a different invention from that covered by the original patent." And in his statement of grounds of decision, under date of January 27, 1882, the examiner gave as his reasons: "In the first place, this claim, being for a combination of parts of peculiar construction, while the original is for a combination of parts when some of the same are constructed of particular metals, the metals being the gist of the claim thereof, is for a different invention from that covered by the original patent. In the second place, the claim now in controversy having been withdrawn from the application upon which the original patent was granted, with a full knowledge of all the facts in the case, it cannot be urged that such withdrawal of the claim, or any other change that the appellant now desires to make, was the result of or necessitated by any inadvertence, accident, or mistake, for which alone corrections by reissue can be made." The letter of allowance bears date February 15, 1882.

The Circuit Court held that the only claim in the reissue was for a combination not claimed in or covered by the original patent, and hence not for the same invention; that the claim in the reissue was before the commissioner and its allowance urged by the patentee through his solicitor, but was not allowed, and was therefore stricken out, and the patent accepted without this claim; that the court could not distinguish betwen the patentee and his counsel as to what occurred during the pendency of the application for the patent, and, as

to its acceptance by the latter, the patentee must be regarded as bound by the acts of his counsel; and that, under the circumstances, the case fell clearly within *Leggett* v. *Avery*, 101 U. S. 256.

In *Leggett* v. *Avery*, thus referred to, Mr. Justice Bradley, speaking for the court, said: "We think it was a manifest error of the commissioner, in the reissue, to allow to the patentee a claim for an invention different from that which was described in the surrendered letters, and which he had thus expressly disclaimed. The pretence that an 'error had arisen by inadvertence, accident, or mistake,' within the meaning of the patent law, was too bald for consideration. The very question of the validity of these claims had just been considered and decided with the acquiescence and the express disclaimer of the patentee. If, in any case, where an applicant for letters patent, in order to obtain the issue thereof, disclaims a particular invention, or acquiesces in the rejection of a claim thereto, a reissue containing such claim is valid, (which we greatly doubt,) it certainly cannot be sustained in this case. The allowance of claims once formally abandoned by the applicant, in order to get his letters patent through, is the occasion of immense frauds against the public. It not unfrequently happens that, after an application has been carefully examined and compared with previous inventions, and after the claims which such an examination renders admissible have been settled with the acquiescence of the applicant, he, or his assignee, when that investigation is forgotten and perhaps new officers have been appointed, comes back to the Patent Office, and, under the pretence of inadvertence and mistake in the first specification, gets inserted into reissued letters all that had been previously rejected. In this manner, without an appeal, he gets the first decision of the office reversed, steals a march on the public, and on those who before opposed his pretensions, (if, indeed, the latter have not been silenced by purchase,) and procures a valuable monopoly to which he has not the slightest title. We have more than once expressed our disapprobation of this practice. As before remarked, we consider it extremely doubtful whether reissued

letters can be sustained in any case where they contain claims that have once been formally disclaimed by the patentee, or rejected with his acquiescence, and he has consented to such rejection in order to obtain his letters patent. Under such circumstances, the rejection of the claim can in no just sense be regarded as a matter of inadvertence or mistake. Even though it were such, the applicant should seem to be estopped from setting it up on an application for a reissue." 101 U. S. 259, 260. See also *Manufacturing Co.* v. *Ladd*, 102 U. S. 408.

A reissue is an amendment, and cannot be allowed unless the imperfections in the original patent arose without fraud, and from inadvertence, accident or mistake. Rev. Stat. § 4916. Hence the reissue cannot be permitted to enlarge the claims of the original patent by including matter once intentionally omitted. Acquiescence in the rejection of a claim; its withdrawal by amendment, either to save the application or to escape an interference; the acceptance of a patent containing limitations imposed by the Patent Office, which narrow the scope of the invention as at first described and claimed; are instances of such omission. *Union Metallic Cartridge Co.* v. *United States Cartridge Co.*, 112 U. S. 624; *Shepard* v. *Carrigan*, 116 U. S. 593; *Roemer* v. *Peddie*, 132 U. S. 313; *Yale Lock Co.* v. *Berkshire Bank*, 135 U. S. 342, 379, and cases cited.

It is clear that the claim of this reissue is not covered by the original patent, and it appears that before the issue of the latter it was passed upon and rejected; was withdrawn and erased; an interference was dissolved upon condition of the amendment; and the issue of the original letters was predicated upon its abandonment. There is no room for the contention that there was any inadvertence, accident or mistake in the premises. Nor, in the light of these protracted proceedings in the Patent Office, can the applicant be permitted to treat the deliberate acts of his attorney as the result of inadvertence, accident or mistake. The repeated official decisions and orders, and the repeated efforts to maintain this claim without success, during this long struggle, indicate anything

but negligence or inadvertence on the part of the solicitors employed.

The decree of the Circuit Court was right, and it is

Affirmed.

BROOM *v.* ARMSTRONG.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 40. Argued October 30, 1890. — Decided December 1, 1890.

In Utah an action under the statute (§ 3460 Compl. Laws Utah, 1888) to foreclose a chattel mortgage, if commenced while the lien of the mortgage is good as against creditors and purchasers, keeps it alive, and continues it until the decree and sale perfect the plaintiff's rights, and pass title to the purchaser.

Under § 3206 of the Compiled Laws of Utah, the rule of *lis pendens* applies to an action to foreclose a mortgage of personal property.

The enforcement of a mortgagee's rights under a chattel mortgage by a suit for foreclosure is commended as affording a safer and more adequate remedy than is afforded by actual seizure and sale of the mortgaged property, or by an action of replevin, detinue or trover.

This case arose upon a complaint filed in the District Court of Weber County, Utah Territory, on the 22d of July, 1885, by James C. Armstrong, the appellee, against Mills H. Beardsley; to foreclose a mortgage of certain chattels, made January 14, 1885, by Beardsley to Armstrong, as security for the payment of his promissory note of that date to Armstrong, for the sum of $8000, payable in four months, with interest from date at one per cent per month, payable monthly from date until paid, both before and after judgment, until maturity; and, if not paid at maturity, ten per cent additional, as cost for collection; which mortgage was duly recorded, as provided by the laws of the Territory.

On the 22d of September, thereafter, Armstrong, with leave of the court, filed an amended complaint, making John Broom and E. A. Whitaker parties defendant, in which he alleged that the two defendants Broom and Whitaker, after the orig-

inal suit was instituted, had claimed an interest in the mortgaged chattels; that Broom's claim arose from his being a purchaser of the mortgaged property at a sale on August 13, 1885, under an execution issued upon a judgment dated March 18, 1885, against the defendant Beardsley, in favor of the Utah National Bank, for three thousand one hundred and sixty dollars ($3160); that the property having been levied upon by the United States marshal and sold, as above stated, was delivered by the marshal to Broom, as purchaser thereof, and put into his possession; that Whitaker's claim arose out of a mortgage upon the same property, made to him by Broom, August 22, 1885, to secure the payment of four thousand one hundred and thirty dollars, ($4130,) advanced by him to Broom; that this action on the original complaint had been pending from the date of the filing thereof to that time; that a notice of the pendency thereof was filed in the recorder's office of Weber County, on the 11th of August, 1885; and that the defendants had due notice and actual knowledge of all these facts and proceedings at the time the levy was made on the mortgaged property, and at the time Broom received and took possession of the same. Wherefore, in addition to his prayer for foreclosure against Beardsley, in the original complaint, he prayed that the two defendants Broom and Whitaker, and all persons claiming under them, subsequently to the execution of said chattel mortgage, be foreclosed of all right or claim or equity of redemption in the said property, and every part thereof.

The defendants Broom and Whitaker, and the defendant Beardsley also, filed their respective demurrers to the amended and supplemental complaint, as not stating facts sufficient to constitute a cause of action, both of which demurrers were overruled. Thereupon the defendants Broom and Whitaker filed their separate answer setting up, among other defences, the levy upon the property mortgaged, the purchase by Broom at the judicial sale thereof, and the invalidity of the lien of the chattel mortgage after the expiration of ninety days from the maturity of the note which it secured.

The case was submitted to the court on the pleadings and

proofs. A decree was rendered for the plaintiff in accordance with the prayer of the amended complaint, finding that Beardsley was liable for the principal and interest due on the note, with ten per cent additional for collection, etc., and that the said amount was a valid lien upon the property described in the amended and supplemental complaint; and directing a sale of the mortgaged property to satisfy the same with costs, etc. The Supreme Court of the Territory affirmed the decree of the District Court, and that decree of affirmance was brought to this court for review by the present appeal.

Mr. Samuel Shellabarger, (with whom was *Mr. Jeremiah M. Wilson* on the brief,) for appellants.[1]

---

[1] Mr. Shellabarger's brief contained the following extracts from the Compiled Laws of Utah (1888) upon which he relied.

SEC. 2801. No mortgage of personal property shall be valid as against the rights and interests of any person, (other than parties thereto,) unless the possession of such personal property be delivered to, and retained by, the mortgagee, or unless the mortgage provide that the property may remain in the possession of the mortgagor, and be accompanied by an affidavit of the parties thereto, or, in case any party is absent, an affidavit of the parties present, and of the agent or attorney of such absent party, that the same is made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagor.

SEC. 2802. Every mortgage of personal property shall be witnessed, acknowledged by the mortgagor, or person executing the same; and when the mortgage debt is satisfied shall be released by the mortgagee, in the same manner as is provided for mortgages of real property.

SEC. 2803. Every mortgage of personal property, together with the affidavit and acknowledgment thereto, shall, to constitute notice to third parties, be filed for record in the office of the recorder of the county where the mortgagor resides, or, in case he is a non-resident of this Territory, then in the respective offices of the recorders of each and every county where the personal property may be at the time of the execution of the mortgage; and each of said recorders shall, on receipt of such mortgage, endorse thereon the time of filing the same with him, and shall promptly record the same, together with said affidavit and acknowledgment, in a book to be kept in his office, properly indexed and specially provided for the record of chattel mortgages, and, when so recorded, deliver the same to the mortgagee.

SEC. 2805. Any mortgage of personal property, acknowledged and filed as hereinbefore provided, shall, thereupon, if made in good faith, be good and valid as against the creditors of the mortgagor and subsequent pur-

The main questions in this case are (1) whether the provision in § 2805 of the Compiled Laws of Utah, which declares that a mortgage of personal property, made in good faith in the manner provided by law and recorded, shall be valid against creditors and subsequent purchasers from the time it

---

chasers and mortgagees, from the time it is so filed for record until the maturity of the entire debt or obligation, for the security of which the same was given, and for a period of ninety days thereafter; *Provided* the entire time shall not exceed one year.

SEC. 2809. An action for the foreclosure of a mortgage on personal property, or the enforcement of any lien thereon, of whatever nature, may be commenced, conducted, and concluded in the same manner as provided by law for the foreclosure of a mortgage or lien on real property and without the right of redemption. . . .

SEC. 2837. Every sale made by a vendor of goods or chattels in his possession, or under his control, and every assignment of goods and chattels, unless the same be accompanied by a delivery within a reasonable time, and be followed by an actual and continued change of the possession of the things sold or assigned, shall be conclusive evidence of fraud against the creditors of the vendor, or assignor, or subsequent purchasers in good faith. The word "creditors" as used in this section shall be construed to include all persons who shall be creditors of the vendor or assignor at any time while such goods and chattels shall remain in his possession or under his control.

SEC. 3206. In an action affecting the title, or the right of possession of real property, the plaintiff at the time of filing the complaint, and the defendant at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may file for record, with the recorder of the county in which the property, or some part thereof, is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, or defence, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby, be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names.

SEC. 3460. There can be but one action for the recovery of any debt, or the enforcement of any right, secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the encumbered property, or so much thereof as may be necessary, and the application of the proceeds of the sale to the payment of the costs of the court and the expenses of the sale and the amount due to the plaintiff; and sales of real estate under judgments of foreclosure of mortgages and liens are not subject to redemption as in case of sales under execution. . .

is filed for record until the maturity of the debt secured by it and for ninety days thereafter, means that it shall not be valid after the expiration of the ninety days when possession of the property is not taken by the mortgagee; and, (2) whether, assuming that such is its meaning, the pendency of a suit to foreclose the mortgage, and the filing of a *lis pendens* therein will nevertheless prevent the termination of the lien, as between the mortgagor and his creditors.

Section 2805 is in substance and legal effect a statutory provision that, in the absence of possession taken by the mortgagee, the lien terminates at the expiration of the ninety days.

Section 2837 renders an assignment like the present void as against creditors, except as protected by § 2805.

Putting these two sections together, we have an express statute, totally free from ambiguity and clearly mandatory in its requirements, enacting that no sale or assignment of chattels, whether made by a chattel mortgage executed, acknowledged and recorded, as provided in the mortgage statute, or otherwise, when unaccompanied by delivery of possession to the vendee or assignee, shall ever be otherwise than absolutely void after the expiration of ninety days from the maturity of the debt secured by the mortgage. This proposition does not seem to have been disputed below, but, on the contrary, was admitted by the court.

In order to escape from the termination of the lien by the operation of the statute, the appellee resorts to "interpretation" and "construction." But the rule applied by the courts to such statutes is, that they are to be construed strictly, and that no statute is to be construed as altering the common law further than its words import. *Shaw* v. *Railroad Co.*, 101 U. S. 557, 565.

In *Hamilton* v. *Russell*, 1 Cranch, 309, this court held that an absolute bill of sale of goods was fraudulent as to creditors unless possession accompanies and follows the deed; that the want of possession was not merely evidence of fraud, but was a circumstance *per se* which made the transaction fraudulent in point of law. In cases of absolute deeds of assignment,

that case has been followed in a multitude of cases since: as in *Moore* v. *Ringgold*, 3 Cranch C. C. 434; *Travers* v. *Ramsay*, 3 Cranch C. C. 354; *Meeker* v. *Wilson*, 1 Gallison, 419, 423, and cases cited in note; *Bank of Leavenworth* v. *Hunt*, 11 Wall. 391, 395. But where the deed provides for retention of possession by the assignor or vendor, the rule has been held to be that such retention of possession is simply evidence of fraud, and is not conclusive. *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386; *De Wolf* v. *Harris*, 4 Mason, 515; *United States* v. *Hooe*, 3 Cranch, 73; *Brooks* v. *Marbury*, 11 Wheat. 78; *Warner* v. *Norton*, 20 How. 448, 456; *People's Savings Bank* v. *Bates*, 120 U. S. 556, and cases cited.

These and numerous other decisions by this and other courts are not always reconcilable as to some points; but all agree, in substance, that the statute of Elizabeth, and statutes like said section 2837 of the Compiled Laws of Utah, are really in affirmance of the principles of the common law, and are within the rule which this court states in *Shaw* v. *Railroad Co.*, *supra*.

And it may be said to be a general rule that where possession of personal property is allowed to remain in the mortgagor after condition broken, it is a fraud as against persons subsequently dealing with him. *Gassner* v. *Patterson*, 23 California, 299; *Porter* v. *Parmley*, 52 N. Y. 185; *Porter* v. *Dement*, 35 Illinois, 479; *Chenyworth* v. *Daily*, 7 Indiana, 284; *Divver* v. *McLaughlin*, 2 Wendell, 696; *S. C.* 20 Am. Dec. 655; *Meyer* v. *Gorham*, 5 California, 322; *Cook* v. *Hager*, 3 Colorado, 386; *Crane* v. *Chandler*, 5 Colorado, 21; *McDowell* v. *Stewart*, 83 Illinois, 538.

In the following cases it was held that the mortgagee must take possession, within a reasonable time after default in payment of the debt secured by the mortgage; and that when possession remains with the mortgagor until default under a provision to that effect in the deed, if the possession be not then taken, the mortgage, after such default, is regarded as fraudulent: *Leaman* v. *Eager*, 16 Ohio St. 209; *Hanford* v. *Obrecht*, 49 Illinois, 146; *Wylder* v. *Crane*, 53 Illinois, 490; *Lemen* v. *Robinson*, 59 Illinois, 115; *Burnham* v. *Muller*

Illinois, 453; *Barbour* v. *White*, 37 Illinois, 164; *Arnold* v. *Stock*, 81 Illinois, 407; *Dunlap* v. *Epler*, 88 Illinois, 82; *Chapin* v. *Whitsett*, 3 Colorado, 315.

Although these authorities might be indefinitely increased, going to the point that statutes tolerating chattel mortgages, where a change of possession does not occur, are strictly construed and never extended beyond the letter of the statute; yet we refrain from further citation because, in the case at bar, it is the effect of the statute itself that renders the lien void after the expiration of ninety days from the maturity of the mortgage debt; and we are not, therefore, here dependent upon any general principles of law in maintaining the expiration of the lien at the end of ninety days.

These authorities negative the proposition relied upon by appellee that, because the appellant had actual notice of the mortgage, such notice avoids the effect of the levy and sale.

It is settled law that actual knowledge of the existence of an imperfect or an unrecorded chattel mortgage does not prevent a valid levy, by or on behalf of the party having such knowledge. *Travis* v. *Bishop*, 13 Met. 304; *Shapleigh* v. *Wentworth*, 13 Met. 358; *Bingham* v. *Jordan*, 1 Allen, 373; *S. C.* 79 Am. Dec. 748; *Porter* v. *Dement*, 35 Illinois, 478; *Sage* v. *Browning*, 51 Illinois, 217; *Forest* v. *Tinkham*, 29 Illinois, 141; *Gregg* v. *Sanford*, 24 Illinois, 17; *S. C.* 76 Am. Dec. 719; *Henderson* v. *Morgan*, 26 Illinois, 431; *Sheldon* v. *Conner*, 48 Maine, 584; *Rich* v. *Roberts*, 48 Maine, 548; *Bevans* v. *Bolton*, 31 Missouri, 437; *Bryson* v. *Penix*, 18 Missouri, 13; *Harvey* v. *Crane*, 2 Bissell, 496; *Heryford* v. *Davis*, 102 U. S. 235; *Harkness* v. *Russell*, 118 U. S. 663, 680.

But it is contended that though taken by itself, section 2805 would render a chattel mortgage invalid after the expiration of the ninety days, yet, that the commencement of a suit to foreclose it has the effect to prolong the duration of the mortgage lien up to the close of the suit. To this we answer:

1. That this is in effect to add to the statute a condition which is not only not in it, but is, in legal effect, expressly prohibited by it, namely, a condition which says that the statute shall be so read that the said lien, which the statute termi-

nates at the end of ninety days, shall continue indefinitely after the expiration of the said ninety days, provided suit to foreclose is commenced within the ninety days. This addition is simply legislation, and is not interpretation.

2. The *lis pendens* accomplished by the commencement of the foreclosure suit is, at most, only a notice to, and an obligation upon, appellant, as purchaser *pendente lite*, which binds him to abide by whatever rights such suit shall finally adjudge to the complainant therein, as being held by him in the subject matter of the suit so pending when the purchase was made. *Warren County* v. *Marcy*, 97 U. S. 96. It does not change or add to the character or duration of the lien created by the chattel mortgage. It simply brings into court the question, what is the duration of the chattel-mortgage lien, as that duration is defined by the statute?

The result, therefore, is this: that since the mortgagee did not take possession within the ninety days, he did not perform the indispensable condition under which he could continue the existence of his mortgage lien after the expiration of the ninety days. He had a perfect right to commence his foreclosure suit; and had he taken possession within the ninety days, and before the levy, his *lis pendens* would have been conclusive against appellant. But he did no such thing as take possession. Therefore, his *lis pendens* has accomplished nothing for him in the way of excusing his taking possession of the property. And the question is left for the decision of this court whether such taking possession is, indeed, by the statute made to be a condition precedent to the continuance of the mortgage lien after ninety days.

That, therefore, presents to this court the question whether the commencement of the suit is, by the statute, made to be a substitute for that change of possession to the mortgagee which sections 2837 and 2805 require, in express terms, in order to a lien being continued beyond the said ninety days?

That it is the visible and overt act of actual change of possession from mortgagor to mortgagee — from vendor to vendee, or from assignor to assignee — which the statutes of frauds of all the States, and of Elizabeth, make to be essential

to the validity, as against creditors, of the transfer, cannot, we think, be reasonably disputed.

It is further said that it would be unreasonable and absurd to make the taking possession by the mortgagee of the mortgaged property a condition precedent to the continuance of his mortgage lien after said ninety days, because such possession might be refused by the mortgagor, and the mortgagee would thus be placed at the mercy of his mortgagor; and that said section 3460 does not allow, in cases of mortgage, any other action than the one to foreclose prescribed by it.

But the contract right to take possession, which is given by the mortgage, is not meant to be and cannot be destroyed by section 3460. That section admits of no such construction. Jones on Chattel Mortgages, § 706; *Lacey* v. *Giboney*, 36 Missouri, 323; *S. C.* 88 Am. Dec. 145; *Cleaves* v. *Herbert*, 61 Illinois, 126; *Barbour* v. *White*, 37 Illinois, 164; *Wood* v. *Weimar*, 104 U. S. 786; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664, 672.

Mr. John B. Goode for appellee. *Mr. H. W. Smith* filed a brief for same. *Mr. J. G. Sutherland* and *Mr. J. R. McBride* also filed a brief for same.

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

There seems to be no dispute as to any material fact in the case. The note and chattel mortgage sued upon were executed on the 14th of January, 1885, recorded on the 17th of the same month, and became due on the 14th of May, 1885. The action for foreclosure was commenced and the notice of pendency properly recorded within the ninety days provided by the statute of Utah for the lien to continue in force after the maturity of the debt secured by the mortgage. By the terms of the mortgage it was provided that the mortgaged property should remain in the possession of the mortgagor, who, in accordance therewith, retained such possession until the property was levied on and sold under execution against the mortgagor. This levy, therefore, was made after the ninety days from the maturity of the debt secured by the

mortgage had expired, and while the property was in the possession of the mortgagor.

The main contention of the appellants is, that the District and Supreme Courts erred in holding that the appellee by virtue of his mortgage and the pendency of the foreclosure suit, had a lien upon the property as against the levy and sale on the 13th of August, under which the appellant Broom made his purchase. This presents the question which really controls this case, viz.: did the appellee, on the day of sale, have any right or interest in the property superior to that of the appellant Broom?

To sustain their contention, the appellants rely upon sections 2805 and 2837 of the Compiled Laws of Utah. The former of these sections provides that, "Any mortgage of personal property, acknowledged and filed as hereinbefore provided, shall, thereupon, if made in good faith, be good and valid as against the creditors of the mortgagor and subsequent purchasers and mortgagees, from the time it is so filed for record until the maturity of the entire debt or obligation for the security of which the same was given, and for a period of ninety days thereafter; *Provided* the entire time shall not exceed one year." Section 2837 provides that, "Every sale made by a vendor of goods or chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by a delivery within a reasonable time, and be followed by an actual and continued change of the possession of the things sold or assigned, shall be conclusive evidence of fraud against the creditors of the vendor or assignor, or subsequent purchasers in good faith," etc.

It is contended with great earnestness that these two sections taken together constitute an express and mandatory enactment that any sale or assignment of goods and chattels, whether in the form of a chattel mortgage or otherwise, when unaccompanied by delivery of possession to the vendee, assignee or mortgagee, shall be absolutely void as to creditors of the latter or subsequent *bona fide* purchasers, after the expiration of ninety days from the maturity of the debt secured by the mortgage.

As opposed to the holding of the District and Supreme Courts that the commencement of the suit to foreclose keeps alive the lien of the mortgage, and continues it in force up to the foreclosure decree, it is insisted that the sections above quoted expressly limit the duration of the lien to the expiration of ninety days from the maturity of the debt; that to this clear and imperative limitation the statute makes no exception; that such a holding adds a condition which is not only not in the sections quoted, but is absolutely prohibited by them; and that said ruling is in contravention of the principle established by the courts that statutes authorizing chattel mortgages are to be strictly adhered to, and are never to be extended by construction beyond their letter. We cannot accept this view without coming in conflict with the manifest intent, and, in some cases, the express provisions of other sections of the Utah statutes applicable to this case, which should be construed *in pari materia* with those above quoted. Section 2801 in substance enacts that a mortgage of personal property executed, acknowledged and recorded according to law shall be valid as to all parties, even though the possession of the property be not delivered to, and retained by, the mortgagee, if the mortgage itself provides that the property may remain in the possession of the mortgagor and be accompanied by an affidavit required by that section. The section reads as follows:

"No mortgage of personal property shall be valid against the rights and interests of any person, (other than the parties thereto,) unless the possession of such personal property be delivered to, and retained by the mortgagee, or unless the mortgage provide that the property may remain in the possession of the mortgagor, and be accompanied by an affidavit of the parties thereto, or, in case any party is absent, an affidavit of the parties present, and of the agent or attorney of such absent party, that the same is made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagor."

As the equivalent of the mortgagee's taking possession of the mortgaged property upon default of payment and within ninety days thereafter, a remedy in case of such default is

provided by express statutory enactment. Section 3460 of the Compiled Laws above mentioned provides that, "There can be but one action for the recovery of any debt, or the enforcement of any right, secured by mortgage upon real estate or personal property; which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the encumbered property, or so much thereof as may be necessary, and the application of the proceeds of the sale to the payment of the costs of the court and the expenses of the sale and the amount due to the plaintiff; and sales of real estate under judgments of foreclosure of mortgages and liens are not subject to redemption as in case of sales under execution."

This remedy of a suit for foreclosure of a chattel mortgage has been adopted in most of the States, and has been much commended by the courts and text writers as a safer and more adequate remedy for recovering debts secured by chattel mortgages, and enforcing the lien of the mortgagee, than that of actual seizure and sale of the property by the mortgagee, or than the action of replevin, detinue or trover. A judicial sale of the property and the application of the proceeds, as directed by the decree, make a record which will protect the mortgagee from the embarrassments and charges of unfairness in the conduct of the sale which attend the actual taking possession and sale of the property by the mortgagee without a decree of the court. So "that if it falls short of satisfying the debt, the mortgagee may have a decree for the residue; or, if there should be a surplus, that it may be awarded to the mortgagor, and so put an end to litigation. If the mortgagee should sell himself, there would be, in case of deficiency, an action at law to recover the remainder of the debt; or, if there should be a surplus, the mortgagor might sue for it. Equity makes an end of these matters." *Bryan* v. *Robert*, 1 Strob. Eq. 334, 342, per Chancellor Harper. We think a construction of the above-quoted sections of the statute should be in furtherance of these objects. But what avail would be such a remedy, as a means of enforcing the mortgagee's right, if his mortgage, valid and in full force at the commencement of his foreclosure

suit, is extinguished before a decree for the sale of the specific property can be rendered?

We are of opinion that the Supreme Court is correct in its conclusion that the foreclosure "action having been commenced by plaintiff while the lien of the mortgage was good as against creditors [and purchasers], it kept the lien alive, and continued it until the decree and sale under it perfected his right with respect to it, and passed the title to the purchaser." We think this conclusion follows, necessarily, from the very nature of the proceeding directed by the Utah statute. It is, in its primary and controlling character, an action brought by the creditor against the specific property which has been mortgaged to him by his debtor, to have it seized and sold for the payment of his debt. Its object is to reach the property to which the lien attaches, and dispose of it by sale, in whatever hands it may be found, whether in the mortgagor's, in those of third persons or in those of the mortgagee himself. The special prayer of the original complaint is that a receiver may be appointed immediately by the court to take charge of, and hold possession of, said mortgaged property, and preserve the same until it can be sold on the judgment, order or decree of the court. It is, therefore, a proceeding *in rem*, as much so as an attachment suit against the property of an absent debtor, or a suit instituted to partition real estate. And the property is within the power of the court until the judgment or decree is entered, so that the lien upon it may be enforced, as the statute requires. *Pennoyer* v. *Neff*, 95 U. S. 714. The section with regard to foreclosure, which we have cited, is imperative. It expressly limits the mortgagee to that one action. Its language is: "There can be but one action for the . . . enforcement of any right . . . secured by mortgage upon . . . personal property." Of course the mortgagee cannot institute his foreclosure suit until after the debt secured by it becomes due, and after the ninety days following begin to run. It is admitted that when this foreclosure suit was commenced the mortgage was good against creditors and subsequent purchasers, and that it was superior to the bank judgment when it was obtained, after the suit was

commenced. If we accept the construction contended for by the appellants, it must follow that unless the decree of the court shall be rendered within the remainder of the ninety days, such decree cannot enforce the lien of the mortgage; and the effect would be not only to render futile the action which the statute authorized the party to bring, but to take from the court the power to give effect to its decree, which, under the statute, it is bound to render.

It was found by the court below, and we think the finding is fully sustained by the evidence — in fact, it is not disputed — that the defendants Broom and Whitaker had actual notice and full knowledge of the mortgage of Armstrong, and of the institution and pendency of the foreclosure proceedings, before their claim of interest or right in the property had arisen. The notice of the pendency of the suit was recorded before the ninety days from the maturity of the debt had expired. Under the Utah statutes the rule of *lis pendens* applies to an action to foreclose a mortgage of personal property, as well as to a similar action respecting real estate. Section 3206 of the Compiled Laws of Utah provides: "In an action affecting the title or the right of possession of real property, the plaintiff at the time of filing the complaint, and the defendant at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may file for record, with the recorder of the county in which the property, or some part thereof, is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, or defence, and a description of the property in that county affected thereby. From the time of filing such notice for record only, shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names."

Section 2809 provides: "An action for the foreclosure of a mortgage on personal property, or the enforcement of any lien thereon, of whatever nature, may be commenced, conducted and concluded in the same manner as provided by law for the foreclosure of a mortgage or lien on real property and without the right of redemption."

We think, therefore, that the appellants Broom and Whitaker having had full notice, actual and constructive, of the mortgage and the pendency of the suit commenced before the expiration of the ninety days, acquired no valid title to the property in question, and that the purchase of the property by the appellant Broom was subject to the rights of the appellee under his mortgage. His mortgagee, with like notice, can have no superior rights in the premises. That appellee's mortgage was executed to secure a *bona fide* debt, and in good faith, is not disputed.

The decree of the Supreme Court of the Territory of Utah is *Affirmed.*

UNITED STATES *v.* LYNCH.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 1195. Argued November 20, 1890. — Decided December 8, 1890.

In order to enable this court to entertain jurisdiction of a writ of error to the Supreme Court of the District of Columbia upon the ground that the validity of an authority exercised under the United States was drawn in question in the case, the validity of the authority must have been denied directly and not incidentally.

Where the relator in an application for mandamus seeks to compel the Fourth Auditor and the Second Comptroller to audit and allow a claim for mileage upon the ground that the statute provides for such mileage in terms so plain as not to admit of construction; that this court has so decided; and that hence the duty to be performed is purely ministerial; he does not thereby directly question the validity of the authority of the auditor to audit his account, and of the comptroller to revise and pass upon it.

On the 6th day of December, 1889, R. Mason Lisle filed a petition for a writ of mandamus in the Supreme Court of the District of Columbia against John R. Lynch, Fourth Auditor, and Benjamin F. Gilkeson, Second Comptroller, of the Treasury of the United States, and their successors, in the name of the United States, upon his relation, couched in these words:

"1. The petitioner avers that he was an officer of the Navy from March 19, 1872, to May 6, 1872, of the rank of lieuten-

ant; that on March 19, 1872, he was ordered by his superior officer to proceed from Philadelphia, Pennsylvania, via New York and the Pacific mail steamer from New York, on March 30th, to Aspinwall, across the Isthmus of Panama, and thence to the navy-yard, Mare Island, California, and report for duty on board the U. S. S. 'Lackawanna'; that he proceeded by the said route, in accordance with said orders, completing the journey on May 6, 1872.

"2. That in obeying the said orders he travelled 6222 miles, viz., from Philadelphia to New York, 88 miles; from New York to Mare Island, 6134 miles. For his travelling expenses from Philadelphia to New York he was paid $8.80, being at the rate of ten cents per mile; but for his travelling expenses from New York to Mare Island he was only credited with mileage for the distance between the extreme points by the overland route — a route he was not ordered to travel and did not travel — 3248 miles, at ten cents per mile, amounting to $324.80, whereas, by the law in force at the time of the travel, (Act of March 3, 1835, 4 Stat. 755,) he should have been credited with mileage for the distance actually travelled, 6134 miles, at ten cents per mile, amounting to $613.40; thus the petitioner has received $288.60 less than he should have received under the said act of Congress, which was the act which governed the compensation to be paid for mileage at that time.

"3. That the respondents have refused, and still do continue to refuse, to pay the petitioner, or to credit him with, the sum of $288.60, that being the amount remaining unpaid on the said travel under the said act of Congress.

"4. That there is no application of the statute of limitations, for the claim was adjusted and disallowed by Comptroller Maynard on February 2, 1887, the said disallowance being a clear violation of the said act of Congress.

"Therefore, the said travel having been performed, the distance having been correctly computed, the application of the said act of Congress to the said travel — under the acts of Congress, Rev. Stat. (1878), sections 273, 277, prescribing the duties of the accounting officers — is a mere ministerial duty,

Counsel for Plaintiff in Error.

the exercise of a discretion being invalid under the said sections.

"Wherefore the petitioner prays that a writ of mandamus may be issued to the said respondents, commanding them to audit the petitioner's account for the said travel and allow the same, and to issue a warrant in the manner it is the custom of the Treasury to issue warrants for the payment of mileage under the said act of Congress of March 3, 1835, the same being mandatory upon the accounting officers."

A rule to show cause was thereupon entered, and the defendants appearing, it was agreed that the petition and rule to show cause should be considered and treated as an alternative writ of mandamus, to which the respondents might make answer or demur as they might be advised. The respondents accordingly demurred, their demurrer being accompanied by the following:

"NOTE. — Among the matters of law relied upon and to be argued in support of the above demurrer are —

"1st. That mandamus will not lie against an officer of the Treasury Department for refusal to allow and pay a claim against the United States; for, however obviously without legal justification his refusal may be, a mandamus against him to compel such allowance and payment is none the less in effect a suit against the United States.

"2d. That it appearing that the relator's claim had been disallowed by the predecessor in office of the respondent Gilkeson, (to wit, Second Comptroller Maynard,) and there being no allegation of the production before the respondents of new-discovered material evidence, or that the original disallowance involved errors of computation, it is not competent for these respondents to reopen the settlement involving such disallowance."

The cause was heard by the Supreme Court of the District sitting in general term, and judgment rendered denying the relief sought, and dismissing the petition. The pending writ of error was thereupon sued out.

Mr. R. Mason Lisle in person, (with whom was *Mr. J. Edward Carpenter* on the brief,) for plaintiff in error.

Mr. Assistant Attorney General Maury for defendant in error.

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

As the matter in dispute does not reach the jurisdictional sum or value, it is contended that this court has jurisdiction to entertain the writ of error because "the validity of an authority exercised under the United States" was drawn in question in the case. 23 Stat. 443, c. 355.

The claim of the relator arises under the last clause of section 2 of the act of March 3, 1835, entitled "An Act to Regulate the Pay of the Navy of the United States," 4 Stat. 755, 757, c. 27, which reads: "It is hereby expressly declared that the yearly allowance provided in this act is all the pay, compensation, and allowance that shall be received under any circumstances whatever, by any such officer or person, except for travelling expenses when under orders, for which ten cents per mile shall be allowed."

By section 273 of the Revised Statutes it is provided that: "It shall be the duty of the Second Comptroller: First. To examine all accounts settled by the Second, Third, and Fourth Auditors, and certify the balances arising thereon to the Secretary of the Department in which the expenditure has been incurred. Second. To countersign all warrants drawn by the Secretaries of War and of the Navy, which shall be warranted by law."

And by section 277: "The duties of the Auditors shall be as follows: . . . Fifth. The Fourth Auditor shall receive and examine all accounts accruing in the Navy Department or relative thereto, and all accounts relating to Navy pensions; and, after examination of such accounts, he shall certify the balances, and shall transmit such accounts, with the vouchers and certificate, to the Second Comptroller for his decision thereon."

Section 236 provides: "All claims and demands whatever by the United States or against them, and all accounts what-

ever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury."

By the act establishing the offices of Comptroller and Auditor, the former was authorized and required "to superintend the adjustment and preservation of the public accounts," and "to examine all accounts settled by the Auditor;" and it was made the duty of the latter "to receive all public accounts, and after examination to certify the balance, and transmit the accounts with the vouchers and certificate to the Comptroller for his decision thereon." 1 Stat. 66.

Considering the accepted definition of an auditor with the language used in these provisions, the Fourth Auditor may be correctly said to be authorized to examine accounts accruing in the Navy Department, compare the items with the vouchers, allow or reject charges, and state the balance; and the Comptroller has authority to revise the action of the Auditor and certify the balances finally found by him.

It is stated in the opinion delivered by Mr. Chief Justice Waite in *United States* v. *Graham*, 110 U. S. 219, 220, cited on behalf of relator, that it was found as a fact in that case "that on the 6th of April, 1835, which was only a little more than a month after the act of 1835 passed, circular instructions were issued from the Treasury Department to the effect that mileage at the rate of ten cents a mile was fixed by law and should be paid for travelling expenses within the United States, but that the usual and necessary passage money actually paid by officers returning from foreign service, under orders or on sick ticket, when they could not return in a public vessel, would be paid as theretofore, as well as the like expenses of officers going out. The navy regulations adopted in 1865, and in force in 1872, when the claim of Graham, the appellee, accrued, provided that 'for travelling out of the United States the actual expenses only are allowed.' It is also found that from the time of the passage of the act of 1835 until the decision of Temple's case in this court, the Navy and Treasury Departments had, with a single exception, always held that the ten cents a mile did not apply to travel

to, from, or in foreign countries, but only to travel in the United States. In Temple's case the long continued practice in the Departments was relied on to justify the decision of the accounting officers of the Treasury against him, but the fact of the actual existence of the practice was not found as it has been now."

The decision in *United States* v. *Temple*, 105 U. S. 97, was announced at October term, 1881. That case brought under consideration the act of Congress of June 30, 1876, relating to the mileage of officers of the Navy, while Graham's case arose under the act of March 3, 1835, and it was held that, as the language of the statute in each instance was clear and precise and its meaning evident, there was no room for construction, and that eight cents a mile in the one case and ten cents in the other, was properly allowed the claimants by the Court of Claims, from whose judgments in their favor appeals were prosecuted to this court.

It is now argued that the duty of the Fourth Auditor and of the Second Comptroller, under the last clause of section 2 of the act of 1835 and the decision of this court in relation to it, was merely ministerial, and that by the disallowance of relator's claim for mileage these officers exercised a discretion which they did not possess; that this was an invalid exercise of an authority under the United States; and that hence the validity of the authority was drawn in question. In order to justify this position, however, the validity of the authority must have been drawn in question directly and not incidentally. The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed. The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry.

We think that the authority of the Second Comptroller and the Fourth Auditor is not thus denied here, nor the validity of that authority questioned, but that what is claimed is that in the exercise of a valid authority, the Auditor and Comptroller

erred in respect to an allowance, in view of the decision of this court in another case.

In *Decatur* v. *Paulding*, 14 Pet. 497, 515, it was remarked by Mr. Chief Justice Taney that the duties to be performed by the head of an executive department of the government, whether imposed by act of Congress or by resolution, are not, in general, mere ministerial duties; that departmental duties are executive in their nature; that the laws and resolutions of Congress under which the departments are required to act have to be expounded in the exercise of judgment; and that, while the court would not be bound to adopt the construction given, when departmental decisions are under review in a proper case, the court would not by mandamus control the exposition of statutes by direct action upon executive officers. In relation to the interpretation of a pension law by the Commissioner of Pensions and the Secretary of the Interior, in *United States ex rel. Dunlap* v. *Black, Commissioner*, 128 U. S. 40, 48, Mr. Justice Bradley said: "Whether, if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case."

The contention of the relator is, that the interpretation he puts upon the act is too obviously correct to admit of dispute, and that this court has so decided; but it does not follow, because the decision of the Comptroller and Auditor may have been erroneous, that the assertion of relator to that effect raises a cognizable controversy as to their authority to proceed at all. What the relator sought was an order coercing these officers to proceed in a particular way, and this order the Supreme Court of the District declined to grant. If we were to reverse that judgment upon the ground urged, it would not be for want of power in the Auditor to audit the account, and in the Comptroller to revise and pass upon it, but because those officers had disallowed what they ought to have allowed and erroneously construed what needed no construction. This would not in any degree involve the validity of their authority. *Snow* v. *United States*, 118 U. S. 346, 353; *Baltimore and Potomac Railroad Co.* v. *Hopkins*, 130 U. S. 210. In

Clayton v. *Utah Territory*, 132 U. S. 632, the power vested in the governor of the Territory of Utah by the organic act, to appoint an auditor of public accounts, was drawn in question; and in *Clough* v. *Curtis*, 134 U. S. 361, 369, the lawful existence, as the legislative assembly of the Territory of Idaho, of a body of persons claiming to exercise as such the legislative power conferred by Congress, was controverted. In *Neilson* v. *Lagow*, 7 How. 772, 775, and 12 How. 98, the plaintiff in error claimed the land in dispute through an authority exercised by the Secretary of the Treasury, and the State court decided against its validity. The existence or validity of the authority was primarily involved in these cases, and they contain nothing to the contrary of our present conclusion.

Why the relator did not bring suit in the Court of Claims does not appear, nor does the record show the reasons of the Second Comptroller for rejecting this claim in 1887, nor for the action of the present Auditor and Comptroller other than as indicated in the demurrer. These matters are, however, immaterial in the view which we take of the case.

The writ of error must be dismissed and it is

So ordered.

GROVER AND BAKER SEWING MACHINE COMPANY *v.* RADCLIFFE.

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

No. 72. Argued November 13, 14, 1890. — Decided December 8, 1890.

Domicil generally determines the particular territorial jurisprudence to which the individual is subjected.

Although a judgment in one State against a citizen of another State, may be held valid under local laws by the courts of the former, the courts of the latter are not bound to sustain it, if it would be invalid but for the special laws of the State where rendered.

B., a citizen of Maryland, having executed a bond, containing a warrant authorizing any attorney of any court of record in the State of New York or any other State, to confess judgment for the penalty, and judgment having been entered against him in Pennsylvania by a prothonotary,

Statement of the Case.

without service of process, or appearance in person or by attorney, under a local law permitting that to be done, *Held;*

(1) That in a suit upon this judgment in Maryland, the courts of Maryland were not bound to hold the judgment as obligatory either on the ground of comity or of duty, contrary to the laws and policy of their own State.

(2) B. could not properly be presumptively held to knowledge and acceptance of particular laws of Pennsylvania or of all the States other than his own, allowing that to be done which was not authorized by the terms of the instrument he had executed.

This was an action brought in the Circuit Court of Cecil County, Maryland, by the Grover and Baker Sewing Machine Company against James Benge and John Benge, who were then citizens of Delaware, by summons and attachment on warrant, which was served on William P. Radcliffe as garnishee. Radcliffe filed pleas on behalf of the Benges according to the Maryland practice, putting the validity of the judgment in issue.

The declaration was in these words:

"This suit is instituted to recover the sum of twenty-three hundred dollars from the defendants, due and owing from the defendants to the plaintiff on and by virtue of a certain judgment which the plaintiff, on the third day of January, in the year eighteen hundred and seventy-four, in the Court of Common Pleas in and for the county of Chester, in the State of Pennsylvania, one of the United States of America, by the judgment of the said court, recovered against the defendants, for the sum of three thousand dollars; which said judgment is still in force and unsatisfied."

Upon the trial, a record from the Court of Common Pleas in and for the county of Chester, in the State of Pennsylvania, was read in evidence as follows:

"I do hereby enter judgment against the defendants and in favor of the plaintiff in this cause for the sum of three thousand dollars, lawful money, debt, besides costs, etc., on a bond and warrant of attorney to confess judgment, dated March sixteenth, A.D. one thousand eight hundred and seventy-two, conditioned that if the above-named James Benge, his heirs,

executors, or administrators, shall well and truly pay or cause to be paid to the said Grover & Baker Sewing Machine Company the full amount of each and every liability incurred or to be incurred by him, the said James Benge, to or with the said Grover & Baker Sewing Machine Company, for and on account of all sewing-machines and all sewing-machine findings, silks, and threads or other articles, including promissory notes and other property that may from time to time hereafter be sold, consigned, supplied, or otherwise entrusted to him, the said James Benge, by the said Grover & Baker Sewing Machine Company, upon his orders or by his acceptance, with or without notice to the said John Benge, at the time or times when each and every liability shall become due and payable or at such time and times for which payment of the same may hereafter, with or without notice to the said John Benge, be extended, then this obligation to be void. This obligation is intended to operate as a continuing security for the payment, when the same shall become due and be demanded, of all and every liability incurred to and with the said Grover & Baker Sewing Machine Company by the said James Benge aforesaid, to the amount not exceeding the limit of this bond.

"January 3d, 1874. — Judgment, $3000.00.

"JOHN A. RUPERT, *Prot.*"

The bond referred to was executed March 16, 1872, by James Benge, then a citizen of Pennsylvania, and John Benge, then a citizen of Maryland, and was as follows:

"Know all men by these presents that James Benge, of West Chester, Pa.; John Benge, of Kimbleville, Cecil County, Md., are hereby held and firmly bound unto the Grover & Baker Sewing Machine Company, a corporation duly established by law in the city of Boston, State of Massachusetts, also doing business at Philadelphia, State of Pennsylvania, in the sum of three thousand dollars, lawful money of the United States of America, to be paid to the said Grover & Baker Sewing Machine Company, its legal representatives or assigns; for which payment, well and truly to be made, we

bind ourselves, heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the 16th day of March, one thousand eight hundred and seventy-two; and we hereby authorize any attorney of any court of record in the State of New York or any other State to confess judgment against us for the said sum, with release of errors, etc.

"Whereas the above-named James Benge, at the special instance and request of the above-bound John Benge, has obtained a credit with the said Grover & Baker Sewing Machine Company for machines of their manufacture, and for sewing-machine findings, silks, and threads manufactured and dealt in by said Grover & Baker Sewing Machine Company and for other articles, including promissory notes and other property to be hereafter supplied to him, the said James Benge:

"Now, the condition of this obligation is such that if the above-bound James Benge, his heirs, executors, or administrators, shall well and truly pay or cause to be paid to the said Grover & Baker Sewing Machine Company the full amount of each and every liability incurred by him, the said James Benge, to or with the said Grover & Baker Sewing Machine Company for and on account of all sewing-machines and all sewing-machine findings, silks, and threads or other articles, including promissory notes and other property that may from time to time hereafter be sold, consigned, supplied, or otherwise entrusted to him, the said James Benge, by the said Grover & Baker Sewing Machine Company, upon his orders or by his acceptance, with or without notice to the said John Benge, at the time or times when each and every liability shall become due and payable, or at such time and times for which payment of the same may hereafter, with or without notice to the said John Benge, be extended, then this obligation to be void.

"This obligation is intended to operate as a continuing security for the payment, when the same shall become due and be demanded, of all and every liability incurred to and with the said Grover & Baker Sewing Machine Company by

the said James Benge, as aforesaid, to the amount not exceeding the limit of this bond, three thousand dollars.

"JAMES BENGE. [SEAL.]
"JOHN BENGE. [SEAL.]"

Plaintiff read in evidence a statute of the State of Pennsylvania, enacted February 24, 1806, as follows:

"It shall be the duty of the prothonotary of any court of record, within this Commonwealth, on the application of any person being the original holder (or assignee of such holder) of a note, bond, or other instrument of writing, in which judgment is confessed, or containing a warrant for an attorney-at-law, or other person to confess judgment, to enter judgment against the person or persons who executed the same, for the amount which, from the face of the instrument, may appear to be due, without the agency of an attorney, or declaration filed, with such stay of execution as may be therein mentioned, for the fee of one dollar, to be paid by the defendant; particularly entering on his docket the date and tenor of the instrument of writing on which the judgment may be founded, which shall have the same force and effect, as if a declaration had been filed, and judgment confessed by an attorney, or judgment obtained in open court and in term time; and the defendant shall not be compelled to pay any costs, or fee to the plaintiff's attorney, when judgment is entered on any instrument of writing as aforesaid." Purdon's Digest, Judgment, 30.

It was stipulated that "the common law of Pennsylvania, the practice of her courts, and the construction placed by her courts upon any statutes in force in that State may be proved by the decisions of the Pennsylvania courts, as reported in the printed volumes of Pennsylvania Reports." The other evidence adduced tended to establish or disprove that the property in controversy in the attachment and garnishment belonged to John Benge.

The court instructed the jury "that the statute law of the State of Pennsylvania, offered in evidence by the plaintiff and admitted by the defendant to be the law under which the

judgment offered in evidence by the plaintiff was entered, did not authorize the prothonotary of the Court of Common Pleas in and for the county of Chester, in the State of Pennsylvania, to enter the said judgment, and their verdict should be for the defendant."

The verdict was accordingly returned for the defendant and judgment entered thereon, and an appeal prosecuted therefrom to the Court of Appeals of the State of Maryland, by which the judgment was affirmed, and a writ of error was thereupon allowed to this court. The opinion of the Court of Appeals will be found reported in 66 Maryland, 511.

Mr. Albert Constable (with whom was *Mr. William T. Warburton* on the brief) for plaintiff in error.

The Court of Appeals of Maryland erred in affirming the instruction given by the Circuit Court for Cecil County to the jury, "that the statute law of the State of Pennsylvania offered in evidence by the plaintiff, and admitted by the defendant to be the law under which the judgment offered in evidence by the plaintiff was entered, did not authorize the prothonotary of the Court of Common Pleas, in and for the county of Chester, in the State of Pennsylvania, to enter the said judgment." If this judgment is a nullity as to John Benge, then every judgment in Pennsylvania, entered by a prothonotary under the statute of 1806, is a nullity, and every title, acquired by a sale under such a judgment, is invalid. As the statute has been practiced under since 1806, many titles necessarily depend upon its validity.

Looking at the substance of things, not names, a judgment when confessed by an attorney on a warrant which specified, on its face, the amount, terms, etc., of the proposed judgment, was never really confessed by the attorney, but by the defendant himself. The warrant on its face, in such cases, which are the only cases dealt with by the statute, is a full consent by the defendant to the judgment therein and thereby authorized. It is not a principle of law, but a rule of practice merely which requires in such cases, that is, cases where the warrant of

attorney, upon its face, has specified the amount, terms, etc., of the confessed judgment, that between the defendant who gives the warrant, and the prothonotary who makes the actual entry of judgment, there shall be interposed the agency of an attorney; and it is only this rule of practice in entering the formal judgment that the statute of 1806 deals with. This is mere procedure. *Helvete* v. *Rapp*, 7 S. & R. 306.

Such a judgment is the act of the court; *Braddee* v. *Brownfield*, 4 Watts, 474. It is a judicial act; *Hageman* v. *Salisbery*, 74 Penn. St. 280, 284; and being a judicial act it must be tested by the application of the same principles which guide us in testing the jurisdiction of any other judicial officer or court. One of those principles is that the court having acquired jurisdiction over a party may proceed to enter judgment against him; and that that jurisdiction may be acquired (1) by due service of process upon him within the jurisdiction; (2) by his voluntary appearance without process; or, (3) by his waiver of process. The latter is what Benge did, thereby yielding his right to notice of the time and place of hearing, and the opportunity to be heard. In *Rabe* v. *Heslip*, 4 Penn. St. 139, the Supreme Court of Pennsylvania said: "The Act of Assembly merely substitutes the prothonotary, though not named or described, for an attorney of the court; but it supplies no deficiency of the power given in the first instance."

But there is another ground upon which this judgment against John Benge can stand, and which, we submit, is equally conclusive.

At the time John Benge gave the warrant to "any attorney of any court of record of the State of New York, or any other State," to confess a judgment against him for $3000, this Statute of 1806 was an existing statute of the State of Pennsylvania, any one of whose courts of record were thus authorized by Benge to enter the judgment against him. This statute, therefore, formed part of the warrant, and must be read into it. In giving the warrant, this statute of 1806 being at the time an existing statute of the State regulating the manner in which the courts should enter the judgment on instruments of that description, he virtually thereby consented that judgment

might be entered according to the practice of the courts of that State as regulated by this statute. It would be a monstrous claim, that having given a warrant to confess a judgment in the courts of Pennsylvania, he was now entitled to argue that a judgment entered in one of those courts in accordance with the law and practice of the State, was void and a nullity, though that law was an existing law of the forum at the time he gave the warrant. *Johnson* v. *Chicago &c. Elevator Co.*, 119 U. S. 388, 400; *Hopkins* v. *Orr*, 124 U. S. 510.

Mr. John A. J. Creswell for defendant in error.

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

The Maryland Circuit Court arrived at its conclusion upon the ground that the statute of Pennsylvania relied on did not authorize the prothonotary of the Court of Common Pleas of that State to enter the judgment; and the Court of Appeals of Maryland reached the same result upon the ground that the judgment was void as against John Benge, because the court rendering it had acquired no jurisdiction over his person.

It is settled that notwithstanding the provision of the Constitution of the United States, which declares that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State," Art. IV, section 1, and the acts of Congress passed in pursuance thereof, 1 Stat. 22, Rev. Stat. § 905 — and notwithstanding the averments in the record of the judgment itself, the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding; that the jurisdiction of a foreign court over the person or the subject-matter, embraced in the judgment or decree of such court, is always open to inquiry; that, in this respect, a court of another State is to be regarded as a foreign court; and that a personal judgment is without validity if rendered by a State court in an action upon a money demand against a non-resident of the

State, upon whom no personal service of process within the State was made, and who did not appear. *D'Arcy* v. *Ketchum*, 11 How. 165; *Thompson* v. *Whitman*, 18 Wall. 457; *Hall* v. *Lanning*, 91 U. S. 160; *Pennoyer* v. *Neff*, 95 U. S. 714.

The rule is not otherwise in the State of Pennsylvania, where the judgment in question was rendered; *Guthrie* v. *Lowry*, 84 Penn. St. 533; *Scott* v. *Noble*, 72 Penn. St. 115; *Noble* v. *Thompson Oil Co.*, 79 Penn. St. 354; *Steel* v. *Smith*, 7 W. & S. 447; nor in the State of Maryland, where the action under review was brought upon it; *Bank of the United States* v. *Merchants' Bank*, 7 Gill, 415; *Clark* v. *Bryan*, 16 Maryland, 171; *Weaver* v. *Boggs*, 38 Maryland, 255. And the distinction between the validity of a judgment rendered in one State, under its local laws upon the subject, and its validity in another State, is recognized by the highest tribunals of each of these States.

Thus in *Steel* v. *Smith*, 7 W. & S. 447, it was decided, in 1844, that a judgment of a court of another State does not bind the person of the defendant, in another jurisdiction, though it might do so under the laws of the State in which the action was brought, and that the act of Congress does not preclude inquiry into the jurisdiction, or the right of the State to confer it. The action was brought on a judgment rendered in Louisiana, and Mr. Chief Justice Gibson, in delivering the opinion of the court, said: "The record shows that there was service on one of the joint owners, which, in the estimation of the law of the court, is service on all; for it is affirmed in *Hill* v. *Bowman*, already quoted, [14 La. 445,] that the State of Louisiana holds all persons amenable to the process of her courts, whether citizens or aliens, and whether present or absent. It was ruled in *George* v. *Fitzgerald*, 12 La. 604, that a defendant, though he reside in another State, having neither domicil, interest nor agent in Louisiana, and having never been within its territorial limits, may yet be sued in its courts by the instrumentality of a curator appointed by the court to represent and defend him. All this is clear enough, as well as that there was in this instance a general appearance by attorney, and a judgment

against all the defendants, which would have full faith and credit given to it in the courts of the State. But that a judgment is always regular when there has been an appearance by attorney, with or without warrant, and that it cannot be impeached collaterally for anything but fraud or collusion, is a municipal principle, and not an international one having place in a question of State jurisdiction or sovereignty. Now, though the courts of Louisiana would enforce this judgment against the persons of the defendants, if found within reach of their process, yet, where there is an attempt to enforce it by the process of another State, it behooves the court whose assistance is invoked to look narrowly into the constitutional injunction, and give the statute to carry it out a reasonable interpretation." pp. 449, 450.

Referring to § 1307 of Mr. Justice Story's Commentaries on the Constitution, and the cases cited, to which he added *Benton* v. *Burgot*, 10 S. & R. 240, the learned Judge inquired: "What, then, is the right of a State to exercise authority over the persons of those who belong to another jurisdiction, and who have perhaps not been out of the boundaries of it?" (p. 450) and quoted from Vattel, Burge, and from Mr. Justice Story, (Conflict of Laws, c. 14, § 539,) that "'no sovereignty can extend its process beyond its own territorial limits, to subject other persons or property to its judicial decisions. Every exertion of authority beyond these limits is a mere nullity, and incapable of binding such persons or property in other tribunals;'" and thus continued: "Such is the familiar, reasonable and just principle of the law of nations; and it is scarce supposable that the framers of the Constitution designed to abrogate it between States which were to remain as independent of each other, for all but national purposes, as they were before the revolution. Certainly it was not intended to legitimate an assumption of extra-territorial jurisdiction which would confound all distinctive principles of separate sovereignty; and there evidently was such an assumption in the proceedings under consideration. . . . But I would perhaps do the jurisprudence of Louisiana injustice, did I treat its cognizance of the defendants as an act of usurpation. It makes

no claim to extra-territorial authority, but merely concludes the party in its own courts, and leaves the rest to the Constitution as carried out by the act of Congress. When, however, a creditor asks us to give such a judgment what is in truth an extra-territorial effect, he asks us to do what we will not, till we are compelled by a mandate of the court in the last resort." p. 451.

In *Weaver* v. *Boggs*, 38 Maryland, 255, it was held that suit could not be maintained in the courts of Maryland upon a judgment of a court of Pennsylvania rendered upon returns of *nihil* to two successive writs of *scire facias* issued to revive a Pennsylvania judgment of more than twenty years' standing, where the defendant had for more than twenty years next before the issuing of the writs resided in Maryland and out of the jurisdiction of the court that rendered the judgment. The court said: "It is well settled that a judgment obtained in a court of one State cannot be enforced in the courts and against a citizen of another, *unless* the court rendering the judgment has acquired jurisdiction over the defendant by actual service of process upon him, or by his voluntary appearance to the suit and submission to that jurisdiction. Such a judgment may be perfectly valid in the jurisdiction where rendered and enforced there even against the property, effects and credits, of a non-resident defendant there situated; but it cannot be enforced or made the foundation of an action in another State. A law which substitutes constructive for actual notice is binding upon persons domiciled within the State where such law prevails, and as respects the property of others there situated, but can bind neither person nor property beyond its limits. This rule is based upon international law, and upon that natural protection which every country owes to its own citizens. It concedes the jurisdiction of the court to the extent of the State where the judgment is rendered, but upon the principle that it would be unjust to its own citizens to give effect to the judgments of a foreign tribunal against them when they had no opportunity of being heard, its validity is denied."

Publicists concur that domicil generally determines the par-

ticular territorial jurisprudence to which every individual is subjected. As correctly said by Mr. Wharton, the nationality of our citizens is that of the United States, and by the laws of the United States they are bound in all matters in which the United States are sovereign; but in other matters, their domicil is in the particular State, and that determines the applicatory territorial jurisprudence. A foreign judgment is impeachable for want of personal service within the jurisdiction of the defendant, this being internationally essential to jurisdiction in all cases in which the defendant is not a subject of the State entering judgment; and it is competent for a defendant in an action on a judgment of a sister State, as in an action on a foreign judgment, to set up as a defence, want of jurisdiction, in that he was not an inhabitant of the State rendering the judgment and had not been served with process, and did not enter his appearance. Whart. Conflict Laws, §§ 32, 654, 660; Story, Conflict Laws, §§ 539, 540, 586.

John Benge was a citizen of Maryland when he executed this obligation. The subject-matter of the suit against him in Pennsylvania was merely the determination of his personal liability, and it was necessary to the validity of the judgment, at least elsewhere, that it should appear from the record that he had been brought within the jurisdiction of the Pennsylvania court by service of process, or his voluntary appearance, or that he had in some manner authorized the proceeding. By the bond in question he authorized "any attorney of any court of record in the State of New York, or any other State, to confess judgment against him (us) for the said sum, with release of errors, etc." But the record did not show, nor is it contended, that he was served with process, or voluntarily appeared, or that judgment was confessed by an attorney of any court of record of Pennsylvania. Upon its face, then, the judgment was invalid, and to be treated as such when offered in evidence in the Maryland court.

It is said, however, that the judgment was entered against Benge by a prothonotary, and that the prothonotary had power to do this under the statute of Pennsylvania of February 24, 1806. Laws of Penn. 1805–6, p. 347. This statute

was proved as a fact upon the trial in Maryland, and may be assumed to have authorized the action taken, though under *Connay* v. *Halstead*, 73 Penn. St. 354, that may, perhaps, be doubtful. And it is argued that the statute, being in force at the time this instrument was executed, should be read into it and considered as forming a part of it, and therefore that John Benge had consented that judgment might be thus entered up against him without service of process, or appearance in person, or by attorney.

But we do not think that a citizen of another State than Pennsylvania can be thus presumptively held to knowledge and acceptance of particular statutes of the latter State. What Benge authorized was a confession of judgment by any attorney of any court of record in the State of New York or any other State, and he had a right to insist upon the letter of the authority conferred. By its terms he did not consent to be bound by the local laws of every State in the Union relating to the rendition of judgment against their own citizens without service or appearance, but on the contrary made such appearance a condition of judgment. And even if judgment could have been entered against him, not being served and not appearing, in each of the States of the Union, in accordance with the laws therein existing upon the subject, he could not be held liable upon such judgment in any other State than that in which it was so rendered, contrary to the laws and policy of such State.

The courts of Maryland were not bound to hold this judgment as obligatory either on the ground of comity or of duty, thereby permitting the law of another State to override their own.

No color to any other view is given by our decisions in *Johnson* v. *Chicago & Pacific Elevator Co.*, 119 U. S. 388, 400, and *Hopkins* v. *Orr*, 124 U. S. 510, cited for plaintiff in error. Those cases involved the rendition of judgments against sureties on restitution and appeal bonds if judgment went against their principals, and the sureties signed with reference to the particular statute under which each bond was given; nor did, nor could, any such question arise therein as that presented in the case at bar. *Judgment affirmed.*

JOHNSON *v.* RISK.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 81. Submitted November 18, 1890. — Decided December 8, 1890.

Where, in an action pending in a state court, two grounds of defence are interposed, each broad enough to defeat a recovery, and only one of them involves a federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court, that the judgment was rested upon the disposition of the federal question: and if this does not affirmatively appear, the writ of error will be dismissed unless the defence which does not involve a federal question is so palpably unfounded, that it cannot be presumed to have been entertained by the state court.

This was a bill filed in the Chancery Court of Shelby County, Tennessee, on October 28, 1885, by John Johnson against Thomas L. Risk, L. Tiff Risk, John D. Milburn, H. C. Warriner, Eben L. Risk, a minor, and his guardian, Alice H. Risk, all residing in Shelby County, and Frank L. Duncan and Jennie, his wife, residing in Cincinnati, Ohio. The bill averred that the complainant and one E. F. Risk, since deceased, were co-partners in the city of Memphis, under the styles of Johnson, Risk & Co. and Risk & Johnson, doing a foundry and also a mercantile business; and that on the first day of February, 1875, the firms were dissolved, and for ten thousand dollars paid to complainant, he sold and conveyed to Risk his undivided half of the real estate, and also his interest in the machinery, tools and stock of every kind, belonging to said firms, reserving their bills receivable, book accounts and debts due them, which were to remain the joint property of Risk and complainant, but were to be collected by Risk, and by him accounted for to complainant in the proportion of one-half to complainant and the other to Risk, "in the manner set forth in the deed of bargain and sale executed at the time, and a copy of which is filed with and is a part of this bill, and marked Exhibit 'A.'" It was further averred that "one condition of the said sale was that the said E. F. Risk assumed

the payment of each and all the debts and liabilities of every kind whatever of each and both of the said firms of Johnson, Risk & Co. and Risk & Johnson, and bound and obligated himself to pay the same and protect and keep the said Johnson harmless from the payment of any part thereof."

The bill then stated that among the liabilities of the firms so assumed by Risk, was one to his son L. Tiff Risk, who declined to sue his father for the debt, notwithstanding he knew of the contract "by which his father had gotten all the assets of the said firms and had agreed to pay all their debts and liabilities," but brought suit therefor against the complainant alone in the Circuit Court of Shelby County, and recovered a judgment therein, April 22, 1878, for $1260.87 and costs; that E. F. Risk never at any time paid any part of this judgment, and on the 27th of August, 1885, the complainant paid L. Tiff Risk $1000 in satisfaction thereof, by giving him his note for $150 due at four months, and another of the same date for $850 due at six months, with endorsers; and that no part of said sum had been repaid complainant, but the whole remained due and unpaid. Complainant further stated that on the 11th of July, 1878, E. F. Risk filed his petition in bankruptcy in the District Court of the United States for the District of West Tennessee under and in compliance with the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved on the third day of March, 1867, and in such petition asked to be discharged from all his debts and liabilities then existing; that subsequently, on the 20th of December, 1878, a discharge was granted him by the court aforesaid in manner and form as declared in said act; that E. F. Risk died intestate in Shelby County, Tennessee, on the 20th of June, 1882, without ever having paid any part of the debt to L. Tiff Risk, on which the latter had recovered judgment against complainant; that on the 27th of June, 1882, letters of administration on his estate were granted by the Probate Court of Shelby County to the defendant Thomas L. Risk, who was qualified and became the administrator and executed a bond as such, conditioned according to law, with the defendants John D. Milburn and

L. Tiff Risk as his sureties; that the administrator, on the 21st of August, 1882, filed an inventory of the assets of the estate, showing certain cash on hand and giving a list of personal property on which no value was set; that on the 27th of September, 1882, the said Thomas L. Risk, as such administrator, filed in the Probate Court his final settlement of the estate of E. F. Risk without giving the prescribed statutory notice to creditors and others interested in said estate; and that on the same day an order was entered confirming the settlement and discharging Thomas L. Risk as administrator, cancelling his bond and releasing his sureties from further liability. Upon this settlement it was shown by the administrator that the personalty had been disposed of, and that the whole amount with which he should be charged was $1028.49; and he also showed the debts paid, the expenses of administration, and the sum remaining for distribution, and credited himself with the sums paid the distributees of E. F. Risk, deceased, being as follows: To Mrs. Jennie Duncan, to L. Tiff Risk, to Alice H. Risk as guardian of Eben L. Risk, grandson of E. F. Risk, deceased, and himself, $202.56 each.

Complainant averred that Thomas L. Risk made the payments to the distributees without taking any refunding bond as required by the statute, and in his own wrong and without the authority of law, and that he and his sureties on his administration bond are now liable to complainant on account of the matters set out in the bill for the full amount of said payments and interest thereon until paid. Complainant further showed that on December 1, 1883, Thomas L. Risk was appointed by the Probate Court administrator *de bonis non* of the estate of E. F. Risk, deceased, and at that time gave a bond as such administrator, with defendants L. Tiff Risk and H. C. Warriner as sureties, and thereupon qualified and had since continued to be such administrator, but had filed no inventory of the assets of said estate since his appointment, and had taken no steps in the administration so far as the complainant knew or believed.

The bill then proceeded: "Upon the state of facts aforesaid the plaintiff submits that the discharge in bankruptcy of the

said E. F. Risk did not discharge him or his estates from liability to the plaintiff on the contract of indemnity, a copy of which is marked Exhibit 'A,' and a part of this bill, but such liability remains upon his estate, and the said Thomas L. Risk, as administrator thereof, personally, as if no discharge in bankruptcy had been granted; and the plaintiff further submits that the said distributees to whom the said Thomas L. Risk distributed the sums aforesaid in the manner aforesaid, to wit, (naming them), are liable and are bound by law to refund and pay the said sums so distributed to them, respectively, in order that the same may be applied towards the payment of the demand herein set up by the plaintiff against the estate of the said E. F. Risk, deceased, and the said Thomas L. Risk, as administrator." The bill prayed process, and that on the final hearing complainant might have a decree against the defendants and each of them, or such of them as were liable, jointly or severally, for the sums they respectively owed him, and for general relief.

Exhibit "A" attached to the bill bore date February 1, 1875, and recited that in consideration of ten thousand dollars, the receipt of which was thereby acknowledged, and the further consideration thereinafter mentioned, Johnson had that day bargained, sold and conveyed to E. F. Risk, his undivided half or moiety of a certain parcel of land as described, (upon which the firm's foundry building was located,) together with all the tools and machinery of every sort and kind whatever, then on said lot or in said foundry, and then continued: "This instrument further witnesseth that the firms of Johnson, Risk & Co. and of Risk & Johnson are this day dissolved, the said Johnson selling all his interest in the machinery, tools, and stock of every kind on hand belonging to both firms, to the said E. F. Risk, and part of the consideration for said sale and the above conveyance is that the said Risk assumes payment of each and all the debts and liabilities of every kind whatsoever of each and both of said firms, and binds and obligates himself to pay the same and protect and keep said Johnson harmless from the payment of any part thereof;" and it is then provided that the bills receivable, etc., shall be

collected by E. F. Risk and divided as fast as practicable between himself and Johnson, less necessary costs and charges, one-half to each; that $150 shall be paid to Johnson in cash at the end of each and every month, and whenever the monthly collections amount to $1000 or more in excess of the monthly payment of $150 to Johnson and a like amount retained by Risk, then Risk was to execute his note to Johnson for one-half of said collections, payable eight months after date, with interest. It was further provided that Johnson should retain a lien upon the real estate and machinery conveyed, Risk acknowledging the same, "together with a lien, equal to and like a mortgage upon his other undivided half of said foundry property, both land and machinery, to secure to Johnson the faithful performance of the undertakings herein made by the said Risk, which are that he will pay over to Johnson at the end of each month $150; one-half of all other collections eight months after they are made, with interest thereon at eight per cent per annum; and pay all the debts outstanding owing by the said two firms or either of them." And: "In the event that Johnson should have to pay any of said debts or be sued thereon, or should not be paid his half of the collections made as stipulated above, then he may proceed forthwith to enforce the liens herein retained and granted by proper proceeding therefor."

To this bill Thomas L. Risk in his own right and as administrator *de bonis non* of E. F. Risk, deceased, John D. Milburn and H. C. Warriner demurred, assigning as grounds that E. F. Risk was released from the debt sued for by his discharge in bankruptcy, granted on the 20th of December, 1878, on his petition in bankruptcy filed on the 11th of July, 1878; and also that the supposed cause of action was barred by the statute of limitations of two years and six months from the grant of letters of administration, June 27, 1882; and also that the cause of action did not accrue within six years next before the bringing of the suit, and was therefore barred; and a special ground as to Warriner. L. Tiff Risk filed his separate demurrer assigning the same causes. The chancellor sustained the demurrers and dismissed the bill, and complain-

ant prayed an appeal to the Supreme Court of the State, which, on the 28th of April, 1887, affirmed the decree. Complainant then sued out this writ of error.

The following are sections of the Code of Tennessee of 1884, the numbers being given of that and the preceding edition:

"3087–2249. That all creditors may be duly apprised of the death of any person indebted to them, the executor or administrator of the deceased shall, within two months after qualification, advertise at the court-house of the county where the deceased usually dwelt at the time of his death, and other public places in the county, for all persons to bring to him their accounts and demands."

"3112–2274. Executors and administrators shall have six months from the date of their qualification to ascertain the situation of the deceased's estate, and to arrange and settle it without being liable to suit and costs; and all suits commenced within that period may be abated and dismissed at the plaintiff's cost, except suits brought by sureties of the deceased, which may be brought without delay."

"3117–2279. The creditors of deceased persons, if they reside within this State, shall within two years, and if without, shall within three years from the qualification of the executor or administrator, exhibit to them their accounts, debts, and claims, and make demand, and bring suit for the recovery thereof, or be forever barred in law and equity."

"3222–2377. Creditors whose debts are not due shall be under the same obligation to present their claims as those whose debts are due, and upon failure to do so shall be barred in like manner; but a creditor shall not be bound to present his claim before due, except where the estate is represented to be insolvent as herein provided."

"3454–2760. The time between the death of a person and the grant of letters testamentary or of administration on his estate, not exceeding six months, and the six months within which a personal representative is exempt from suit, is not to be taken as a part of the time limited for commencing actions which lie against the personal representative."

"3466–2769. All civil actions, other than those for causes

embraced in the foregoing article, shall be commenced after the cause of action has accrued, within the periods prescribed in this chapter, unless otherwise expressly provided."

"3472–2775. Actions for the use and occupation of land and for rent, actions against the sureties of guardians, executors, and administrators, sheriffs, clerks, and other public officers, for nonfeasance, misfeasance, and malfeasance in office; actions on contracts not otherwise expressly provided for, within six years after the cause of action accrued."

"3481–2784. Actions against the personal representatives of a deceased person shall be commenced by a resident of the State within two years, and by a non-resident within three years after the qualification of the personal representative, if the cause of action accrued in the lifetime of the deceased, or, otherwise, from the time the cause of action accrued."

Mr. William M. Randolph, for plaintiff in error, submitted on his brief.

Mr. B. M. Estes, for defendants in error, submitted on his brief.

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

The defendants below demurred upon two general grounds, one of which involved the construction of the provisions of the bankrupt act of March 2, 1867, and the other, the bar of the statutes of limitation of the State of Tennessee. So far as we are advised, no opinion was given by the Supreme Court of that State, upon rendering the judgment of affirmance, and the record discloses no specific statement of the ground upon which the court proceeded. Inasmuch as one of the defences called for the construction and application of a State statute in a matter purely local, in respect to which great weight, if not conclusive effect, should be given to the decisions of the highest court of the State, (*Gormley* v. *Clark*, 134 U. S. 338, 348,) the plaintiff in error, if he wished to claim that this cause was

disposed of by the decision of a federal question, should have obtained the certificate of the Supreme Court to that effect, or the assertion in the judgment that such was the fact.

In *De Saussure* v. *Gaillard*, 127 U. S. 216, the general rule is stated that to give this court jurisdiction of a writ of error to a State court, "it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

Where there is a federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then if the independent ground was not a good and valid one, sufficient of itself to sustain the judgment, this court will take jurisdiction of the case, because, when put to inference as to what points the state court decided, we ought not to assume that it proceeded on grounds clearly untenable. *Klinger* v. *Missouri*, 13 Wall. 257. But where a defence is distinctly made, resting on local statutes, we should not, in order to reach a federal question, resort to critical conjecture as to the action of the court in the disposition of such defence.

Was the defence of the statute of limitations so palpably unfounded that we must presume that the state court overruled it?

The decisions of the Supreme Court of Tennessee seem to establish, as to the sections of the code of that State given above, that section 3117 relates to demands arising against deceased persons in their lifetime, and applies alike to solvent and insolvent estates, *Brown* v. *Porter*, 7 Humphreys, 373; *Miller* v. *Taylor*, 6 Heiskell, 465; that under section 3481, where the estate is solvent, the statute of limitations does not begin to run until the demand falls due or right of action accrues, *Trott* v. *West*, 9 Yerger, 433; *Hearn* v. *Roberts*, 9 Lea, 365; that the omission of the advertisement for claims prescribed by section 3087 does not prevent the running of the

statute, *Todd* v. *Wright*, 12 Heiskell, 442; that under section 3454, construed with section 3117, the resident creditor has two years and a half after qualification of the personal representative, in which to sue on demands not barred by the general statute; *Maynard* v. *May*, 2 Coldwell, 44; *Todd* v. *Wright*, 12 Heiskell, 442; and that when the general statute has commenced to run in the debtor's lifetime, death suspends its operation for not exceeding six months after that event, and prior to the grant of letters testamentary or of administration, and suit cannot be commenced against the administrator for the six months following such grant. *Bright* v. *Moore*, 87 Tennessee, 186; *Boyd* v. *Lee*, 12 Lea, 77.

The bill counted upon the liability of E. F. Risk under the agreement attached as an exhibit, and not otherwise. By that agreement Risk contracted to pay all the debts and liabilities of every kind of the firms, to assume the liabilities and to save Johnson harmless. This was broken by a failure to pay the parties to whom the firms were liable, and it was not necessary to a breach that Johnson should show that he had first paid those parties. It was not an agreement merely to indemnify Johnson from damage, but to assume the indebtedness and discharge him from liability. *Mills* v. *Dow's Administrator*, 133 U. S. 423, 432; *Wicker* v. *Hoppock*, 6 Wall. 94; *Locke* v. *Homer*, 131 Mass. 93. In the latter case, Mr. Justice Gray, then Chief Justice of Massachusetts, reviews the authorities, and cites among others, *Robinson* v. *Robinson*, 24 L. T. Rep. 112. There by an indenture of dissolution of a partnership between the plaintiff and defendant, the defendant to whom all the partnership property was transferred, covenanted to pay and satisfy within eighteen months all the debts of the partnership, and also to indemnify and save harmless the plaintiff against all costs, losses, charges, damages, claims, and demands which he might incur or become liable to in respect to the partnership debts. In an action on the defendant's covenant to pay the debts of the partnership, Lord Campbell and Justices Wightman and Erle held that the measure of damages was the whole amount of the debts which he had not paid, whether they had been paid by the plaintiff, or he had given

promissory notes for them or not. The ruling of the Supreme Court of Tennessee in *Gray* v. *Williams*, 9 Humphreys, 502, 505, is to the same effect. See also *Atkins* v. *Scarborough*, 9 Humphreys, 517.

This bill does not show when the debt to L. Tiff Risk became due, nor when suit for its recovery was commenced against Johnson, but it was of course prior to April 22, 1878, when judgment was recovered. The contract of E. F. Risk had therefore been broken prior to that time, and this action was commenced on the 28th of October, 1885, more than seven years and six months after the breach, and more than three years and four months after June 27, 1882, the date of the letters of administration to Thomas L. Risk.

Johnson was a resident of Tennessee, and should have exhibited his claim to the administrator and commenced his action within two and a half years after the letters were issued. Moreover, the cause of action on the agreement would have been barred as early as April 22, 1884, against E. F. Risk, if he had lived, and, so far as his death operated to give further time, that had also expired.

Inasmuch, therefore, as, if the Supreme Court of the State had sustained the defence of the statutes of limitation, we cannot perceive that such decision would have been erroneous, it does not appear that the judgment as rendered could not have been given without deciding the federal question, or that its decision was necessary to the determination of the cause and that it was actually decided.

The writ of error must therefore be

Dismissed.

AUFFMORDT *v.* HEDDEN.

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

No. 78. Argued November 14, 17, 1890. — Decided December 8, 1890.

On a reappraisement by a merchant appraiser and a general appraiser, under § 2930 of the Revised Statutes, the valuation of goods entered in March, 1886, was raised, and the importer paid thereon additional duties, for which he sued the collector, after protest and appeal. At the trial, the plaintiff put in evidence chapter 3, part 3, articles 447 to 506, and chapter 5, part 8, articles 1399 to 1410, and 1415 to 1417, of the general regulations under the customs and navigation laws published by the Treasury Department in 1884; and extracts from the instructions issued for the guidance of officers of the customs and others concerned, by the Secretary of the Treasury, under date of July 1, 1885, being instructions of June 9, 1885, and June 10, 1885. The importer had asked for the reappraisement, and the collector selected the merchant appraiser. He took the prescribed oath in regard to the goods in question. The defendant had a verdict in respect of the additional duties, under the direction of the court, and the importer had a judgment in respect of another matter: On a writ of error: *Held*,

(1) The instructions of the Treasury Department gave the importer all the rights to which he was entitled, and were not repugnant to that provision of §§ 2902 and 2930 which required the use of "all reasonable ways and means," in appraising, and the proper rights of the importer were accorded to him in this case;

(2) The question of the dutiable value of the merchandise was not to be tried before the appraisers as if it were an issue in a suit in a judicial tribunal;

(3) In a suit to recover back duties paid under protest, the valuation of merchandise made by the appraisers is, in the absence of fraud, conclusive on the importer, and the question as to the actual value of the merchandise cannot be tried;

(4) The merchant appraiser was not an officer, within the meaning of article 2, section 2 of the Constitution, so as to require him to be appointed by the President, or a court of law, or the head of a department;

(5) Section 2930 of the Revised Statutes was not unconstitutional in making the decision of the appraisers final.

THE case is stated in the opinion.

Mr. Henry E. Tremain, (with whom were *Mr. Mason W. Tyler* and *Mr. Alexander P. Ketchum* on the brief,) for plaintiffs in error.

Assistant Attorneys General Maury and *Parker* for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action at law, brought by Clement A. Auffmordt, John F. Degener, William Degener and Adolph William von Kessler, composing the firm of C. A. Auffmordt & Co., against Edward L. Hedden, collector of the port of New York, in the Superior Court of the city of New York, and removed by the defendant into the Circuit Court of the United States for the Southern District of New York, to recover an alleged excess of duties, paid under protest, on goods imported into the port of New York from Bremen by the steamer Main and entered at the custom-house at New York on March 13, 1886. After issue joined, the case was, on the application of the plaintiffs, separated into two causes of action, the present one covering all questions of law and fact involved in the importation, except those which concerned the rates of duty affecting it; and the trial involved in the case now before us proceeded on that basis. It was had before Judge Wheeler and a jury, and resulted in a verdict for the plaintiffs for $10, for which amount, with interest and costs, judgment was entered in July, 1887. The plaintiffs brought a writ of error, claiming that the verdict should have been for a larger sum.

The valuation of the goods on entry was 7070 francs, on which a duty of 50 per cent was paid. Afterwards the appraisers raised the valuation by adding 440 francs 10 centimes to the 7070 francs, making a total valuation of 7510 francs 10 centimes. On a reappraisement by a merchant appraiser and a general appraiser, under section 2930 of the Revised Statutes, the same result was reached; and on this valuation of 440 francs 10 centimes a duty of 50 per cent was paid, amounting to $42. The controversy in the case relates to this $42.

There is no foundation for the suggestion made in the brief for the plaintiffs that they paid any duty upon non-dutiable charges.

Various assignments of error are made which are not especially referred to in the brief for the plaintiffs; and those which are discussed in that brief may be classified under distinct heads.

Section 2930 of the Revised Statutes, under which the principal question in the case arose, was as follows: "If the importer, owner, agent, or consignee of any merchandise shall be dissatisfied with the appraisement, and shall have complied with the foregoing requisitions, he may forthwith give notice to the collector, in writing, of such dissatisfaction; on the receipt of which the collector shall select one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same, agreeably to the foregoing provisions; and if they shall disagree, the collector shall decide between them; and the appraisement thus determined shall be final and be deemed to be the true value, and the duties shall be levied thereon accordingly."

At the trial, the plaintiffs put in evidence the following-named parts of the general regulations under the customs and navigation laws, published by the Treasury Department in 1884, namely: Chapter 3, part 3, articles 447 to 506, both inclusive; chapter 5, part 8, articles 1399 to 1410, both inclusive, and articles 1415 to 1417, both inclusive; also, extracts from instructions issued for the guidance of officers of the customs and others concerned, by the Secretary of the Treasury, under date of July 1, 1885, known as Treasury Department Document No. 712, being instruction of June 9, 1885, p. 245, No. 6957; instruction of June 10, 1885, p. 249, No. 6959; and instruction of July 20, 1885, p. 305, No. 7029.

Of the general regulations of 1884, above referred to, those which are material in this case are set out in the margin.[1]

[1] "Art. 459. It is lawful for the appraisers, or the collector and naval officer, as the case may be, to call before them and examine, upon oath or affirmation, any owner, importer, consignee, or other person, touching any matter or thing which they may deem material in ascertaining the true

In the present case, the plaintiffs filed protests and appeals to the Secretary of the Treasury on the 29th of April, 1886.

---

market value or wholesale price of merchandise imported, and to require the production, on oath or affirmation, to the collector or to any permanent appraiser, of any letters, accounts, or invoices in his possession relating to the same, for which purpose they are authorized to administer oaths and affirmations. Such persons are not entitled to compensation. S. 335. And all testimony in writing or depositions thus taken will be filed in the collector's office, preserved for future use or reference, and transmitted to the Secretary of the Treasury whenever he may require the same."

Article 462 provides for the giving of a written notice by the collector to the importer of any addition to value made and certified by the appraisers, and provides for the form of such notice.

"Art. 463. If the importer be dissatisfied with the appraisement he may, if he has complied with the legal requirements, give notice of such dissatisfaction in writing to the collector. This notice must be given in all cases within twenty-four hours, or before the end of the official day after the day on which the collector gave the notice prescribed in the foregoing article, and may be in the following form (R. S. 2930):

"Form No. 102.

"*Importer's Notice to Collector Claiming Reappraisement.*

"———, ——— —, 18—.

"SIR: As I consider the appraisement made by the United States appraisers too high on ———, imported by——— ———, in the———, from———, I have to request that the same may be reappraised pursuant to law with as little delay as your convenience will permit.

"——— ———.

"——— ———, collector of the customs."

Articles 464 and 465 provide for a special report of the local appraisers to be made after such notice claiming a reappraisement is given.

"*Merchant Appraisers.*

"Art. 466. On the receipt of this report the collector will select one discreet and experienced merchant, a citizen of the United States, familiar with the character and value of the goods in question, to be associated with an appraiser at large, if the attendance of such officer be practicable, to examine and appraise the same according to law. R. S. 2930. The selection of merchant appraisers should not be confined exclusively to those connected with foreign imports, but when the requisite knowledge exists should be extended so as to embrace domestic manufacturers and producers and other citizens acting as merchants, although not dealing in foreign merchandise. S. 6111. The merchant thus selected will be notified by the collector of his appointment and of the time and place of the reëxamination

There was no decision by the Secretary on the appeals, and this suit was brought. The notice of dissatisfaction with the

---

The appraiser at large will be notified of the appeal, of the time fixed for reappraisement, and of the name of the merchant appraiser. The importer will be notified of the time and place, but not of the name of the merchant selected to assist in the reappraisement. If the attendance of an appraiser at large be impracticable, the collector will select an additional merchant, qualified as aforesaid, for the performance of the service.

"Art. 467. The notice of the appointment of the merchant appraiser will be in the following form:

"Form No. 104.

"*Appointment of Merchant Appraiser.*

"CUSTOM HOUSE, ——,
"COLLECTOR'S OFFICE, —— —, 18—.

"SIR: You are hereby appointed to appraise ——— which has been entered at this port, the importer having requested a new appraisement thereof in accordance with the provisions of the several acts of Congress providing for and regulating the appraisement of imported merchandise, and you are requested to appear at ———, at — o'clock on the — day of ———, 18—, to appraise the said goods pursuant to law.

"Before entering upon the duty indicated in the above appointment you will please call at this office to take the requisite oath.

"Very respectfully, ——— ——— *Collector.*

"To ——— ———, merchant.

"Art. 468. The oath to be taken by the merchant appraiser will be in the following form:

"Form No. 105.

"*Oath of Merchant Appraiser.*

"I, the undersigned, appointed by the collector of —— to appraise ——, imported per ——, from ——, the importer having requested a new appraisement thereof in accordance with law, do hereby solemnly swear diligently and faithfully to examine and inspect said lot of —— and truly to report, to the best of my knowledge and belief, the actual market value or wholesale price thereof at the period of the exportation of the same to the United States, in the principal markets of the country from which the same was imported into the United States, in conformity with the provisions of the several acts of Congress providing for and regulating the appraisement of imported merchandise.

"———.
"PORT OF ——.

"Sworn to and subscribed before me this — day of ——, 18—.

"———, *Collector.*

first appraisement was dated March 22, 1886, and contained a request for a reappraisement. Mr. M'Creery was selected by

---

"*Samples, &c., to be Sent to Reappraisers.*

"Art. 469. At the time fixed for reappraisement the collector will send to the appraiser at large and merchant appraiser the invoice or invoices of the merchandise to be examined and appraised. The storekeeper or other officer having charge will deliver to them the samples or packages ordered for examination, and they will proceed to examine and appraise in the manner pointed out by law. The importer or his agent will be allowed to be present and to offer such explanations and statements as may be pertinent to the case. The valuation having been determined, the appraisers will report the same to the collector."

Article 472 provides for a compensation of $5 a day to the merchant appraiser while so employed, to be paid by the party taking the appeal.

"Art. 474. Merchants' appraisements should not assume the nature of a judicial inquiry where judgment is rendered in accordance with the preponderance of testimony on either side, but should be conducted as an investigation by experts, to ascertain whether the local appraiser has reported the true and proper market value of the merchandise in question. S. 2655. Application for copies of proceedings on reappraisements should be made to the general appraiser, who will exercise his discretion in regard to furnishing the same.

"Art. 475. It shall be the duty of the appraisers of the United States, and every of them, and every person who shall act as such appraiser, or of the collector and naval officer, as the case may be, by all reasonable ways and means in his or their power, to ascertain, estimate, and appraise the true and actual market value and wholesale price, any invoice or affidavit thereto to the contrary notwithstanding, of the merchandise at the time of exportation and in the principal markets of the country whence the same has been imported into the United States, and the number of such yards, parcels, or quantities, and such actual market value or wholesale price of every of them, as the case may require."

"Art. 479. The appraisers or the collector and naval officer, as the case may be, may call before them and examine upon oath any owner, importer, consignee, or other person touching any matter or thing which they may deem material in ascertaining the true market value or wholesale price of any merchandise imported, and require the production, on oath, to the collector or to any permanent appraiser, of any letters, accounts, or invoices in his possession relating to the same. All testimony in writing or depositions taken by virtue of this section shall be filed in the collector's office and preserved for future use or reference, to be transmitted to the Secretary of the Treasury when he shall require the same. R. S. 2922."

"Art. 1407. In cases of appeal general appraisers shall pursue their inquiry into the question of the actual character and dutiable value of the goods under reëxamination in such manner as may they deem most condu-

the collector to be the merchant appraiser, but the notice to him of his selection was not put in evidence. The oath signed

---

cive to a just and equitable determination of the question. It is expected that they will arrive at that conclusion from their own knowledge and judgments as experts, in substantially the same manner as in the case of original appraisements. See article 474. S. 2655."

"Art. 1409. As the examinations of appraisers are made the basis of the general classification of importations for the imposition and assessment of duty, it becomes necessary that appraisers shall closely inspect the articles ordered for appraisement, and where they retain doubts concerning the quality or denomination of articles they shall submit samples thereof, with their opinions, to collectors, for transmission, in case of disagreement, to the Secretary of the Treasury. R. S. 2949.

"Art. 1410. Appraisers must rigidly exclude unauthorized persons from the rooms where goods are awaiting or are under examination for appraisement, and forbid their subordinates to hold communication with interested persons concerning the goods under appraisement. R. S. 2949."

"Art. 1416. Appraisers are, in cases of reappraisement, to give courteous and due attention to explanations and statements of importers, in person or by representative, relating to the subject matter under examination, but they are to limit the privilege so accorded to one person in each single case of reappraisement, to receive only statements of fact, to require all facts to be stated concisely and not argumentatively, and to pursue their inquiry into the question of the actual character and dutiable value of the goods under reëxamination in such manner as they deem most conducive to a just and equitable determination of the question. Merchant appraisers appointed in cases of appeal from the decisions of the customs appraisers are also to be governed by this article."

From the instructions of June 9, 1885: "The law of reappraisement is precisely the same as that of original appraisement, and there is no authority or justification for the system, which it appears has grown up in your office, of treating a reappraisement as in the nature of a trial in a court of law, wherein the reappraising officers sit as judges and render decisions according to the preponderance of testimony adduced. The law provides that the merchant appraiser shall be familiar with the character and value of the goods in question, and it is presumed that the general appraiser will have or will acquire such expert knowledge of the goods he is to appraise as to enable him to intelligently perform his official duty with a due regard for the rights of all parties and independently of the testimony of interested witnesses. The functions of the reappraising board are the same as those of the original appraisers. They are themselves to appraise the goods and not to depend for their information upon the appraisement of so-called experts in the line of the goods in question. I am informed that it is the practice to hold reappraisements on certain days of the week, within the hours of twelve and three, and that, owing to the number of appeals pending,

by him and sworn to before a deputy collector, on the 8th of April, 1886, was put in evidence, and was in the following

---

two or more cases are often heard at the same time by different merchant appraisers, all acting in conjunction with the general appraiser; that importers and witnesses are permitted to throng the general appraiser's office, in whose presence the conclusions of the appraising board are often announced, and that, if such conclusions are not satisfactory to the importer, he is allowed to protest and reargue the case, with a view to a modification of the finding, in which he is often successful. It is plain that all this is a wide departure from the methods of reappraisement contemplated by the law and regulations, and must necessarily result in injury to the revenue and general demoralization among officials and importers. The local appraisers are expected to do their full duty in ascertaining, estimating, and appraising the true and actual market value or wholesale price of imported merchandise at the time of exportation, and in the principal markets of the country whence the same has been imported. When appeals are taken from the valuation so found, it is expected that the general appraiser and merchant appraiser selected to act with him will reappraise the merchandise in substantially the same manner as is pursued on original appraisement. Section 2922 of the Revised Statutes authorizes appraisers to call before them and examine under oath any owner, importer, consignee, or other person, touching anything which they may deem material in ascertaining the true market value or wholesale price of any merchandise imported. It is by this law that appraisers are authorized to summon witnesses, but there is no authority for the public examination of such witnesses, or their cross-examination by importers, or counsel employed by such importers. The appraising officers are entitled to all information obtainable concerning the foreign market value of goods under consideration, but such information is not public property. It is due to merchants and others called to give such information that their statements shall be taken in the presence of official persons only. It must often occur that persons in possession of facts which would be of value to the appraisers in determining market values are deterred from appearing or testifying, by the publicity given to reappraisement proceedings. Article 1416 of the Regulations enjoins appraisers to give courteous and due attention to the explanations and statements of importers, in person or by representative, relating to the subject matter under investigation, but they are to limit the privilege so accorded to one person in each single case of reappraisement, to receive only statements of fact, and to require all facts to be stated concisely and not argumentatively. This regulation has been so construed that attorneys-at-law and custom-house brokers have appeared and acted as representatives of the importer on reappraisement. Such a construction is erroneous. The representative of the importer in such cases should be his employé or salesman — some person belonging to his house familiar with the facts touching the subject matter under consideration. There is no office here for the lawyer or cus-

terms: "I, the undersigned, appointed by the collector of the district of New York to appraise a lot of manufactures of silk and cotton imported per steamship Main from Bremen, the importer having requested a new appraisement thereof in accordance with law, do hereby solemnly swear diligently and faithfully to examine and inspect said lot of manufactures of silk and cotton, and truly to report, to the best of my knowledge and belief, the actual market value or wholesale price thereof, at the period of the exportation of the same to the United States, in the principal markets of the country from which the same was imported into the United States, in conformity with the provisions of the several acts of Congress providing for and regulating the appraisement of imported merchandise. So help me God." The plaintiffs were notified by the collector, on the 20th of April, 1886, to pay the additional duty. This was after the reappraisement, and the additional duty was paid, they having previously paid $10 for the merchant appraiser's compensation.

---

tom-house broker, and such persons, as well as all others not officially called before the appraisers, should be excluded. This Department expects that all appraising officers, including the general appraisers, will coöperate in all proper measures for the suppression of undervaluations, and be just and uniform in the appraisement of imported merchandise, to the end that the tariff laws may be strictly enforced, and fair and honorable merchants protected from loss by the dishonest practices of unscrupulous importers."

From the instructions of June 10, 1885: "Experts have been employed at several of the foreign consulates, for the purpose of enabling the consul to obtain and transmit to appraisers information as to cost of producing silks and other merchandise, so that these officers would have the means of ascertaining the cost or value of the materials composing such merchandise, together with the expense of manufacturing, preparing, and putting up such merchandise for shipment. . . . The law (section 2902, Revised Statutes) makes it your duty to ascertain, estimate, and appraise the true and actual market value and wholesale price of the merchandise at the time of exportation, and in the principal markets of the country whence the same has been imported into the United States, and when it appears that such true and actual market value cannot be ascertained to your satisfaction, you are to ascertain the cost of production, pursuant to the ninth section of the act of 1883, referred to, and in no case to appraise the goods at less than the cost so ascertained. These statutes are plain, and the appraising officers must comply with and enforce them."

Opinion of the Court.

In the course of the trial, the plaintiffs proposed to show by Mr. M'Creery that, at the time he acted as merchant appraiser in the present case, he acted as such at the same time in other cases. This testimony being objected to by the defendant as irrelevant, it was excluded, and the plaintiffs excepted. The court, however, admitted in evidence the fact that some other appraisals were going on at the same time with the one in the present case, although it excluded, under the exception of the plaintiffs, testimony as to how many of them there were.

The plaintiffs also, for the purpose of raising the point that the merchant appraiser should have been selected by virtue of the classification of employés in the classified customs service, as certified to by the Secretary of the Treasury under section 882 of the Revised Statutes, being the classification provided for by section 6 of the act of January 16, 1883, c. 27, (22 Stat. 405,) offered such classification in evidence, but it was excluded by the court under the objection of the defendant, as incompetent, immaterial and irrelevant, and the plaintiffs excepted.

They also offered to show that the merchant appraiser was not appointed under the civil service rules under the said act of 1883, but the court excluded the evidence and the plaintiffs excepted.

They also offered in evidence sundry depositions of witnesses taken before the reappraisers in this case, in regard to market value; but they were excluded by the court on the objection of the defendant, and the plaintiffs excepted.

They also offered to show by a witness the true and actual market value and wholesale price of the goods in question, and of goods identical with them, in the principal markets of the country from which they were exported, at the time of their exportation, in March, 1886; but, on the objection of the defendant that the testimony was immaterial, incompetent and irrelevant, it was excluded, and the plaintiffs excepted.

The court directed a verdict for the plaintiffs for the $10 merchant appraiser's fees. The defendant asked for a direction for a verdict for him except as to such $10. The plaintiffs requested the court to submit to the jury, for their finding,

the question whether or not there was any lawful appraisement or reappraisement in the case. The court refused so to do, but directed a verdict for the defendant except as to the $10, to which action of the court the plaintiffs excepted.

The plaintiffs then asked the court to direct a verdict for the plaintiffs for the sum claimed beyond the $10, on the ground that the statute under which the merchant appraiser was appointed was unconstitutional and void, under that provision of article 2, section 2, of the Constitution of the United States, which reads as follows: "The Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments," claiming that the merchant appraiser was an inferior officer, within the meaning of that provision, and was not appointed in accordance therewith. The court denied the motion, and the plaintiffs excepted.

They then requested the court to submit all of the testimony to the jury, with proper instructions as to what constituted an appraisement or a reappraisement, which request was refused, and the plaintiffs excepted.

They also requested the court to submit all of the evidence to the jury touching the value upon which the duty was assessed, and the value declared on entry, on the ground that section 2930 of the Revised Statutes was unconstitutional; that the plaintiffs had the right to have submitted to the jury, under proper instructions, on the evidence, all questions touching the imposition of duty; and that, by withholding the evidence from the jury, by virtue of an unconstitutional statute which declared the conclusions of the reappraisers to be final, the plaintiffs were deprived of their constitutional right to a trial by jury, in a case where, by the common law, it obtained, under article 7 of the Amendments of the Constitution. This request was denied and the plaintiffs excepted.

It is provided, by section 2902 of the Revised Statutes, that it shall be the duty of the appraisers of the United States "and every person who shall act as such appraiser," "by all reasonable ways and means in his or their power, to ascertain, estimate, and appraise the true and actual market value and

wholesale price" of the merchandise under appraisal, "at the time of exportation, and in the principal markets of the country whence the same has been imported into the United States;" and by section 2930 it is made the duty of the general appraiser and the merchant appraiser to examine and appraise the goods "agreeably to the foregoing provisions."

While the general appraiser, Mr. Brower, who acted with the merchant appraiser in the present case, was under examination as a witness on the trial, he was asked whether he proceeded on the appraisement in accordance with the instructions of the Secretary of the Treasury of June 9, 1885, and prior thereto, in respect to the method of procedure. This question was objected to by the defendant as incompetent, irrelevant, and immaterial, the court sustained the objection, and the plaintiffs excepted. The exclusion of this evidence is assigned for error. The question was too general, and was incompetent in that respect, because it called upon the witness to institute a comparison between the method pursued and the entire instructions of the Secretary of the Treasury, whereas the proper course was for the witness to give the particulars of the method pursued, leaving it to the court and the jury to make the comparison with the instructions which were in evidence. But, inasmuch as the court directed a verdict for the defendant, the plaintiffs properly raise the question as to whether what was done by the appraisers, as shown by the evidence, shows that the reappraisers proceeded "by all reasonable ways and means" to ascertain the value of the goods. In other words, the instructions of the Treasury Department being in evidence, and it being presumed that they were followed, the question is raised, whether those instructions give the importer all the rights to which he is entitled, and whether they are, or are not, repugnant to the provision of the statute which requires the use of "all reasonable ways and means," and whether the proper rights of the importers were accorded to them in this case. The views of the Circuit Court in regard to this case, as stated at the trial, are set forth in the report of it in 30 Fed. Rep. 360, and are contained also in the record. Mr. Robinson, the agent of the

plaintiffs, employed to attend to their custom-house business, and who acted in the present case, gave his testimony as to what took place in regard to the reappraisement, so far as he was cognizant of it. The court commented on his testimony and that of other witnesses, and said: "I do not gather from the testimony, as given here, that the plaintiffs or their agent understood that they were in any way excluded from their goods, which were in the adjoining room. I understand him to say that when his appraisal was going on he was at perfect liberty to be in the room where the goods were, and point them out to the appraisers, but not to the witnesses. I understand him that there was a notice on the door that led into that room that nobody would be allowed in there when the witnesses were examining the goods. When this case was up and the merchant appraiser and the general appraiser were there, if he had wanted to, he could have gone into the room and pointed out any of the goods he had a mind to. He was asked to make his statement and understood that he had the right. He didn't question but that the samples they had were the right ones. He stayed there as long as he wanted to, to do anything about pointing out his goods. I think the importer was entitled to that — to be there when the appraisal was made; to point out his goods; to know they were his goods; to illustrate them and exhibit them in any manner he saw fit; and to present to the appraisers any views he had. I think he had that right; but I am not able to say from this evidence that there was anything tending to show that he was denied that right There is one other point upon which I am not clear; that is, when this board takes testimony, (and, whether they will take it at all or not, they are to decide themselves,) whether they are bound to let the importer know that they are taking it; or, if they do let the importer know they have taken it, whether they are bound to let him know what it is, so he may answer it. But my impression is that that is discretionary with the board; that they may make inquiry by what they deem to be proper ways and means; and that the importer must rely on their fairness and judgment as to what testimony they do take and the weight they give to it; that

the fact that the importer was not informed who the witnesses were, and what they testified to, and given an opportunity to cross-examine them, and an opportunity to meet it, does not constitute a valid objection against the reappraisement."

The contention of the plaintiffs is that, under the instructions of the Treasury Department and the evidence, the question in issue as to the dutiable value of the merchandise could not be reasonably heard at all, on the reappraisement, because (1) the importer or his agent was practically excluded from the reappraisement; (2) was not afforded opportunity to support his oath on entry, or within proper limits to confront the opposing witnesses by testimony in his own behalf; (3) or to sift evidence secretly or openly heard in opposition to him; (4) or to have the aid of counsel, if he desired; and particularly, that the rule of "reasonable ways and means" could not exist in a tribunal which proceeded to examine an issuable matter under a rule which excluded lawyers.

We are of opinion that, under the statute, the question of the dutiable value of the merchandise is not to be tried before the appraisers as if it were an issue in a suit in a judicial tribunal. Such is not the intention of the statute, and the practice has been to the contrary from the earliest history of the government. No government could collect its revenues or perform its necessary functions, if the system contended for by the plaintiffs were to prevail. The regulations prescribed in the instructions from the Treasury Department are reasonable and proper. By section 2949 of the Revised Statutes, the Secretary of the Treasury has power to establish "rules and regulations, not inconsistent with the laws of the United States, to secure a just, faithful, and impartial appraisement of all merchandise imported into the United States;" and by section 2652 it is made "the duty of all officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws; and in case any difficulty shall arise as to the true construction or meaning of any part of the revenue laws, the decision of the Secretary of the Treasury" is made conclusive and binding.

The proceedings for appraisal must necessarily be to some extent of a summary character. In *Cheatham* v. *United States*, 92 U. S. 85, 88, it was said by this court, speaking by Mr. Justice Miller: "All governments, in all times, have found it necessary to adopt stringent measures for the collection of taxes and to be rigid in the enforcement of them. These measures are not judicial; nor does the government resort, except in extraordinary cases, to the courts for that purpose. The revenue measures of every civilized government constitute a system which provides for its enforcement by officers commissioned for that purpose. In this country, this system for each State, or for the Federal government, provides safeguards of its own against mistake, injustice, or oppression, in the administration of its revenue laws. Such appeals are allowed to specified tribunals as the law-makers deem expedient. Such remedies, also, for recovering back taxes illegally exacted, as may seem wise, are provided. In these respects the United States have, as was said by this court in *Nichols* v. *United States*, 7 Wall. 122, enacted a system of corrective justice, as well as a system of taxation, in both its customs and internal-revenue branches. That system is intended to be complete. In the customs department it permits appeals from appraisers to other appraisers, and in proper cases to the Secretary of the Treasury; and, if dissatisfied with this highest decision of the executive department of the government, the law permits the party, on paying the money required, with a protest embodying the grounds of his objection to the tax, to sue the government through its collector, and test in the courts the validity of the tax." It was said also in that case (p. 89) that the government "has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues." One of those conditions is and always has been, that the determination of appraisers as to the dutiable value of goods shall be conclusive and not reëxaminable in a suit at law, provided the appraisers are selected in conformity with the statute, and, in appraising, act within the scope of the powers conferred upon them. See, also, *State Railroad Tax Cases*, 92 U. S. 575, 613; *Snyder* v.

Marks, 109 U. S. 189, 193, 194; *Hilton* v. *Merritt*, 110 U. S. 97; *Arnson* v. *Murphy*, 115 U. S. 579, 585, 586: *Oelbermann* v. *Merritt*, 123 U. S. 356, 361.

In *Hilton* v. *Merritt*, it was distinctly held that the valuation of merchandise made by the appraisers was, in the absence of fraud, conclusive on the importer; that the right of appeal to the Secretary of the Treasury, when duties were alleged to have been illegally or erroneously exacted, and the right to a trial by jury in case of an adverse decision by the Secretary of the Treasury, did not relate to alleged errors in the appraisement of goods, whether by a merchant appraiser or otherwise; and that it was not allowable, in a suit to recover back duties, for the plaintiff to put in evidence the records of the proceedings before the merchant appraiser and the general appraiser, including the testimony and the various documents before the appraisers, or to try before the jury the question as to the actual value of the goods, and whether the appraisers followed the evidence before them or disregarded it. The evidence ruled out in that case was evidence which tended only to show carelessness and irregularity in the discharge of their duties by the appraisers, but not that they had assumed powers not conferred by the statute.

Although by section 29 of the act of June 10, 1890, c. 407, entitled "An act to simplify the laws in relation to the collection of the revenues," sections 2902 and 2930 of the Revised Statutes are expressly repealed, section 10 of that act provides that it shall be the duty of the appraisers of the United States, "by all reasonable ways and means," to appraise the actual market value and wholesale price of imported goods in the principal markets of the country whence the same have been imported; and section 13 of that act provides that the decision of the appraiser, or that of the general appraiser in cases of reappraisement, or that of the board of general appraisers on review, shall be final and conclusive as to the dutiable value of the merchandise, against all parties interested therein.

There is nothing in the instructions of the Secretary of the Treasury, or in any of the regulations prescribed, or in the evidence in this case, which shows that the appraisers were

not free to perform their duties properly, as required by the statute. The reappraisers appraised the goods in the appraisers' room in the public store. On the day before the reappraisement took place, the agent of the plaintiffs received due notice of it, and he attended and was called by the reappraisers before them. The merchant appraiser had then and there samples of the plaintiffs' goods, and the general appraiser asked the agent for his statement in the case, and it was made. The samples were on the table before the merchant appraiser, and the cases of goods were in the adjoining room. The agent made no objection as to the proceedings, and testifies that he was allowed to make a full statement concerning the value of the plaintiffs' goods; and the evidence fails to show that any request was made on behalf of the plaintiffs which was refused, except the request to find the value which the plaintiffs desired to be found.

It is contended for the plaintiffs that the merchant appraiser is an officer, and an inferior officer, who, under article 2, section 2, of the Constitution, could be appointed only by the President, or by a court of law, or by the head of a department. In the present case, the selection of the merchant appraiser, his oath, and the manner in which he and the general appraiser discharged their duties, were in compliance with the statute and with the Treasury regulations; but it is urged that the manner of appointing the merchant appraiser was illegal. The merchant appraiser is an expert, selected as an emergency arises, upon the request of the importer for a reappraisal. His appointment is not one to be classified under the civil service law, he is not to be appointed on a competitive examination, nor does he fall within the provisions of the civil service law. He is not a "clerk," nor an "agent," nor a "person employed," in the customs department, within the meaning of section 6 of the civil service act; nor is he an officer of the United States, required to be appointed by the President, or a court of law, or the head of a department. He is an expert, selected as such. Section 2930 requires that he shall be a "discreet and experienced merchant," "familiar with the character and value of the goods in question." He is selected for the special

case. He has no general functions, nor any employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case. He is an executive agent, as an expert assistant to aid in ascertaining the value of the goods, selected for the particular case on the request of the importer, and selected for his special knowledge in regard to the character and value of the particular goods in question. He has no claim or right to be designated, or to act except as he may be designated. The statute does not use the word "appoint," but uses the word "select." His position is without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily. Therefore, he is not an "officer," within the meaning of the clause of the Constitution referred to. *United States* v. *Maurice*, 2 Brockenbrough, 96, 102, 103; *United States* v. *Hartwell*, 6 Wall. 385, 393; *United States* v. *Germaine*, 99 U. S. 508, 510, 511; *Hall* v. *Wisconsin*, 103 U. S. 5, 8, 9; *United States* v. *Mouat*, 124 U. S. 303, 307; *United States* v. *Smith*, 124 U. S. 525, 532.

The present question is very much like that considered in *United States* v. *Germaine*. In that case, under section 4777 of the Revised Statutes, the Commissioner of Pensions was empowered to appoint civil surgeons to make a periodical examination of pensioners and to examine applicants for pensions. The question arose whether a surgeon so appointed was an officer of the United States, whose appointment was required to be made by the President, or a court of law, or the head of a department. This court held that he was not, and said, referring to the case of *United States* v. *Hartwell*: "If we look to the nature of defendant's employment, we think it equally clear that he is not an officer. In that case the court said, the term embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary. In the case before us the duties are *not* continuing and permanent, and they *are* occasional and intermittent. The surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner, or claimant of a pension, pre-

sents himself for examination. He may make fifty of these examinations in a year, or none. He is required to keep no place of business for the public use. He gives no bond and takes no oath, unless by some order of the Commissioner of Pensions of which we are not advised. No regular appropriation is made to pay his compensation, which is two dollars for every certificate of examination, but it is paid out of money appropriated for paying pensions in his district, under regulations to be prescribed by the Commissioner. He is but an agent of the Commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. He may appoint one or a dozen persons to do the same thing. The compensation may amount to five dollars or five hundred dollars per annum. There is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case. If Congress had passed a law requiring the Commissioner to appoint a man to furnish each agency with fuel at a price per ton fixed by law high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeons appointed under this statute."

This case does not present any question like that of substituting a new merchant appraiser for one already selected, as in *Greely* v. *Thompson*, 10 How. 225; nor is it a case where the appraiser did not see the original packages, as in *Greely's Administrator* v. *Burgess*, 18 How. 413; nor a case where it was offered to show that the merchant appraiser was not a person having the qualification prescribed by the statute, as in *Oelbermann* v. *Merritt*, 123 U. S. 356, and in *Mustin* v. *Cadwalader*, 123 U. S. 369; nor a case where it was contended that the appraisers did not open, examine and appraise the packages designated by the collector, as in *Oelbermann* v. *Merritt;* nor a case where to the admitted market value of an importation there was added such additional value as was equal to a reduction made in the valuation of the cases containing the goods, as in *Badger* v. *Cusimano*, 130 U. S. 39. Those were instances of errors outside of the valuation itself and outside of the appraisement prescribed by the statute.

Opinion of the Court.

Nor is there anything in the objection that section 2930 of the Revised Statutes is unconstitutional in making the decision of the appraisers final, and that the plaintiffs had a right to have the question of the dutiable value of the goods passed upon by a jury. As said before, the government has the right to prescribe the conditions attending the importation of goods, upon which it will permit the collector to be sued. One of those conditions is that the appraisal shall be regarded as final; and it has been held by this court, in *Arnson* v. *Murphy*, 109 U. S. 238, that the right to bring such a suit is exclusively statutory, and is substituted for any and every common law right. The action is, to all intent and purposes, with the provisions for refunding the money if the importer is successful in the suit, an action against the government for moneys in the Treasury. The provision as to the finality of the appraisement is virtually a rule of evidence to be observed in the trial of the suit brought against the collector.

The uniform course of legislation and practice in regard both to the mode of selection of the merchant appraiser and as to the conclusive effect of the appraisal, are entitled to great weight. *Stuart* v. *Laird*, 1 Cranch, 299, 309; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 352; *Cohens* v. *Virginia*, 6 Wheat. 264, 418, 421; *Cooley* v. *Board of Wardens*, 12 How. 299, 315; *Lithographic Co.* v. *Sarony*, 111 U. S. 53, 57; *The Laura*, 114 U. S. 411, 416.

The plaintiffs complain of the exclusion, as evidence, of a paper, Exhibit No. 14, being a report received by the collector at New York from the United States consul at Horgen, in Switzerland, dated February 25, 1886, and purporting to be a memorandum made by one Schmid, a government silk expert, concerning certain undervaluations of merchandise covered by invoices of goods to C. A. Auffmordt & Co., which embraced the goods in question. The paper was excluded by the court on the objection of the defendant that it was immaterial and irrelevant, and the plaintiffs excepted. It does not appear that the paper was used upon either of the appraisals, and, if it had been, it would have been proper to use it, as advising the officers of the government of the cost of the goods in question. It was properly excluded.

Syllabus.

The other questions discussed at the bar have been fully considered, but it is not considered necessary to comment on them. *Judgment affirmed.*

THE NACOOCHEE.

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

Nos. 87, 88. Argued November 24, 1890. — Decided December 8, 1890.

In a collision, in a dense fog which hung low down over the water, in the Atlantic Ocean off Cape May, between a steamer and a fishing schooner, the steamer was going at half-speed, between six and seven knots an hour, and the schooner about four knots an hour. When so running, the steamer would forge ahead 600 to 800 feet after reversing her engines, before beginning to go backwards. The steamer first sighted the schooner when the latter was about 500 feet distant. The schooner first sighted the steamer when 400 to 500 feet distant. The steamer reversed her engines full speed astern, in about 12 seconds, but did not attain backward motion before the collision. The bow of the steamer struck the port quarter of the schooner about 10 feet from the taffrail, and sank her. The steamer on a north half east course, had overhauled and sighted the schooner, on a north-northeast course, with the wind south southeast, about an hour before, and had passed to the eastward of her, and heard her fog-horn. Thinking she heard cries of distress to the starboard, the steamer ported and changed her course 13½ points, to south-southeast. The schooner had on deck one man at the wheel, and one man forward as a lookout and blowing the fog-horn, and 14 men below. The schooner kept her course. Her fog-horn was heard by the steamer, before the steamer sighted her: *Held*,

(1) Under Rule 21, of § 4233 of the Revised Statutes, the steamer was in fault for not going at a moderate speed in the fog;

(2) She was, under the circumstances, bound to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog;

(3) The schooner was not sailing too fast, and she blew her fog-horn properly, and she was not in fault for keeping her course, her failure to port being not a fault but, at most, an error of judgment *in extremis*, due to the fault of the steamer;

(4) As the Circuit Court did not find that the absence of another lookout on the schooner contributed to the collision, and, so far as the

Statement of the Case.

findings were concerned, the man forward on her properly discharged his double duties, there was no lack of vigilance on the part of the schooner in the matter of a lookout;

(5) The testimony not being before this court, it cannot consider exceptions to the refusals of the Circuit Court to find certain facts;

(6) As the District and Circuit Courts found both vessels in fault, and gave to the schooner only one-half of her damages, this court reversed the decree of the Circuit Court, and ordered a decree for the schooner for the full amount of her damages, with interest, and her costs in both of the courts below, and in this court.

This was a libel in admiralty, filed in the District Court of the United States for the Southern District of New York, by Edward S. Moseley and others, as owners of the fishing schooner Lizzie Thompson, against the steamer Nacoochee, to recover damages for the loss of the schooner and her outfit and the property on board of her, in consequence of her being sunk by a collision with the steamer, in March, 1883, in the Atlantic Ocean, off Cape May in the State of New Jersey.

The libel alleged negligence on the part of the steamer and absence of fault on the part of the schooner. The collision took place in the daytime in a fog. The answer of the steamer alleged that she was not in fault, and that the collision was due to negligence on the part of those on board of the schooner, in not having the fog-horn properly sounded and in not putting the helm of the schooner hard a-port when the steamer was seen to be within forty or fifty feet from her. After issue joined, the libel was amended by joining as libellants the master and crew of the schooner, for the loss of their personal effects. The case was heard by Judge Brown, and he made an interlocutory decree that the libellants recover one-half of their damages, his opinion being reported in 22 Fed. Rep. 855. On the report of a commissioner, a decree was entered in the District Court, May 19, 1885, in favor of the libellants for $5379.14, being one-half of their damages, namely, $5110.57, and their costs $256.65, and $11.92 interest.

Both parties appealed to the Circuit Court, where the case was heard before Judge Wallace. His opinion is reported in 24 Blatchford, 99, and 28 Fed. Rep. 462. He filed the following findings of fact and conclusions of law, which are con-

tained in the report in 24 Blatchford, but not in the report in 28 Fed. Rep.:

"*Findings of facts:* 1. The steamship Nacoochee, belonging to the claimants, is a propeller of about 3000 tons burden and about 310 feet long. Her propeller is a right-handed propeller, and her engines are compound and reversed by steam, and can be so reversed in 12 seconds. At full speed her propeller makes 62 revolutions a minute, and the speed attained is between 13 and 14 knots an hour. When running at half speed she would forge ahead 600 to 800 feet, after reversing her engines, before beginning to go backwards.

"2. On the 16th of April, 1883, she was bound on her regular voyage from Savannah, Georgia, to the city of New York. She was in all respects in good order, well and sufficiently equipped and manned with competent officers and men, and was blowing her fog-whistle at least once a minute. The wind was moderate and the sea calm, but a dense fog hung low down over the water. At about half-past one or two o'clock in the afternoon of that day, as she was on her usual course, north half east, off Cape May, about 10 miles to the southeast of the Five Fathom light-ship proper, and going at half speed, between six and seven knots an hour, and making 30 revolutions of the propeller to the minute, she overhauled and sighted the schooner Lizzie Thompson, and passed to the eastward of her, at a distance of about two or three hundred yards. The Lizzie Thompson, owned by the libellants, was a fishing schooner, returning from the fishing grounds, with a full fare of fish, and bound for New York, having on board sixteen men at the time the Nacoochee passed her. She was going about four knots an hour, with all sails set, upon a course of north-northeast, with the wind south-southeast, blowing at the rate of 8 to 10 miles an hour. But two men were on the schooner's deck, A. J. Small, one of them, acting as a lookout and blowing the fog-horn, and Samuel Kimball, aged twenty, at the wheel. The other fourteen men were all below deck.

"3. At this time, when the Nacoochee was passing the Lizzie Thompson, the fog-horn of the schooner was heard upon the steamer and the steamer's whistle was heard by those

on the schooner. Most of the schooner's crew came on deck and saw the steamer till she disappeared ahead in the fog, and then went below. The steamer continued her course north half east until those on board heard what they supposed to be cries of distress on their starboard beam. This was about half-past two o'clock. These cries were heard by the captain and others on board the steamer. After some conference with respect to these cries, and several persons agreeing as to their apparent character, the steamer's helm was put hard to port, and she swung around until she headed a south-southeast course, when her helm was steadied. Very soon afterwards the schooner Lizzie Thompson was suddenly sighted, looming up in the fog on the steamer's starboard bow, about 500 feet away.

"4. The captain of the steamer immediately ordered the engines reversed full speed astern, which orders were immediately obeyed and put into execution within about 12 seconds, but a collision occurred between her and the Lizzie Thompson, the schooner's port quarter aft of the main chains and about ten feet from the taffrail colliding with the bow of the Nacoochee, which penetrated two or three feet into the schooner, causing the schooner to sink in a very few moments. All her crew were saved and taken on board the steamer, which then resumed her former course N. ½ E., and pursued her way to New York, arriving there the next morning.

"5. The Lizzie Thompson had continued on her course of north-northeast, after the steamer passed her for the first time, without change up to the moment of collision. The fog continued and was dense, and the same men were on deck, Samuel Kimball at the wheel and A. J. Small on the watch and blowing the horn, and all the others were below deck, including her captain, sitting around. All the sails were set, and she was sailing at the rate of about four miles an hour.

"6. Just before the collision Lookout Small, on the schooner's deck, saw the steamer appearing through the fog and bearing down on them on their port side, about 400 to 500 feet off. He then shouted, 'A steamer is coming into us,' and the men below then came upon deck. Florence McKown, her

captain, who sat in the cabin, when he heard the watch sing out, 'A steamer is coming into us,' told the man at the wheel to keep his course, and jumped on deck, and saw the steamer approaching on the port quarter. No change was made in the schooner's helm, and she continued her north-northeast course up to the very moment of collision.

"7. After the steamer had turned to go to the supposed cries of distress the captain took his position in front of the pilot-house. A seaman, Andrew Johnson, was on the lookout, standing right up forward as far as he could get; the second officer was on watch in the pilot-house; and the quartermaster was at the wheel. All of them heard the fog-horn of the schooner and immediately after saw the schooner appearing through the fog off on the starboard bow, about 500 feet away. The captain gave his orders to back full speed astern, and took his position at the stem of the steamer and called out to those on board the schooner, 'Port the helm.'

"8. That, when a screw vessel like the Nacoochee is going through the water at the rate of six miles an hour, and the engines are reversed 'full speed astern,' porting the helm or starboarding the helm has no effect at all on the vessel while she is still going ahead. The Nacoochee had not attained backward motion when she struck the schooner.

"9. That, immediately before the collision, the two vessels did not sight each other through the fog at the same moment, but that the Nacoochee first sighted the Lizzie Thompson when the latter was about 500 feet distant and the Lizzie Thompson first sighted the Nacoochee when 400 to 500 feet distant.

"*Conclusions of law:* 1. That the steamship Nacoochee was in fault, contributing to this collision, for not going at moderate speed in a fog.

"2. That the schooner was in fault, and in this respect, namely, that she was sailing too short-handed in the fog, and was guilty of negligent navigation in having but one man forward charged with the double duties of a lookout and blowing the horn, and one man astern, who was a youth of 20 only, at the wheel, all the other fourteen men, including the captain, being below deck.

Argument for the Nacoochee.

"3. The decree of the District Court is affirmed, without costs of this court to either party."

The claimant of the steamer filed six exceptions to the refusal of the court to find certain facts as prayed by the claimant, such exceptions being based on the ground that the facts so requested to be found were proved by the evidence and not contradicted by any material evidence in the case, and that, therefore, the refusal of the court to find the same was an error of law, as a finding against the evidence. The claimant also excepted to the first conclusion of law and to certain findings of fact as being unsupported by any evidence; also to the refusal of the court to make four several conclusions of law, as prayed for — (1) that the steamer was not in fault as contributing to the collision; (2) that the schooner was in fault, because she was sailing at the rate of five miles an hour before the wind, with every sail set, in a dense fog; (3) that the schooner was guilty of negligent navigation, because, immediately before the collision, she did not port her helm in order to avoid immediate danger, when by so doing she could have escaped the collision, and that Rule 24 required her to depart from Rule 23 on the occasion, and that she was not justified in keeping her course up to the moment of collision; (4) that the libel should be dismissed, with costs of the District and Circuit Courts. There was a bill of exceptions, setting forth the foregoing exceptions, but none of the testimony is embodied in the transcript of the record.

A final decree was made by the Circuit Court, that the libellants recover one-half of the damages sustained by them, amounting to $5110.57, with interest from May 19, 1885, being $421.60, and their costs in the District Court, taxed at $256.65, amounting in all to $5788.82. As both parties had appealed, no costs of the Circuit Court were given to either of them. From the decree of the Circuit Court both parties have appealed to this court.

Mr. Nathan Bijur for the steamship Nacoochee.

I. There is one element in this case which must be borne in mind, and which colors all the facts and distinguishes it from

all other cases of collision involving the question of speed, and that is that the Nacoochee turned about to save life, and was on a life-saving errand when the collision occurred. It was evident that she had not only the right to change her course, but it was her duty to do so when supposed cries of distress were heard. *The Boston*, 1 Sumner, 328, 335; *The George Nicolaus*, Newberry Adm. 449, 451; *The Edwin Hawley*, 41 Fed. Rep. 606.

The Nacoochee being on an errand to save life, and turned in the direction of the cries, was compelled to proceed expeditiously, and so had to maintain speed enough for that purpose. The 23d rule expressly provides that all rules must be construed in reference to any special circumstances which may render a departure from the other rules necessary; and in considering, therefore, whether the steamer was guilty of violating the rule which prescribes that vessels shall go at moderate speed in a fog, regard must be had to the fact that she was engaged in a service which required her to move as promptly as possible. As was said in *The Leland*, 19 Fed. Rep. 771: "What is a moderate and what is a dangerous rate of speed are, of course, to some extent comparative terms, depending upon the surrounding circumstances."

It is of course admitted that the fact that she was engaged in trying to save life would not authorize the steamer to forge ahead at full speed and discharge her from any obligation to observe due precautions to avoid vessels which might be in the neighborhood. But nothing of the kind appears in this case. On the contrary, it is expressly found by the court that she was going only at half speed, that she could be stopped within 800 feet, and that the strictest lookout was kept.

The court below cites, to support its view that there was no moderate speed in this case, the rule laid down in *The Batavier*, 40 Eng. Law and Eq. 9, 25, which has been quoted with approval by this court in the case of *The Colorado*, 91 U. S., on page 703. That rule says: "At whatever rate she (the steamer) was going, if going at such a rate as made it dangerous to any craft which she ought to have seen and might have seen, she had no right to go at that rate."

We claim that that rule could only be invoked against us if it were shown that it was possible for us to have known that at our rate of speed other vessels could not be seen within the distance necessary to stop the ship. If the mere fact that a collision occurred because the steamer could not be stopped is evidence that the steamer was running at a speed which under the circumstances was not moderate, then the consequence would be that in every case of collision the steamer must be held to have contributed to the accident and to be liable for at least half the damages.

II. The schooner was at fault, in not keeping a sufficient lookout, and having a boy of only slight experience at the helm. Where there is a crew of sixteen persons, and fourteen, including the captain, are below, and although there is a fog, only one man is charged with the duty both of sweeping the horizon on all points of the compass and blowing the fog-horn, it certainly is strange to claim that when a collision occurs the steamer, which kept the best possible lookout, is at fault, and the schooner is not.

Mr. Wilhelmus Mynderse for the libellants.

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

It is contended for the steamer that she was not guilty of any neglect in going at the rate of speed found. Her full rate of speed was between thirteen and fourteen knots an hour. When she first overhauled the schooner her speed was between six and seven knots an hour, and she kept up the latter speed until she reversed her engines on suddenly sighting the schooner in the fog, about five hundred feet away. At the time this collision took place the rules of navigation found in section 4233 of the Revised Statutes were in force. By Rule 15, whenever there was a fog or thick weather, whether by day or night, a sail-vessel under way was required to sound a fog-horn at intervals of not more than five minutes. By Rule 20, "If two vessels, one of which is a sail-vessel and the other a

steam-vessel, are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sail-vessel." By Rule 21, "Every steam-vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam-vessel shall, when in a fog, go at a moderate speed." By Rule 23, "Where by Rules seventeen, nineteen, twenty, and twenty-two, one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of Rule twenty-four." By Rule 24, "In construing and obeying these rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger."

It is urged on the part of the steamer, that, in determining the question whether her speed was a moderate one in the fog, it is to be considered that she supposed she was on a life-saving errand, and was hastening towards what she thought were cries of distress, which required her to move as promptly as possible. It is found as a fact that, when running at half speed, as she was, she would forge ahead 600 to 800 feet, after reversing her engines, before beginning to go backwards; and that she had not attained backward motion when she struck the schooner. This, it is contended, was a moderate speed. It is urged, that if the master of the steamer thought that the fog was of such a character that he could see a vessel at a distance of about 800 feet, and it turned out that the fog was more dense than he thought it to be, he committed merely an excusable error of judgment, and was not guilty of negligence. But we cannot regard these views as controlling. The steamer was bound to keep out of the way of the schooner, and the burden rests upon her to show a sufficient reason for not doing so. She must be held wholly responsible, unless she shows a fault on the part of the schooner which contributed to the collision, or that it was due to unavoidable accident. The latter is not shown, and it is shown that the steamer was not going at a moderate speed in the fog. It is found that the steamer first sighted the schooner when the latter was about

500 feet distant, and that the fog was dense and hung low down over the water. The steamer, from her own course and that of the schooner, when the former overhauled and passed the latter, must have known, by the lapse of time before she heard the supposed sounds of distress, that, when she changed her course, by porting, 13½ points, to south-southeast, it was quite likely she would encounter the schooner. She was bound, therefore, to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a stand-still, by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog. This is the rule laid down by this court in the case of *The Colorado*, 91 U. S. 692, 702, citing *The Europa*, 2 Eng. Law & Eq. 557, 564, and 14 Jurist, pt. 1, 627, and *The Batavier*, 40 Eng. Law & Eq. 19, 25, and 9 Moore P. C. 286. The rule laid down in the last named case is that, at whatever rate a steamer was going, if she was going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate. See also *The Pennsylvania*, 19 Wall. 125, 134.

The rule is still maintained, and is expressed as follows, in article 16 of section 1 of the act of August 19, 1890, c. 802, entitled "An act to adopt regulations for preventing collisions at sea:" "Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions."

In the present case, the steamer discovered the schooner on her starboard bow, about 500 feet away, looming up in the fog. The speed of the schooner was about four knots an hour and that of the steamer between six and seven knots, the combined rate being over ten knots an hour, or over 1000 feet a minute; so that, at a distance apart of 500 feet, the vessels, at the combined speed, were not over half a minute apart. The steamer's engines could be reversed in twelve seconds; but, although they were reversed at full speed astern, she had not attained backward motion when she struck the schooner. This was not the moderate speed required by the statute. During the twelve seconds necessary to reverse the engines the steamer

would progress ahead 200 feet, leaving the distance between the vessels at the time the steamer commenced to back only 300 feet.

Both of the courts below found the schooner to be in fault. The fault found by the Circuit Court was that the schooner was sailing too short-handed in the fog, and was guilty of negligent navigation in having but one man forward, charged with the double duties of a lookout and blowing the fog-horn, and one person astern, a youth of only twenty, at the wheel, while all the other fourteen men, including the master, were below deck. In addition, it is contended here for the steamer, that the schooner was sailing too fast in the fog, and that she kept her course, instead of porting, when she sighted the steamer.

It is alleged, in the answer of the steamer, that the schooner was in fault in not putting her helm hard a-port when the steamer was seen to be within forty or fifty feet from her; but it is not averred in the answer that the schooner was sailing too fast in the fog. It is, however, alleged in the answer that the schooner was in fault in not having her fog-horn properly sounded; but this latter defence cannot be maintained, because it is found by the Circuit Court that the officers of the steamer all of them heard the fog-horn of the schooner before they saw her.

It is contended that the schooner could have avoided the collision by porting her helm when she saw the steamer. But it was the primary duty of the schooner, under Rule 23, to keep her course; and, when her master was notified of the approach of the steamer, he told the man at the wheel of the schooner to keep his course, and no change was made in her helm up to the very moment of collision. Even if it was an error of judgment in the schooner to hold her course, it was not a fault, being an act resolved upon *in extremis*, a compliance with the statute, and a manœuvre produced by the fault of the steamer. *New York & Liverpool Steamship Co.* v. *Rumball*, 21 How. 372, 383; *The Nichols*, 7 Wall. 656, 666; *The Carroll*, 8 Wall. 302, 305; *The Elizabeth Jones*, 112 U. S. 514, 526; *The Bywell Castle*, 4 Prob. Div. 219.

Opinion of the Court.

In regard to the alleged fault of the schooner in sailing too short-handed in the fog, and having only two men on deck, one of them forward, charged with the double duties of a look-out and blowing the horn, and one astern at the wheel, it is not found by the Circuit Court as a fact that the absence of another lookout contributed to the collision, nor are any facts found which can justify that conclusion, either as fact or law. So far as the findings are concerned, the man forward properly discharged his double duties. He blew the fog-horn and it was heard on board the steamer, and it is not found that he did not blow it properly or in accordance with the statute. Nor is it found that he could have performed the duties of a lookout better than he did, or that any different manner of performing those duties, either by him or an additional look-out, could or would have made any difference in the result, or that the steamer would or could have been seen by the schooner any sooner than she was seen. The finding is that the steamer first sighted the schooner when the latter was about 500 feet distant, and the schooner first sighted the steamer when 400 to 500 feet distant. The schooner being low in the water and the fog hanging low down over the water, it was, of course, denser on the deck of the schooner than it was on the higher deck of the steamer, and those on the steamer naturally would see the masts and sails of the schooner up in the lighter fog before the vision of the lookout on the schooner would penetrate the denser fog which enveloped him. Under all these circumstances, and in view of the actual findings, it cannot be held that there was any lack of vigilance on the part of the schooner in the matter of a lookout. *The Farragut*, 10 Wall. 334; *The Fannie*, 11 Wall. 238, 243; *The Annie Lindsley*, 104 U. S. 185, 191.

Nor is there anything in the suggestion that the schooner was sailing too fast. It is not so averred in the answer or found by the Circuit Court.

The exceptions to the refusals of the Circuit Court to find certain facts cannot be considered, because the testimony is not before us. *The Francis Wright*, 105 U. S. 381. The excep-

tions to the refusal to find certain conclusions of law are considered sufficiently in what has been said already.

The decree of the Circuit Court is reversed, and the case is remanded, with a direction to enter a decree for the libellants for the full amount of their damages, with interest from the date of the report of the commissioner in the District Court, and for their costs in the District Court and in the Circuit Court, and in this court, on both appeals.

SOLOMONS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 64. Argued November 10, 11, 1890. — Decided December 8, 1890.

When a person in the employ of the United States makes an invention of value and takes out letters patent for it, the government, if it makes use of the invention without the consent of the patentee, becomes thereby liable to pay the patentee therefor.

If a person in the employ and pay of another, or of the United States, is directed to devise or perfect an instrument or means for accomplishing a prescribed result, and he obeys, and succeeds, and takes out letters patent for his invention or discovery, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer.

When a person in the employ of another in a certain line of work devises an improved method or instrument for doing that work, and uses the property of his employer and the services of other employés to develop and put in practicable form his invention, and explicitly assents to the use by his employer of such invention, a jury, or a court trying the facts, is warranted in finding that he has so far recognized the obligations of service flowing from his employment and the benefits resulting from his use of the property, and the assistance of the coemployés, of his employer, as to have given to such employer an irrevocable license to use such invention.

McClurg v. *Kingsland*, 1 How. 202, affirmed and applied.

During the years 1867 and 1868 Spencer M. Clark was in the employ of the government as Chief of the Bureau of Engraving and Printing. That bureau was not one created by any special act of Congress, but was established by order

of the Secretary of the Treasury, under the general powers conferred by the second section of the act of July 11, 1862, 12 Stat. 532, now § 3577 Rev. Stat., which provides as follows:

"That the Secretary of the Treasury be, and is hereby, authorized, in case he shall think it inexpedient to procure said notes, or any part thereof, to be engraved and printed by contract, to cause the said notes, or any part thereof, to be engraved, printed, and executed, in such form as he shall prescribe, at the Treasury Department in Washington, and under his direction; and he is hereby empowered to purchase and provide all the machinery and materials, and to employ such persons and appoint such officers as may be necessary for this purpose."

While so employed he conceived the idea of a self-cancelling stamp, and under his direction the employés of that bureau, in the fall of 1867, using government property, prepared a die or plate, and put into being the conception of Mr. Clark. On February 10, 1868, Clark filed a caveat in the Patent Office, and on September 1 an application for a patent. While this application was pending, and on December 6, 1869, he assigned, by deed duly recorded, his rights to the appellant, in payment of a long-standing account of appellant against him. On December 21, 1869, the patent was issued to appellant, as the assignee of Clark, antedated to June 21, 1869. On December 27, 1869, appellant notified the Commissioner of Internal Revenue that he was the owner of the patent, and sought an arrangement for proper compensation for the use of this patented stamp by the government on whiskey barrels. No answer was made to this communication, and on September 17, 1875, appellant brought this suit in the Court of Claims to recover from the government for such use. In addition to the matters heretofore stated, the following facts were found by the Court of Claims:

"I. In the latter part of 1867, or early part of 1868, while the subject of revising the methods for collecting internal revenue was being considered by the Committee on Ways and Means of the House of Representatives, a subcommittee was

given special charge of the tax on whiskey and distilled spirits. A room was assigned by the Secretary of the Treasury in the Treasury building to this subcommittee, which immediately proceeded to hold official consultations with the Secretary of the Treasury and Commissioner and Deputy Commissioner of Internal Revenue. Into these consultations Spencer M. Clark, the Chief of the Bureau of Engraving and Printing, was called officially, and to him was assigned the duty of devising a stamp, and it was early determined and understood by all, including Mr. Clark, that the scheme would proceed upon the assumption that the best stamp which he could devise would be adopted and made a part of the revised scheme. In these consultations it was mutually understood that Mr. Clark was acting in his official capacity, as Chief of the Bureau of Engraving and Printing, and it was not understood or intimated that the stamp which he was to devise would be patented or become his personal property.

"II. In the course of the consultations referred to in the first finding, Mr. Clark laid before the Commissioner and subcommittee a self-cancelling revenue stamp as being, in his opinion, a very desirable stamp for the prevention of fraud. This stamp was satisfactory to the Committee on Ways and Means and to the Commissioner of Internal Revenue. It was of the same design and construction as the stamp subsequently adopted by the Commissioner and manufactured and used by the government, as hereinafter set forth, and was the same device as that set forth and described in the specifications of Clark's patent annexed to and forming part of the petition.

"III. No bargain, agreement, contract or understanding was ever entered into or reached between the officers of the government and Mr. Clark concerning the right of the government to use the invention or concerning the remuneration, if any, which should be paid for it. Neither did Mr. Clark give notice or intimate that he intended to protect the same by letters patent, or that he would expect to be paid a royalty if the government should manufacture and use stamps of his invention. Before the final adoption of the stamp by the Commissioner of Internal Revenue he stated to him that the

design was his own, but that he should make no charge to the government therefor, as he was employed on a salary by the government and had used the machinery and other property of the government in the perfection of the stamp. No express license to use the invention was ever given by Mr. Clark to the government, nor any notice prohibiting its use or intimating that he would demand a royalty.

"IV. Immediately after the enactment of the act 20th July, 1868 (15 Stat. 125), and before Mr. Clark had filed an application for a patent, the Commissioner of Internal Revenue adopted the stamp as the one to be used in the collection of the tax on whiskey and distilled spirits. It was adopted by the Commissioner on the recommendation of Mr. Clark. The Commissioner's selection referred to the completed and perfected stamp which had been devised by the claimant and engraved and made in the Bureau of Engraving and Printing and approved by the Committee of Ways and Means, as set forth in the second finding. The Government then proceeded to manufacture at the Bureau of Engraving and Printing large quantities of these stamps. The first so manufactured were delivered to the Commissioner of Internal Revenue on the 25th August, 1868, and the 2d November following was fixed by the Secretary of the Treasury as the day for commencing the use thereof. Their manufacture and use were continued until some time in the year 1872, the last issue to the collection districts being on February 15, 1872."

And upon these facts judgment was entered in favor of the government. 21 C. Cl. 479, and 22 C. Cl. 335. From such judgment an appeal was brought to this court.

Mr. Lewis Abraham and *Mr. Benjamin F. Butler* for appellant.

Mr. Solicitor General for appellees.

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

The case presented by the foregoing facts is one not free from difficulties. The government has used the invention of

Mr. Clark and has profited by such use. It was an invention of value. The claimant and appellant is the owner of such patent, and has never consented to its use by the government. From these facts, standing alone, an obligation on the part of the government to pay naturally arises. The government has no more power to appropriate a man's property invested in a patent than it has to take his property invested in real estate; nor does the mere fact that an inventor is at the time of his invention in the employ of the government transfer to it any title to, or interest in it. An employé, performing all the duties assigned to him in his department of service, may exercise his inventive faculties in any direction he chooses, with the assurance that whatever invention he may thus conceive and perfect is his individual property. There is no difference between the government and any other employer in this respect. But this general rule is subject to these limitations. If one is employed to devise or perfect an instrument, or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer. That which he has been employed and paid to accomplish becomes, when accomplished, the property of his employer. Whatever rights as an individual he may have had in and to his inventive powers, and that which they are able to accomplish, he has sold in advance to his employer. So, also, when one is in the employ of another in a certain line of work, and devises an improved method or instrument for doing that work, and uses the property of his employer and the services of other employés to develop and put in practicable form his invention, and explicitly assents to the use by his employer of such invention, a jury, or a court trying the facts, is warranted in finding that he has so far recognized the obligations of service flowing from his employment and the benefits resulting from his use of the property, and the assistance of the coemployés, of his employer, as to have given to such employer an irrevocable license to use such invention. The case of *M'Clurg* v. *Kingsland*, 1 How. 202, is in point. In that case was presented the question as to the right of defendants to use an invention

made and patented by one Harley. The facts as stated and the rulings of the court are these: "That Harley was employed by the defendants at their foundry in Pittsburgh, receiving wages from them by the week; while so employed, he claimed to have invented the improvement patented, and, after several unsuccessful experiments, made a successful one in October, 1834; the experiments were made in the defendants' foundry, and wholly at their expense, while Harley was receiving his wages, which were increased on account of the useful result. Harley continued in their employment on wages until January or February, 1835, during all which time he made rollers for them; he often spoke about procuring a patent, and prepared more than one set of papers for the purpose; made his application the 17th February, 1835, for a patent; it was granted on the 3d of March, assigned to the plaintiffs on the 16th of March, pursuant to an agreement made in January. While Harley continued in the defendants' employment, he proposed that they should take out a patent, and purchase his right, which they declined; he made no demand on them for any compensation for using his improvement, nor gave them any notice not to use it, till, on some misunderstanding on another subject, he gave them such notice, about the time of his leaving their foundry, and after making the agreement with the plaintiffs, who owned a foundry in Pittsburgh, for an assignment to them of his right. The defendants continuing to make rollers on Harley's plan, the present action was brought in October, 1835, without any previous notice by them. The court left it to the jury to decide what the facts of the case were; but, if they were as testified, charged that they would fully justify the presumption of license, a special privilege, or grant to the defendants to use the invention; and the facts amounted to 'a consent and allowance of such use,' and show such a consideration as would support an express license or grant, or call for the presumption of one to meet the justice of the case, by exempting them from liability; having equal effect with a license, and giving the defendants a right to the continued use of the invention." On review in this court, the rulings of the trial

court were sustained. That case is decisive of this. Clark was in the employ of the government when he made this invention. His experiments were wholly at the expense of the government. He was consulted as to the proper stamp to be used, and it was adopted on his recommendation. He notified the government that he would make no charge if it adopted his recommendation and used his stamp; and for the express reason that he was in the government employ, and had used the government machinery in perfecting his stamp. He never pretended, personally, to make any charge against the government. Indeed, there is but one difference between that case and this: in that, Harley's wages were increased on account of his invention; in this, Clark's were not; but such difference does not seem vital. We think, therefore, the rulings of the Court of Claims were correct, and its judgment is

Affirmed.

MONTANA RAILWAY COMPANY *v.* WARREN.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

No. 80. Argued November 18, 19, 1890. — Decided December 8, 1890.

In this case the record contained the pleadings and a motion for a new trial, which motion was authenticated by the trial judge and set forth at length all the proceedings at the trial, including the evidence, the exceptions to testimony, the instructions to the jury, the exceptions to those instructions, a bill of exceptions in due form, properly certified by the presiding judge, the verdict, and the judgment on the verdict. This proceeding was in accordance with the practice authorized by the Statutes of Montana. *Held*, that it was sufficient for the purposes of review here.

Kerr v. *Clampitt*, 95 U. S. 188, distinguished from this case.

In this court inquiry is limited to matters presented to and considered by the court below, unless the record presents a question not passed upon by that court, which is vital, either to the jurisdiction, or to the foundation of right, and not simply one of procedure.

In a proceeding under the right of eminent domain to condemn, for use in the construction of a railroad, an undeveloped "prospect" in mineral land, the testimony of a competent witness, familiar with the country and its surroundings, as to the value of the land taken, may be received in evidence, inasmuch as such property is the constant subject of barter and

sale, although its absolute and intrinsic value may be uncertain before development.

As it is difficult to lay down any exact rule as to the amount of knowledge which a witness as to the value of lands condemned for use in the construction of a railroad must possess, the determination of that matter must rest largely in the discretion of the trial judge.

THIS action was commenced by a petition filed by the Montana Railway Company, upon which Commissioners were appointed, to assess the damages to the respondents, for a right of way of the company's line of road over a certain mining claim in Silver Bow County, Montana, known as the Nipper Lode. The Commissioners assessed the damages at $1552. From their award Warren appealed to the District Court of the second judicial district of Silver Bow County where the case was tried before a jury who returned a verdict assessing the damages at $7000. A motion by the railway company for a new trial having been overruled and denied, and a judgment rendered on the verdict, the railway company carried the case to the Supreme Court of the Territory of Montana, where the judgment below was affirmed. The company thereupon sued out this writ of error. The case is stated in the opinion.

Mr. John F. Dillon, (with whom was *Mr. Harry Hubbard* on the brief,) for plaintiff in error.

Mr. S. S. Burdett for defendants in error.

MR. JUSTICE BREWER delivered the opinion of the court.

The plaintiff in error desiring to construct its railroad through a tract of land belonging to the defendants in error, the same being a mining claim known as the Nipper Lode, situated in Silver Bow County, Montana Territory, took appropriate proceedings for the condemnation of a right of way. The appraisers assessed the damages at $1552. From such appraisement the defendants appealed to the District Court; and on trial there the jury found the damages to be $7000, for which, with costs, judgment was entered against the rail-

road company. An appeal was taken to the Supreme Court of the Territory, which affirmed this judgment; which judgment of affirmance has been brought before us for consideration. The opinion of that court will be found in 6 Montana, 275.

A preliminary question is presented by the defendants in error: They insist that no bill of exceptions was taken at the trial, and that therefore no rulings of the trial court are before us for consideration, citing as authority the case of *Kerr* v. *Clampitt*, 95 U. S. 188. In that case, as in this, after the trial a statement of the errors alleged, upon which a motion for a new trial was based, was prepared and filed; but, although signed by counsel, it was held by this court to be not the equivalent of a bill of exceptions, and to be available only for the purpose expressed, to wit, the motion for a new trial. There was in that case no stipulation that the statement should be treated as a bill of exceptions, or be available for other purposes than that of a new trial. It was not authenticated by the trial judge. Lacking that authentication, it was adjudged available only for the purpose named; and that it did not bring into the record, for review, in this court, the questions presented. In this case the proceedings on the trial are embodied in a statement prepared like that for the purpose of a motion for a new trial; but in addition, it is authenticated by the trial judge as a correct statement of the proceedings. Further than that, at the trial a bill of exceptions was prepared in respect to the rulings of the court on instructions, signed by the trial judge and filed at the time, which bill of exceptions was incorporated in the statement. So that we have a separate and perfect bill of exceptions as to the ruling of the court on the matter of instructions; and a statement of all the proceedings in the trial, approved by counsel and authenticated by the trial judge. This proceeding was authorized by the statutes of Montana, and must be adjudged as sufficient for the purposes of review here.

When the case was brought to the Supreme Court of Montana, no new assignments of error were made. The only specifications of error were in the statement prepared for the

motion for a new trial in the District Court. Perhaps nothing more was necessary; and all the questions arising on the trial may have been open to consideration. Be that as it may, the opinion of the Supreme Court opens by saying: "There are assignments of error in the statement which are not referred to in appellant's brief, and which will therefore not be considered by this court. Those relied upon are as follows." It then discusses them; and closes with the statement that "these are all the errors complained of and relied upon in appellant's brief." The court also comments upon the character of the record, and says: "It is certainly apparent that it is not such a record as should be filed in this court." The question now arises whether our inquiry is limited to the matters presented to and considered by that court, or should be broadened to all matters that transpired at the trial. Obviously, the former. Error is alleged in the judgment of the Supreme Court of the Territory; and if, in all matters presented to it, its rulings were correct, it cannot be affirmed that its judgment was erroneous, because there were in the record matters not vital to the question of jurisdiction or the foundation of right, but simply of procedure, to which its attention was not called, and in respect to which its judgment was not invoked. All such matters must be considered as waived by the complaining party. It would be an anomaly if a party feeling himself aggrieved by the rulings of a trial court could appeal to the Supreme Court of his Territory, and invoke its judgment on certain alleged errors; and, when defeated there, could transfer the judgment of that Territorial Supreme Court to this, and ask a reversal here of its judgment on grounds involving mere matters of procedure in the prior trial, to which its attention was not directed. It is fundamental that when the judgment of a court is challenged in error, its rulings alone are open to consideration. Of course, if the trial court had no jurisdiction, that is a matter which is always open, and the attention of the court of last resort may be called thereto in the first instance; but mere matters of error may always be waived, and they are waived when the attention of the reviewing court is not called to them. Our conclusion, therefore,

is that our inquiry in this case is only in relation to the matters presented to and reviewed by the Supreme Court of the Territory.

They are three in number: First, that the verdict indicates passion and prejudice. Obviously, there is no foundation for this. If the testimony admitted by the trial court was competent, there was ample foundation for the verdict. If the witnesses were to be believed and their testimony was competent, the verdict was not excessive; and the second of the three points presented to the Supreme Court, which was that the evidence was not sufficient to justify the verdict, thus fails. There remains for consideration but a single point — that there was admitted in evidence on the trial the opinions of witnesses as to the value of the land, which were not based upon the sale of the same or similar property, and were not, therefore, the opinions of persons competent to so testify. It appears that the land taken was a strip running through a mining claim, which had been patented and belonged to the defendants in error. The claim adjoined the Anaconda mining claim, which had been developed and worked, and demonstrated to contain a vein of great value. The claim in controversy had been developed so far as to indicate that possibly, perhaps probably, the same rich vein extended through its territory. It had not been developed so far that this could be affirmed as a fact proved. The strip taken ran lengthwise through the claim; and, upon the trial, witnesses were permitted to testify as to their opinion and judgment of its value. It may be conceded that there is some element of uncertainty in this testimony; but it is the best of which, in the nature of things, the case was susceptible. That this mining claim, which may be called "only a prospect," had a value fairly denominated a market value, may, as the Supreme Court of Montana well says, be affirmed from the fact that such "prospects" are the constant subject of barter and sale. Until there has been full exploiting of the vein its value is not certain, and there is an element of speculation, it must be conceded, in any estimate thereof. And yet, uncertain and speculative as it is, such "prospect" has a market value; and the absence of cer-

tainty is not a matter of which the railroad company can take advantage, when it seeks to enforce a sale. Contiguous to a valuable mine, with indications that the vein within such mine extends into this claim, the railroad company may not plead the uncertainty in respect to such extension as a ground for refusing to pay the full value which it has acquired in the market by reason of its surroundings and possibilities. In respect to such value, the opinions of witnesses familiar with the territory and its surroundings are competent. At best, evidence of value is largely a matter of opinion, especially as to real estate. True, in large cities, where articles of personal property are subject to frequent sales, and where market quotations are daily published, the value of such personal property can ordinarily be determined with accuracy; but even there, where real estate in lots is frequently sold, where prices are generally known, where the possibility of rental and other circumstances affecting values are readily ascertainable, common experience discloses that witnesses the most competent often widely differ as to the value of any particular lot; and there is no fixed or certain standard by which the real value can be ascertained. The jury is compelled to reach its conclusion by comparison of various estimates. Much more so is this true when the effort is to ascertain the value of real estate in the country, where sales are few, and where the elements which enter into and determine the value are so varied in character. And this uncertainty increases as we go out into the newer portions of our land, where settlements are recent and values formative and speculative. Here, as elsewhere, we are driven to ask the opinions of those having superior knowledge in respect thereto. It is not questioned by the counsel for plaintiff in error that the general rule is that value may be proved by the opinion of any witness who possesses sufficient knowledge on the subject; but their contention is, that the witnesses permitted to testify had no such sufficient knowledge. It is difficult to lay down any exact rule in respect to the amount of knowledge a witness must possess; and the determination of this matter rests largely in the discretion of the trial judge. *Stillwell Manufacturing Co.* v. *Phelps*, 130 U. S. 520; *Law-*

rence v. *Boston*, 119 Mass. 126; *Chandler* v. *Jamaica Pond Aqueduct Corporation*, 125 Mass. 544. The witnesses whose testimony is complained of, all testified that they knew the land and its surroundings; and many of them that they had dealt in mining claims situated in the district, and had opinions as to the value of the property. It is true, some of them did not claim to be familiar with sales of other property in the immediate vicinity; and the want of that means of knowledge is the specific objection made in the Supreme Court of the Territory to the competency of those witnesses. But the possession of that means of knowledge is not essential. It has often been held that farmers living in the vicinity of a farm whose value is in question, may testify as to its value although no sales have been made to their knowledge of that or similar property. Indeed, if the rule were as stringent as contended, no value could be established in a community until there had been sales of the property in question, or similar property. After a witness has testified that he knows the property and its value, he may be called upon to state such value. The means and extent of his information, and therefore the worth of his opinion, may be developed at length on cross-examination. And it is fully open to the adverse party, if not satisfied with the values thus given, to call witnesses in the extent of whose knowledge and the weight of whose opinions it has confidence.

We think the Supreme Court of Montana was right in holding that no error was committed in permitting the testimony of these witnesses. These are all the questions submitted to that court; and its ruling in respect thereto being correct, its judgment is

Affirmed.

CENTRAL NATIONAL BANK *v.* UNITED STATES.

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

No. 90. Argued November 24, 25, 1890. — Decided December 8, 1890.

Under the statute of the State of New York of April 23, 1866, providing for assessing and taxing stockholders in national banks upon the value of their shares, and making it "the duty of every such bank" "to retain so much of any dividend or dividends belonging to such stockholder as shall be necessary to pay any taxes assessed in pursuance of such act," the plaintiff in error having declared dividends, retained therefrom the taxes thereon assessed and due to the State. *Held*, that the several sums so retained were part of "the earnings, income, or gains of the bank," upon which an internal revenue tax was imposed by c. 173, § 120 of the Act of June 30, 1864, as amended by the Act of July 13, 1866, 14 Stat. 98, 138, c. 184.

If a national bank, in good faith, but by mistake, declares a dividend or makes an addition to its surplus or contingent funds, when it is not in a condition to do so, the dividend or addition is subject to taxation, and the mistake cannot be corrected by the courts in an action brought to recover the tax.

THE case as stated by the court was as follows:

This action was brought in the District Court of the United States for the Southern District of New York to recover certain amounts alleged to be due the United States for taxes on "profits" made and realized by the Central National Bank from its business for the years 1866, 1867, 1868, and 1870, — namely, $56,555.69 for 1866, $79,003.22 for 1867, $79,800 for 1868, and $33,750 for 1870 — of which no return was made to the assessor or assistant assessor of the district in which the bank was located, and on which no tax was paid to the collector, as required by law. A demurrer to various counts of the answer was overruled with leave to the government to amend its complaint. 10 Fed. Rep. 612.

An amended complaint was filed which proceeded upon the ground that the bank in each of the above years "declared a dividend or dividends in money due to its stockholders" of the

above amounts, for the years named, respectively, of which no return was made, and on which no tax was paid.

The action was based, chiefly, upon section 120 of the act of Congress of June 30, 1864, entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," 13 Stat. 223, 283, c. 173, as amended by the act of July 13, 1866, 14 Stat. 98, 138, c. 184. That section provided: "That there shall be levied and collected a tax of five per centum on all dividends in scrip or money thereafter declared due, wherever and whenever the same shall be payable, to stockholders, policy-holders or depositors, or parties whatsoever, including non-residents, whether citizens or aliens, as part of the earnings, income or gains of any bank, trust company, savings institution, and of any fire, marine, life, inland insurance company, either stock or mutual, under whatever name or style, known or called, in the United States or Territories, whether specially incorporated or existing under general laws, and on all undistributed sums, or sums made or added during the year to their surplus or contingent funds; and said banks, trust companies, savings institutions, and insurance companies shall pay the said tax, and are hereby authorized to deduct and withhold from all payments made on account of any dividends or sums of money that may be due and payable as aforesaid the said tax of five per centum. And a list or return shall be made and rendered to the assessor or assistant assessor on or before the tenth day of the month following that in which any dividends or sums of money became due or payable as aforesaid; and said list or return shall contain a true and faithful account of the amount of taxes as aforesaid; and there shall be annexed thereto a declaration of the president, cashier or treasurer of the bank, trust company, savings institution or insurance company, under oath or affirmation, in form and manner as may be prescribed by the commissioner of internal revenue, that the same contains a true and faithful account of the taxes as aforesaid. And for any default in the making or rendering of such list or return, with such declaration annexed, the bank, trust company, savings institution or insurance company

making such default shall forfeit as a penalty, the sum of one thousand dollars; and, in case of any default in making or rendering said list or return, or of any default in the payment of the tax as required, or any part thereof, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal: *Provided*, That the tax upon the dividends of life insurance companies shall not be deemed due until such dividends are payable, nor shall the portion of premiums returned by the mutual life insurance companies to their policy-holders, nor the annual or semi-annual interest allowed or paid to the depositors in savings banks or savings institutions, be considered as dividends."

Section 121 of the same act is as follows: "That any bank legally authorized to issue notes as circulation, which shall neglect or omit to make dividends or additions to its surplus or contingent fund as often as once in six months, shall make a list or return in duplicate, under oath or affirmation of the president or cashier, to the assessor or assistant assessor of the district in which it is located, on the first day of January and July in each year, or within thirty days thereafter, of the amount of profits which have accrued or been earned and received by said bank during the six months next preceding said first days of January and July; and shall present one of said lists or returns and pay to the collector of the district a duty of five per centum on such profits, and in case of default to make such list or return and payment within the thirty days as aforesaid, shall be subject to the provisions of the foregoing section of this act: *Provided*, That when any dividend is made which includes any part of the surplus or contingent fund of any bank, trust company, savings institution, insurance or railroad company, which has been assessed, and the duty paid thereon, the amount of duty so paid on that portion of the surplus or contingent fund may be deducted from the duty on such dividend." 13 Stat. 284, c. 173.

The answer to the amended complaint denies, on information and belief, that during the period from the 1st of January, 1866, to the 31st day of December, 1866, the defendant declared

a dividend or dividends in money due to its stockholders of the amount of $56,555.69, whereof no return was made, and on which no tax was paid; and denies that the alleged dividend or dividends were liable to the tax of five per cent as claimed by the government.

As a separate defence to the cause of action based upon the alleged declaration of dividends for the year 1866, the bank averred that, in 1866, it was required by the laws of New York, not only to retain from the dividends to its stockholders the amount of the municipal tax levied by that state against stockholders on the value of its shares of capital stock owned by them, respectively, but to pay over to the proper State officers, out of its funds, the amount of taxes thus levied upon the par value of said stock, and deduct the amount ratably from the dividends to be paid by it to stockholders; that in 1866, in pursuance of the laws of New York, it retained and paid to such officers the amount of taxes so levied by the State upon the shares of defendant's stock owned by stockholders, and the amount so paid was $56,555.69; that in making up returns to the United States assessor it did not include that amount in its statement of dividends, being advised, and now insisting, that such amount was a legitimate expense of its business and in no sense part of dividends, or to be returned as such.

The statute of New York here referred to is that of April 23, 1866, providing that no tax shall thereafter be assessed upon the capital of any bank or banking association organized under the authority of the State or of the United States, "but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein;" such shares to be "included in the valuation of the personal property of such stockholder in the assessment of taxes at the place, town or ward where such bank or banking association is located." The 6th section of that act provides: "For the purpose of collecting such taxes, and in addition to any other law of this State, not in conflict with the Constitution of the United States, relative to the imposition of taxes, it shall be the duty of every such bank or

banking association, and the managing officer or officers thereof, to retain so much of any dividend or dividends belonging to such stockholder as shall be necessary to pay any taxes assessed in pursuance of this act, until it shall be made to appear to such officer that such taxes have been paid." Laws of N. Y. 1866, vol. 2, p. 1647.

A similar defence was made in respect to the alleged declarations of dividends for the years 1867, 1868 and 1870.

In reference to the causes of action based upon the alleged declarations of dividends for 1866, 1867 and 1868, the bank made further special defences, which are set out at great length, but are stated by its counsel, as follows: "That in each of said years 1866, 1867 and 1868 the bank sustained losses from the embezzlement of its funds, by its cashier, to an amount in each of said years largely exceeding the amount of the so-called 'dividend' or State tax for such year; that said losses were concealed from the other officers of the bank until July, 1869, and in the interim the bank was led to believe that its profits were much larger than they actually were, and to pay and distribute among its stockholders, and to assume to add to its surplus fund much larger sums than it had actually earned, and to make erroneous returns of its dividends from earnings and of its additions to surplus, and to pay to the United States a much larger tax thereon than was really payable. The following is a summary of the erroneous returns so made, and of the erroneous taxes so paid to the United States, as stated in said separate defences:

Year.	Dividend.	Addition to Surplus Fund.	Total.	Five per cent tax paid.
1866 . . .	$448,947 36	$30,000	$478,947 36	$23,947 36
1867 . . .	325,789 40	30,000	355,789 40	17,789 48
1868 . . .	315,789 48	30,000	345,789 48	17,289 48

Amount of taxes paid on erroneous dividends, and on erroneous additions to surplus during said three years $59,026 32

"That, in making said erroneous dividends and additions to the surplus, the bank, in each of said years, drew the same

largely from its capital and its surplus earned in former years, and that since its discovery of said losses it has been compelled to apply its profits made since July 1, 1869, to make good the impairment of its capital and surplus caused by said erroneous payments, and to withhold from its stockholders the portion of its profits so applied, and that the State taxes, or 'dividends' paid by the bank to the State of New York in 1866, 1867 and 1868 were not paid from its earnings, income or gains in either of said years, but wholly from its capital and accumulated surplus of former years, and were not liable to the tax of five per cent imposed by section 120, and that section does not apply to such a payment." The claim of the defendant, in its answer, was that, if it may not treat the amount paid to the State as municipal taxes on the value of its stock held by stockholders as a legitimate expense of its business in the years 1866, 1867 and 1868, respectively, it is entitled to have deducted from the amount of tax on the sums alleged to have been declared as dividends the amounts it paid, through mistake of fact, on the excess of profits returned for the above years over the profits actually made and realized from its business in those years.

In the District Court a demurrer to the counts of the answer containing the special defences was overruled, and judgment given for the defendant. 15 Fed. Rep. 223. Upon writ of error to the Circuit Court that judgment was reversed, and the cause was remitted to the District Court, where, upon final trial, judgment was rendered in favor of the United States for the sum of $28,625.33. 24 Fed. Rep. 577. This judgment having been affirmed in the Circuit Court, the case has been brought here by the bank.

Mr. M. W. Divine and *Mr. M. P. Whitehead* for plaintiff in error.

We concede that where a bank, by mistake, makes a return showing more profits than it has earned, and where, upon the faith of that return, a tax has been assessed and collected, the bank is debarred or estopped from afterwards correcting its

mistake and reclaiming any part of that tax; but we also claim that this estoppel must be limited to the erroneous return made and to the tax assessed and collected on the basis of that return, and that it cannot and should not be extended, so as to cover a payment, not included in the return, of a state tax against its stockholders made by a bank, not from its earnings, income or gains of the current year, but, concededly, from its capital and surplus of previous years.

"An estoppel will be strictly limited to the representation made." Bigelow on Estoppel, pp. 495, 496, and cases cited. Herman on Estoppel, § 24, p. 338.

In Cooley on Taxation, 2 ed. pp. 819, 820, it is said: "But the technical doctrine of estoppel is one to be applied with great caution, for it sets aside general rules on supposed equities, and the danger is always imminent that wrong may be done," see also p. 360.

In this case the estoppel must be confined to the dividends declared and returned, and to the taxes assessed thereon by the assessor and paid by the bank in 1866, 1867 and 1868.

The payment of the state tax was not, in any manner an admission by the bank that the amount paid was a dividend or a part of its profits, etc., and even if it were, it could only operate as an admission or estoppel as between the bank and the State, and not as between the bank and the United States.

There being, then, no element of estoppel as between the bank and the United States, in reference to the alleged "dividends" or State taxes mentioned in the first three causes of action, the only ground upon which the United States can claim a recovery therefor is removed; for, clearly, that State tax was not a dividend "declared due to stockholders as part of the income, earnings or gains" of the bank to entitle the United States to recover.

To entitle the United States to recover the tax upon the "alleged dividends" mentioned in the complaint, it must allege and prove that those dividends or taxes were, in fact, dividends declared due to stockholders, as part of the earnings, income or gains of the bank.

If the United States proved that the bank paid to the State

of New York in each of those years the taxes mentioned in the complaint for account of its stockholders, but did not include them in its returns of dividends, it would still have to prove that those payments were made from the "earnings, income or gains" of the bank, and in response to any such proof, it would be competent for the bank to show, what is now conceded by the demurrer, viz.: that those State taxes or dividends were paid, not from the said "earnings, income or gains," but from the bank's capital and accumulated surplus of previous years; that the returns of dividends, etc., which the bank actually made showed more dividends and additions to surplus than it had actually earned; and that it had, in fact, paid to the United States more taxes than it was liable for. If such proof were offered, would not the bank be entitled to judgment in its favor?

As has already been stated, all these causes of action are based on § 120 of the Revenue act, and to entitle the bank to recover for any or either of them, it must allege and prove, not only that the moneys paid for the State taxes were "dividends in money declared due to the stockholders" of that bank, but must also allege and prove that those dividends were in fact declared due "as part of the earnings, income or gains" of the bank.

We submit that the taxes paid to the State were not "dividends declared due to stockholders," within the meaning or intent of § 120, nor can they be subject to the five per cent tax on dividends imposed by that section. The dividends liable to taxation are clearly defined in that section, viz.: They must be declared due to stockholders as part of the earnings, income or gains of the bank; and clearly these payments to the State of New York do not come within that definition.

The only pretext for any claim that the amounts paid by the bank for State taxes were liable to any United States Internal Revenue tax is, that they represented "profits" which the bank omitted or neglected to return.

But the United States, on May 12, 1882, deliberately repudiated any such claim by amending its complaint, so as to

base its claim solely upon section 120 (viz., that the State tax was a dividend) and not upon section 121 (that it represented profits).

Having made this election more than eight years ago, and having adhered to it ever since, we submit that the United States is not entitled to recover anything from the bank in this action.

If the United States has any valid claim against the bank for profits not returned in 1870, it can enforce that claim in an appropriate action at any time, for the statute of limitations does not run against the United States. *United States* v. *Nashville &c. Railway*, 118 U. S. 120, and cases there cited.

Mr. Assistant Attorney General Parker for defendants in error.

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

The act of Congress was correctly interpreted by the Circuit Court. That the amounts paid by the bank to the State in the years 1866, 1867, 1868 and 1870 came from dividends declared by it to be due and payable to stockholders, as part of its earnings, income or gains, is entirely clear. Because they were from dividends, so declared, the bank recognized its obligation to pay, and did pay, the taxes assessed by the State upon shares owned by stockholders. It was not required to retain the amount of taxes due the State except from "dividends belonging to such stockholders." The taxes constituted a claim against stockholders only, and the bank was made simply an agent to collect them for the State. Their retention by the bank out of dividends declared due to stockholders was a convenient mode adopted by the State to collect its taxes. The circuit judge well said that, in legal effect, the retaining by the bank of the amount of the taxes assessed against stockholders was the same as if it had paid the whole dividend to stockholders, and the latter had handed back the

sum due from them for municipal taxes, and authorized the bank to pay it. For these reasons, the bank had no right to omit from its return a statement of the sums retained by it for the State out of dividends to stockholders in the years 1866, 1867, 1868 and 1870.

This is an end of this case, unless, as contended, the embezzlement of the bank's cashier, whereby it was led to believe that its profits were larger than they actually were, and whereby it was induced to distribute among its stockholders and add to its surplus or contingent funds larger sums than were actually earned, and to make erroneous returns of dividends from earnings and of additions to surplus, constitutes a defence to the action. We are of opinion that the liability of the bank, under section 120, depends solely upon the questions whether dividends were, in fact, declared due and payable to stockholders from its earnings, income or gains, and whether undistributed sums were, in fact, made or added to its surplus or contingent fund. Whether or not such dividends should be declared, or such additions made, was for the bank to determine. In view of the language and object of the statute, we hold that, if the declarations or additions were not recalled or rescinded before the time when it became the duty of the bank to make its returns to the assessor, the question whether or not, for the purposes of taxation by the United States, dividends had been declared due to stockholders, or additions made to surplus or contingent funds, was closed, and the liability of the bank for the tax of five per cent on such dividends or additions attached. If the bank, in good faith and by mistake, made a declaration of dividends, or an addition to its surplus or contingent funds when it was not in a condition to do so, the mistake cannot be corrected by the courts in an action brought to recover the tax. Relief must come from another branch of the government.

In *Bailey* v. *Railroad Co.*, 106 U. S. 109, 113, 115, this court had occasion to construe section 122 of the above act of Congress, providing that "any railroad, canal, turnpike, canal navigation or slack-water company, indebted for any money for which bonds or other evidences of indebtedness have been

issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money due or payable to its stockholders, . . . as part of the earnings, profits, income or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five per centum on the amount of such interest or coupons, dividends or profits, whenever and wherever the same shall be payable," etc. 13 Stat. 283; 14 Stat. 138. The court, speaking by Mr. Justice Matthews, said: "It is true, indeed, that by the terms of the law the amount paid as interest on bonds is charged with a tax as part of the earnings, although there may have been no net earnings out of which to pay it; but the law proceeds upon a presumption which disregards what is merely exceptional. And we have no hesitation in saying, that in reference to a dividend declared as of earnings for the current year and paid as such to stockholders, whether in money or in scrip, no proof would be admissible, for the purpose of avoiding the tax, that no earnings had in fact been made. The law conclusively assumes, in such a case, that a dividend declared and paid is a dividend earned." The same principle must govern the construction of section 120, and determines the present case in favor of the United States.

Judgment affirmed.

Mr. Justice Field dissented.

HANDLEY *v.* STUTZ.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 1516. Submitted November 10, 1890. — Decided December 8, 1890.

Upon a bill in equity by creditors of an insolvent corporation, whose claims amounted to more than $2000, against the corporation and stockholders therein, to compel sums, due from them to the corporation for unpaid subscriptions to stock, to be paid in, and administered as a trust fund and distributed among all creditors of the corporation who should come in and contribute to the expense of the suit, the Circuit Court referred the case to a master to receive proofs of claims, and, upon the return of his report, adjudged that claims severally less than $5000, but together exceeding that sum, were just debts of the corporation, and that, in order to pay them, the stockholders should pay the amount of their subscriptions to a receiver. Stockholders so charged with more than $5000 each appealed to this court. *Held*, that the sums in dispute were sufficient to give the Circuit Court jurisdiction of the case, and this court jurisdiction of the appeal.

This was a bill in equity, filed February 8, 1889, in the Circuit Court of the United States for the Middle District of Tennessee, by citizens of Pennsylvania, of Indiana and of Ohio, judgment creditors of the Clifton Coal Company, in behalf of themselves and all other creditors who should come in and contribute to the expenses of the suit, against that corporation, which was a Kentucky corporation, whose chief officers resided in Tennessee, and against sixteen individuals, alleging that they were stockholders in the corporation and citizens of Tennessee, and had paid nothing for their stock and were liable to the corporation for the amounts thereof, and their liabilities were assets of the corporation and a trust fund for the payment of all its debts; that the corporation was insolvent, and had no other assets that the plaintiffs could reach; and that its officers had declined to collect or to attempt to collect any of the amounts so due to it, and had neglected to administer the trust fund.

The bill prayed that the defendant stockholders might be

decreed to pay to the plaintiffs, and to such other creditors as might become parties, such sums as might be found due them; that such sums might be assessed upon the stockholders as law and equity require; and that the moneys due from the stockholders to the corporation might be decreed to be held in trust by them, and to be a trust fund for its creditors, and be administered by the court as a trust fund pledged for the payment of the debts of the corporation; and for general relief.

The corporation, though served with process, did not appear, and no further proceedings were taken against it. The plaintiffs dismissed their bill against three of the individual defendants, because, as recited in the order of dismissal, they were not within the jurisdiction of the court, being citizens of other States than Tennessee. The other defendants appeared and answered; and upon a hearing it was adjudged that the amount of their stock had never been paid, and was still due from them to the corporation, and constituted a trust fund for the payment of the debts of the plaintiffs and of other creditors who might come in. A receiver was appointed, and the case referred to a master to receive proofs of claims. 41 Fed. Rep. 531. The master's report allowed sixty-three claims of different creditors, amounting in all to $22,888; those of the original plaintiffs for $4032, $3286 and $464, respectively; one other claim for $3527; and the rest varying from $1060 down to $3.25.

As to the claims for less than $2000 each, the defendants excepted to the master's report, and moved the Circuit Court to dismiss the bill for want of jurisdiction. On September 6, 1890, the court overruled the exception and motion, confirmed the master's report, and decreed that all the claims allowed by the master were just debts of the corporation and entitled to be paid out of the assets; and that, in order to pay the amount of these debts, the defendants should pay to the receiver, and he should be authorized to collect, their unpaid subscriptions to stock, amounting in all to $56,175, the sums so charged against five of the defendants being more than $5000 each, and against each of the other defendants less than $5000. The defendants so charged with more than $5000 appealed to this court.

The appellees now moved this court as follows:

"First. To advance this cause for hearing, and now to hear the same, so far as there may be appeals herein, under the provisions of the act of February 25, 1889, c. 236, questioning the jurisdiction of the Circuit Court to render certain parts of the relief granted by its judgment herein.

"Second. To dismiss all the other appeals herein, for the reason that this honorable court has not jurisdiction of the same."

By agreement of parties, and leave of court, the case was advanced for hearing as to the questions of the power of the Circuit Court to grant the relief decreed; and those questions, as well as the motion to dismiss, were submitted on printed briefs.

Mr. Walter Evans and *Mr. James R. McFarlane* for the motions.

Mr. Edward H. East and *Mr. James S. Pilcher* opposing.

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

This is a bill in equity by some, in behalf of all, of the creditors of a corporation, against the corporation and holders of stock therein. The bill is not founded upon any direct liability of the stockholders to the plaintiffs; but upon the theory that, the corporation being insolvent and having no other assets, the sums due to it from the stockholders on their unpaid subscriptions to stock ought to be paid by them to the corporation as a trust fund to be distributed among the plaintiffs and all other creditors of the corporation, so far as required to satisfy their just claims, and that, the corporation having neglected to collect these sums or to administer the trust, and the plaintiffs and defendants being citizens of different States, the Circuit Court, sitting in equity, should compel those sums to be paid in by the stockholders, to be administered as a trust fund and to be distributed among all creditors who should

come in. Such a bill can only be maintained by one or more creditors in behalf of all, and not by any one creditor to secure payment of his own debt to the exclusion of others. *Sawyer* v. *Hoag*, 17 Wall. 610, 622; *Patterson* v. *Lynde*, 106 U. S. 519; *Johnson* v. *Waters*, 111 U. S. 640, 674. In *Hatch* v. *Dana*, 101 U. S. 205, the bill of a single creditor, which was sustained by the court, was brought in behalf of himself and all other creditors of the corporation who should come in and contribute to the expenses of the suit; no other creditors came in; and it did not appear that there were any others.

Each of the appellants has been charged by the decree below with a sum of more than $5000; and it is undisputed that each of them, if the others should prove insolvent, would be obliged to pay the whole sum charged against him, and that each, therefore, has more than $5000 at stake. The contest is upon the sufficiency in amount of the creditors' claims to support the jurisdiction of the Circuit Court in the first instance, and of this court on appeal, within the meaning of the statutes limiting the jurisdiction of each court to cases in which the sum in dispute exceeds $2000 and $5000 respectively. Acts of August 13, 1888, c. 866, § 1, 25 Stat. 434; February 16, 1875, c. 77, § 3, 18 Stat. 316.

The sums alleged to be due from the corporation to the original plaintiffs amounting to more than $2000, the Circuit Court had jurisdiction of the case, and authority to administer and distribute the amounts, due from the individual defendants to the corporation for unpaid subscriptions to stock, as a trust fund for the benefit of all the creditors of the corporation, and for that purpose to permit creditors, who had not originally joined in the bill, to come in and prove their claims before a master. *Johnson* v. *Waters*, above cited.

The trust fund so administered and ordered to be distributed by the Circuit Court amounting to much more than $5000, the appellate jurisdiction of this court is not affected by the fact that the amounts decreed to some of the creditors are less than that sum. It was immaterial to the appellants how the sums decreed to be paid by them should be distributed, and (which is more decisive) such a bill as this could not have

been filed by one creditor in his own behalf only, and the case does not fall under that class in which creditors, who might have sued severally, join in one bill for convenience and to save expense. This court, therefore, has jurisdiction of the whole appeal, according to the rule affirmed in *Gibson* v. *Shufeldt*, 122 U. S. 27, and the cases there collected.

Motion to dismiss appeal overruled, and jurisdiction of the Circuit Court sustained.

HAMILTON *v.* HOME INSURANCE COMPANY.

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

No. 98. Argued December 1, 2, 1890. — Decided December 15, 1890.

A provision in a policy of fire insurance, that "in case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy," cannot be pleaded in bar of an action on the policy, unless the policy further provides that no such action shall be brought until after an award.

This was an action, brought June 26, 1886, upon a policy of insurance, numbered 3190, by which the Home Insurance Company of New York insured Robert Hamilton for one year from February 23, 1886, on a stock of tobacco in his warehouse at 413 and 415 Madison Street in Covington in the State of Kentucky, against loss or damage by fire to the amount of $5000, "to be paid sixty days after due notice and proofs of the same shall have been made by the assured and received at the office of the company in New York."

The policy, after providing that in case of loss the assured should forthwith give notice, and as soon afterwards as possible furnish proofs of loss, with a magistrate's certificate, submit to examination on oath, and produce books and vouchers,

and copies of lost books and invoices, further provided, among other things, as follows:

"When personal property is damaged, the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity, quality and cost of each article. The amount of sound value and of damage shall then be ascertained by appraisal of each article by competent persons (not interested in the loss as creditors or otherwise, nor related to the assured or sufferers) to be mutually appointed by the assured and the company, their report in writing to be made under oath before any magistrate or other properly commissioned person, one-half of the appraiser's fees to be paid by the assured. The company reserves the right to take the whole or any part of the articles at their appraised value; and until such proofs, declarations and certificates are produced, and examinations and appraisals permitted by the claimant, the loss shall not be payable."

"But provided, in case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy."

"And it is hereby understood and agreed by and between this company and the assured that this policy is made and accepted in reference to the foregoing terms and conditions, and to the classes of hazards and memoranda printed on the back of this policy, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for in writing."

The answer admitted the execution of the policy, and notice of loss; put in issue the amount of loss; denied that the plain-

tiff ever delivered due proofs of loss, or had performed the conditions of the policy on his part; and, after reciting the substance of the provisions above quoted, alleged as follows:

"And the defendant says that differences having arisen touching the loss and damage sustained by said plaintiff under said policy and the amount thereof, the plaintiff claiming a loss of $40,000, and the defendant claiming and believing that it was slight and but a very small part of said sum, and being unable to agree upon the amount of said loss, this defendant requested and demanded in writing that the amount of such loss and damage should be submitted to and ascertained and determined by impartial arbitrators, whose award in writing should be binding upon the parties as to the amount of loss or damage, but should not decide the liability of the company under said policy.

"And the said defendant further says that the plaintiff wholly disregarded the terms and conditions of said policy in that respect, and neglected and refused to have such arbitration, and refused to choose or submit to arbitrators chosen in accordance with the terms and provisions of said policy the amount of the loss or damage by fire to the property covered by said policy, and refused to be governed in the ascertainment of said loss by any of the terms and conditions of said policy, and, against the protest of the defendant, proceeded to and did sell all of said property at auction. An arbitration and the ascertainment of the said loss thereby, as provided in said policy, became impossible, and this defendant was deprived of its rights and privileges under said policy with respect to said property and the appraisement thereof.

"This defendant further says that the damage done to the property insured was of such a nature as to require a careful and scrutinizing examination to ascertain the injury thereto and loss thereon, and that an appraisement by arbitrators, as required by the terms and conditions of said policy, was of the greatest importance to the defendant, and the only means under said policy whereby the exact amount of damage and injury sustained by said plaintiff upon said property could be determined; and the said plaintiff, by the sale of said prop-

erty, and in disregarding the terms and conditions of said policy in that respect, wholly deprived this defendant of the right to an arbitration, as provided in said policy, and all other rights in respect to the property so injured or damaged by said fire.

"The defendant further says that by reason of the failure and refusal of said plaintiff to agree upon arbitrators to determine the amount of the loss and damage so sustained as aforesaid, and his refusal to submit the amount of such loss to arbitration in accordance with the plain terms and provisions of said policy, and the sale of said property so injured as aforesaid against the written protest of the defendant, the said plaintiff is not entitled to recover in this action, nor to have or maintain this action against the said defendant."

The plaintiff filed a replication, denying these allegations of the answer.

At the trial, the plaintiff introduced evidence tending to prove a loss or damage by fire on April 16, 1886, to the amount of the insurance, and the delivery of proofs of loss in accordance with the policy, and put in evidence a policy of the Liverpool, London and Globe Insurance Company on the same property; the defendant introduced evidence tending to prove that the amount of loss or damage was less; and there was put in evidence a correspondence in writing between the parties or their authorized agents at Cincinnati, the material parts of which were as follows:

April 26, 1886. Plaintiff to defendant. "I enclose proof of loss under policy of your company, with invoice attached, in compliance with the requirements of the policy. If there is anything defective in the substance or form of the above proof, please advise me thereof at once that I may perfect the same to your satisfaction, and return the proof to me in such case for that purpose. The property described and damaged has been invoiced and arranged, and is ready for examination by your company. Such examination must be made at once, for the reason that I am obliged to occupy the premises in the prosecution of my business, and each day of delay involves considerable loss and expense to me. As before advised, I

propose to send the entire stock to be sold at public auction in a few days, whereof I will give you notice. It can be readily inspected in a short time where it now lies."

April 27, 1886. Defendant to plaintiff. "Received of Robert Hamilton papers purporting to be proofs of loss under Home Insurance policy No. 3190."

April 28, 1886. Defendant and other insurance companies to plaintiff. "The undersigned, representing the several insurance companies against which you have made claim for loss under their respective policies of insurance upon stock in your tobacco factory, Nos. 413 and 415 Madison street, Covington, Ky., claimed to have been damaged by fire on April 16, 1886, beg leave jointly to take exception to the amount of claim made, and to demand that the question of the value of and the loss upon the stock be submitted to competent and disinterested persons, chosen as provided for in the several policies of insurance under which claim is made; and we hereby announce our readiness to proceed at once with this appraisement, so soon as your agreement to the demand is declared. We further desire jointly to protest against the removal, sale or other disposition of the property until such an appraisement has been had, and to notify you that the insuring companies will in no way be bound by such *ex parte* action."

April 29, 1886. Plaintiff's counsel to defendant and other insurance companies. "Mr. Hamilton is not endeavoring to obtain any unfair advantage or unfair adjustment of his loss against the companies. He had believed that, in view of the fact that the traffic in tobacco is so large in this city, and substantially all of it, at least ninety-nine per cent of the leaf tobacco business, is transacted by sale at public auction, that a sale of this tobacco presented the fairest mode of ascertaining its actual value as it stands. It is in substance and effect an appraisement in detail of every package by the entire trade in this city. But in view of the fact that the insurers seem to demand arbitration by arbitrators, and that you propose to select a competent person, which we understand to mean a man acquainted with the manufacture of tobacco, to act as arbitrator in your behalf, Mr. Hamilton will accede to your

proposition, upon the express understanding that the arbitrators selected shall have a full opportunity to examine the stock of tobacco, and that it shall then be sold at public auction, in order that its value thus ascertained, together with such other evidence as either party may desire to offer, may be presented to the arbitrators before they make their award." "If the proposed arbitration is satisfactory, will you at once inform me of the arbitrator selected by you and submit to me the form of agreement for arbitration which you propose? Mr. Hamilton will do the like in respect to the arbitrator selected by him."

April 30, 1886. Defendant and other insurance companies to plaintiff's counsel. "We must insist upon arbitration, in accordance with the terms of our several contracts, without importing into it any conditions as to the sale of the property. Such conditions would be incompatible with the provisions of our several policies of insurance and the rights of the insuring companies thereunder. As soon as Mr. Hamilton indicates his readiness to proceed with the arbitration called for, we will submit the name of an arbitrator, and also a form of agreement for arbitration."

April 30, 1886. Plaintiff's counsel to insurance companies. "Mr. Hamilton, and I in his behalf, deny that the arbitration in the manner indicated is in violation of the terms of any of the policies, or imports any condition into it which the insured is not entitled to insist upon, or which is incompatible with the provisions of the several policies of insurance, or the rights of the insurance companies thereunder. Mr. Hamilton is ready, and has directed to me to express his readiness, to proceed at once with an arbitration which, as he understands it, is in substantial compliance with the arbitration provided for in all the several policies; but they are not alike in their provisions upon this subject of arbitration, and a literal compliance with some of them would be inconsistent with a literal compliance with others. The only way, as it seems to me, that Mr. Hamilton, or I in his behalf, can determine whether what you call the 'arbitration called for' is what Mr. Hamilton understands to be the 'arbitration called for' and is will-

ing to accede to, is for you to indicate what you understand the arbitration called for to be, by submitting a form of agreement for arbitration, or in some other mode indicating the specific terms of the arbitration which you have demanded. I wish to say that, as I understand the expression in my letter of the 29th, that 'it' (the tobacco) 'shall then be sold at public auction, in order that its value thus ascertained, together with such other evidence as either party may desire to offer, may be presented to the arbitrators before they may make their award,' does not in any wise call upon the companies to consent to a sale of the property. Mr. Hamilton is quite ready to take upon himself the responsibility of selling it. It simply requires that the arbitration shall be commenced before the sale, when the arbitrators may have an opportunity of examining the property, and that the award shall not be made until after the sale has taken place, and the assured has had an opportunity to submit the result of it, with other competent evidence, to the arbitrators before the award is made."

May 3, 1886. Insurance companies to plaintiff's counsel. "In compliance with the request in your letter of April 30th, addressed to the companies insuring Robert Hamilton, we herewith enclose a form of agreement for 'submission to appraisers,' which is in practical accordance with the conditions of the policies of the several companies, and which all the companies are willing to sign, and abide by the award reached thereunder. We must again decline to entertain your proposition that the arbitrators, after examining the stock, shall postpone their award until after the stock shall have been sold, when the result of such sale, with other evidence, shall be submitted to the arbitrators. We insist that the arbitration provided for in such case by our policies is in no sense a court for the hearing of evidence. The appraisers may, in their discretion, seek any evidence they deem necessary for their own full information and the forming of their own judgments as to the value and damage of the goods. But we insist that under the conditions of the several policies there can be no abandonment of the stock to the companies, and that after an award has been reached the companies have the right to take the stock,

in whole or in part, at the appraised value. The companies propose to stand upon the conditions of their policies, and decline all propositions looking to a waiver thereof, or adding new and inconsistent conditions thereto."

The principal part of the form of "submission to appraisers," enclosed in this letter, was as follows: "It is hereby agreed by Robert Hamilton, of the first part, and the several insurance companies, by their representatives, whose names are hereunto affixed, of the second part, that —— —— and —— —— shall appraise and estimate the loss by fire of April 16, 1886, upon the property of Robert Hamilton, as specified below and as hereinafter provided. In case of disagreement, said appraisers shall select a third, who shall act with them in matters of difference only. The award of said appraisers or any two of them, made in writing in accordance with this agreement, pursuant to the terms of the policies, shall be binding upon both parties; but it is understood that this agreement and appraisement are only for the purpose of fixing the sound value of the property immediately before the fire and the loss or damage thereon occasioned by said fire, and shall not waive, invalidate or terminate the right of the insurers to take said property at its appraised value, or any other rights of either party hereto, but the same are to be construed solely by reference to said policies."

May 4, 1886. Plaintiff's counsel to insurance companies. "There can be no misunderstanding as to the position taken by the companies and the assured in this matter. 1st. I understand the companies demand that appraisers be selected by the companies and the assured, who shall estimate the loss by their own judgment and without hearing the testimony of witnesses who may be called by either party, and that the parties shall be bound by their report or award as to the amount of the loss thus made. This Mr. Hamilton declines to do. 2d. Mr. Hamilton is willing that the companies jointly, or as they may arrange between themselves, shall make their own appraisement through their own appraisers of the value of the stock, and that they shall jointly, or either of them, with the consent of the rest, have the right to take the stock,

in whole or in part, at their appraisal. 3d. Mr. Hamilton has made and makes no claim to abandon the property, and he has made and makes no claim that the companies shall consent to the sale by him of the damaged stock."

Enclosed in this letter, and signed by the plaintiff's counsel, was the following: "To the Liverpool and London and Globe Insurance Company and the companies jointly acting with it in respect to the loss sustained by Robert Hamilton on the property in Nos. 413 and 415 Madison street, Covington, Ky. Mr. Hamilton demands of the several insurance companies an arbitration of the amount of the loss sustained upon the goods covered by fire on the 16th day of April, and will select an arbitrator to represent him in pursuance of the provisions of the policy, it being stipulated in the agreement for arbitration that the several companies and the assured shall be duly notified of the time of the hearing by the arbitrators, and that the arbitrators shall hear all competent legal testimony that may be offered by either party, as well as personally examine the damaged goods, in considering and awarding the amount of the loss."

May 5, 1886. Insurance companies to plaintiff's counsel. "Your communication of the 4th is at hand. We have nothing to add to our letter of the 3d; and if, as we are made to understand, Mr. Hamilton declines to consent to a form of 'submission to appraisers' that does not provide for the introduction of 'all competent legal testimony that may be offered by either party' (under which provision, as you have repeatedly declared, Mr. Hamilton would seek to present evidence based on a sale of the property,) we must accept your communication as a refusal to comply with our request and with the conditions of the policies of insurance, which are clearly incompatible with your wishes in the matter."

May 7, 1886. Insurance companies to plaintiff's counsel: "Referring to your letter of the 4th, setting forth your understanding of the position taken by the two parties, permit me, on behalf of the companies, to take exceptions to your first statement, to wit: 'I understand the companies demand that appraisers be selected by the companies and the assured, who

shall estimate the loss by their own judgment and without hearing the testimony of witnesses who may be called by either party, and that the parties shall be bound by their report or award as to the amount of the loss thus made.' This does not correctly state our position, which remains now as stated in our communication of the 3d, to wit: 'The appraisers may, at their discretion, seek any evidence they deem necessary for their own full information.' What we do object to and protest against is the sale of the goods, or the consideration by the appraisers of evidence founded on that fact or result. If the form of 'submission to appraisers' we submitted contains any provision or condition limiting or defining the duties of the appraisers and not prescribed by the several policies, each company will submit its own form, as we desire and demand a submission free from any conditions imposed by either party."

The plaintiff also gave in evidence a letter from his counsel to the Liverpool, London and Globe Insurance Company, dated May 20, 1886, enclosing a notice in a newspaper of the day before of a sale by auction to be had on May 29, 1886, at the plaintiff's warehouse in Covington, of the tobacco insured by the policy in suit.

Upon this evidence, the court instructed the jury that, on the issues joined on the special defences in the answer, the plaintiff could not recover, and that they should return a verdict for the defendant. The plaintiff tendered a bill of exceptions to these instructions, and, after verdict and judgment for the defendant, sued out this writ of error.

Mr. Joseph Wilby and *Mr. E. W. Kittredge* for plaintiff in error.

Mr. Channing Richards for defendant in error. *Mr. Thomas B. Paxton* and *Mr. Charles H. Stephens* were with him on the brief.

The correspondence in the record discloses that the defendant requested that the amount of loss or damage should be

submitted to appraisers in accordance with the terms of the policy, and that the plaintiff refused to do so unless the defendant would consent in advance to define the legal powers and duties of the appraisers or arbitrators, which (as the court held in *Hamilton* v. *Liverpool, London & Globe Ins. Co.*, 136 U. S. 242), defendant was under no obligation to do. And it likewise discloses the determination of the assured to dispose of the property, at public sale, regardless of the Company's rights under the policy, so that the result of such forced sale might be used as evidence of the extent of his loss; and that he was determined not to submit to an appraisal or arbitration except on terms that would admit of such a course. This, the court held in the case against the Liverpool and London and Globe Insurance Company, was in effect a refusal by plaintiff to permit an appraisal in accordance with the terms of the policy, and fatal to his action.

An effort is made here, as was done below, to distinguish the policies in the two cases, and to claim that the determination of the amount of loss or damage as provided in the policy of the defendant company is not made a condition precedent to recovery, as it was in the policy of the Liverpool and London and Globe Insurance Company.

It is true that the express provision in the policy of the Liverpool and London and Globe Company, that no action should be sustainable against the company upon the policy until after an award had been obtained fixing the amount of the claim as provided in the policy, is not found in this policy; but we submit, that upon a fair construction of the contract it is none the less a condition precedent to recovery in this case.

In the case of *Scott* v. *Avery*, 5 H. L. Cas. 811, which is the leading case in support of such conditions, the Lord Chancellor says that it is a question of construction whether by the terms of the contract any right of action exists until the amount of damage has been ascertained in a specified mode; and if the meaning of the parties was that the amount to be recovered should only be such a sum as should be determined by arbitration, in case of disagreement, then such ascertainment of the amount is a condition precedent to recovery. And he adds, if

that was their meaning, the circumstance that they have not stated that meaning in the clearest terms, or in the most artistic form, is a matter utterly unimportant.

In that case, it is true there was an express provision that no action should be brought until the amount of the loss had been determined by arbitration — being substantially the same language as that contained in the policy of the Liverpool and London and Globe Insurance Company: but there was no such provision in the policies involved in *Elliott* v. *Royal Exchange Ins. Co.*, L. R. 2 Ex. 237, and *Braunstein* v. *Accidental Death Co.*, 1 B. & S. 782; in both of which the decision of *Scott* v. *Avery* was followed.

In several American cases also the policies did not expressly provide that no suit should be brought until ascertainment of the amount of loss or damage; yet an appraisal or arbitration was held to be a condition precedent to recovery. *Hall* v. *Norfolk Fire Ins. Co.*, 57 Connecticut, 105, 114; *Saucelito Dry Dock Co.* v. *Commercial Union Assurance Co.*, 66 California, 253. In the latter case the policy was almost identical with the policy of the Royal Exchange Company. In *Holmes* v. *Richet*, 56 California, 307, and also in *Delaware & Hudson Canal Co.* v. *Pennsylvania Coal Co.*, 50 N. Y. 250, *Scott* v. *Avery* was followed, and held to be decisive.

In some cases, several of which are cited in the brief filed on behalf of the plaintiff in error, it has been held that the mere provision in policies of insurance for an appraisement or arbitration was an independent covenant, and did not constitute a condition precedent to recovery upon the policy, but it was recognized as a question of the proper construction of each policy; and in every such case the policy differed materially from the policy of the defendant company involved in this case.

Thus, in *Reed* v. *Washington Insurance Co.*, 138 Mass. 572, the court held it to be a question of construction whether an appraisal of value, or an award of the amount of damages, is a condition precedent to a right of action, and distinguished the policy under consideration in that case from those involved in *Scott* v. *Avery*, *Elliott* v. *The Royal Exchange Co.*, *Braunstein* v. *The Accidental Death Co.*, and other cases, finding

that the agreement for arbitration was distinct from the promise to pay the loss, and from the provision for a statement by the assured, which was a condition of the promise.

The policy of the defendant company expressly stipulates that it is made and accepted in reference to certain terms and conditions, which are declared to be a part of the contract, and are to be used and resorted to in order to determine the rights and *obligations* of the parties in all cases not otherwise specially provided for in writing. One of these conditions provides for the submission of differences touching any loss or damage to arbitration, and makes the award binding on the parties. Such language is alone sufficient, under the rules of construction applied in the various cases already cited, to make it incumbent on the plaintiff to show that the amount of his loss or damage has been thus determined, or that the failure has been through no fault of his.

As no action can be maintained until the loss is payable, an appraisal is made a condition precedent to an action as clearly as by the language employed in the policy of the Liverpool, London and Globe Company, and much more clearly than in the other policies and contracts involved in the cases above referred to. In this it resembles the policy involved in *Scottish Union Ins. Company* v. *Clancey*, 71 Texas, 5, which provided that loss or damage, unless the amount was agreed on, should be appraised by disinterested and competent persons, and the award of any two in writing should be binding and conclusive as to the amount; that the report of the appraisers in writing, under oath, should form a part of the proofs of loss; and that until such proofs were produced and an appraisal permitted, the loss sustained should not be payable. The court held that, in the absence of fraud, accident or mistake, the parties having agreed that the amount of loss should be determined in a particular way, such stipulation was valid; and as the contract required that the report of the appraisement of the loss should be made a part of the proofs of loss, and that the loss should not be payable until after such proofs were furnished, that such appraisement and proofs of loss were conditions precedent to right of action by the assured.

Opinion of the Court.

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

This case resembles in some aspects that of *Hamilton* v. *Liverpool, London & Globe Ins. Co.*, 136 U. S. 242, decided at the last term, but it is essentially different in important and controlling elements.

In that case, the effect of the provisions of the policy, by reason of which it was held that the assured, having refused to submit to the appraisal and award provided for, could not maintain his action, was thus stated by the court: "The conditions of the policy in suit clearly and unequivocally manifest the intention and agreement of the parties to the contract of insurance that any difference arising between them as to the amount of loss or damage of the property insured shall be submitted, at the request in writing of either party, to the appraisal of competent and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss or damage only, and shall not determine the question of the liability of the company; that the company shall have the right to take the whole or any part of the property at its appraised value so ascertained; and that until such an appraisal shall have been permitted, and such an award obtained, the loss shall not be payable, and no action shall lie against the company. The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss, and to the maintenance of any action." 136 U. S. 254, 255.

That policy looked to a single appraisal and award, to be made as one thing and by one board of appraisers or arbitrators, whenever any difference should arise between the parties, and to be binding and conclusive as to the amount of the loss, although not to determine the question of the liability of the company; and the policy contained, not only a provision that until such an appraisal the loss should not be payable, but an express condition that no action upon the policy should be sustainable in any court until after such an award.

In the case now before us, on the other hand, the appraisal

and the award are distinct things, and to take place at separate times, and the effect assigned to each is quite different from that given to the appraisal and award in the other policy. The "appraisal," without which the loss is not payable, is required to be made, not merely when differences arise as to its amount, but in all cases, and results in a mere "report in writing," which is not declared to be binding upon the parties in any respect, and is in truth but a part of the proofs of loss. It is only by a separate and independent provision, and when differences arise touching any loss "after proof thereof has been received in due form," that the matter is required, at the request of either party, to be submitted to "arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss, but shall not decide the liability of this company under the policy;" and there is no provision whatever postponing the right to sue until after an award.

The special defences set up, with some tautology and surplusage, in the answer, reduce themselves, when scrutinized, to a single one, the plaintiff's refusal to submit to an award of arbitrators, as provided in the policy. This appears by the general frame of the answer, and by its speaking of the award as "an arbitration and the ascertainment of the said loss thereby" and as "an appraisement by arbitrators," as well as by the distinct averments that the defendant requested and the plaintiff declined a submission to arbitration, and by the omission of any specific allegation that the plaintiff neglected to procure a report of appraisers.

The evidence introduced at the trial was to the same effect. Proofs of loss, sent by the plaintiff to the defendant, with a request that any defects in substance or form might be pointed out so that he might perfect the proofs to the defendant's satisfaction, were received by the defendant, without then or afterwards objecting to their form or sufficiency. The subsequent correspondence between the parties was evidently influenced in form by embracing insurances in different companies under policies with various provisions; but, as applied to the policy in suit, it manifestly related, and was understood by both parties to relate, not to a mere report of appraisers,

but to an award of arbitrators which should bind both parties as to the amount of the loss.

The instruction to the jury, therefore, that on the issues joined on the special defences in the answer, and upon the evidence in the case, the plaintiff could not recover, was in effect a ruling that the plaintiff could not maintain his action because he had refused to submit the amount of his loss to arbitration.

A provision, in a contract for the payment of money upon a contingency, that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action upon it shall be maintained until after such an award, then, as was adjudged in *Hamilton* v. *Liverpool, London & Globe Ins. Co.*, above cited, and in many cases therein referred to, the award is a condition precedent to the right of action. But when no such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount to arbitration is collateral and independent; and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract. *Roper* v. *Lendon*, 1 El. & El. 825; *Collins* v. *Locke*, 4 App. Cas. 674; *Dawson* v. *Fitzgerald*, 1 Ex. D. 257; *Reed* v. *Washington Ins. Co.*, 138 Mass. 572; *Seward* v. *Rochester*, 109 N. Y. 164; *Birmingham Ins. Co.* v. *Pulver*, 126 Illinois, 329, 338; *Crossley* v. *Connecticut Ins. Co.*, 27 Fed. Rep. 30.

The rule of law upon the subject was well stated in *Dawson* v. *Fitzgerald*, by Sir George Jessel, Master of the Rolls, who said: "There are two cases where such a plea as the present is successful: first, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue

on the first, leaving the defendant" "to bring an action for not referring," or (under a modern English statute) "to stay the action till there has been an arbitration." 1 Ex. D. 260.

Applying this test, it is quite clear that the separate and independent provision, in the policy now before us, for submitting to arbitration the amount of the loss, is a distinct and collateral agreement, and was wrongly held by the Circuit Court to bar this action.

Judgment reversed, and case remanded, with directions to set aside the verdict, and to take such further proceedings as may be consistent with this opinion.

THE PROPELLER BURLINGTON.

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

No. 783. Submitted December 1, 1890. — Decided December 15, 1890.

The libellant in an Admiralty suit, owner of a barge lost through alleged negligence in the propeller towing it, obtained a decree against the offending vessel in the Circuit Court on appeal, valuing it at $5300, and adjudging that he recover of the claimants (owners) and also against the sureties on the appeal bond, $2422.28 for his own damages by loss of the barge and freight, and $2877.72 as trustee for the owners of the lost cargo. Claimants appealed to this court. After this appeal was taken claimants commenced a new suit in Admiralty in the District Court, in which a decree was obtained valuing the vessel at $7000 and distributing this amount to the libellant in this suit and to other sufferers. In this new distribution libellant was awarded $4658, instead of $5300. *Held*,

(1) That this Court had jurisdiction of the appeal in this suit;

(2) That this jurisdiction was not affected by the proceedings in the subsequent and independent suit.

When a tow suffers injury through improper and unseamanlike conduct on the part of the tug hauling it, the latter is liable. Facts stated which show such improper and unseamanlike conduct in this case.

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

Statement of the Case.

Darius C. Ford filed his libel in the District Court of the United States for the Eastern District of Michigan, as owner of the barge William Vanetta, and trustee for the owners of her cargo, against the propeller Burlington, to recover damages for the loss of the barge and cargo in Lake Erie, while being towed by the propeller, because, as averred, of her careless and negligent management.

Bradley and Burrington, as owners of the propeller, answered, denying carelessness and negligence, and pleading also the limitation of liability act in connection with an appraisal and stipulation in the case.

The District Court found the Burlington guilty of the carelessness and negligence alleged, and entered a final decree confirming the report of the commissioner fixing the damages for the loss of the cargo at the sum of $3361.93, and for the loss of the barge and freight at the sum of $2829.83, in all, $6191.76 ; and it further appearing to the court that the propeller had been duly appraised at the sum of $5300, and that a stipulation with sureties had been filed in that amount to secure the judgment of the court, it was ordered that the said sum of $5300 be apportioned and distributed as follows: $2422.28 to libellant for his damages by reason of the loss of the barge and freight, and $2877.72 to libellant as trustee for the owners of the cargo ; and these sums were awarded to him for the damages therein, and it was decreed that he recover the same of the claimant of the propeller and the sureties in the stipulation with costs, and that libellant have execution therefor.

The owners of the propeller appealed to the Circuit Court, and the appeal having been heard, that court made the following findings of fact and conclusion of law, to wit:

"This court finds from the evidence that there was an agreement on the part of the Burlington to tow the Vanetta from Detroit to Cleveland via the South passage, through Lake Erie.

"That in violation of such agreement the master of the Burlington, after entering Lake Erie and running for some hours on the proper course for the South passage, changed

the course of the Burlington and took the Vanetta via north shore of Lake Erie.

"That the South passage was the usual, safest and proper course from the Detroit River through Lake Erie to Cleveland at that season of the year, especially with the wind from the southward and westward, as it prevailed when the Burlington started on the trip with the Vanetta in tow.

"That with the wind as it was, the north shore was a lee shore to the Burlington and her tow, and in taking the North passage, the master of the Burlington not only violated his agreement with the Vanetta, but by this direction actually exposed the latter to greater risk and danger.

"That the master of the Burlington having sought and gained shelter from the southwest wind on the east side of Pt. Pelee Island, which offered him a safe and sufficient protection, about 3 o'clock in the morning of April 1st, 1886, left that shelter and pulled the Vanetta and her other barge back to the north'ard and westward into the open lake, where the Burlington and her tow were subjected to the full force of the wind on a lee shore and where the Burlington was unable to control and manage said barge, thereby bringing about a collision between them, which resulted in serious injury to the Vanetta and led to her total loss.

"That it was an improper and unseamanlike move on the part of the propeller Burlington to leave the shelter of the east side of Pt. Pelee Island and go back into Pigeon Bay on a lee shore, where the Vanetta was exposed to greater danger, which resulted in her loss.

"That the propeller was in fault for not attempting to tow the Vanetta to a place of greater safety after the latter was injured in Pigeon Bay and had signaled the former for help.

"It follows, therefore, as a matter of law, that said propeller Burlington is liable to the libellant and appellee for the value of said barge William Vanetta, and her cargo, as adjudged by the District Court, whose judgment and decree in this case is in all things affirmed, with costs and interest on the amount awarded libellant in the court below. Judgment will accordingly be rendered herein against the appellant, and the stipu-

lators on the appeal bond for the amount of the decree below with interest and costs, for which execution is awarded."

And decree was thereupon entered as follows:

"This cause having been fully argued by counsel on either side, and the record of the court below being seen and fully considered, it is now by this court considered, adjudged and decreed that the judgment and decree of the District Court aforesaid be, and the same is now, in all things affirmed.

"And it is further considered, adjudged and decreed by this court, that the said libellant do recover of and from the said Russell M. Bradley and Riley M. Burrington, claimants and appellants, and also against Perry R. Hall, Russell M. Bradley, Charles H. Bradley and Jay Conderman, as sureties on appeal for said appellants, the sum of five thousand, five hundred and sixty-seven dollars and sixty-five cents damages, being the sum for which judgment or decree in the court below was allowed, ($5300,) with interest to this day, ($267.65,) together with said libellant's cost of suit both in the District Court and in this court, to be taxed by the clerk of this court. It is further ordered, considered, adjudged and decreed that the above sum of five thousand, five hundred and sixty-seven dollars and sixty-five cents, be apportioned and distributed between libellant as owner of scow William Vanetta and freight, and as trustee for the owners of the cargo of said scow in manner following: The sum of two thousand five hundred and forty-four dollars and sixty-one cents ($2544.61) to libellant for his damages by reason of the loss of said scow William Vanetta and freight; and the sum of three thousand and twenty-three dollars and four cents ($3023.04), to libellant as trustee for the owners of the cargo of said scow, and that he have execution against the said claimants and appellants and said sureties on appeal therefor."

From this decree an appeal was taken to this court. It was shown by affidavit that, after this appeal was taken, the owners of the propeller filed their petition in the District Court alleging, among other things, the assertion of claims against them as owners of the propeller by reason of the loss of the barges Vanetta and Star of Hope, while in tow of the propel-

ler; the seizure of the propeller at the suit of the appellee, her appraisal at the sum of $5300, and the filing of the stipulation in that sum; and praying that they might contest their liability and the liability of the propeller for the loss of the barges; that such proceedings were had thereunder as resulted in finding the value of the propeller on the day of the loss at $7000; that there was due appellee by reason of the loss of the Vanetta the sum of $5330.74 and interest, and to the owners of the Star of Hope by reason of her loss the sum of $4000 and interest, and a final decree was entered limiting the liability of appellants to the sum of $7000 with interest, which decree was, on appeal to the Circuit Court, in all things affirmed; that at the date of the entry of the decree from which the appeal in this case was taken there was due appellee the sum of $6542.06, and to the owners of the Star of Hope the sum of $4488, principal and interest; that at that date the declared value of the propeller, with interest from the day of the loss, was $7854; and that the proportion due to appellee was the sum of $4658. This appears in substance, with a slight difference in the amounts by reason of the calculation of interest, from the report of the commissioner in the limited liability proceedings, a copy of which was attached to the affidavit.

Mr. H. C. Wisner for the motion.

Mr. H. H. Swan and *Mr. F. H. Canfield* opposing.

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

This case comes before us on a motion to dismiss, united with a motion to affirm. Appellee contends that as he recovered for himself, as owner, only the sum of $2544.61, and for the owners of the cargo only the sum of $3023.04, the matter stands as though two separate suits had been brought, and that the amount in controversy in either does not reach the jurisdictional sum; and *Ex parte Baltimore & Ohio Railroad Co.*, 106 U. S. 5, and *The Nevada*, 106 U. S. 154, are cited.

But in both of those cases the owners of the vessel and the owners of the cargo were parties to the proceedings and recovered the amounts due them respectively. Here Ford is to be treated in all respects as the sole libellant, and the decree is for the recovery of the total sum of $5567.65, and, although this amount was subsequently apportioned so as to show the allowance for the loss of the barge and that for the loss of the cargo separately, the decree for recovery of the aggregate remained the same, and the execution ordered against the claimants and their sureties on appeal would issue for the single amount.

Nor does the fact, that, upon the subsequent proceedings for limitation of liability, it appeared that Ford could not collect more than $4658, his *pro rata* share of the limit decreed, affect the question. That limitation was arrived at in the other suit, and cannot be laid hold of as controlling this. We think, however, under the circumstances, that there was color for the motion to dismiss, though we overrule it, and that we may therefore consider the motion to affirm.

Under the act of February 16, 1875, 18 Stat. 315, c. 77, our review of the decrees of the Circuit Courts upon their findings of fact and conclusions of law in admiralty cases is "limited to a determination of the questions of law arising upon the record, and to such rulings of the Circuit Court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law." There is no bill of exceptions here, and the inquiry is reduced simply to whether the findings of the Circuit Court justify the decree appealed from.

The general rule is laid down by Mr. Justice Strong, delivering the opinion of the court in *The Steamer Webb*, 14 Wall. 406, 414, "that an engagement to tow does not impose either an obligation to insure, or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance, or that there has been negligence, or unskilfulness to his injury in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault.

The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services. But there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it."

The Circuit Court found that the loss of the Vanetta was the result of improper and unseamanlike conduct on the part of the propeller Burlington. And the findings state various facts showing that the propeller was in fault, and that but for such fault the loss would not have happened. Findings that the master of the Burlington took the Vanetta via the north shore of Lake Erie when the South passage was the usual, safest and proper course at that season of the year, especially with the wind as it then prevailed, and that in doing so he violated his agreement with the Vanetta and exposed the latter to greater risk and danger; that the master having gained shelter which offered a safe and sufficient protection, left it and pulled the Vanetta and the other barge into the open lake, where the propeller and her tow were subjected to the full force of the wind on the lee side, and the propeller was unable to control and manage the barges, which resulted in serious injury to the Vanetta and led to her total loss; that this was an improper and unseamanlike move, and resulted in the Vanetta's loss; and that the propeller was in fault for not attempting to tow the Vanetta to a place of greater safety after the latter was injured in Pigeon Bay and had signaled the former for help; are findings from which the conclusion of law followed; for these findings established that in what was done, there was an actionable lack of the usual caution and skill, and that what was omitted to be done was within the power of the propeller to do, and should have been done by any master of competent skill and experience; and that different conduct would, in all probability, have prevented the catastrophe. As we cannot go behind the findings, and they are sufficient to sustain the decree, further argument is not required. *The Maggie J. Smith*, 123 U. S. 349; *The Gazelle and Cargo*, 128 U. S. 474.

Decree affirmed.

In re LANCASTER, Petitioner.

ORIGINAL.

No number. Submitted December 4, 1890. — Decided December 5, 1890.

The petitioners, being indicted in a Circuit Court of the United States and taken into custody, applied to this court for a writ of *habeas corpus* without first invoking the action of the Circuit Court upon the sufficiency of the indictment. *Held*, that this court would not interfere.

THIS was a motion for leave to file the following petition for a writ of *habeas corpus*.

To the Honorable, The Supreme Court of the United States:

The petition of Wright Lancaster, Jno. K. Lancaster, Henry Lancaster, Jas. Moore, Lewis Knight and Luther A. Hall respectfully showeth that each and every of them are citizens of the United States of America, and that the liberty of each and every of them is now restrained, and that each and every of them are now in the custody of Walter P. Corbett, the United States marshal for the Southern District of Georgia, and are by him kept in custody in the county jail of Bibb County, Georgia, under an indictment in the United States Circuit Court for the western division of the Southern District of Georgia, which said indictment was filed in said court on the twentieth day of November, eighteen hundred and ninety, and a certified copy of said indictment is hereto attached and made part of this petition. Your petitioners show that said indictment is a joint indictment against these petitioners and others in said indictment named, charging them with conspiracy and murder. Your petitioners allege that their liberty is unlawfully and illegally restrained under said indictment; and they further show that their custody under said indictment by said marshal is unlawful and illegal because the matters and things set forth and charged in the said indictment and the several counts thereof do not constitute any offence or offences against the laws of the United States and do not come within the purview, true intent and meaning of the act of Congress,

approved May 31, 1870, entitled An act to enforce the rights of citizens of the United States, etc., nor any part thereof, and because the matters and things in the said indictment and in the various counts thereof set forth and charged do not constitute any offence or offences cognizable in the said Circuit Court and do not come within its power and jurisdiction, and because the said indictment and each and every of the various counts thereof are too vague, general, insufficient and uncertain to constitute an indictment according to the Constitution of the United States.

Wherefore your petitioners pray that the writ of *habeas corpus* may issue out of this court, directed to the said W. P. Corbett, United States marshal for the Southern District of Georgia, commanding him to produce the bodies of your petitioners, together with the cause of their detention, to the end that your petitioners may be discharged from his custody; and your petitioners further pray that the writ of *certiorari* may issue, directed to the clerk of the United States court for the western division of the Southern District of Georgia, commanding him to certify and send up to this court the said indictment and all proceedings thereunder.

Wright Lancaster.
Jno. K. Lancaster.
James T. Moore.
Lewis E. Knight.
Luther A. Hall.

Mr. Washington Dessau for the petitioner.

In this case the Circuit Court has exercised jurisdiction. It has directed the United States Marshal to hold the petitioners under the indictment now on file in that court.

This court will presume that everything has been done between the return of the indictment as true by the grand jury, and the taking of the prisoners into custody by the marshal, that ought to have been done; that is to say, that a warrant was duly issued, duly served, and a return thereon duly made by the marshal.

Under this presumption of law, the reasoning of this court in *Ex parte Virginia*, 100 U. S. 339, applies and ought to control this motion. The inferior court having taken jurisdiction, the writ of *habeas corpus* is now applied for in the nature of an appeal from the judgment of that court.

This case is readily distinguished from *Kemmler's Case*, 136 U. S. 436; from *Mirzan's Case*, 119 U. S. 584; from *Royall's Case*, 117 U. S. 241; and from *Wales* v. *Whitney*, 114 U. S. 564.

Mr. Attorney General opposing.

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

The petitioners were indicted under sections 5508 and 5509 of the Revised Statutes, on the 20th of November, 1890, in the Circuit Court for the Southern District of Georgia, and have been taken into custody. They have not invoked the action of the Circuit Court upon the sufficiency of the indictment by a motion to quash or otherwise, but ask leave to file in this court a petition for a writ of *habeas corpus*, upon the ground that the matters and things set forth and charged do not constitute any offence or offences under the laws of the United States, or cognizable in the Circuit Court, and that for other reasons the indictment cannot be sustained. In this posture of the case we must decline to interfere.

The application for leave to file the petition is

Denied.

FOND DU LAC COUNTY *v.* MAY.

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

No. 61. Argued November 26, 1890. — Decided December 15, 1890.

Letters patent No. 25,662, granted to Edwin May, October 4, 1859, for an "improvement in the construction of prisons," are invalid.

The novel idea set forth in the patent was to interpose a grating between

the jailer and the prisoners at every stage of opening and shutting a door. The mechanism of the patent, except the grating, was old.

As to claim 1, the angle door being old, its combination with a lock or bolt was not new or patentable.

As to claims 3 and 4, the mechanical devices were old, and operated in the same way, either with or without the grating.

Introducing the grating did not make a patentable combination, but only an aggregation.

At law for the infringement of letters patent. Verdict for plaintiff and judgment on the verdict. Defendant sued out this writ of error. The case is stated in the opinion.

Mr. Charles E. Shepard for plaintiff in error. *Mr. J. H. McCrory* was with him on the brief.

Mr. M. C. Burch for defendant in error. *Mr. Duane E. Fox* was with him on the brief.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action at law, brought in the Circuit Court of the United States for the Eastern District of Wisconsin, on the 26th of September, 1885, by Sarah May against the county of Fond du Lac, a corporation of the State of Wisconsin, to recover damages for the infringement of letters patent No. 25,662, granted to Edwin May, October 4, 1859, for fourteen years from that day, for an "improvement in the construction of prisons."

The specification and claims of the patent are as follows: "Be it known that I, Edwin May, of Indianapolis, in the county of Marion and State of Indiana, have invented certain new and useful improvements in the construction and operation of prisons, of which the following is a full and exact description, reference being had to the accompanying drawings and the letters marked thereon. Figure 1 is a perspective and figures 2, 3, 4, 5, 6, 7, 8 are sectional views showing the construction and general arrangement of the same.

"A represents the side and end walls of the prison; B, the floor; C, the outside door; D, inside or angle door; E, mould-

ing or hood over door C; F, the cells; G, the small door of the safe or box J; H, the crank which operates the drum (*p*); I, bolt or lock to the angle door D; *a*, a bar connected with the bolts S, which are operated by the levers (*b*) for the purpose of fastening the cell doors (*j*); *c*, fulcrum of the lever (*b*); *d*, levers for operating the sliding doors (*l*); *e*, wire rope or endless chain which operates the levers (*d*); *f*, hinge joints to levers (*d*); *g*, support of pulleys for chain or wire rope; *h*, pulleys over which the chain or wire rope (*e*) operates; *i*, the grated partition; *j*, cell doors; *k*, slide or groove for doors (*l*) to work in; *m*, rollers for sliding doors (*l*); *n*, guard or slide for levers (*d*); *o*, staple to padlock levers (*b*); *q*, pawl or catch to hold the drum (*p*) in place; *r*, rollers for bar (*d*) to work over.

"The nature and extent of the improvement will be more readily understood by reference to the object sought, which is, avoiding the necessity of actual contact with the prisoners, while the keeper has perfect knowledge and control of them, and preventing their escape by knocking down the keeper, which has often occurred where the common arrangement of prisons has been used. It is peculiarly adapted to county prisons and that portion of State prisons appropriated to solitary confinement.

"The following is the manner of operating the same and managing the prisoners: The jailer, opening the outside door C, releases the edge of the small or safe door G, giving access to the crank H, which operates the doors (*l*) in the grated partition (*i*) by means of the endless chain or rope which passes around the drum (*p*) and is attached to the hinge or joint (*f*) of the lever (*d*). The angle door D is held by the bolt or lock I while the keeper is allowed to examine every part of the hall, which the peculiar shape of the angle door D allows. Should there be any prisoners in the first hall they are ordered to retire through the doors (*l*) in the grated partition (*i*). The doors (*l*) are then closed by operating the crank H, as has been shown. The keeper then, unlocking, passes through the angle door D into the first hall, being separated from the prisoners by the grating (*i*), through which he orders the prisoners each

to his cell, and to close the door after him. By operating the lever (*b*) the bars (*a*) are drawn, while the bolts S, being drawn over the doors, secure the same. He then passes in and locks the doors (*j*), whereby an iron grating is always kept between the keeper and the prisoners.

"What I claim and desire to secure by letters patent is —

"First. The angle door D, in combination with the safe lock or bolt I, when constructed and operated substantially as set forth.

"Second. The safe J, containing the drum (*p*) and bolt I, and being held by the outer door C, when constructed and operated substantially as and for the purposes set forth.

"Third. The endless chain or rope (*e*), in combination with the levers (*d*), when constructed and operated substantially as and for the purposes set forth.

"Fourth. The combination and arrangement of the levers (*b*), bar (*a*), and bolts or lugs S, when operated from without the grating *i*, substantially as and for the purposes set forth."

The patent was, on the 4th of October, 1873, extended by the Commissioner of Patents for seven years from that day. The patentee, who was the husband of the plaintiff, died on the 27th of February, 1880. The plaintiff claimed that one Edwin Forrest May, on the 6th of March, 1880, was duly appointed executor of Edwin May by the proper tribunal; that, he having resigned his trust on the 7th of June, 1880, one McGinnis was duly appointed administrator *de bonis non*, with the will annexed, of Edwin May; and that McGinnis, on the 6th of March, 1882, under a proper order of the proper court to that effect, conveyed to the plaintiff all the title of the estate of the patentee under the patent and its extension, including all rights of action and claims for damages which the estate had by virtue thereof. Damages were claimed for the use of the patented invention, as covered by claims 1, 3 and 4, for the period of the extended term, from October 4, 1873, to October 4, 1880.

The defendant, by an answer and a notice of special matter, set up in defence the statute of limitations of the State of Wisconsin and want of novelty. The case was tried by a

jury, who found that during the extended term of the patent the defendant had infringed claims 1, 3 and 4; and they awarded to the plaintiff $1774.68 damages. 27 Fed. Rep. 691. The defendant moved for a new trial on various grounds, including one that the court erred in not instructing the jury to render a verdict for the defendant, and another that the court erred in ruling that the plaintiff was the owner of the cause of action. This motion was denied; and the defendant then moved for an arrest of judgment, on the grounds (1) that the patent was void on its face, because none of the claims were for a patentable invention or combination, and that no one of the several combinations claimed in it as the patentee's inventions was a new or patentable invention; and (2) that the plaintiff was not the lawful owner of the cause of action sued upon. This motion was overruled, and judgment was entered for the plaintiff for $1774.68 and costs. To review that judgment the defendant has brought a writ of error.

At the trial, when the patent was offered in evidence, it was objected to by the defendant on the ground that, on the face of the specification and claims, it was invalid. This objection was overruled, and the defendant excepted. The same objection was made to the certificate of extension, and overruled and the defendant excepted. The proceedings for the appointment of the executor and of the administrator *de bonis non*, and for the sale of the patent, the conveyance to the plaintiff, and the order of the court confirming the sale and conveyance, were then put in evidence under the objection and exception of the defendant that they did not vest in the plaintiff any title to the cause of action sued on.

One Luther V. Moulton was then introduced as a witness by the plaintiff, and testified as follows: "I live at Grand Rapids, Michigan; am a partner in a foundry there; I have had experience in mechanics and patents; have photographed models; have been consulted about the patentability of mechanical devices; have been an expert witness in patent causes; have done patent soliciting; am acquainted with the May patent in suit; know its specifications and claims, and am acquainted with its practical operation and effect."

It was contended that the defendant had infringed the patent by constructing and using a county jail containing the inventions covered by claims 1, 3 and 4. Models of a jail constructed according to the patent, and of the defendant's jail, were introduced in evidence by the plaintiff and identified as correct. A stipulation was then put in evidence, signed by the attorneys for the parties, to the effect that the device used by the defendant in its jail for fastening the doors had been in use therein since 1869. The witness Moulton then proceeded: "In my opinion the model representing the defendant's jail contains the mechanical equivalents of the devices described in the specification, and claimed particularly in the first, third and fourth claims of the patent in question. The results produced by the combinations claimed in the patent are produced by substantially the same means." On cross-examination he testified as follows: "The novelty and utility of this patented device consist in interposing a grating or wall between the person operating the mechanism for securing the doors and the prisoners, so that they can be observed through the door or grating and the corridor doors be closed and secured, or unlocked and opened, or the cell doors can be locked or unlocked, all without any contact between the jailer and the prisoners, and without the jailer being in the same apartment with the prisoners, and thus exposed to attack by them. The several elements of the device are probably old. The novelty consists in the particular combinations, whereby a new and useful result is produced. I think an angle door is old; have never seen them in jails; have seen angle doors and curved doors and illustrations of them in books many years ago, before 1859. Locks and bolts upon doors are also old, and to put a lock or bolt upon such a door would not be invention. In defendant's jail, the corridor doors are not closed by the fastening mechanism as described in the patent, but, when closed by the prisoners or turnkey, they are locked by bolts moved by rock-shafts extending from the outer apartment, through the wall, into the jail proper and to the corridor doors. There is nothing new in a rock-shaft as applied to the purpose of transmitting motion to bolts or other like uses; it

is the equivalent of an endless chain, or any other well-known device for transmitting motion; it is very old. The operation and effect of the rock-shaft, the handle or lever that moves it, and the bolts that it moves in connection with the corridor doors thereby locked and unlocked, are precisely the same with or without a wall or grating interposed between the handle or lever and the door locked, and also the same as the corresponding parts in the May patent. In the Fond du Lac jail the handle of this rock-shaft and the place where it is operated are a few feet distant from the angle door. There is an embrasure or slit in the wall by these handles to the rock-shafts, through which two corridors, one over the other on one side of the jail, can be observed; but the other side of the jail with its two corridors and two tiers of cells, cannot be observed. The doors of all four corridors are locked by rock-shafts, all starting and moved from the same point. The operation and effect of the arrangement of the lever (*b*), bar (*a*), and bolts or lugs (S), as described in the patent, for locking and unlocking the cell doors, are precisely the same whether the lever is operated through a wall or grating, or whether there is none there. Mechanically, the effect is precisely the same with or without the grating, so far as fastening and unfastening the doors is concerned. The only difference is in the effect of the grating to protect the jailer and guard against escapes. Every separate element of the combination of the fourth claim is old — the bar, the lever, the lugs or bolts, and the grating. Levers have long been used, long before this patent, to move a long bar and thereby to move bolts, lugs, or the like, at a distance; so, also, similar devices passing through a wall, to open and close and secure window shutters and the like; but the particular combination adapted to interpose protection between the person operating the device and those on the other side of the wall or grating was new and patentable, and so patented to Mr. May. The grating has nothing to do directly with locking or unlocking the doors. It affords protection to the operator while so doing. So with the second claim in suit, which is the third of the patent. All its separate elements are old. It is only the par-

ticular combination applied to this purpose that is new and patentable."

The plaintiff then gave evidence to show that the patented contrivance was useful and economical, and for much of the time since it was patented had been in use in sundry jails and prisons in this country. It was further proved that the defendant had used in its jail, ever since 1869, the outside angle door, the contrivance for locking and unlocking the corridor doors, and the contrivance for locking and unlocking the cell doors, which were exhibited by the model of its jail which had been put in evidence. Other evidence was given on the part of the plaintiff, but none to contradict what had been testified to by the witness Moulton; and at the close of the plaintiff's case the defendant moved that a verdict be directed for it, on the grounds, among others, that the patent was void for lack of novelty, and that the combinations described in it were not operative combinations, and were old and well-known devices applied to similar uses. This motion was overruled, and the defendant excepted.

Thereupon the defendant proved that at the Wisconsin State prison at Waupun, the Chemung County jail at Elmira, New York, and elsewhere, there had been in common and public use, well known to many persons, for many years before 1859, a device consisting of a lever, a bar, and lugs or bolts attached, operated substantially as described in said patent, to lock or unlock the cell doors, but without any intervening wall, corridor grating or other protection to the jailer against attack; that such device, except for the absence of a corridor wall or grating, was substantially identical with, and a mechanical equivalent of, the device described in said patent, and claimed in the fourth claim thereof, and that it was used, and operated in the same way, to lock or unlock the cell doors after they had been closed.

No evidence in rebuttal was offered by the plaintiff, and, the testimony being closed, the defendant renewed its motion for a verdict to be directed for it, on the grounds before stated; but the motion was denied, and the defendant excepted.

The defendant then prayed that the jury be instructed that

each of the claims, 1, 3 and 4 was void; that claim 1 did not claim a new device, nor was the combination claimed therein an operative combination, but was a mere aggregation; that claim 3 did not describe a new device; and that it was a question for the jury whether there was an invention, or exercise of the inventive faculty, in the construction of the devices described in the patent. Each of these instructions was refused, and the defendant excepted to each refusal. The case was submitted to the jury under instructions from the court, the defendant excepting thereto because the court did not submit it to the jury to say whether the elements specified in each of the several combinations in claims 1, 3 and 4 appeared together in a practical combination, or whether it was a mere aggregation.

We are of opinion that the court ought to have directed a verdict for the defendant, on the ground that the patent was void; and that the judgment must be reversed. The objects sought to be accomplished by the patentee were twofold, — safe observation of the prisoners while they were out of their cells but within the outer inclosure of the jail, and a safe mode of locking them in their cells without risk of personal contact with them. These objects he sought to attain by three contrivances, which are the foundations of the four claims of the patent. Proceeding inwards from the outside of the jail, these three contrivances are as follows: (1) An angle door D, with the angle in the middle line of the door, projecting inward, a safe or box J, containing a drum (*p*) operated by a crank H, and a bolt or lock I to the angle door D. This contrivance, which is the subject of claim 1, enables the jailer, after he opens the extreme outer door of the jail, to have access to the angle door, so as to look through its grated bars in all directions by means of the angle, while that door is securely held by the bolt or lock I, and to inspect the interior of the prison and observe the prisoners, and direct them to retire behind the corridor or partition doors (*l*) in the grated partition (*i*). This partition separates an outer hall or space from the corridors which run along the tiers of cells. (2) When the prisoners have thus retired behind the corridor or partition doors (*l*), the

next step is to open the safe or box J, from the space between the outer door and the angle door, and by the crank H operate the drum (*p*), which carries the wire rope or endless chain (*e*), which, by pulleys, levers and hinges, opens or shuts the corridor or partition doors (*l*). Those doors being closed while the jailer is still outside of the angle door, he can then open the angle door and go into the inner hall. The mechanism thus explained is the foundation of claims 2 and 3. (3) Then the jailer, having between him and the prisoners the grated partition (*i*), with the doors in it closed, can direct each prisoner to retire to his cell and to close the cell door after him. The jailer then, by operating the lever (*b*), can draw the bars (*a*) and carry the bolts or lugs S over the cell doors, and thus secure them. He can then advance into the corridor and further secure the cell doors by ordinary locks on them. This mechanism is the foundation of claim 4.

The novel idea set forth in the patent is to interpose a grating between the jailer and the prisoners at every stage of opening or shutting a door. Previously, there had been between the jailer and the prisoners no intervening wall, corridor grating or other protection against attack; but, with that exception, the prior device used in the Wisconsin State prison and the Chemung County jail was substantially identical with, and a mechanical equivalent of, the device claimed in claim 4 of the patent, and operated in the same way to fasten and unfasten the cell doors.

The several elements of the patented device were old. Moulton testified that he had seen angle doors and curved doors, and illustrations of them in books, before 1859; that in the defendant's jail the corridor doors were not closed by the fastening mechanism described in the patent, but, when closed by the prisoners or the turnkey, were locked by bolts moved by rock-shafts extending from the outer apartment, through the wall, into the jail proper and to the corridor doors; that there was nothing new in a rock-shaft applied to the purpose of transmitting motion to bolts or to other like uses; that it was the equivalent of an endless chain or any other well-known device for transmitting motion, and was very old; that the

operation and effect of the rock-shaft and handle or lever that moved it and the bolts that it moved, in connection with the corridor doors thereby locked and unlocked, were precisely the same with or without a wall or grating interposed between the handle or lever and the door locked; that the operation and effect of the arrangement of the lever (*b*), bar (*a*), and bolts or lugs S, as described in the patent, were precisely the same, whether the lever was operated through a wall or grating or not; that mechanically the effect was precisely the same with or without the grating, so far as fastening and unfastening the doors was concerned; that the only difference was in the effect of the grating to protect the jailer and guard against escapes; that every separate element of the combination of claim 4 was old, the levers, the bars, the bolts or lugs and the grating; that levers had been used long before the patent to move a long bar and thereby move bolts, lugs or the like at a distance, and so had similar devices passing through a wall to open and close window-shutters and the like, but that the particular combination adapted to interpose protection between the person operating the device and persons on the other side of the wall or grating, was new; that the grating had nothing to do directly with locking or unlocking the doors, but afforded protection to the operator while so doing; that all the elements of claim 3 of the patent were old; and that it was only the particular combination applied to the purpose indicated that was new.

As the angle door was an old contrivance, it is manifest that the combination of it with the safe lock or bolt I, claimed in claim 1, was not new or patentable. As the witness Moulton says, locks and bolts upon doors are old, and to put a lock or bolt upon an angle door would not be invention. Nor is the combination of an angle door, with a lock of any kind, a patentable invention, even though the particular lock had not before been put upon an angle door. Moreover, the combination claimed in claim 1 is one of the angle door with the particular lock or bolt I, that is, such lock or bolt as an integral part of the safe or box J, with its drum (*p*) and connections, in which view the apparatus in the defendant's jail does not infringe claim 1.

As to the patentability of claims 3 and 4, the feature which it is alleged makes both of them patentable is the interposition of a barrier between the jailer and the prisoners. In claim 3, the sliding doors are opened and closed, while the angle door is still locked. In claim 4, the cell doors are fastened by means of the bolts or lugs S, during the time the grated doors in the corridor are securely closed. In view of the evidence, it is clear that the devices covered by claims 3 and 4, as mechanical devices, existed before, having the same mechanical elements and the same mechanical operation and effect. The whole combination was the same, so far as it was a mechanical or patentable combination, namely, a lever, a bar passing through an interposed barrier, a lever or its mechanical equivalent at the other end, and something to be moved by the motion thus transmitted through the barrier. The patentee merely used the same devices which had before been used by other persons, between one side of an interposed barrier and the other, with the same mechanical effect. His motive was, and his use of the device was, to protect the jailer, by a sufficient barrier, from being injured by the prisoners; but neither the motive nor the strength of the barrier can enter as an element into the question. The case is one merely of a double use. The mechanism was old in its use to move a door or a gate at a distance, and the mechanical operation of the device was the same, whether the mechanism passed through a solid iron barrier, or a grated iron barrier, or a barrier of another material, or through no barrier at all. Mr. Moulton testifies that the mechanical effect is precisely the same with or without the grating, so far as fastening and unfastening the doors is concerned, the only difference being in the effect of the grating to protect the jailer and guard against escapes. *Tucker* v. *Spaulding*, 13 Wall. 453; *The Corn Planter Patent*, 23 Wall. 181, 232; *Brown* v. *Piper*, 91 U. S. 37; *Dunbar* v. *Myers*, 94 U. S. 187; *Vinton* v. *Hamilton*, 104 U. S. 485, 491; *Heald* v. *Rice*, 104 U. S. 737, 754; *Hall* v. *Macneale*, 107 U. S. 90; *Thompson* v. *Boisselier*, 114 U. S. 1; *Stephenson* v. *Brooklyn Cross-Town Railroad Co.*, 114 U. S. 149; *Aron* v. *Manhattan Railway Co.*, 132 U. S. 84; *Watson* v. *Cincinnati &c.*

Railway Co., 132 U. S. 161; *Hill* v. *Wooster*, 132 U. S. 693; *Burt* v. *Evory*, 133 U. S. 349; *St. Germain* v. *Brunswick*, 135 U. S. 227.

As the mechanical operation and effect of the patented devices are the same, whether there be a grating or other barrier or not, there is no patentable combination between the devices and the grating. The grating performs no mechanical function and has no mechanical effect. The case is one of mere aggregation. *Pickering* v. *McCullough*, 104 U. S. 310, 318; *Double-Pointed Tack Co.* v. *Two Rivers Mfg. Co.*, 109 U. S. 117; *Stephenson* v. *Brooklyn Cross-Town Railroad Co.*, 114 U. S. 149; *Hendy* v. *Miners' Iron Works*, 127 U. S. 370; *Aron* v. *Manhattan Railway Co.*, 132 U. S. 84.

This patent was granted under the act of July 4, 1836, chap. 357, the sixth section of which, 5 Stat. 119, provides for the granting of a patent for "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement in any art, machine, manufacture, or composition of matter." It was not granted for an art or process, that is, "an act or a series of acts performed upon the subject matter to be transformed and reduced to a different state or thing." *Cochrane* v. *Deener*, 94 U. S. 780, 788. So far as the grating is sought to be made an element in the combinations of claims 3 and 4, it is not an element of the mechanism. It is no part of the machine, and has no effect upon its operation. Nor is the apparatus a manufacture or a composition of matter. In the patent, the invention is called one of an "improvement in the construction of prisons," and in the specification it is called an invention of "improvements in the construction and operation of prisons." In *Jacobs* v. *Baker*, 7 Wall. 295, suit was brought on four patents for "improvements in the construction of prisons." One was for a secret passage or guard-chamber around the outside of an iron-plate jail, and between the jail and the surrounding inclosure, constructed for the purpose of allowing the keeper to oversee and overhear the prisoners without their being conscious of his presence. Another was for improved iron walls for iron-plate jails. Another was for an improvement in joining the metal

plates. Another was for arranging iron-plate cells in jails. This court held that an improvement in the construction of a jail did not come under the denomination of a machine, or a manufacture, or a composition of matter; and that it was doubtful whether it could be classed as an art. But, however this may be, the grating, in the present case, cannot be considered as a part of a patentable mechanical combination. *Brown* v. *Davis*, 116 U. S. 237, 249, and cases there cited; *Forncrook* v. *Root*, 127 U. S. 176, 181.

The judgment is reversed, and the case is remanded to the Circuit Court, with a direction to grant a new trial.

MAY *v.* JUNEAU COUNTY.

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

No. 94. Argued and submitted November 26, 1890. — Decided December 15, 1890.

The decision in *County of Fond du Lac* v. *May*, *ante*, 395, as to the invalidity of letters patent No. 25,662, granted to Edwin May, October 4, 1859, for an "improvement in the construction of prisons," affirmed.

Want of patentability is a defence to a suit for the infringement of a patent, though not set up in an answer or plea.

At law, for an infringement of letters patent. Verdict for defendant and judgment on the verdict. The plaintiff sued out this writ of error. The case is stated in the opinion.

Mr. M. C. Burch for plaintiff in error. *Mr. Duane E. Fox* was with him on the brief.

Mr. S. U. Pinney, for defendant in error, submitted on his brief.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action at law, brought in the Circuit Court of the United States for the Western District of Wisconsin, by Sarah

May against the county of Juneau, a corporation of the State of Wisconsin, to recover damages for the infringement of letters patent No. 25,662, granted to Edwin May, October 4, 1859, and extended for seven years from October 4, 1873, for an "improvement in the construction of prisons," being the same patent involved in case No. 61, *Fond du Lac County* v. *May*, *ante*, 395, decided herewith. The specification and claims are set forth in the opinion in that case. The complaint alleged infringement only during the extended term, and only claims 1 and 4 were involved in this suit. The title of the plaintiff was the same as in No. 61. A demurrer to the complaint was overruled *pro forma*, and the questions raised by it were reserved for hearing. The defendant then answered, setting up that it was a corporation existing for public purposes and was not liable in the suit; also, that the matter covered by the patent, especially claim 4, was not the subject of a patent. The case was tried before a jury, which, under the direction of the court, found a verdict for the defendant, on which judgment was entered for it, to review which the plaintiff has brought a writ of error.

The plaintiff put in her title, being the same papers as in No. 61, and then Luther V. Moulton, the same witness as in No. 61, testified as follows: "I live at Grand Rapids, Michigan; am a partner in a foundry there. I have had experience in mechanics and patents; have photographed models; have been consulted about the patentability of mechanical devices; have been an expert witness in patent causes; have done patent soliciting; have examined and am acquainted with the May patent in suit; know its specifications and claims, and am acquainted with its practical operation and effect. I have examined the jail of the defendant county and the cells therein and the device there in use for fastening the doors of the cells, its arrangement and method of operation. Such device contains, in my opinion, the mechanical equivalent of the so-called May patent. It is substantially the same thing as the device described in the specification and claims of the patent in question, except the second and third claims. The results produced by the combinations claimed in the patent, so far as they relate

to the first and fourth claims, are produced in the jail by substantially the same means." The model of the patent was then put in evidence, and the witness explained the method of operating the device by reference to the model, and pointed out the similarity between the device used by the defendant and that of the model. On cross-examination he testified: "The novelty and utility of this patented device consists in interposing a grating or wall between the person operating the mechanism for securing the doors and the prisoners, so that they can be observed through the door or point of observation, and the corridor doors be closed and secured, or unlocked and opened, or the cell doors locked or unlocked, all without contact between the jailer and the prisoners, and without the jailer being in the same apartment with the prisoners, and thus exposed to attack by them. The several elements of the device are probably old. The novelty consists in the particular combinations whereby a new and useful result is produced. I think an angle door is old; have never seen them in jails; have seen angle doors and curved doors and illustrations of them in books many years ago, before 1859. Locks and bolts upon doors are also old, and to put a lock or bolt on a door would not be a novelty or invention. The operation and effect of the lever in moving the device which locks and unlocks the cell doors are precisely the same without or with a wall or grating interposed between the lever and the door locked. All the separate elements of this device have long been in use for different purposes and are old, but the particular combination adapted and intended to interpose protection between the person operating the device and those on the other side of and within the wall or grating was new."

The plaintiff then gave evidence tending to show that the patented device was useful and economical, and had been in use in many jails and prisons since it was patented. It was admitted that the device was put into the jail of the defendant in 1878, and had been in use there ever since. Other evidence was put in on the part of the defendant, including a stipulation signed by the attorneys for the respective parties, setting forth that, prior to October 5, 1859, a device or contrivance

was in use at the State prison at Waupun, Wisconsin, and elsewhere, for fastening a series or row of cell doors by means of a lever and horizontal bar, but not operated outside of a corridor or partition separating the prisoners from the jailer.

At the close of the testimony on both sides, the defendant moved the court to direct a verdict for the defendant on the grounds (1) that the defendant was merely a territorial division of the State, existing only as a political subdivision thereof, and could not be sued for the infringement of a patent; (2) that the right of action in the suit had never been assigned to the plaintiff. The court sustained the motion on both grounds, (30 Fed. Rep. 241,) and directed the jury to return a verdict for the defendant, which was done. The plaintiff excepted to the ruling and to the direction.

On the grounds set forth in the opinion in No. 61 *Fond du Lac County* v. *May*, *ante*, 395, the patent was invalid, and the judgment must be affirmed. This defence was set up in the answer, and the motion to direct a verdict for the defendant was broad enough to cover the question of the invalidity of the patent, although that ground was not then distinctly urged. Want of patentability is a defence, though not set up in an answer or plea. *Brown* v. *Piper*, 91 U. S. 37, 44; *Dunbar* v. *Myers*, 94 U. S. 187; *Slawson* v. *Grand Street Railroad Co.*, 107 U. S. 649, 652; *Hendy* v. *Miners' Iron Works*, 127 U. S. 370, 375.

Judgment affirmed.

UNION STOCK YARDS BANK *v.* GILLESPIE.

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

No. 79. Argued November 17, 18, 1890. — Decided December 15, 1890.

A bank, receiving on deposit from a factor, under the circumstances set forth in this case, moneys which it must have known were the proceeds of property of the factor's principal, consigned to him by the principal

Citations for Appellants.

for sale on the principal's account, of which moneys the principal was the beneficial owner, cannot, as against the latter, appropriate the deposits to the payment of a general balance due to the bank from the factor; and if it attempts to do so, the remedy of the principal against the bank is in equity and not at law.

Chapman v. *Forsyth*, 2 How. 202, and *Hennequin* v. *Clews*, 111 U. S. 676, distinguished from this case.

In equity. Decree for the complainants. Defendant appealed. The case is stated in the opinion.

Mr. Edward O. Brown, for appellant, cited: (1) on the question of jurisdiction, *Clarke* v. *Shee*, Cowper, 197, 199; *Mason* v. *Waite*, 17 Mass. 560, 563; *Merrill* v. *Norfolk Bank*, 19 Pick. 32; *Bayne* v. *United States*, 93 U. S. 642; *Wright* v. *Ellison*, 1 Wall. 16; *Oelrichs* v. *Spain*, 15 Wall. 211; *Root* v. *Lake Shore &c. Railway*, 105 U. S. 189; *Parkersburg* v. *Brown*, 106 U. S. 487; *Litchfield* v. *Ballou*, 114 U. S. 190; and (2) on the merits, *Lambert* v. *Peyton*, 8 H. L. Cas. 1; *Wabash & Erie Canal Trustees* v. *Beers*, 2 Black, 448; *Crocket* v. *Lee*, 7 Wheat. 522; *Carneal* v. *Banks*, 10 Wheat. 181; *Harrison* v. *Nixon*, 9 Pet. 483; *Haven* v. *Wakefield*, 39 Illinois, 509; *Bolton* v. *Puller*, 1 Bos. & Pull. 539; *Ward* v. *Brandt*, 11 Martin (La.) 331; *S. C.* 13 Am. Dec. 352; *Ex parte Buckhause &c.*, 10 Nat. Bk. Reg. 206; *Chapman* v. *Forsyth*, 2 How. 202; *Hennequin* v. *Clews*, 111 U. S. 676; *Ex parte Dale*, 11 Ch. D. 772; *Knatchbull* v. *Hallett*, 13 Ch. D. 696; *Ford* v. *Hopkins*, 1 Salk. 283; *Miller* v. *Race*, 1 Burrow, 452; *Murray* v. *Lardner*, 2 Wall. 110; *Swift* v. *Tyson*, 16 Pet. 1; *Brooklyn City &c. Railroad* v. *Bank of the Republic*, 102 U. S. 14; *Atlantic Cotton Mills* v. *Indian Orchard Mills*, 147 Mass. 268; *Currie* v. *Misa*, L. R. 10 Ex. 153; *Commercial Bank* v. *Hughes*, 17 Wend. 94; *Clayton's Case*, 1 Meriv. 554; *Misa* v. *Currie*, 1 App. Cas. 569; *Brandaõ* v. *Barnett*, 12 Cl. & Fin. 787; *Bank of the Metropolis* v. *New England Bank*, 11 How. 234; *S. C.* 6 How. 212; *McDowell* v. *Bank of Wilmington*, 1 Harrington (Del.) 369; *Marsh* v. *Oneida Cent. Bank*, 34 Barb. 298; *Central Bank* v. *Connecticut Mutual Life Ins. Co.*, 104 U. S. 54; *Marine Bank* v. *Fulton Bank*, 2 Wall. 252; *Thompson* v.

Riggs, 5 Wall. 663; *Bank of the Republic* v. *Millard*, 10 Wall. 152.

Mr. L. H. Bisbee and *Mr. John W. Beebe*, (with whom were *Mr. John P. Ahrens* and *Mr. Henry Decker* on the brief,) for appellees, cited: (1) on the question of jurisdiction, *National Bank* v. *Insurance Co.*, 104 U. S. 54; *Sims* v. *Brittain*, 4 B. & Ad. 375; *Williams* v. *Everett*, 14 East, 582; *Yates* v. *Bell*, 3 B. & Ald. 643; *Pannell* v. *Hurley*, 2 Collyer, 241; *Pennell* v. *Deffell*, 4 De G. M. & G. 372; *Bodenham* v. *Hoskyns*, 2 De G. M. & G. 903; *Frith* v. *Cartland*, 2 Hem. & Mil. 417; *Whitley* v. *Foy*, 6 Jones Eq. 34; *S. C.* 78 Am. Dec. 236; *Veil* v. *Mitchell*, 4 Wash. C. C. 105; *N. Y. Ins. Co.* v. *Roulet*, 24 Wend. 505; *Varet* v. *N. Y. Ins. Co.*, 7 Paige, 560; *Kilpatrick* v. *McDonald*, 11 Penn. St. 387; *Warner* v. *Martin*, 11 How. 209: and (2) to the merits, *Hogan* v. *Shorb*, 24 Wend. 458; *Moore* v. *Clementson*, 2 Camp. 22; *Baring* v. *Corrie*, 2 B. & Ald. 137; *Fish* v. *Kempton*, 7 C. B. 687; *Baltimore* v. *Williams*, 6 Maryland, 235; *Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 333; *Allen* v. *St. Louis Bank*, 120 U. S. 20; *Parker* v. *Phetteplace*, 1 Wall. 684; *Lytle* v. *Arkansas*, 22 How. 193; *Harriet* v. *Beal*, 17 Wall. 590; *Alviso* v. *United States*, 8 Wall. 337; *Dickenson* v. *Tillinghast*, 4 Paige, 215; *Nichols* v. *Martin*, 35 Hun, 168; *Duguid* v. *Edwards*, 50 Barb. 288; *Chesterfield Manfg. Co.* v. *Dehon*, 5 Pick. 7; *S. C.* 16 Am. Dec. 367; *Merrill* v. *Bank of Norfolk*, 19 Pick. 32; *Baker* v. *Exchange Bank*, 100 N. Y. 31; *Ex parte Kingston*, L. R. 6 Ch. 632; *Knatchbull* v. *Hallett*, 13 Ch. D. 696; *Overseers of the Poor* v. *Bank of Virginia*, 2 Gratt. 544; *S. C.* 44 Am. Dec. 399; *Wormley* v. *Wormley*, 8 Wheat. 421.

Mr. Justice Brewer delivered the opinion of the court.

On the 25th day of May, 1887, a decree was rendered in the Circuit Court of the United States for the Northern District of Illinois, in favor of appellees and against appellant, for $26,585.90. That decree is challenged by this appeal. Two questions are presented; one of right, the other of jurisdic-

tion. Ought the bank to be compelled to pay to the Gillespies such sum of money; and had a court of equity jurisdiction to entertain and render a decree in this suit? In respect to the first question, it may be premised that the Gillespies were the owners of certain cattle, which were consigned to the firm of Rappal, Sons & Co. for sale; that the proceeds of the sales made by the Rappals were deposited in the bank, — and it is for this money that the suit was brought. This general statement compels the equitable conclusion that, as the Gillespies owned the cattle, they ought to have the moneys received from their sale. The right of an owner of property is not limited to the property itself, but extends to everything which is its direct product or proceeds. But this outline does not present the questions involved in this case, and a more detailed statement of the facts is requisite. A. J. Gillespie and his two sons, Thomas E. Gillespie and Louis J. Gillespie, were citizens of Kansas City, Missouri, doing business there as A. J. Gillespie & Co. Frederick J. Rappal and his two sons, Lawrence L. Rappal and Frederick J. Rappal, Jr., were citizens of Illinois, engaged in the live stock commission business as partners under the firm-name of Rappal, Sons & Co., at the Union Stock Yards in Chicago. The Union Stock Yards National Bank was a bank organized under the laws of the United States, and also located at the Union Stock Yards in Chicago. The consignments were made in October, 1885. In the spring of that year, Frederick J. Rappal, Sr., went to Kansas City to work up business for his firm. On arriving there he formed a nominal partnership, at least, with William P. Bowen and Milton James, for the purpose of buying cattle and sending them to Chicago for sale. The partnership name was W. P. Bowen & Co. On behalf of this firm, the elder Rappal made a contract with the Gillespies, by which the latter were to advance the money for the purchase of cattle; to take charge of the forwarding of them, receiving in consideration therefor five dollars a car-load, afterwards changed to $2.50 a car-load; and in pursuance of this contract, Rappal selected and purchased the cattle in controversy, receiving from the vendors orders of which the following is a specimen:

"KANSAS CITY, MO., *Oct.* 3, '85.

"Union Stock Yard & Transit Co., Chicago, Ill.:

"Please deliver to A. J. Gillespie & Co. four cars cattle, consigned from Shelby & Fulkeeson to us via C., B. & Q. R. R.

"MOUNTJOY, WHITE & CO.

"Deliver above cattle to Rappal Sons.

"A. J. GILLESPIE & CO."

Endorsed on the back the following: "Rappal, Sons & Co."

The allegation of the bill is, that the Gillespies, complainants, were owners of these cattle; and the contention is, that the proof does not establish this allegation, but shows that the Gillespies were not owners, but simply loaners of money on the security of the cattle. In respect to this, the learned Circuit Judge ruled as follows: "I hold that the cattle belonged to the Gillespies, or that the Gillespies were entitled to control them so far as necessary to protect themselves for advancements made on the purchases." This is a very accurate statement of the relations of the parties; and in equity the Gillespies may properly be considered the owners. They paid for the cattle; the orders for possession, equivalent to bills of sale, were in their name; they controlled the shipments; and until their money advanced and stipulated profits were received, they were equitably the owners and in control. The senior Rappal, or Bowen & Co., were agents to purchase, with a stipulation for compensation for services, in the amount received exceeding a named sum.

Rappal, Sons & Co. were in the commission business — known to the bank to be in that business. They were not buyers and sellers, but factors — agents to sell. Presumably, therefore, moneys deposited by them were the proceeds of cattle consigned to them for sale. Their business being known to the bank, such presumption goes with their deposits; and while not of itself notice, is a circumstance to compel inquiry on the part of the bank in respect to any particular deposit. We do not mean to be understood as implying that a bank receiving deposits from one whom it knows to be in the com-

mission business receives every deposit in trust for any unknown principal. A bank is not sponsor for all its depositors, although it may know the character of their business. Its relations to its depositors are those of debtor; and, generally, receiving and paying out money on the checks of its depositors, it discharges the full measure of its obligations. It is not ordinarily bound to inquire whence the depositor received the moneys deposited, or what obligation such depositor is under to other parties. It is only when there gather around any deposit, or line of deposits, circumstances of a peculiar nature, which individualize that deposit or line of deposits, and inform the bank of peculiar facts of equitable cognizance, that it is debarred from treating the deposit as that of moneys belonging absolutely to the depositor. We notice, therefore, the peculiar circumstances which cast knowledge upon this bank, in respect to these deposits. And this knowledge was not limited to the character of the business of the depositor, that of commission merchants, but extended to its results. The bank account of the Rappals with the appellant, from the 1st of January, 1885, up to and including the end of these transactions, is presented. It was a bank account of continuous and increasing overdrafts. Striking the balance, for the several months, of the daily credits and overdrafts, the average result against the Rappals, month by month, was as follows: January, $1476.25; February, $3275.64; March, $2483.77; April, $3122.20; May, $6526.03; June, $9850.46; July, $10,897.96; August, $12,494.05; September, $15,227.91; and in the two days of October prior to that deposit which closed the overdraft, the account was thus: October 1, $18,922.21, overdraft; October 2, $18,454.89, overdraft. From the 1st of August until October 2, only on three occasions — August 27 and 28 and September 3 — were there balances to the credit of the Rappals, and those of small amounts.

It is obvious from this account that the business of the Rappals was failing. The story of their failure was written by the officers of the bank on its books, and it knew all that such story told. It knew that it had, as hereafter disclosed, given credit to the Rappals with the Kansas City dealers. It

saw them failing in business. It knew their business was that of factor, receiving and selling for others on commission. Why this particular occasion should be seized upon, the testimony does not disclose; but is it not obvious that the bank intended to arrest this continuing overdraft; and, familiar with the character of the business of the Rappals, contemplated, with or without their knowledge, the seizure and appropriation of the proceeds of some consignment?

Further, as heretofore suggested, it appears that the assistant cashier of the Kansas City Stock Yards Bank wrote to the cashier of the Union Stock Yards National Bank a letter of inquiry as to the financial standing, individual responsibility and nature of the business of Rappal, Sons & Co., to which this answer was returned:

"UNION STOCK YARDS NATIONAL BANK, *July* 20, 1885.

"*P. Connelly, Esq., Assistant Cashier, Kansas City, Mo.*

"DEAR SIR: Your favor of the 17th instant received. Rappal, Sons & Co. are a firm in good standing, financially and otherwise. I don't think they keep much ready money in the business, but F. J. Rappal owns large farms near Joliet, and is estimated worth $50,000 to $60,000. He is a man of high character and has always had good credit, even before he had any means.

"Yours truly, G. E. CONRAD, *Cashier.*"

This letter was shown to the Gillespies, and they were informed at the same time that the Kansas City bank had arrangements for notification by telegraph in case any draft was not paid. The effect of this letter was to encourage confidence in the Rappals, whatever may have been the motive of the defendant bank; and, in this respect, it is fair to say that there is no evidence to justify the inference that it was known to be inaccurate or intentionally misleading; but here, as often elsewhere, results rather than motives are significant as to determining liability. Again, it will be noticed that the Gillespies were advised that non-payment of any draft would be promptly communicated by telegraph. That was in fact

the uniform custom of the defendant bank. It so happened that the various shipments of cattle and the corresponding drafts were on different days. The first shipment reached Chicago, and the cattle were sold on October 2, — Friday. The draft for the amount thereof, $6506.40, arrived the same day and was presented to the Rappals, and not paid. No explanation was given to the bank by the Rappals for the non-payment. No notice was communicated by telegraph of the non-payment, and no information was received at Kansas City thereof until Monday, October 5. On Saturday, October 3, and Monday, October 5, the balance of the shipment, being the bulk of the cattle, were received and sold, the major portion being so received and sold on Saturday. As the draft received Friday was not accepted or paid, if notice thereof had been given promptly by telegraph, as was the custom, and as the Gillespies were advised was the custom, they might have protected the balance of the cattle, and prevented the Rappals from receiving and selling them. It is fair to say that the testimony shows, and so it was found by the Circuit Judge, that this failure to telegraph was due to the negligence of a clerk, and was not the intentional act of the bank; but we cannot conceive that the question of motive is significant. The result of the omission of the officers of the bank to telegraph Friday, whether intentional or accidental, was the same; and the bank is equally responsible whether the result flowed from negligent or intentional omission. Again, it must be noticed that when, on Friday morning, the bank received the draft, it was information to it that a shipment to the Rappals accompanied the draft; and when the Rappals declined to pay that draft, that fact suggested either that the Rappals had not received the shipment or else that, having received it, they proposed to appropriate the proceeds and repudiate the obligations of factor to principal. When the sale tickets were deposited that evening, it was notice that they had received the shipment, and that for some reason they were contesting their liability to the consignor. As the office of the Rappals was but four or five hundred feet from the bank, it knew that it could ascertain the exact facts; but it failed to make inquiry; and

under those circumstances, failing to inquire and failing to notify the consignor and drawer, it is fairly held responsible for its ignorance of facts which it might easily have acquired knowledge of, and its omission to do that which both its custom and duty compelled it to do.

Summing up these various facts, it may be observed that the bank knew that the business of the Rappals was a failing one; that, instead of making money, they were gradually going deeper and deeper into debt. It knew that the Rappals were not buyers, but simply consignees and factors; and that the moneys received by them on account of sales, of right belonged to their consignors and principals. It knew from the draft received that a shipment had been made to the Rappals. It knew that it had failed to give notice of the nonpayment of the first and smaller draft, and so had put it out of the power of the consignors to protect themselves against the subsequent misconduct of the consignees and factors. It knew, or was chargeable with the knowledge of the fact, that the consignors were confiding in the consignees and factors on the strength of the representations it had made. Upon nonpayment of the first and smaller draft, it knew that it was in a position to easily acquire knowledge of the exact facts; and with its means of knowledge it remained inactive and silent. With all these matters resting in actual or imputable knowledge, it accepts from the Rappals, consignees and factors, the proceeds of the sale of cattle consigned to them by the Gillespies. Can it be that it is not held to know that it was taking from the Rappals the proceeds of complainants' property consigned to them for sale, to discharge their debt to it? While the obligation of a factor to his principal is not a debt created by one acting in a fiduciary capacity, within the meaning of the bankrupt law, as was adjudged in *Chapman* v. *Forsyth*, 2 How. 202, and *Hennequin* v. *Clews*, 111 U. S. 676, the question here is not as to the character of the obligation of factor to principal, but as to the liability of one who takes from a factor, in payment of his debt, moneys which he knows equitably belong to that factor's consignor and principal. Justice forbids the upholding of such a transaction, and demands that

the bank, receiving from the factor in payment of a debt from the factor to itself, moneys which it must have known were the proceeds of the property received from his consignor and principal, account to that principal for the moneys so received and appropriated. The question of right must be resolved in favor of the rulings of the Circuit Court, and it must be affirmed that the complainants are entitled to the moneys so received by the bank. It is equitable, therefore, that the decree be affirmed, if the suit be one of which equity may take cognizance; and so we pass to the second question, that of jurisdiction.

We are met with the proposition that equity ought not to interfere when the law furnishes a remedy; that when a bank has money in its possession which, in fact, belongs to a third party, received from whatever source it may be, an action at law will lie; and that, therefore, no case for equitable cognizance is presented. But this latter proposition has some limitations. It may be true if the full legal title to the moneys is in such third party; but it is not true when his title is equitable rather than legal; and the right of these complainants as against the bank, to the moneys deposited by their factor, is equitable. True, the obligation of a factor to his principal for moneys received on the sale of property consigned to him for sale is not a debt created by one acting in a fiduciary capacity, within the meaning of the bankrupt law, but it does not follow that no fiduciary obligation inheres in such debt. The case of *Chapman* v. *Forsyth*, 2 How. 202, turned not so much on the existence of a trust obligation as on the question as to what trust obligations were intended by the bankrupt act. The court observes: "The cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian,' or 'trustee,' are not cases of implied but special trusts, and the 'other fiduciary capacity' mentioned must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not, therefore, within the act." It cannot be doubted that an element of a fiduciary nature enters into the obligation of the factor — an element different from that

which exists in case of vendor and purchaser. There is a confidence beyond that in the capacity and willingness of a debtor to pay; there is a reliance of a principal on his agent, a confidence that the agent will do as his principal directs, and be loyal to the duties springing from such relation. When property is consigned to a factor, and before sale, who doubts the continuing title of the principal, or his power to restrain unauthorized disposition of such property, or to compel observance by the factor of all the conditions of the trust reposed in him? Can it be that on the moment of sale all these rights of the principal and consignor end, and that there has arisen in their place nothing but a simple debt from factor to principal, with absolute power on the part of the factor to dispose of the moneys received as he sees fit, and with no power on the part of the principal to challenge such misappropriation, when the party who receives the moneys knows the wrongful act of the factor? While it may be true that a legal title to the moneys received on such sale is in the factor rather than in the principal, so that the principal may not maintain an action at law as against one receiving such moneys from the factor; yet, equitably, those moneys belong to the principal, and equitably they may be followed into the hands of any person who receives them chargeable with notice of their trust character. The case of *National Bank* v. *Insurance Company*, 104 U. S. 54, is in point. In that case one Dillon was the agent of the insurance company. He kept an account with the bank — the account was entered on the bank books with him as general agent. As agent of the insurance company he collected, and it was his duty to remit, the premiums. In the course of his dealings with the bank he borrowed money on his personal obligation. Finally the bank sought to appropriate his deposits to the payment of this debt. The insurance company filed its bill in equity to recover the amount of those deposits as equitably belonging to it. The fact that they were premiums received for the insurance company was shown. It was held that, under the circumstances, the bank received them with knowledge that, though the legal title to the moneys was in Dillon, the beneficial ownership

was in the insurance company, and the decree in favor of the insurance company was therefore sustained. This court, by Mr. Justice Matthews, discusses the question of the liability of the bank to the insurance company and the necessity of a suit in equity to establish the rights of the company in these words: "It is objected that the remedy of the complainant below, if any existed, is at law and not in equity. But the contract created by the dealings in a bank account is between the depositor and bank alone, without reference to the beneficial ownership of the moneys deposited. No one can sue at law for a breach of that contract, except the parties to it. There was no privity created by it, even upon the facts of the present case, as we have found them, between the bank and the insurance company. The latter would not have been liable to the bank for an overdraft by Dillon, as was decided by this court in *National Bank* v. *Insurance Company*, 103 U. S. 783; and, conversely, for the balance due from the bank, no action at law upon the account could be maintained by the insurance company. But although the relation between the bank and its depositor is that merely of debtor and creditor, and the balance due on the account is only a debt, yet the question is always open, 'To whom in equity does it beneficially belong?' If the money deposited belonged to a third person, and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account." See also *Manhattan Bank* v. *Walker*, 130 U. S. 267.

The case in 104 U. S., with the authorities cited in it, is decisive of this. The legal title to these moneys deposited was in the Rappals; so it was in that case in Dillon. The beneficial ownership is in the Gillespies; there it was in the insurance company. The circumstances surrounding the deposits, and the relations between the depositor and the bank, were such as to impart notice to the bank that the beneficial ownership was outside of the legal title. With that notice, it had no right to appropriate the deposits to pay the obligations of the depositor to the bank, but it was properly adjudged liable in a suit in equity, and in that alone, to the claims of

the beneficial owner. Here the beneficial owner was the Gillespies; the legal title was in the Rappals; but when they deposited with the bank, the latter received the moneys with notice that the beneficial ownership was elsewhere than in the Rappals. It could not in equity take them and cancel their private debt to it. What might have been the duty of the bank in respect to a check drawn by the Rappals upon these moneys, in favor of a third party, in view of their legal title and primary control, and what equities the Gillespies might have in case the bank had paid such a check, are questions not now before us, and in respect to which we express no opinion. We only decide that, under the circumstances of this case, the bank could not in equity take these particular deposits from the Rappals in payment of their debt to it. As the claim of the Gillespies against the bank was equitable purely, equity alone had jurisdiction.

We conclude, therefore, that the proper forum was sought, and the decree was right; and it is

Affirmed.

BUSELL TRIMMER COMPANY *v.* STEVENS.

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

No. 71. Argued November 12, 13, 1890. — Decided December 15, 1890.

Letters patent No. 238,303, granted to William Orcutt, March 1, 1881, for improvements in rotary cutters for trimming the edges of boot and shoe soles, although the patented claim shows great industry on the part of the patentee in acquiring a thorough knowledge of what others had done in the attempt to trim shoe soles in a rapid and improved mode, by the various devices perfected by patents for that purpose, good judgment in selecting and combining the best of them, with no little mechanical skill in their application, are nevertheless invalid for want of patentable invention, as the claim presents no discoverable trace of the exercise of original thought, and is only an improvement in degree upon previous cutters, and therefore not patentable.

There is no substantial difference between the improved cutter for cutting the teeth of geer wheels, etc., patented to Joseph R. Brown by letters patent

No. 45,294, dated November 29, 1864, and the patent in controversy in this suit, except in the configuration of their molded surfaces, and this is not a patentable difference, even though the Brown cutter was used in the metal art and the Orcutt cutter in the leather art.

Burt v. *Evory*, 133 U. S. 349, and *Florsheim* v. *Schilling*, 137 U. S. 64, affirmed and applied to this case.

In equity for the infringement of letters patent. Decree dismissing the bill. Complainants appealed. The case is stated in the opinion.

Mr. J. E. Maynadier for appellants.

Mr. T. W. Porter for appellees.

Mr. Justice Lamar delivered the opinion of the court.

This was a suit in equity, brought by the Busell Trimmer Company, a New Hampshire corporation, and William D. Orcutt against Frank M. Stevens, Henry B. Cunningham and Samuel N. Corthell, for the alleged infringement of letters patent No. 238,303, issued to Orcutt, March 1, 1881, upon an application filed January 6, 1879, for "improvements in rotary cutters, for trimming the edges of boot and shoe soles."

The bill, filed May 9, 1884, alleged the issue of said letters patent to Orcutt, and the granting of an exclusive license to the Busell Trimmer Company to manufacture and sell the invention described therein, and set out, with considerable detail, the value, importance and novelty of the patented invention.

It then alleged that, as the result of a suit in equity brought in the court below in January, 1882, by these complainants against the Corthell Manufacturing Company, for infringements of the aforesaid letters patent, such proceedings were had that a consent decree was entered in complainants' favor, the following resolution of the stockholders of the defendant in that suit having been passed as a part of such compromise:

"*Resolved*, That in the acceptance of the offer this day tendered to us by the Busell Trimmer Company it is done with the express understanding by all the parties thereto that

it is mutually entered into for the purpose of consolidating the several interests of the two companies, and to that end none of the parties in their corporate capacity or as individuals will directly or indirectly enter into the manufacture of trimming machines or cutters for the sole edge of boots and shoes, except in connection with and for the benefit of the two companies as consolidated."

It further alleged that the defendants were, at that time, stockholders in the Corthell Manufacturing Company, and acquiesced in such resolution; that they were afterwards employed by the complainant, the Busell Trimmer Company, in various capacities, until within about a year previous to the commencement of this suit; that, while so employed, the defendants Stevens and Cunningham secretly sold small cutters manufactured with complainants' tools, which were facsimiles of those manufactured by complainants; and that, after they left complainants' employ, the defendants associated themselves together to manufacture, and continued to manufacture and sell, cutters embracing complainants' invention, in violation of complainants' rights under the patent, and to their damage $20,000.

The bill prayed for an injunction, an accounting and damages, and for other and further relief.

The answer made no reference to the consent decree and compromise between the Busell Trimmer Company and the Corthell Manufacturing Company, referred to in the bill, but set up, as defences, (1) The invalidity of the patent, because the thing alleged to have been patented had been in long use previous to that time, and was not useful; (2) The insufficiency of the specification and drawings of the patent to enable one skilled in the art to which it pertained to construct the article for which the patent was claimed; (3) The want of novelty in the alleged invention; (4) The long continued use of rotary cutters embodying the same principles as were contained in the alleged invention, by various persons and firms engaged in the manufacture of boots and shoes, in various parts of the United States; and (5) That Orcutt's prior patent No. 212,971, dated March 4, 1879, showed and described all that was

claimed in the patent in suit, and that from the date of that patent to January, 1881, Orcutt made no claim to the subject matter of the later patent, thus abandoning such invention to the public, by reason whereof the patent in suit was void.

Replication was filed, issue was joined, proofs were taken, and on the 14th of September, 1886, a final decree was entered by the Circuit Court, held by Mr. Justice Gray and Judge Colt, dismissing the bill; from which decree complainants appealed to this court. The opinion of the Circuit Court, delivered by Judge Colt, is found in 28 Fed. Rep. 575.

The specification, claims and drawings of the patent in suit are as follows:

"My invention relates to that class of rotary cutters, consisting of a series of cutting blades arranged about a common hub, and it consists in certain peculiarities of construction of the blades, more fully described below.

"Figure 1 is a perspective view of one form of rotary cutter embodying my invention. Figures 2 and 3 are perspective views (enlarged for greater clearness) of the upper portion of one of the blades. Figure 4 is a cross-section enlarged, illustrating my improved cutter as used.

"The blades *d* of my improved cutter have a flat front face, *a*, a flat rear face, *b*, and a top surface, *c*. A number of ridges, 1, 2, extend across this top surface or circumferentially of the cutter, making what is called a 'molded' or 'fancy' surface, which is the converse of the sole edge desired, every ridge, 2, 2, making a corresponding depression in the sole edge, the ridge 1 at the side of the cutter, and when in use next the rand guide takes out the rand or welt.

"The main feature of my invention consists in the blade thus formed, with a flat front face and a molded or fancy top surface the converse of the sole edge, and having the ridge 1 or the ridges 2, 2, either or both, extending across its top surface — that is, extending from front to back, as shown in the drawings — my improved cutter having a series of such blades, the cutting edges of each blade extending to one side of the cutter to adapt it for use on the edge of the sole next the upper, and each cutting edge having the same relation with the axis

as all the others. Each blade *d* is shown in this instance as a distinct piece secured to a hub, *d'*, substantially as in the United States patent No. 82,402 to Harrington, dated September 22, 1868. My invention, however, does not relate to the mode or process of manufacture, but to the article of manufacture, and the blades and hub may be in one piece and constructed by any suitable mode or process too well known to need description, and I disclaim as any part of my invention both the cutters and both the modes of manufacture described in the patent to Harrington above named and in the patent to Brown, No. 45,294, dated November 29, 1864.

"The flat front faces *a* of the blades are not radial, but are so inclined as to make each blade slightly hooking, and thereby form a knife edge at the intersection of the flat front face with the top surface *c* and its ridges, 1, 2, 2. This is very desirable, for if the front faces *a* be not so inclined the tool will be a scraper rather than a rotary cutter.

"The blades are made quite thick from front to rear, so that they may be ground back as they become dull, and they are ground only on their front faces *a*, these faces being always maintained at substantially the same pitch. The grinding is done with a flat grinding surface, (the flat side of a small emery wheel,) and does not alter at all the shape of the cutting edge of the blades. The tops *c* and ridges 1, 2, 2 are inclined rearward, to give the necessary clearance, as will be well understood.

"I am aware of the patent No. 207,395 to Corthell, but in that cutter each blade is flat on top, and its front face is molded, the cutting edge being formed by the intersection of the flat top and molded front face, and the ridge corresponding to the ridge 1 of my cutter is across the front face of the blade, or nearly radial, instead of across the top *c* of the blade, or nearly circumferential, as in my cutter. The same is true of the ridges corresponding to the ridges 2 of my cutter. When the ridge 1 is at one side of the front face, as in Corthell's cutter, the height of the projection above its base is limited by the necessary closeness together of the blades. Moreover, the depth of cut is always less than the height of the projec-

tion. The main object of my invention is to provide a sole-edge cutter, in which the depth of cut is the same as the height of the projection, and in which the height of the projection is not limited by the closeness together of the blades. I am also aware of the patents to Brown and Harrington, above mentioned, but both those cutters are wholly unsuited for trimming

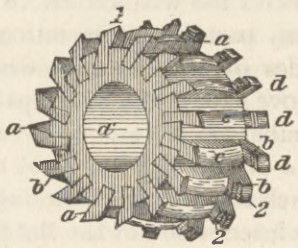


Fig. 1.

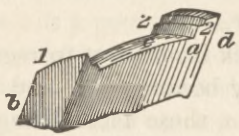


Fig. 2.

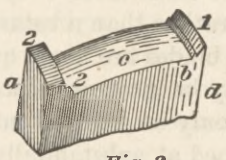


Fig. 3.

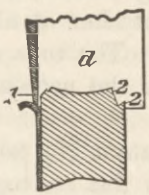


Fig. 4.

sole edges, and both lack the ridge 1 at one side of the top surface of the blade for taking out the rand, and also lack the ridges 2, 2 for beading the sole edge. I disclaim, therefore, all that is shown in either of the above-named patents.

"What I claim as my invention is:

"1. A rotary cutter for trimming sole edges, the blades *d* of which are provided with flat front faces *a*, and have their outer or peripheral ends *c* molded throughout to a uniform shape, the converse of the desired shape to be given to the sole

edge, and slightly eccentric to the axis of the cutter, substantially as described.

"2. A rotary cutter for trimming sole edges, the blades *d* of which are each provided with a flat front face, *a*, and a slightly eccentric cutter or peripheral end, *c*, having formed thereon the end ridges 1 and 2, extending circumferentially across said face, substantially as and for the purposes described."

The Circuit Court held that the patentability of the invention was to be determined by reference to two classes of prior tools, namely, the old hand tool or plane, and the Brown gear cutter, patented in 1864, and found upon a comparison between the various forms of the Brown gear cutter and the Orcutt cutter, that there was no substantial difference between them, except as to the shape of the top surface of the blades that were used to cut the form or outline of the path or figure in the material operated upon; that the form of the cutting teeth in the Orcutt patent was substantially the same as that used in the old hand plane or tool; that the use of the rotary rand knife in the Orcutt patent, in connection with the rand guide, claimed by him to perform a different function from the rand lip of the old hand plane, was not sufficient to sustain the patent, because both the rotary rand knife and the rand guide were found in prior devices; and that the substance of Orcutt's improvements lay in the application of the well-known form of blade to a Brown milling cutter, for the purpose of trimming the edges of boot and shoe soles, which was merely a case of double use, and was, therefore, not patentable.

The errors assigned are, that the court erred (1) In holding that the application of a well-known form of blade, used in the old hand tool for trimming sole edges, to a metal milling cutter, also old and well known, for the purpose of producing a rotary cutter for trimming sole edges, is a case of double use, and not patentable; (2) In holding that, in view of the state of the art, there was no invention in the Orcutt cutter; and (3) In holding that, in view of the two classes of prior tools referred to, taken in connection with a third class of old devices, in which both the rotary rand knife and the rotary rand guide were found, the patent could not be sustained.

It is hardly necessary to discuss these assignments of error *seriatim*. It will be sufficient, perhaps, to refer to some of the essential features of the patent in suit which are claimed to constitute elements of invention.

We have examined the evidence in the case very carefully. That of appellants' principal expert witnesses, John A. Coleman, Frederick W. Coy and O. L. Noble, was unusually clear and intelligent, and was given very ingeniously in support of the theory of the appellants' case; but we think that even their testimony, when subjected to the analysis of cross-examination, contains retractions and admissions fatal to the validity of Orcutt's patent, as containing a patentable novelty.

We are clearly of opinion that the Circuit Court was correct in its construction of this patent. In this connection, the state of the art when the application for the patent was made must be taken into consideration. The old hand plane or tool for trimming the edges of boot and shoe soles had been in existence for a long time; but, while it accomplished the purposes for which it was designed, it was found to operate too slowly to meet the demands of the business. Accordingly, various attempts had been made to perform the work done by the old hand tool, with rotary cutters operated by machinery. A number of patents were issued to various persons, named in the record, for various forms of such devices, long before the date of Orcutt's application. We were furnished on the argument with specifications and drawings of many of such patents, — some English, but mostly American, — running back as early as 1855, when an English patent was issued to one Molière, for what was known as a burr cutter, used to cut only the bed or main body of the boot or shoe sole. It is not deemed necessary to refer to all of the various patents issued from that time up to the date of Orcutt's patent. All of them may be said to have had but one object, viz., the performance of the work formerly done only by the old hand tool; and were improvements, more or less new and useful, in the leather art. An examination of them discloses the fact that, to a greater or less degree, each was an improvement on its predecessors, and was, in like manner, improved upon by those that

followed, in the order of time. The operations of those rotary cutters did not entirely supersede the use of the old hand tool, or the embodiment of the principles of that tool in an automatic machine which imitated the movements of that plane or tool when at work. A number of patents, it appears, were issued for such machines.

The precise features, or combination of features, which, it is claimed, constituted Orcutt's alleged invention, are thus stated by appellants' counsel: "There is nothing whatever in the state of the art of trimming or of burnishing sole edges tending to show any rotary cutter, prior to Orcutt's, made up of a number of blades, each having a rand lip and bed (or a bed, or bed guard, or channel guard in connection with a rand lip and bed), each with a flat front face; and each blade the guard for the cutting edge of the succeeding blade."

We do not think that this statement is sustained by the testimony of the appellants' own witnesses, even putting out of view all the evidence controverting it, given by defendants' numerous expert witnesses, consisting of manufacturers, dealers in shoes, experienced and skilful operators and machinists in making shoes, trimmings, soles and all branches of the leather art. A rotary cutter in the metal art, called the Brown & Sharpe metal cutter, had been well known and in general and constant use seventeen years before the date of the Orcutt patent. The counsel for appellants admits that that rotary cutter "bears a close resemblance to Orcutt's sole-edge cutter. . . . It is made up of a number of blades, each having a flat front face, and a molded top surface, the converse of the surface to be milled; and moreover, each tooth has the proper clearance, so that, if one of the Brown & Sharpe metal cutters and one of the Orcutt cutters be compared, when not in use, say, one held in the left hand, the other in the right, there is a marked likeness between them; in fact, no substantial difference, except that one lacks and the other has a rand lip, bed," etc. Similar admissions by Orcutt himself, and by Noble, the manager of his (Orcutt's) company, leave no doubt upon our minds that the principles of construction and operation of the Brown cutter are substantially identical with those of

most, if not all, of the rotary leather cutters. The appellants' counsel, as we have seen, says that the only exception to the marked likeness between the Brown cutter and that of Orcutt is, that "one lacks and the other has a rand lip, bed," etc. With regard to this exception, so asserted, Coleman, the expert witness on whom the appellants mainly rely, testifies as follows: "Q. You have spoken of Orcutt's cutter being adapted to trim at the same time the rand, the bed and the guard of a shoe sole, or, as you term them, the three fundamental principles of the shoe sole. Do you or not regard Orcutt as the first to accomplish that result with a rotary cutter?" His first answer being considered evasive the question was repeated, and he replied, "No, I do not. Others had made different cutters intended to accomplish the same purpose." It is true that with this admission he also connected the somewhat inconsistent declaration that Orcutt, by his alleged invention, "created a structure which differed in form and principle from any tool previously used for the operations of trimming the rand, bed and guard, because he produced a tool which had blades having top-molded faces the converse of the form of the sole edge to be trimmed, and the flat front faces of the teeth were so inclined forward that they could make a proper cutting edge for leather, and those faces could be ground without disturbing the top-molded face of the teeth." But when cross-examined in detail as to each of those alleged novel differences, he admitted that the facility for sharpening Orcutt's cutter without disturbing its periphery (or the top-molded face of the teeth) was the same as in the Brown cutter and the Snell & Atherton hand-trimming tools; that the forward incline (the rake or overhang) of the teeth was the same as in the Snell & Atherton cutters; that, in his opinion, the increase in the number of teeth in the Orcutt cutter over that of Brown, in view of the art as shown by other and earlier cutters, did not constitute, in itself, an element of invention; that rand guides were in common use with a rotary cutter before Orcutt's cutter; that a rand guide as employed in an Orcutt cutter does not perform any other or different office, or effect any other or different result from that which it performed when used

with other rotary cutters earlier than Orcutt's; that the employment of such rand guide in the Orcutt cutter would not in itself constitute an invention; that rand cutters were in common use both with hand tools and rotary sole-trimming tools before Orcutt's patent; that the result or product of the Orcutt cutter, to wit, the sole edge trimmed by it, was identical with that trimmed by the exhibit hand tools; that the shoe was held in the same manner while being trimmed by the Orcutt cutter, as with any other and earlier cutter; and that before Orcutt's invention it was common to trim the rand, the bed and the guard at one and the same operation, with both hand and rotary cutters.

Effort was made to show by other witnesses that the features in the Orcutt patent, specified in the statement of counsel above quoted, are all patentable novelties, especially the combination of them into one device. We repeat, that in view of the previous state of the art we think otherwise. The evidence, taken as a whole, shows that all of those claimed elements are to be found in various prior patents — some in one patent, and some in another, but all performing like functions in well-known inventions having the same object as the Orcutt patent, and that there is no substantial difference between the Brown metal cutter and Orcutt's cutter, except in the configuration of their molded surfaces. That difference, to our minds, is not a patentable difference, even though the one cutter was used in the metal art, and the other in the leather art. A combination of old elements, such as are found in the patented device in suit, does not constitute a patentable invention. *Florsheim* v. *Schilling*, *ante*, 64, decided at this term of the court, and cases there cited.

We do not think that the cases cited by counsel for the appellants sustain his position that Orcutt's alleged invention is a combination of previous devices, rearranged with connections and adaptations so adjusted as to produce a novel and valuable use. In *LeRoy* v. *Tatham*, 14 How. 156, 177, one of those cases, the claim was for a combination of old parts of machinery to make lead pipes, in a particular manner, under heat and pressure. The combination was held not to be

patentable, the court saying: "The patentees claimed the combination of the machinery as their invention in part, and no such claim can be sustained without establishing its novelty — not as to the parts of which it is composed, but as to the combination." The court also quoted, with approval, the following from *Bean* v. *Smallwood*, 2 Story, 408, an opinion by Mr. Justice Story: "He (the patentee) says that the same apparatus, stated in this last claim, has been long in use, and applied, if not to chairs, at least in other machines, to purposes of a similar nature. If this be so, then the invention is not new, but at most is an old invention or apparatus or machinery applied to a new purpose. Now, I take it to be clear, that a machine or apparatus or other mechanical contrivance, in order to give the party a claim to a patent therefor, must in itself be substantially new. If it is old and well known, and applied only to a new purpose, that does not make it patentable." That case, instead of militating against our view in this, in reality supports it.

The distinction between a double use, as the result of mere mechanical skill, and a new use created by the inventive faculty, is strikingly illustrated in the other case cited by appellants, viz., *Colgate* v. *Western Union Telegraph Co.*, 15 Blatchford, 365. That case was a suit for an infringement of a patent, for the combination of gutta-percha and metallic wire in such form as to encase a wire or other conductors of electricity within the non-conducting substance, gutta-percha, making a submarine telegraph cable which might be suspended on poles in the air, submerged in water or buried in the earth. It was contended that the patent was invalid, because a metallic wire covered with gutta-percha, as a mechanical protection from abrasion or injury from without, existed before the plaintiff's invention. It was decided that the use by the patentee of the wire so covered, to conduct electricity, was not a double use of the covered wire nor a use for a purpose at all analogous to any before made of it; but that it was an entirely new use, the result of a discovery that gutta-percha was an electrical non-conductor, evolved by original thought, totally different from its quality previously known and applied, as a mere mechanical protector from external injuries.

But the patent before us is no such case. The most that can be said of it is that it shows, on the part of Orcutt, great industry in acquiring a thorough knowledge of what others had done in the attempt to trim shoe soles in a rapid and improved mode, by the various devices perfected by patents for that purpose, good judgment in selecting and combining the best of them, with no little mechanical skill in their application; but it presents no discoverable trace of the exercise of original thought.

Furthermore, according to the evidence submitted by the appellants, it is shown that the features of the patent in suit are substantially the same as those in Orcutt's earlier patent of March 4, 1879, having the same object, except that in the patent in suit the teeth are claimed to be detachable from the hub, while in that of 1879 they are shown to be solidly incorporated with the hub. Even admitting such a difference to exist, it does not constitute a patentable difference, in view of the prior state of the art; for the detachable teeth are found in the Corthell patent No. 207,395, of August 27, 1878. But, as a matter of fact, there is no such difference; for, as stated in the specification of the patent in suit, "the blades and hub may be in one piece," etc., thus showing that no claim is made in the patent itself on that score. This, of itself, would be sufficient to defeat the later patent.

It may be admitted that Orcutt's later patent performed the work it was designed to accomplish in a better and more workmanlike manner than any of the preceding cutters patented, because, as already stated, there were constant improvements in the art to which it related. So far as this record shows, it was the last of a series of patents designed to accomplish the same object. As such, it necessarily retained all the beneficial features of those earlier patents, and, to a certain extent, improved upon them. Such improvement, however, was an improvement in degree only, and was, therefore, not patentable. *Burt* v. *Evory*, 133 U. S. 349, and cases there cited.

Decree affirmed.

Syllabus.

TEXAS LAND AND CATTLE COMPANY *v.* SCOTT.

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

No. 1471. Submitted November 3, 1890. — Decided November 10, 1890.

Motion papers should contain enough of the record to enable the court to act understandingly: but when they are deficient in that respect, the court may, if it pleases, examine the record.

THIS was a motion to dismiss or affirm. The case is stated in the opinion.

Mr. A. W. Houston for the motion.

PER CURIAM. Motion papers should contain in themselves so much of the record as to enable the court to act understandingly, and these are deficient in that regard. We have, however, examined the record, and the writ of error is dismissed upon the authority of *Richmond & Danville Railroad* v. *Thouron et al.*, 134 U. S. 45.

ROBERTSON *v.* OELSCHLAEGER.

OELSCHLAEGER *v.* ROBERTSON.

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

Nos. 86, 255. Argued November 20, 1890. — Decided December 22, 1890.

Philosophical apparatus and instruments, as referred to in Schedule N of the tariff act of March 3, 1883, 22 Stat. c. 121, 513, are such as are more commonly used for the purpose of making observations and discoveries in nature, and experiments for developing and exhibiting natural forces, and the conditions under which they can be called into activity; while implements for mechanical or professional use in the arts are such as are more usually employed in the trades and professions for performing the operations incidental thereto.

Duties were assessed at 45 per cent *ad valorem* and collected on a variety of articles imported into New York, it being claimed that they were manufactures not specially enumerated under Schedule N of the act of March 3, 1883, 22 Stat. c. 121, 501. The importer brought suit to recover an alleged excess of duties, claiming that they should have been assessed at 35 per cent, under Schedule N, as philosophical apparatus and instruments. At the trial a scientific expert was examined as a witness. The court and jury, with the exception of this evidence, had nothing before them to rely upon except the common knowledge which all intelligent persons possess. As a result the court directed the jury (1) to render a verdict for the defendant as to a specified class of the articles: (2) to render a verdict for the plaintiff as to another specified class: and (3) as to the remainder, it left the jury to determine their classification, and they found for the plaintiff as to a part, and for the defendant as to a part. *Held*, that there was no error in these instructions.

This was an action against the collector of the port of New York to recover back duties alleged to have been illegally exacted. Upon the trial there was a verdict for the plaintiff as to a part of the sum demanded, and for the defendant as to the residue thereof, and judgment was entered on this verdict. Each party sued out a writ of error. The case is stated in the opinion.

Mr. Edwin B. Smith for Oelschlaeger. *Mr. Charles Curie* was with him on the brief. *Mr. Frank P. Prichard* also filed a brief for same.

Mr. Assistant Attorney General Maury for Robertson.

Mr. Justice Bradley delivered the opinion of the court.

This is an action brought to recover an alleged excess of duties charged for the importation of certain goods and chattels in the year 1884. The goods consisted of certain instruments used in the arts, or in laboratories, or for observation and experiment. The plaintiff, Oelschlaeger, who imported the articles, claimed that they were philosophical instruments and apparatus, and chargeable with a duty of only 35 per cent *ad valorem*, under Schedule N of the act of March 3d, 1883, clause following, to wit: "Philosophical apparatus and instruments, thirty-five per centum *ad valorem*." 22 Stat. 513, c.

121. The defendant, on the other hand, then collector at the port of New York, contended that the goods in question came under the head of the following clause, at the end of Schedule C, in the same act, to wit: "Manufactures, articles or wares, not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, copper, lead, nickel, pewter, tin, zinc, gold, silver, platinum or any other metal, and whether partly or wholly manufactured, forty-five per centum *ad valorem*." 22 Stat. 501, c. 121.

The question is whether the court below, on the trial of the cause, committed any error in its rulings and instructions as to what implements were and what were not embraced in the category of philosophical apparatus and instruments. There is undoubtedly a clear distinction between mechanical implements and philosophical instruments or apparatus; and whatever belonged to the former class was properly chargeable with 45 per cent *ad valorem*, and whatever belonged to the latter class with only 35 per cent.

It is somewhat difficult in practice to draw the line of distinction between the two classes, inasmuch as many instruments, originally used only for the purpose of observation and experiment, have since come to be used, partially or wholly, as implements in the arts; and, on the other hand, many implements merely mechanical are constantly used as aids in carrying on observations and experiments of a philosophical character. The most that can be done, therefore, is to distinguish between those implements which are more especially used in making observations, experiments and discoveries, and those which are more especially used in the arts and professions. For example, an astronomical telescope, a compound microscope, a Rhumkorf coil, would be readily classed as philosophical instruments or apparatus, whilst the instruments commonly used by surgeons, physicians, surveyors and navigators, for the purpose of carrying on their several professions and callings, would be classed amongst mechanical implements, or instruments for practical use in the arts and professions. In short, philosophical apparatus and instruments are such as are more commonly used for the purpose of making observations

and discoveries in nature, and experiments for developing and exhibiting natural forces, and the conditions under which they can be called into activity; whilst implements for mechanical or professional use in the arts are such as are more usually employed in the trades and professions for performing the operations incidental thereto.

The different kinds of articles which were the subject of inquiry on the trial were over forty in number. A specimen of each kind was produced in evidence and marked as an exhibit, as follows, to wit:

Ex. 1. Large compound microscope.
Ex. 1½. Prepared slides for Ex. 1.
Ex. 2. Small microscope for examining textile fabrics.
Ex. 3. Jeweler's magnifying glass.
Ex. 4. Astronomical telescope on tripod.
Ex. 5. Single-barrelled telescope or marine glass.
Ex. 6. Double-barrelled field glass.
Ex. 7. Opera glass.
Ex. 8. Small telescope on tripod.
Ex. 9. Magnifying glass with handle.
Ex. 10. Plano-convex lens, unmounted.
Ex. 11. Reflecting mirror used in old telescopes.
Ex. 12. Ophthalmoscope.
Ex. 13. Combination of magnifying glass and stereoscope.
Ex. 14. Oculist's outfit.
Ex. 15. Stereopticon, or magic lantern.
Ex. 16. Slides prepared for Ex. 15.
Ex. 17. Dentist's speculum.
Ex. 18. Grenet battery.
Ex. 19. Pocket battery for physician.
Ex. 20. Inductive Rhumkorf coil.
Ex. 21. Galvanometer.
Ex. 22. Geissler tube.
Ex. 23. [Not put in evidence.]
Ex. 24. Anemometer.
Ex. 25. Hygrometer.
Ex. 26. Hygrometer.

Ex. 27. Thermometer.
Ex. 28. Thermometer.
Ex. 29. Thermometer, minimum.
Ex. 30. Maximum and minimum thermometer.
Ex. 31. Thermometer (bric-a-brac).
Ex. 32. Dairy thermometer and hydrometer.
Ex. 33. Laboratory thermometer.
Ex. 34. Clinical thermometer.
Ex. 35. Clinical thermometer.
Ex. 36. Pocket thermometer.
Ex. 37. Barometer.
Ex. 38. Barometer.
Ex. 39. Barometer.
Ex. 40. Hydrometer, for general purposes.
Ex. 41. Alcoholometer.
Ex. 42. Urinometer.
Ex. 43. Radiometer.
Ex. 44. Spectacle lenses.

A gentleman of scientific attainments was examined as a witness for the purpose of explaining the specific uses to which these various instruments are respectively applied; and his evidence was all that the court or jury had before them on which to base a decision, except that common knowledge which all intelligent persons possess, and of which the judge who tried the cause may in some instances have taken judicial notice. As the result of the inquiry the judge directed the jury to render a verdict for the defendant as to the articles designated as Exhibits 2, 3, 10, 12, 14, 17, 19, 27, 28, 29, 31, 32, 34, 35, 36, 41, 42, 44, which he held not to be philosophical apparatus or instruments; and a verdict for the plaintiff as to those designated as Exhibits 1, 1½, 4, 11, 15, 16, 18, 20, 21, 22, 24, 25, 26, 30, 33, 37, 38, 39, 40, 43, which he held to be philosophical apparatus or instruments. As to six of the articles, represented by Exhibits 5, 6, 7, 8, 9, 13, he refused to direct a verdict, and left the question of their classification to the jury, who found for the plaintiff as to Exhibits 5, 6, 8, and for the defendant as to Exhibits 7, 9, 13.

With regard to the last six items, which were left for decision with the jury, under the charge of the judge (which is not excepted to), we do not think that the judge erred in thus disposing of them. Each party requested him to direct a verdict in his favor. We think he was justified in refusing these requests. As before remarked, it is difficult to draw the line distinctly, and the classification of the articles referred to, according to the preponderance of use to which they are applied, depended upon a fair consideration of the evidence, which was rightly referred to the jury. No. 5 was a telescope, known as a field glass, which the witness said was not constructed specially for astronomical purposes, though it could be used for some of the stars; that it was used to gratify a laudable curiosity; a great deal by seamen. No. 6 was testified to be of the same general character, though smaller, and sometimes carried in a pouch. No. 8, the witness said, was a magnifying glass, having a lens called the Coddington lens, commonly used for examining grain and minerals and things of that sort, and by botanists and entomologists; that he, as a chemist and scientist, had had occasion to use it. The judge, on this evidence, might well hesitate to speak *ex cathedra* on the character of these instruments; and we cannot say that the jury did wrong in classifying them as philosophical instruments. The same thing may be said with regard to Exhibits 7, 9 and 13, which the jury found not to be such instruments. No. 7 was an opera glass; No. 9, a common magnifying glass with a handle, used for examining anything which was desired to be magnified, — fine print, handwriting, pictures, anything. No. 13 was a magnifying glass and stereoscope, for examining photographs, or stereoscopic views, such as are often found on parlor tables.

We also think that the judge committed no error as to the character and classification of the other instruments, respecting which he directed the jury what verdict to render. It is unnecessary to review the evidence in detail with regard to each instrument. Suffice it to say, that whilst there might be some ground for question with regard to particular cases, yet on the whole we think that the proper principle was followed,

and that no injustice was done to either party. To illustrate our views we may take one or two instruments by way of example. Thus, as to Exhibit 12, the witness testified as follows:

"Exhibit No. 12 is an ophthalmoscope. It is a practical instrument used by oculists for examining the interior of the eye and other parts of the body. The principle on which it works is as follows: The light is reflected from a burner in front of the examiner, who holds this object to his eye, into the eye of the patient without penetrating the observer's eye, as there is only a very small hole through which it can enter; and in that way protects the observer's eye from the direct rays of the light. It is peculiarly adapted for physicians' and oculists' use. It may have other uses, but the witness is not acquainted with them. It is used in their profession for the purpose of enabling them to get at the facts by which to treat either the throat or eye, as the case may be, practically."

It is clear from this evidence, that this instrument is intended for practical use in the profession of an oculist. It is an implement, a tool, not used for the discovery or contemplation of natural objects for the purpose of attaining or communicating general instruction; but as an implement for carrying on a profession or an art.

Again, take Exhibit No. 20. The witness describes its use as follows:

"Exhibit No. 20 is a Rhumkorf coil. This coil is constructed on the following principle: Around a central core of soft iron is wound a certain number of turns of copper wire, each turn being insulated by a layer of paper or some other insulating material; then on top of this coarser wire is wound in the same direction a large number of layers of very thin wire, each one likewise insulated by a layer of paper or other insulating material, and the fine wires connect with the two poles on top and the coarser wires connect with the lower, with the commutator running from one pole to the other. This box is filled with what is called condenser. The condenser is a series or number of plates of tin foil such as we find wound around tobacco. That stores up electricity somewhat on the principle

of a Leyden jar, and keeps it stored, so that when a person uses it he gets a much greater shock than he would if the condenser were not there. That is used in schools and universities, and also by physicians, and by people who merely use it for their own amusement. It is used practically in colleges and universities to illustrate electrical science, and also by every one who has occasion to generate that kind of electricity. It is also used to explode mines at times, to explode dynamite cartridges, or anything of that kind. It may be used in connection with a battery. It has no practical use in telegraphing. Its main use is for illustrating the laws of electrical induction."

It is plain from this description that the Rhumkorf coil is much more used in the lecture room, and for the purpose of scientific discovery, than for practical use in any art or profession.

Considerable argument is employed by the counsel for both parties to show that the judge was mistaken, on the one side or the other, in his various directions; but it would prolong this opinion to an unreasonable extent to examine all these discussions. We can only refer to one or two, and dispose of the rest in a general way.

The counsel for the government contends, amongst other things, that the judge erroneously classified Exhibit 15, (which was a stereopticon or magic lantern,) as a philosophical instrument. He says: "The stereopticon or magic lantern does not appear to be of much scientific use, and we doubt if one is ever purchased to be used for a purely philosophical purpose. But the instrument is mostly used in giving entertainment by throwing magnified pictures or representations on a screen, or for displaying advertisements from elevated points in the streets of cities, and is hardly 'philosophical' or 'scientific.'"

On the other hand, the witness, after describing the construction of the instrument, says: "This instrument is used for illustrating lectures and instruction in colleges and universities, and for projecting pictures of different subjects upon a wall. It is used in the illustration of natural science."

We think that in this instance the judge committed no error in taking the view plainly suggested by the witness, instead of judicially relying on his own knowledge and experience.

In like manner the counsel for the plaintiff strenuously contends that the judge was wrong in not deciding that the *minimum thermometer* (Exhibit 29) is a philosophical instrument. The witness says it is filled with alcohol, and is used for measuring very low temperatures — temperatures below the freezing point of mercury. It can be used where the mercury thermometer cannot be used. He adds: "It is a scientific instrument, used for scientific purposes." It is, however, in the same class with other thermometers, which the judge, as we think correctly, regards as instruments for daily use in the arts and in common life, and not specially philosophical instruments.

But Exhibit No. 30, the *maximum and minimum thermometer*, which is used for recording temperatures, one side for the day time and the other during the night, is of a different character, and, if not entirely, is more particularly used to ascertain the exact momentary variations of the temperature of the atmosphere for the entire period of twenty-four hours. It is very properly classed among philosophical instruments.

But it is unnecessary to pursue the examination. The general principle of classification adopted by the judge at the trial was correct, and we see no misapplication of it which should induce us to reverse the judgment.

Judgment affirmed.

NEW YORK BELTING AND PACKING COMPANY *v.* NEW JERSEY CAR SPRING AND RUBBER COMPANY.

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

No. 39. Argued October 23, 24, 1890. — Decided December 22, 1890.

The first claim in letters patent No. 11,208, granted May 27, 1879, to the New York Belting and Packing Company for a new and useful design for rubber mats, viz.: "1. A design for a rubber mat, consisting of corrugations, depressions or ridges in parallel lines, combined or arranged relatively, substantially as described, to produce variegated, kaleidoscopic, moire, stereoscopic or similar effects, substantially as set forth," covers things which were then well known and were not new; and is therefore too broad to be sustained.

Claims two and three in those letters patent, viz.: "2. A design for a rubber mat, consisting of a series of parallel corrugations, depressions, or ridges, the lines of the said corrugations being deflected at one or more points, substantially as set forth: 3. A design for a rubber mat, consisting of a series of parallel corrugations, depressions, or ridges arranged in sections, the general line of direction of the corrugations in one section making angles with or being deflected to meet those of the corrugations in the contiguous or other sections, substantially as described:" may fairly be regarded as confining the patentee to the specific design exhibited in his patent and shown in the drawing.

IN EQUITY for the infringement of letters patent No. 11,208, granted May 27, 1879, to the New York Belting and Packing Company for a new and useful design for rubber mats. Defendant demurred to the bill and the demurrer was sustained, and the bill dismissed. Plaintiff appealed. The case is stated in the opinion.

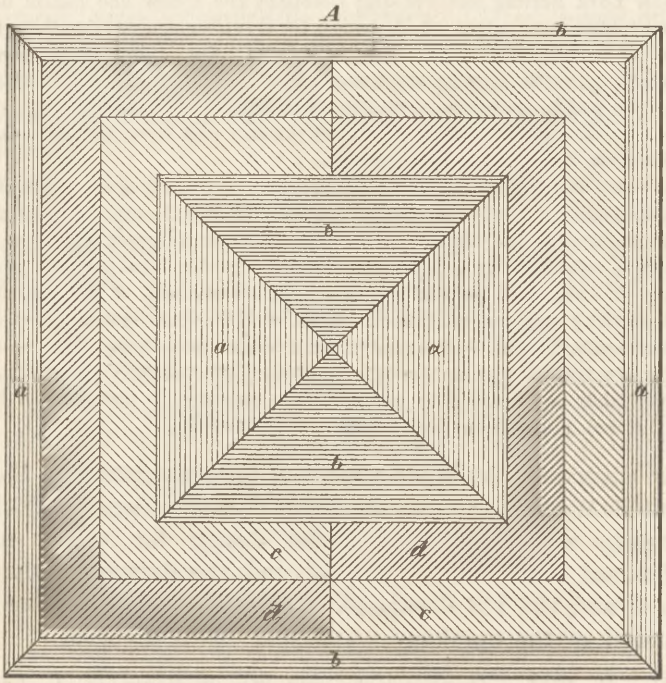
Mr. B. F. Lee, (with whom was *Mr. William H. L. Lee* on the brief,) for appellant.

Mr. Arthur v. Briesen for appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is a suit in equity brought upon a patent for a design by the New York Belting and Packing Company, assignee of

George Woffenden, against the New Jersey Car Spring and Rubber Company. The bill was dismissed upon demurrer, and the case is here on appeal from that decree. The ground for dismissing the bill, as stated by the circuit judge in his opinion, was that the subject matter of the patent was not patentable, 30 Fed. Rep. 785, and this is the question which has been discussed on the appeal. The invention claimed in the patent is a new and original design for rubber mats of which the subjoined plate is a diagram.



Referring to the diagram, the specification describes the invention as follows:

"In accordance with this design the mat gives under the light different effects, according to the relative position of the person looking at it. If the person changes his position continuously the effects are kaleidoscopic in character. In

some cases moire effects, like those of moire or watered silk, but generally mosaic effects, are produced. Stereoscopic effects also, or the appearance of a solid body or geometric figure, may at times be given to the mat, and under proper conditions an appearance of a depression may be presented.

"The design consists in parallel lines of corrugations, depressions or ridges, arranged to produce the effects as above indicated.

"The drawing represents a mat embodying this design.

"A is a mat, which is, as represented, square, although it might be oblong or other desired shape. It is divided into a number of sections, *a b c d*, the corrugations or depressions and ridges in those represented by the same letter being parallel. Thus in the centre and outer border formed by the sections *a b* the corrugations extend around the mat parallel with its outer edge and with each other. At the points where each depression crosses the diagonals, drawn from corner to corner of the mat through the centre, it makes a right angle with its previous path. In the intermediate borders the corrugations in the sections *c* are arranged at an angle with those in the sections *d*, and in both they form an angle with the corrugations in the sections *a b*. By the different shading of the sections attempt has been made to represent the mosaic effects produced, which, it will be understood, vary like a kaleidoscope as the observer shifts his position.

"The above forms simply one of the many ways in which my invention may be carried into effect. The corrugations in the centre and outer border need not extend entirely around the mat; but in each of the sections a depression in one section may be opposite a ridge in the next; and it is not necessary that the corrugations be parallel with the edges of the mat. They may run in any direction. The ridges and depressions in the intermediate borders might be made to form different angles with each other or with those in the other sections, or the borders might be increased or diminished in number. It will, of course, be understood that the effect produced and the manner in which the appearance varies are modified more or less by these changes. Instead of making

the corrugations in the centre of mat to bend four times, they may be made to change their line of direction any desired number of times in a regular or irregular way — that is to say, instead of having four series of parallel depressions and ridges, a number of series, less or more, arranged at various angles with each other, may be employed. I may divide the mat by a number of imaginary lines representing a projection of any geometrical figure, and in each of the sections so formed make parallel corrugations or alternate ridges and elevations, the different sets of corrugations making with each other the proper angle to give the effects sought for.

"To give the moire effects I usually make the ridges and depressions undulating, while maintaining the parallel position with relation to each other. I desire, therefore, to have it understood that I do not intend to limit the design to parallel corrugations which are straight throughout any considerable portion of their length, (as represented on the drawing, for example,) but that it includes the undulating ridges and depressions, or other disposition or formation in which the corrugations alter their direction irregularly, or in which they may be straight for a certain distance and then formed in undulations, and that it includes the corrugations arranged in concentric circles, in spirals, in zigzags, or according to any desired figure."

Having thus described his invention, the patentee claims:

"1. A design for a rubber mat, consisting of corrugations, depressions or ridges in parallel lines, combined or arranged relatively, substantially as described, to produce variegated, kaleidoscopic, moire, stereoscopic or similar effects, substantially as set forth.

"2. A design for a rubber mat, consisting of a series of parallel corrugations, depressions or ridges, the lines of the said corrugations being deflected at one or more points, substantially as set forth.

"3. A design for a rubber mat, consisting of a series of parallel corrugations, depressions or ridges arranged in sections, the general line of direction of the corrugations in one section making angles with or being deflected to meet those of

the corrugations in the contiguous or other sections, substantially as described."

The circuit judge in his opinion said:

"The patent is an attempt to secure to the patentee a monopoly of all ornamentation upon rubber mats by which variations of light and shade are produced by a series of ridges and depressions, without regard to any particular arrangement or characteristics of the lines except that they are to be parallel. Although there is an illustration in the drawing, and although each claim is for a design 'substantially as described,' the language of the specification is carefully expressed so as not to restrict the claims to the design shown in the drawing, but so that the first claim shall include every variety which can be produced by the arrangement of corrugations, depressions or ridges in parallel lines; the second, all obtainable when by the arrangement the corrugations are deflected; and the third, all obtainable when by the arrangement of corrugations in sections, those of one section make an angle with those in the contiguous or other sections.

"It was not new to produce contrasts and variations in light and shade or stereoscopic effects, by depressions or elevations in the surface of materials. It was old to do this by arranging them in parallel lines, as in wood, plaster, and corduroy cloth. It is not novelty which will sustain a design patent to transfer to rubber, or to a rubber mat, an effect or impression to the eye which has been produced upon other materials or articles by contrast or variation of light and shade. The design of this patent is not new unless it embodies a new impression or effect produced by an arrangement or configuration of lines which introduces new elements of color or form. This is not claimed.

"None of the claims can be limited to design which produces any definite or concrete impression to the eye."

We think that the judge was right in holding that the first claim of the patent is altogether too broad to be sustained, and for the reasons stated in the opinion. But as the other claims may fairly be regarded as confining the patentee to the specific design, exhibited in his patent and shown in the draw-

ing, we think that the demurrer should have been overruled, and that the defendants should have been put to answer the bill. Whether or not the design is new is a question of fact, which, whatever our impressions may be, we do not think it proper to determine by taking judicial notice of the various designs which may have come under our observation. It is a question which may and should be raised by answer and settled by proper proofs.

There is one feature of this patent which presents an interesting if not a novel aspect. We are in the habit of regarding a design as a thing of distinct and fixed individuality of appearance — a representation, a picture, a delineation, a device. A design of such a character, of course, addresses itself to the senses and the taste, and produces pleasure or admiration in its contemplation. But, in the patent before us, the alleged invention is claimed to be something more than such a design. It is claimed to have an active power of producing a physical effect upon the rays of light, so as to produce different shades and colors according to the direction in which the various corrugated lines are viewed — a sort of kaleidoscope effect. It is possible that such a peculiar effect, produced by such a particular design, impressed upon the substance of india-rubber, may constitute a quality of excellence which will give to the design a specific character and value and distinguish it from other similar designs that have not such an effect. As this is a question which it is not necessary now to decide, we express no opinion upon it.

We reverse the decree of the Circuit Court and remand the cause, with directions to overrule the demurrer and take such further proceedings in accordance with this opinion as law and justice may require.

In re PENNSYLVANIA COMPANY, Petitioner.

ORIGINAL.

No. 7. Original. Argued December 8, 1890. — Decided December 22, 1890.

The power which this court had before the passage of the act of March 3, 1887, 24 Stat. 552, c. 373, (reënacted August 13, 1888, 25 Stat. 433, c. 866,) to afford a remedy by mandamus when a cause, removed from a state court is improperly remanded to the state court, was taken away by those acts.

Under the act of March 3, 1887, 24 Stat. 552, c. 373, and the act of August 13, 1888, 25 Stat. 433, c. 866, the matter in dispute in a case removed from a state court on the ground of prejudice or local influence must exceed the sum of two thousand dollars in order that the Circuit Court may take jurisdiction.

Since the passage of those statutes, when a cause is removed from a state court on the ground of prejudice or local influence, the Circuit Court must be legally satisfied, by proof suitable to the nature of the case, of the truth of the allegation that by reason of those causes the defendant will not be able to obtain justice in the state court; the amount and manner of such proof being left, in each case, to the discretion of the court.

THIS was a petition for mandamus to the judges of the Circuit Court of the United States for the District of Connecticut, to take jurisdiction of the suit of Alberto T. Roraback against the petitioner. The case is stated in the opinion.

Mr. Daniel Davenport, (with whom was *Mr. William H. O'Hara* on the brief,) for the petitioner.

Mr. Lewis E. Stanton opposing.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is a petition of the Pennsylvania Company, a corporation and a citizen of Pennsylvania, for a mandamus to be directed to the judges of the Circuit Court of the United States for the District of Connecticut, commanding them to

reinstate, take jurisdiction of and try and adjudge a certain suit of one Alberto T. Roraback, a citizen of Connecticut, against the said Pennsylvania Company. The suit had been commenced on the 4th of June, 1889, by writ returnable the first Monday of July, 1889, in the court of common pleas for Litchfield County, in the State of Connecticut. The demand in said suit was for the sum of five hundred dollars. In the term of March, 1890, of said court of common pleas the company filed a petition for the removal of the suit to the United States Circuit Court for the District of Connecticut, on the ground of prejudice and local influence, filing therewith proper affidavit and bond, and the said court accepted said petition and bond, and granted the application and ordered the suit to be removed. On the opening of the Circuit Court of the United States in April, the company entered in said Circuit Court a copy of the record, and also filed a petition to the same court reciting the steps already taken, realleging the ground of removal, and praying the court to take jurisdiction of the suit; and filed an additional affidavit setting forth all the facts as to the existence of the alleged prejudice and local influence in the state court, and that the petitioner would not be able to obtain justice therein. But afterwards the plaintiff in the suit moved to remand the same to the state court, on the ground that the amount in dispute did not exceed the sum of two thousand dollars, exclusive of interest and costs. The Circuit Judge granted the application and made an order for remanding the cause, and the Circuit Court refuses to take jurisdiction of the same. 42 Fed. Rep. 420. Wherefore the present mandamus is prayed.

The first question to be decided is, whether this court has power to grant the writ applied for. The general power of the court to issue a writ of mandamus to an inferior court, to take jurisdiction of a cause when it refuses to do so, is settled by a long train of decisions. *Ex parte Bradstreet*, 7 Pet. 634; *Life and Fire Ins. Co.* v. *Wilson*, 8 Pet. 291; *United States* v. *Gomez*, 3 Wall. 752; *Ex parte Roberts*, 15 Wall. 384; *Ex parte United States*, 16 Wall. 699, 702; *Ins. Co.* v. *Comstock*, 16 Wall. 258, 271; *Railroad Co.* v. *Wiswall*, 23 Wall. 507; *Ex*

parte Schollenberger, 96 U. S. 369; *Harrington* v. *Holler*, 111 U. S. 796; *Ex parte Brown*, 116 U. S. 401; *Ex parte Parker*, 120 U. S. 737; *Ex parte Hollon Parker*, 131 U. S. 221.

It is true that after a case has proceeded to the filing of a declaration and a plea to the jurisdiction, or its equivalent, and a judgment is rendered in favor of the plea and a consequent dismissal of the action, this court has held that the plaintiff is confined to his remedy by writ of error, and cannot have a mandamus, which only lies, as a general rule, where there is no other adequate remedy. *Ex parte Balt. & Ohio Railroad*, 108 U. S. 566; *Ex parte Railway Co.*, 103 U. S. 794. But it was expressly held in *Railroad Co.* v. *Wiswall*, 23 Wall. 507, that a mandamus would lie to compel a Circuit Court to take jurisdiction of and proceed with a case which it had wrongfully remanded to the state court. The reason was that an order to remand was not a final judgment, and no writ of error would lie. This case is supported by the rule laid down by Chief Justice Marshall in *Ex parte Bradstreet*, 7 Pet. 634; and if the decision of the present case depended only on the general rule, the power of the court to issue the mandamus would be undoubted.

But in our opinion, the matter is governed by statute. This will be manifest by reference to previous legislation on the subject. The 5th section of the act of March 3, 1875, (determining the jurisdiction of the Circuit Courts,) provided that the order of the Circuit Court dismissing or remanding a cause to the state court should be reviewable by the Supreme Court on writ of error or appeal, as the case might be. 18 Stat. 470, 472, c. 137. This act remained in force until the passage of the act of March 3, 1887, by which it was superseded, and the writ of error or appeal upon orders to remand causes to the state courts, was abrogated. The provision of the act of 1887 is as follows: "Whenever any cause shall be removed from any state court into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, *such remand shall be immediately carried into execution*, and no appeal or writ of

error from the decision of the Circuit Court so remanding such cause shall be allowed." 24 Stat. c. 373, 552, 553. This statute was reënacted August 13, 1888, for the purpose of correcting some mistakes in the enrollment, 25 Stat. c. 866, 433, 435; but the above clause remained without change. In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words "such remand shall be immediately carried into execution," in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error.

We also agree with the circuit judge that, by the act of 1887, the matter in dispute must exceed the sum or value of two thousand dollars in order to give the Circuit Court jurisdiction, as well in cases sought to be removed from a state court on account of prejudice or local influence, as in other cases. It is true that the clause allowing a removal for such cause does not name any amount as requisite. But we should bear in mind the history of the law, and read the whole of the two sections together. The act of March 2, 1867, which first gave the right of removal for cause of prejudice and local influence at any time before the final hearing of the case,

required that the matter in dispute should exceed the sum or value of five hundred dollars; which was the amount then required for the jurisdiction of the Circuit Court in all ordinary cases, whether by original process or by removal from a state court; that is, in all cases except those in which jurisdiction was given independently of the amount in controversy. 14 Stat. c. 196, 558. This statute was carried into section 639 of the Revised Statutes, article "Third." Now as the act of 1887 raises the jurisdictional limit prescribed for the Circuit Courts in ordinary cases to an amount exceeding the sum or value of two thousand dollars (instead of five hundred dollars), we naturally expect to find the same amount required for its jurisdiction in cases of removal for cause of prejudice or local influence. The first section requires that amount in ordinary actions for its original jurisdiction. The second section requires the same amount in ordinary cases removed from a state court. Its language is as follows:

"SEC. 2. [I.] That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district. [II.] Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being non residents of that State. [III.] And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district. [IV.] And where a suit is now

pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause."

Here the first two clauses expressly require an amount exceeding two thousand dollars. The third clause, in referring to "any suit mentioned in this section," evidently means the two first clauses of the section, and, of course, is limited to cases in which the matter in dispute exceeds two thousand dollars. The fourth clause (the one in question) describes only a special case comprised in the preceding clauses. The initial words, "And where," are equivalent to the phrase, "And when in any such case." In effect, they are tantamount to the beginning words of the third clause, namely: "And when in any suit mentioned in this section."

On this point, the circuit judge refers to an opinion of Mr. Justice Harlan in the case of *Malone* v. *Richmond & Danville Railroad*, 35 Fed. Rep. 625, which seems to us to express the correct view of the law. It is true, other judges have taken a different view; but, on a careful consideration of the subject, we have come to the conclusion above expressed.

There is another question raised in this case, on which it is proper that we should express our opinion. It arises upon the following words of the act: "*When it shall be made to appear to said Circuit Court* that from prejudice," etc. *How must it be made to appear* that from prejudice or local influence the defendant will not be able to obtain justice in the state court? The act of 1867 only required an affidavit of the party that he had reason to believe that from prejudice or local influence he would not be able to obtain justice in the state court. Rev.

Stat. § 639, Subdiv. Third. By the act of 1887 it must be made *to appear* to the court. On this point, also, various opinions have been expressed in the Circuit Courts. Our opinion is, that the Circuit Court must be legally (not merely morally) satisfied of the truth of the allegation that, from prejudice or local influence, the defendant will not be able to obtain justice in the state court. Legal satisfaction requires some proof suitable to the nature of the case; at least, an affidavit of a credible person; and a statement of facts in such affidavit, which sufficiently evince the truth of the allegation. The amount and manner of proof required in each case must be left to the discretion of the court itself. A perfunctory showing by a formal affidavit of mere belief will not be sufficient. If the petition for removal states the facts upon which the allegation is founded, and that petition be verified by affidavit of a person or persons in whom the court has confidence, this may be regarded as *prima facie* proof sufficient to satisfy the conscience of the court. If more should be required by the court, more should be offered.

In view of these considerations, we are disposed to think that the proof of prejudice and local influence in this case was not such as the Circuit Court was bound to regard as satisfactory. The only proof offered was contained in the affidavit of the general manager of the defendant corporation, to the effect that, from prejudice and local influence, the company would not be able to obtain justice in the court of common pleas for Litchfield County, or any other state court to which, etc. We do not say that, as a matter of law, this affidavit was not sufficient, but only that the court was not bound to regard it so, and might well have regarded it as not sufficient.

The petition for mandamus is denied.

In re Pennsylvania Company, Petitioner. On petition for mandamus to the judges of the Circuit Court of the United States for the District of Connecticut, to take jurisdiction of the suit of Samuel A. Herman against the petitioner. No. 6, Original. Argued December 8, 1890. Decided December 22, 1890. Mr. Jus-

TICE BRADLEY delivered the opinion of the court. This case in all material respects is identical with the case of *Ex parte The Pennsylvania Company*, just decided, and the same conclusion is reached as in that case. The petition for mandamus is *Denied.*

Mr. Daniel Davenport and *Mr. William H. O'Hara* for the petitioner.

Mr. Lewis E. Stanton opposing.

BASS *v.* TAFT.

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

No. 93. Submitted November 26, 1890. — Decided December 22, 1890.

Statutes of Kentucky, of 1869, 1870, 1872 and 1873, construed, in reference to the duty of the judge of a county court to levy an annual tax to pay the interest on bonds of the county issued in aid of the Cumberland and Ohio Railroad Company, and to appoint a collector of the tax.

A mandamus to the county judge to compel him to levy such annual tax and cause it to be collected, refused, because it appeared that he had levied the tax and appointed a person to collect it.

THE case is stated in the opinion.

Mr. Philip B. Thompson, Jr., for appellant, submitted on his brief.

No appearance for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

On the 2d of February, 1887, Harvey S. Taft, a citizen of Michigan, presented a petition for a mandamus to the Circuit Court of the United States for the District of Kentucky. The petition states that John W. Bass, the presiding judge of the county court of Taylor County, in the State of Kentucky, is a citizen of Kentucky, and that Taylor County is a municipal

corporation, created under the laws of that State, and a citizen of that State; that in the years 1881 and 1882, Taft recovered two judgments against the county of Taylor, in the Circuit Court of the United States for the District of Kentucky, one for $5974.98, with interest, and the other for $1214.96, with interest; that executions were issued on those judgments and returned "no property found;" that the judgments were rendered on coupons for the payment of interest on bonds issued by the county of Taylor in payment of its subscription to the capital stock of the Cumberland and Ohio Railroad Company; that by the statute authorizing such subscription, the county court was empowered and directed to levy annually, and cause to be collected, a tax sufficient to pay the interest on the bonds; that, for the purpose of levying and collecting such tax, the powers granted by the statute were vested in the presiding judge of the county court; that Taft had demanded of Bass that the latter cause to be levied on the taxable property, real and personal, listed for taxation in the county for the year 1887, a tax sufficient to pay the judgments and costs of collection, and that when levied he cause the tax to be collected from the taxpayers of the county; and that Bass refused to make the levy or to cause it to be collected.

The prayer of the petition was that a writ of mandamus issue to such judge, commanding him to levy on the taxable property in the county, listed for taxation for the year 1887, an *ad valorem* tax sufficient in amount to pay Taft's judgments, with costs of collection, and to cause such tax, when levied, to be collected from the taxpayers of the county and paid into court to satisfy the judgments.

The court granted an alternative writ of mandamus, returnable February 21, 1887. The command of the writ was that Bass cause to be levied and collected a tax sufficient to pay the judgments and the cost of collecting the tax, "on all the real estate and personal property in Taylor County subject to taxation under the revenue laws of the State of Kentucky, including the amounts owned by the residents of said county, which ought to be given in under the equalization laws of said State."

On the return day of the writ, the plaintiff moved the court for a peremptory writ, and the defendant filed his answer to the alternative writ. The answer set forth that the defendant was elected judge of the county in August, 1882, and entered upon his office September 4, 1882, after the judgments in question were obtained; that, ever since his term of office began, he had caused a tax to be levied, and levied a tax, on all the real and personal property in the county subject to taxation under the revenue laws of the State, sufficient to pay all interest coupons on bonds of the county issued in aid of the Cumberland and Ohio Railroad Company, as the same accrued or became due, and sufficient to pay for the collection of the same, and sufficient to pay the plaintiff's judgments and cost of collection; that, in obedience to the alternative writ, he had, on the 7th of February, 1887, caused an order to be entered on the records of the Taylor County court, making a levy of 86½ cents on each $100 worth of all the property, both real and personal, subject to taxation under the revenue laws of Kentucky, in said county, which was shown by the assessor's book of the county to amount to $1,229,274, which levy was amply sufficient to pay the plaintiff's judgments and the cost of collection; and that he entered an order on the records of the court appointing J. P. Gaddie collector for Taylor County, who was a citizen of the county and a good and competent man, to collect such tax. It appears by that order that the tax was levied for the purpose of paying the two judgments of the plaintiff and the cost of collection, and that it was levied on the taxable property listed and returned by the assessor of the county for the year 1887.

The answer further set forth that the office of sheriff of Taylor County was then vacant, and had been since the year 1877, and for that reason the defendant made the order appointing Gaddie collector; that the law under which the bonds of the county were issued in aid of the railroad company did not confer upon the defendant, as presiding judge of the county, power himself to collect the plaintiff's debt, or to enforce its collection, but only to levy a tax on the taxable property in the county, sufficient to pay the debt, and to

appoint a collector to collect it, if the office of sheriff was vacant; and that the defendant had fully discharged his duties in the premises as such presiding judge.

The plaintiff demurred to the answer on the ground that it did not state facts sufficient to constitute a defence.

On the 22d of February, 1887, the plaintiff moved the court to appoint the marshal of the District of Kentucky to execute the mandamus and to collect from the taxpayers of the county the taxes assessed and levied for the purpose of paying the plaintiff's judgments. On the next day the case came on to be heard on the last-named motion and on the demurrer to the answer, and the court entered a judgment that so much of the answer as related to the appointment of a collector was insufficient; that the demurrer to that portion of the answer was sustained; that the motion for a peremptory mandamus against the defendant in relation to the appointment of a collector to collect the levies made by the defendant and described in the answer, was sustained to that extent; that the motion for the court to appoint the United States marshal for the District of Kentucky as collector to collect from the taxpayers and taxable property of Taylor County the amounts severally assessed against them, under the terms of the special levy made in obedience to the writ of mandamus, was sustained; that the marshal was thereby appointed such collector, but such appointment would be suspended or rescinded whenever it was shown by "the said defendant, Taylor County," that it or its appointees were willing and able to execute "this judgment"; that before proceeding to execute "this judgment" the marshal must execute a bond, with sufficient sureties, to be approved by the court, payable to Taylor County, to account for all moneys collected by him under such levies; that the marshal should not proceed to act as such collector until the expiration of ninety days from that date, but if, after the lapse of that period, "the defendant" had not manifested in the meantime "its willingness and ability, through its own officials," to proceed in good faith to execute "this judgment," then the marshal should proceed without further delay to execute it, and should continue the execution thereof until it

was fully executed or until his appointment was suspended or rescinded. To review this judgment, the defendant Bass, presiding judge of the Taylor County court, has brought a writ of error, the county of Taylor not being a party to the proceeding or to such writ of error. The plaintiff has not appeared in this court by counsel.

By section 15 of the act of Kentucky of February 24, 1869, Laws of 1869, c. 1578, vol. 1, p. 470, a subscription by Taylor County to the stock of the railroad company in question was authorized, as also the issue of the bonds on which the plaintiff's judgments were founded, and the county court of the county was authorized and required to levy annually and collect by taxation upon the taxable property in the county, as listed and taxed under the revenue laws of the State, a sum sufficient to pay the interest on the bonds as it should accrue, with the cost of collecting the same, and it was also authorized to establish a sinking fund, there being a provision for exchanging the tax receipts for stock, the holders thereof to become stockholders. The railroad company was authorized to pay to the county the amount of tax levied by reason of the bonds, "and thus stop the collection of tax for that year;" and the county court was empowered to appoint collectors of the tax or to require the sheriff to collect it, the sheriff to have the same powers, and to proceed in the same way for the collection of such tax, as the sheriff in the collection of the state revenue.

By section 4 of the act of March 11, 1870, Laws of Kentucky of 1869–70, c. 610, vol. 2, p. 226, it was provided that the sheriff of the county in which the tax should be levied should collect it at the same time he collected the state revenue; and that he and his securities on his official bond should be responsible for the same, and for the same damages for the failure to collect or non-payment of the same that sheriffs were by law liable for on account of not paying over the state revenue, to be collected in the same way. By section 12 of the same act, it was provided that the county court should annually levy a tax upon all of the property in the county subject to taxation for state revenue, sufficient to pay the interest on the bonds when due and the principal thereof at maturity.

By section 4 of the act of February 13, 1872, Laws of Kentucky of 1871–72, c. 265, vol. 1, p. 318, it was provided that the sheriff of any county who should collect such taxes should pay over the same to the commissioners of the sinking fund, who should apply the taxes to pay the interest on the bonds.

By section 1 of the act of March 11, 1873, Laws of Kentucky of 1873, c. 375, vol. 1, p. 478, it was made the duty of the county court of any county that might have issued or might thereafter issue bonds in payment of subscriptions to the capital stock of the railroad company, annually, at the April or May term of the court, to levy a tax on the property of the county subject to taxation for revenue purposes, sufficient to pay one year's interest on the bonds. By section 2 of the same act it was made the duty of the sheriff to collect the tax and pay over the same to the sinking fund commissioners for the county, he and his securities on his official bond to be liable for a failure to collect or pay over the tax; with a proviso that if the county court should appoint a special collector of the tax, other than the sheriff, and such appointee should qualify, the sheriff should not be required to collect the tax for that year.

By these provisions it was made the duty of the county court to levy the tax annually to pay the interest on the bonds for that year. In view of the provision that the railroad company might pay the interest on the bonds to the county and stop the tax for that year, it is manifest that it was not intended that the interest should be allowed to accumulate and a tax covering several years' interest be levied at one time. Neither was it intended that a separate levy should be made for each bondholder, but only one tax was authorized to be levied by the county court, and such tax was to pay all the interest for the year and such part of the principal as might be proper for the sinking fund.

The presumption under these statutes is that the county court of Taylor County had levied annually, for all the years prior to 1887, a tax on the property in the county subject to taxation for state revenue sufficient to pay the interest for each year, and that this tax was collected and paid over to

the commissioners of the sinking fund. If this be true, and it is not denied, the defendant Bass was not in default. The county court can do only what is authorized by the statutes.

The petition does not allege that the county court, in any year in which the plaintiff's coupons became due, failed to levy an annual tax on the property in the county subject to taxation for state revenue, sufficient to pay the interest on the bonds for that year, nor does it allege that the county had never levied or collected such tax since that time. As it appears that the defendant levied the tax in question and appointed Gaddie a special collector of it, the defendant had exhausted his authority.

These are all the questions which concern the defendant. He has nothing to do with the question of the appointment of the United States marshal as collector, or with so much of the judgment as relates to the county of Taylor as a "defendant," when it is not a defendant. The only matter in which the defendant Bass was interested was as to that part of the judgment which compelled him to perform an alleged duty. It being clear that he had performed all the duty which was enjoined upon him by the statute,

The judgment of the Circuit Court must be reversed as to so much of it as holds the answer of the defendant insufficient in regard to the appointment of a collector, and as sustains the demurrer to that part of the answer, and as sustains the motion for a peremptory writ of mandamus against the defendant in relation to the appointment of a collector; and the case is remanded to the Circuit Court with a direction to take such further proceedings as shall be in conformity with the opinion of this court.

HOFFMAN *v.* OVERBEY.

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

No. 99. Argued December 2, 1890. — Decided December 22, 1890.

A suit in equity to set aside a written compromise between a creditor and a debtor, whereby the former, in consideration of the surrender by the latter of certain real property of much less value than his debt, and of his representation that he was unable to pay such debt in full, discharged the debtor absolutely. The ground of relief was the false and fraudulent representations of the debtor as to his financial condition, and the admissions of the debtor to the creditor, made more than twelve years after the compromise. These admissions constituted the principal evidence of the fraud charged. *Held*, that the relief asked could not be granted, because such admissions were made after the debtor's intellect had become so far impaired, that his statements ought not to be the basis of a decree affecting his rights of property, and because it did not satisfactorily appear from other evidence that he had made false or fraudulent representations to the creditor.

THE case was stated by the court as follows:

Hoffman, Lee & Co., merchants of Baltimore, agreed to aid James R. Millner in his business of manufacturing tobacco in Pittsylvania County, Virginia, by advancing to him, when called upon, between the 10th days of March and May, 1871, the sum of fifteen thousand dollars, to be repaid with interest at the rate of six per cent per annum; Millner agreeing that all the tobacco that he worked or caused to be worked during the year 1871 should be shipped to Hoffman, Lee & Co., for sale by them at not less than its market value. To secure the payment of that sum with interest, Millner, February 13, 1871, mortgaged to Hoffman, for his firm, a tract of land in Pittsylvania County containing two hundred acres, with its buildings, improvements and appurtenances, including the tobacco factory situated on it, with the fixtures and appliances thereto belonging.

By deed of May 3, 1872, Millner continued this mortgage in force as security for an additional loan of fifteen thousand

dollars, which Hoffman, Lee & Co. agreed to make between that date and June 1, 1872 — if he needed that amount, or should call for it, or any part thereof — upon the same terms as those expressed in the first mortgage.

On the 28th day of February, 1873, Millner and Hoffman, Lee & Co. entered into an agreement in writing, which, after reciting the above mortgages, proceeded: "Whereas upon a settlement of accounts between the parties respecting the advances secured by said deeds, the said James R. Millner is found indebted to said Hoffman, Lee & Co. in the sum of $15,758.67, which sum it is agreed far exceeds the value of all the property, real and personal, embraced in said mortgage deeds; and whereas the said James R. Millner is unable to pay the said debt in full and has offered, by way of compromise, to said Hoffman, Lee & Co., that he and his wife will, by a proper deed, surrender and release to said Hoffman, Lee & Co., or to said Robert G. Hoffman for their benefit, all the right, title and interest whatsoever in law and equity, including the wife's contingent right of dower, of them, the said James R. Millner and wife, and to all the property of every kind embraced and described in said deeds of mortgage, except as hereinafter stated, provided the said Hoffman, Lee & Co. will accept the said surrender and release, when perfected by a proper deed, in full satisfaction and discharge of his said debt to them, and will allow him to remain in the occupation of the land described in said mortgage deeds as the tenant of said Hoffman, Lee & Co. until the 1st day of January, 1874, without paying any rent for the same, it being understood that since the date of the last-mentioned deed a portion of the tobacco fixtures of the tobacco factory described in said deed of mortgage has been sold by said James R. Millner to Millner Bros. with written consent of said Hoffman, Lee & Co., and the portion so sold is not included in the present compromise, which includes, however, all the residue of the mortgaged property, except that portion of the tobacco fixtures so sold; and whereas the said Hoffman, Lee & Co. have accepted the said offer of compromise: Now, therefore, the parties do agree that the said James R. Millner and his wife

shall, without unreasonable delay, proceed to execute and acknowledge a proper deed relinquishing, surrendering and releasing to said Robert G. Hoffman, for the benefit of said Hoffman, Lee & Co., all their right, title and interest whatsoever in law or equity in and to all the mortgaged property aforesaid, except the portion of the fixtures sold as aforesaid; and upon the delivery of said deed executed and acknowledged as aforesaid, ready to be recorded, said Hoffman, Lee & Co. shall and will accept the same in full satisfaction and discharge of the said debt due to them by said James R. Millner and will allow him to occupy the land, including the factory and all the buildings upon it, as their tenant, during the remainder of the present year, without paying any rent."

Millner Brothers, a firm composed of John P. Millner and Joseph T. Millner, (brothers of James R. Millner,) under date of March 5, 1873, entered into a written contract with the appellants, whereby the latter in consideration of the delivery to them, by Millner Brothers, of 16,000 pounds of twist tobacco, branded "Jas. R. Millner's Extra Goldwin Twist," promised to make title to the former for the property which by the agreement of 28th of February, 1873, was to be conveyed by James R. Millner and wife to Hoffman, Lee & Co.

On the 15th day of March, 1873, James R. Millner and wife, in execution of the agreement of February 28, 1873, made an absolute conveyance to Hoffman, for his firm, of the property covered by the mortgage of February 13, 1871, excepting therefrom certain fixtures previously sold to Millner Brothers with the consent of Hoffman, Lee & Co. This deed contained the recital that the parties agreed that the amount due from James R. Millner to the appellants, $15,758.67, "far exceeds the value of all the said mortgaged property," but that the latter had consented to accept that property, free of all claims at law or in equity of James R. Millner and wife, or either of them, in full satisfaction and discharge of their debt.

The contract of March 5, 1873, having been satisfactorily performed, Hoffman, Lee & Co., by deed of June 10, 1874, conveyed to Millner Brothers the property embraced by the deed from James R. Millner and wife. Subsequently, Septem-

ber 3, 1874, Millner Brothers sold and conveyed it to James R. Millner, the consideration recited in the deed being six thousand dollars paid or secured to be paid.

On the 30th of June, 1885, more than twelve years after the settlement between James R. Millner and Hoffman, Lee & Co., the latter brought the present suit against James R. Millner, John P. Millner and J. D. Blair, administrator of Joseph T. Millner. The suit proceeds upon these grounds, substantially: That in order to induce the plaintiffs to make the settlement of February 28, 1873, James R. Millner represented to them not only that he had faithfully invested and used in the purchase and manufacture of leaf tobacco all the moneys advanced by the plaintiffs, and was totally unable to discharge his debts to them, and would surrender "all the property he owned," with a clear title thereto instead of a mere security therein, but that the property held by plaintiffs as security was worth $6000 to $8000, and "was all he had on earth," and that unless they took it and released him, he would avail himself of the bankrupt law; that, relying upon such representations, the plaintiffs "consummated the parol agreement to accept the mortgaged property from James R. Millner and release him," and to that end took the deed of March 15, 1873; that the representations so made were false; that the mortgaged property was not worth the sum named by him; that the whole transaction, resulting in the release of James R. Millner, and the sale to Millner Brothers, was pursuant to a plan formed between the three brothers to defraud the plaintiffs; that in violation of the arrangement under which the plaintiffs advanced moneys to James R. Millner, the latter "systematically set apart and appropriated to himself certain sums from such advances," without the knowledge of the plaintiffs, "until, at the time of said settlement and release, he had thus accumulated the large amount of $12,000, which money he had thus without warrant deducted from the advances and failed to invest and use as agreed;" that at the time of such settlement and release the plaintiffs were not advised that Millner "had so much money," certainly "they never suspected that he had $12,000 of their

money, in his hands in ready cash, which had been advanced only to be used in the purchase and manufacture of tobacco for them;" that these facts were fraudulently concealed by Millner to enable him to secure his release; that Millner Brothers knew of his having the $12,000, or, at least, knew that he had a large sum rightfully belonging to the plaintiffs; that they, also, knew of the above settlement and release, and aided James R. Millner therein, taking the conveyance to themselves of the mortgaged property to further said fraud, knowing that the property was to be paid for with tobacco manufactured by using plaintiffs' money; that the money so withheld and concealed was used as common capital between James R. Millner and Millner Brothers, the latter sharing in the general division of the profits arising therefrom; and that the tobacco delivered by them for the property was, in fact, purchased and prepared for sale with the money of the plaintiffs.

The bill also alleges that the plaintiffs, until very recently before the commencement of this suit, rested absolutely upon the finality and good faith of these transactions and settlements, and would have continued to do so, but for the revelation of the above facts made in June, 1885, by James R. Millner himself.

The relief sought is a decree declaring void the above releases and conveyances, and causing the property to be conveyed to the plaintiffs; that an accounting be had between them and the defendants; and that after all recourse against James R. Millner is exhausted, Millner Brothers and the administrator of Joseph T. Millner be required to reimburse them to the extent of any deficiency that may be found to exist.

During the progress of the cause an answer was filed by the committee of James R. Millner, who was adjudged a lunatic on the 24th of October, 1885, and committed to an insane asylum. He died pending this appeal, and his administrator was made a party instead of his committee. His heirs at law have also been made parties. Answers were filed by John P. Millner and the administrator of Joseph T. Millner, putting in issue the material allegations of the bill.

By the final decree the bill was dismissed, the circuit judge being of opinion that its allegations were not sustained by the proof.

Mr. S. Teakle Wallis and *Mr. James P. Harrison* (with whom was *Mr. Landon C. Berkeley, Jr.*, on the brief), for appellants.

Mr. Samuel Field Phillips and *Mr. Frederic D. McKenney*, for appellees.

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

The principal question raised by the pleadings and discussed at the bar involves actual fraud upon the part of James R. Millner in procuring the release from Hoffman, Lee & Co. We have seen that, according to the bill, Millner sought such release upon the ground of his "total inability" to discharge that claim, and because the mortgaged property, which he proposed to surrender absolutely, and freed from his wife's contingent right of dower, was all that he owned and "all he had on earth;" whereas, it is alleged, he had at the time $12,000 in cash that had been fraudulently kept out of the moneys advanced to him from time to time for the purchase and manufacture of tobacco to be shipped to Hoffman, Lee & Co. for sale, the proceeds to be applied to the payment of the moneys so advanced. That Millner had $12,000 in cash during the summer after the settlement with Hoffman, Lee & Co., is clearly established by the evidence. But that he represented to them at the time of, or as an inducement for, the settlement of February 28, 1873, that the mortgaged property was all he had, or that he threatened to take the benefit of the bankrupt law unless discharged upon the terms stated in the writing of that date, or that he retained, without investing in his business, $12,000 out of the moneys advanced to him, only appears from the depositions of Hoffman and his attorney and a physician, each of whom details conversations had by them, separately, with James R. Millner, in June, 1885, at Buffalo Lithia

Springs, Virginia, where he was then staying for his health. Upon a careful scrutiny of all the evidence, oral and written, bearing upon the condition of James R. Millner at the date of the above conversations, we are satisfied that he was of unsound mind. What he said in those conversations cannot properly be made the basis of a decree against him. His mental faculties had then become too much impaired to admit of any decree against him, based upon his statements or admissions. Indeed, the evidence fairly requires the conclusion that he was not at any time during the six months immediately preceding that time competent to make any admission that ought to be the foundation of a decree affecting his rights of property.

The only representation that he may be held, upon the present record, to have made in order to induce Hoffman, Lee & Co. to accept the mortgaged property and discharge him from further liability, is, that at the time of the compromise he was — in the words of the agreement of February 28, 1873 — "unable to pay the said debt ($15,758.67) in full." Was that representation false or fraudulent? That it was either, is not shown with sufficient clearness to justify the court in disregarding or setting aside a settlement made more than twelve years before this suit was instituted. Besides there is no proof that James R. Millner had, at the time the compromise was made, the means that he subsequently invested in the business conducted by Millner Brothers, nor does it satisfactorily appear when or from whom he got the moneys that were thus invested. If he were in such condition as to be able to testify or to furnish evidence upon this point, it may be that the fact of his having, in cash, as much as $12,000 shortly after the settlement of 1873, if not explained, would justify the conclusion that he had that amount at the time he asserted his inability to pay in full the debt of Hoffman, Lee & Co. No such rule ought, however, to be applied in the present case; for it may well be supposed that his committee could not, after the lapse of so many years, furnish the explanation that would properly be required of Millner if he were alive and of sound mind.

Beyond this, it is not at all clear from the evidence, that

Hoffman, Lee & Co. released Millner in the belief that, when surrendering the mortgaged property, he gave up or intended to give up, literally, everything that he had, retaining nothing for the support of himself or family pending his efforts to establish himself again in business. The representation that he was unable to pay the debt of the plaintiff in full was not equivalent to a representation that the mortgaged property was all he owned. Liberally construed, the former representation was not inconsistent with the retention of a part of his means for the support of his family or to meet the demands of other creditors.

The fact principally relied upon to show that he and his brothers combined to defraud the plaintiffs is, that the property surrendered to the latter, and by them sold and conveyed to Millner Brothers, was ultimately repurchased by him. But there was no concealment of the fact that Millner Brothers, before taking a conveyance from the plaintiffs, had arranged to sell the property to James R. Millner. Of that fact the plaintiffs were informed both by Millner Brothers and by James R. Millner as early as April, 1873. The deed to the latter was put upon record September 3, 1874; so that Hoffman, Lee & Co. knew, or could easily have known, at least ten years before this suit was brought, that James R. Millner had become again the owner of the property surrendered to them in 1873. If they understood him as representing, in February, 1873, that the mortgaged property was "all he had on earth," the question would naturally have arisen in their minds as to how he was able to buy that property back so soon after the compromise. But no inquiry upon that subject was instituted; at least the evidence does not show that when the facts were recent, or before James R. Millner's mind was permanently impaired, any was made by them. The utmost that can be fairly predicated of such of the evidence as may be properly considered as the basis of a decree in the cause, is, that there is ground to suspect that James R. Millner did not make a frank and full disclosure as to his financial condition at the time the compromise was effected with the plaintiffs. But a suspicion of the want of good faith is not

sufficient to justify a decree setting aside, upon the ground of fraud, a compromise made as far back as 1873; especially, when the party to be affected by such a decree has become incapable, from impairment of intellect, to present his side of the question. Upon the whole case we are of opinion that the ends of justice will be best subserved by not disturbing that compromise.

These views render it unnecessary to consider other questions argued by counsel, and require an affirmance of the decree.

Affirmed.

BANK OF BRITISH NORTH AMERICA *v.* COOPER.

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

No. 103. Argued December 5, 1890. — Decided December 22, 1890.

Facts contested in a trial before a jury must be taken in this court to be as determined by the verdict.

The mere receipt of a bill on payment of money is not an assent to the proposition that the bill contains the whole contract between the parties, but whether it is so or not is a fact to be determined by the jury.

A party receiving moneys from another to be transmitted for him to a named destination, in order that they may be used there to pay his liabilities, cannot change the destination at the desire of the party to whom the money is sent, without becoming liable for the loss, in case loss ensues in consequence of the change.

In the relation of principal and agent, strict compliance by the latter with the instructions of the former is an unvarying condition of exemption from liability.

C in New York, who had had business relations with M. & Co. of Glasgow, drew upon them for £5000, to mature February 29. On February 26th he bought of plaintiff in error, who had an office in London, a cable transfer of this amount in favor of M. & Co. to be transmitted in a check by post from London to Glasgow, and took from the bank a receipt "for cable transfer on the Bank of British North America, London, in favor of" M. & Co. "Glasgow." The cable message was accordingly sent, but the London office, under previous directions from M. & Co. as to all such matters, but without knowledge of C, instead of forwarding the check to Glasgow, deposited it to the credit of M. & Co. in the Bank of Scotland in London, which action was approved by M &

Opinion of the Court.

Co. On the 28th or 29th of February M. & Co. suspended. It was in evidence that on the 28th they applied similar moneys to the payment of similar obligations, and that if the check had been sent by mail as directed, it would have reached Glasgow on the morning of that day in time to be applied to the payment of C's draft. The Bank of Scotland appropriated the £5000 to the payment of the balance due from M. & Co. to it, and C was obliged to meet his draft. In an action by him against the Bank of British North America, *Held*,

(1) That whether the bill contained the entire contract between the parties was a question for the jury;

(2) That the bank, having received the money with knowledge that it belonged to C, and that it was to be used in the payment of his liabilities, could not substitute for his instructions the wishes of the party to whom he was remitting the money;

(3) That when his instructions were disobeyed and a loss ensued, that loss would *prima facie* fall upon the bank, and the burden was upon it to show that obedience to the instructions would have produced a like result.

The case is stated in the opinion.

Mr. Stephen P. Nash for plaintiff in error.

Mr. John M. Bowers for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

This was an action at law, brought by the defendant in error in the Circuit Court of the United States for the Southern District of New York. The trial resulted in a judgment in his favor, and the defendant there has brought such judgment here on error. As the case was tried before a jury, contested facts must be accepted to be as alleged by the plaintiff, because resolved in his favor by the verdict. *Lancaster* v. *Collins*, 115 U. S. 222.

The facts thus established are these: For some years prior to the transaction in controversy, the plaintiff Cooper had had business relations with the firm of Martin, Turner & Co., of Glasgow, Scotland. In consequence of these relations, he had had frequent occasions to remit money to that firm, and many of such transactions had been carried on through the agency of the defendant. He had, on December 14, 1883, drawn a

draft on the firm of Martin, Turner & Co. for five thousand pounds sterling, which became due on the 29th of February, 1884. It was his duty to provide funds for the payment of that draft, and the defendant knew that such was his duty. The duty was his; the moneys therefor were his. The defendant had an office in London, as well as in New York. On the 26th of February Cooper called at the office of defendant in New York, and purchased and paid for a cable transfer of five thousand pounds to Martin, Turner & Co. The bill which he received was in these words:

"New York, 26*th Feb.*, 1884.

"W. B. Cooper, Jr., Dr., to the agents Bank of British North America, 52 Wall street, for cable transfer on the Bank of British North America, London, in favor of Martin, Turner & Co., Glasgow, 5000 pounds, at

4.90½	$24,525
Cost of cable	2
	$24,527"

The cable message was in cypher, and the cyphers theretofore arranged with Cooper represented the following phrases: "Martin, Turner & Co., Glasgow, ac. W. B. Cooper, Jr.," and "Martin, Turner & Co., 3 Market Buildings, 29 Mincing Lane, ac. W. B. Cooper, Jr." Beyond this was an arrangement for transmission by telegraph from London to Glasgow, which involved an additional expense. When Cooper called to purchase this cable transfer, he was asked whether he wished transmission by telegraph or mail, and answered that he wanted a check mailed to Glasgow. So the contract established by the verdict of the jury, in accordance with his testimony, was one for the transmission by mail of a check from London to Glasgow for the five thousand pounds. The cable directing such transfer was sent as ordered; but the London office, instead of forwarding a check to Glasgow, on the 27th of February deposited the amount in the Bank of Scotland, at London, to the credit of Martin, Turner & Co. It did this on the strength of a request communicated to it by Martin, Turner & Co., some months prior thereto, to deposit with the

Bank of Scotland in London all amounts received to their credit. Cooper knew nothing of this request, and relied upon strict compliance with his directions. On the day that the deposit was made with the Bank of Scotland, Martin, Turner & Co. were advised both by wire and by letter thereof, and wrote approving such action. On the 28th or 29th of February, Martin, Turner & Co. suspended in consequence of advices received from India, and the Bank of Scotland appropriated the funds in its possession to the payment of their overdrawn account; so this cabled amount was not applied to the taking up of Cooper's draft, and he was thereafter compelled to pay it. If the money had been sent by mail from London to Glasgow, as directed, the draft would have reached the latter place on the morning of the 28th, and would, as shown by the testimony of some of the members of the firm of Martin, Turner & Co., have been appropriated, as other like drafts then received, to the special purpose for which the transmission was made. In brief, the neglect of the defendant to follow the specific instructions of the plaintiff in regard to the transmission prevented the appropriation of the amount transmitted to the payment of plaintiff's draft, and secured its appropriation to an obligation of Martin, Turner & Co. to the Bank of Scotland. It is true that this disregard of instructions was owing to a special request theretofore made by the payee of the draft; but such special request does not disturb the fact that the instructions of the plaintiff were disregarded, and that he suffered loss in consequence therefrom. It would seem from this general statement that the liability of the defendant could not be doubted. It had no contract with the payee of the draft; its contract obligations were with the sender of the money; and it is the general law of agency that disregard of the explicit instructions of the principal casts upon the agent liability for any loss resulting therefrom.

After the testimony was closed, counsel for the defendant moved to strike from the case all parol evidence tending to affect the legal construction of the bill heretofore quoted, which motion was overruled. The contention now is, that that bill stated the contract with all its terms, and, being in

writing, could not be varied or controlled by parol testimony. But this contention begs the question. The mere receipt of a bill of parcels or bill of lading, on payment of money or delivery of goods, is not necessarily an assent to the proposition that such bill of parcels or bill of lading states the contract and the whole contract between the parties. Such bills may or may not be the contract. They may be nothing more, and intended to be nothing more, than memoranda or receipts. Whether they are the entire contract, or simply in the nature of receipts, is not a question of law for the court, but one of fact for the jury. The case of *Mobile & Montgomery Railway Co.* v. *Jurey*, 111 U. S. 584, is suggestive. There, on a shipment of goods, it was insisted that a bill of lading voiced the entire contract. The trial court opened the door to inquiry as to the terms of the real contract between the parties, and the circumstances under which the bill of lading was given and received, and left it to the jury to determine whether the bill of lading was or was not the contract. The ruling of that court was affirmed by this. We think, therefore, there was no error in denying this motion, and leaving the question of fact to the determination of the jury. Even if inquiry were limited to the bill itself, the description of the place, Glasgow, therein, certainly suggests that delivery was intended at that place, and may not unreasonably be construed as meaning not merely that it was the place of business of Martin, Turner & Co., but also the place to which the money was to be remitted. *Filley* v. *Pope*, 115 U. S. 213.

A further contention of plaintiff in error is this: The contract between the plaintiff and defendant was to deliver five thousand pounds to Martin, Turner & Co., in fact, a delivery was made in the manner and at the place requested by Martin, Turner & Co., and the delivery approved by them; and it is urged that if the money was to go to Martin, Turner & Co., and the defendant was instructed to deliver it to them, it might deliver it to them at any place and in any manner they desired. Whatever force there might be in this argument, if the money belonged to Martin, Turner & Co., it is of no weight, inasmuch as the money belonged

to Cooper, as was known to the defendant, and was sent by him to take up his own paper. The case of *Southern Express Co.* v. *Dickson*, 94 U. S. 549, was properly held by the trial court decisive of this question. 30 Fed. Rep. 171. It is true that that case was one of the consignment of goods; but the principle is the same. There goods belonging to the shipper were handed by him to an express company for transportation to a place mentioned, for delivery there to a person named. At the request of the consignee, the express company made the delivery at another place, in consequence whereof the shipper lost his goods; and the express company was held liable, because, although consigned to a named consignee, they were delivered for transportation to him at a named place; and they were, as known to the express company, the property of the shipper. The failure to obey the specific instructions of the owner and shipper resulted in loss; and it was properly held that the consignee could not interfere with those instructions, and that the company could not recognize him as owner, and obey other instructions than those of the shipper and known owner. So, here, the defendant received these moneys knowing that they belonged to Cooper, and that they were to be used for the payment of his liabilities; and it could not substitute for his instructions the wishes of the parties to whom he was sending the money. It is not the case of one employing the defendant to transfer moneys to a third party, which he owes such third party, in which case the debt of the sender may be discharged whenever the party to whom the money is sent receives it.

Another contention of plaintiff in error is this: Had the money been remitted by mail from London to Glasgow, and reached there on the 28th, how can it be affirmed that Martin, Turner & Co. would have appropriated this money to the payment of the intended draft? Might they not have passed it into the volume of their assets, for equal distribution among their creditors? Of course, no positive affirmation can be made in response. It cannot be absolutely declared that Martin, Turner & Co. would have appropriated the check to the specific purpose intended by the plaintiff. It is true the

testimony of the two members of that firm shows that on the 28th moneys transmitted and received for special purposes were appropriated thereto, and indicates that probably a like action would have attended the check if received on the 28th. But we do not understand that the certainty of a different result must be established; on the contrary, the burden of proof is on the defendant. If positive instructions are disobeyed and loss results, *prima facie* liability for that loss ensues; and the burden is on the defendant, the disobeying agent, to prove that obedience would have brought a like result. The fair conclusion from the testimony is, that obedience would have prevented loss. It certainly cannot be affirmed that the same loss would have resulted if the instructions had been obeyed. There can, as a rule, be little hardship, and there is generally great benefit, in holding an agent bound to absolute compliance with the explicit instructions of his principal. In view of the manifold contingencies of business transactions, and the wide range of possibilities that attend any act of a commercial nature, few things could be more unfortunate than to incorporate into established law the right of an agent to disobey specific instructions, and to make a guess as to results an excuse for relief from accruing loss. Uniform recognition and enforcement of certain settled and clear rules are important. Among them, few are more significant or more essential than that in the relation of principal and agent strict compliance by the latter with the instructions of the former is an unvarying condition of exemption from liability. Loss from disregard thereof must be borne by the agent, unless he establishes that the disregard had no connection with the loss, and that it would certainly have followed whether instructions were obeyed or disregarded.

The verdict of the jury in this case establishes a disregard of instructions. Confessedly, loss resulted, and it cannot be affirmed that the same loss would have resulted if instructions had been obeyed. We conclude, therefore, that the judgment was right, and it is *Affirmed.*

Mr. Justice Gray did not sit in this case and took no part in its decision.

AMBLER *v.* EPPINGER.

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

No. 1383. Submitted December 1, 1890. — Decided December 22, 1890.

The provision in the act of March 3, 1887, 24 Stat. c. 373, § 1, pp. 552, 553, that no Circuit or District Court shall "have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action, in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made," does not apply to an action of trespass brought by an assignee of the claim, to recover damages for cutting down and removing timber from the land of the assignor.

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

This case comes before the court on a writ of error, under the act of February 25, 1889, 25 Stat. c. 236, p. 693, to review the decision of the Circuit Court, upon the question of its jurisdiction. That act provides that, in all cases where a final judgment or decree shall be rendered in a Circuit Court of the United States, involving the question of its jurisdiction, the party against whom the judgment or decree is rendered shall be entitled to an appeal to the Supreme Court of the United States, or to a writ of error from it, to review such judgment or decree, without reference to its amount, except that, where that does not exceed the sum of five thousand dollars, the review shall be limited to the question of jurisdiction.

The plaintiff is a citizen of New York, and the action is brought by him in his own right, and as assignee of John K. Russell, against the defendants, who are citizens of Florida, to recover as damages six thousand dollars, the alleged value of three thousand trees and pine logs cut down by the defendants upon the lands of the plaintiff and the said Russell in the years 1885, 1886 and 1887, and carried away and converted to their use. The declaration, after setting forth the entry by

the defendants upon the lands of the plaintiff and Russell, the cutting down of the trees and their removal and conversion, alleges that afterwards, in November, 1887, Russell, for a valuable consideration, sold and assigned to the plaintiff all his right, title and interest in the pine trees and logs thus cut down, removed and converted, and in the claim and demand against the defendants, and that they refused to pay the plaintiff the value of the trees and timber, though payment was often demanded. The declaration contains four counts, but they all proceed for the same trespass and conversion, the facts being stated with some additional particulars in the different counts, not affecting the question presented.

To the declaration the defendants demurred on several grounds, all of which are embraced in this: — that it appeared by the declaration that the grievances complained of were on lands at the time jointly owned by the plaintiff and John K. Russell, and that the right of action was, therefore, not the subject of assignment.

The demurrer was overruled; the defendants thereupon pleaded, and issue was joined. They then moved the court to dismiss the action upon the alleged ground that it was shown by the declaration that it had no jurisdiction thereof. This motion was denied, and the plaintiff obtained a verdict for eleven hundred dollars. A motion to arrest the judgment on a similar ground was made and overruled. Judgment upon the verdict was thereupon entered, to review which the case is brought to this court.

Mr. James Lowndes, for plaintiffs in error, submitted on his brief.

Mr. H. Bisbee, for defendant in error, submitted on his brief.

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

The record is silent as to the citizenship of Russell, who assigned his interest to the plaintiff; and the defendants below,

the plaintiffs in error here, contend that the Circuit Court was therefore excluded by the act of March 3, 1887, from jurisdiction of the action, it not appearing that he could have prosecuted in the Circuit Court a suit upon the claim. That act, after declaring in its first section that certain suits shall not be brought in the Circuit or District Courts, adds: "Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action, in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." 24 Stat. c. 373, pp. 552, 553.

This act, as appears on its face, does not embrace, within its exceptions to the jurisdiction of those courts, suits by an assignee upon claims like the demand in controversy. The exceptions, aside from suits on foreign bills of exchange, are limited to suits on promissory notes and other choses in action, where the demand sought to be enforced is represented by an instrument in writing, payable to bearer, and not made by a corporation, the words following the designation of choses in action indicating the manner in which they are to be shown. They must be such as arise upon contracts of the original parties, and not founded, like the one in controversy, upon a trespass to property.

The construction given by this court in *Deshler* v. *Dodge*, 16 How. 622, to the clause in the eleventh section of the Judiciary Act, which denied to any Circuit or District Court "cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange," is in harmony with the construction we give to the act of 1887. It was there held that the exception by that section of the jurisdiction of those courts of suits by an assignee did not extend to a suit on a chose in action to recover possession of a specific chattel or damages

for its wrongful caption or detention, although the assignee could not himself sue in that court. And in the subsequent case of *Bushnell* v. *Kennedy*, 9 Wall. 387, it was said that the exceptions to the jurisdiction applied only to rights of action founded on contracts which contained within themselves some promise or duty to be performed, and not to mere naked rights of action founded on some wrongful act or some neglect of duty to which the law attaches damages.

The judgment below being under five thousand dollars, no other question than that of jurisdiction can be reviewed by this court. The validity of the transfer of Russell's interest in the timber removed and converted to the defendants' use, and the effect of such transfer upon the amount of the plaintiff's recovery, are matters touching the merits of the action, and are not open to consideration here.

Judgment affirmed.

HOLDEN *v.* MINNESOTA.

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

No. 1237. Argued November 20, 21, 1890. — Decided December 8, 1890.

Section 4 of the Minnesota statute of April 24, 1889, (Gen. Laws Minn. 1889, c. 20,) providing that, in case of sentence of death for murder in the first degree, the convict shall be kept in solitary confinement after the issue of the warrant of execution by the governor, and only certain persons allowed to visit him, is an independent provision, applicable only to offences committed after its passage, and is not *ex post facto*.

Section 7 of that statute, which repeals all acts or parts of acts inconsistent with its provisions does not repeal the previous statute which prescribes the punishment of murder in the first degree by death by hanging, and that the execution should take place only after the issue of a warrant of execution.

Section 3 of that statute, which requires the punishment of death by hanging to be inflicted before sunrise of the day on which the execution takes place, and within the jail or some other enclosure higher than the gallows, thus excluding the view from persons outside, and limiting the number of those who may witness the execution, excluding altogether reporters of newspapers, are regulations that do not affect the substan-

tial rights of the convict, and are not *ex post facto* within the meaning of the Constitution of the United States, even when applied to offences previously committed.

The provisions of a statute cannot be regarded as inconsistent with a subsequent statute merely because the latter reënacts or repeats those provisions.

The case of *Medley, Petitioner*, 134 U. S. 160, distinguished from this case.

The statutes of Minnesota authorizing the governor to fix by his warrant the day for the execution of a convict sentenced to suffer death by hanging, are not repugnant to the constitutional provision that no person shall be deprived of life without due process of law; it being competent for the legislature to confer either upon the court or the executive the power to designate the time when such punishment shall be inflicted.

This was a petition for a writ of *habeas corpus*. The writ was denied by the court below, from which judgment the petitioner appealed. The case is stated in the opinion.

Mr. Charles C. Willson, for petitioner, appellant.

Mr. H. W. Childs, opposing. *Mr. Moses E. Clapp*, Attorney General of the State of Minnesota, was with him on the brief.

Mr. Justice Harlan delivered the opinion of the court.

By an indictment returned May 15, 1889, in the District Court of Redwood County, Minnesota, Clifton Holden was charged with the crime of murder in the first degree, committed in that county on the 23d day of November, 1888. Having been found guilty, and a motion for a new trial having been overruled, he prosecuted an appeal to the Supreme Court of the State. That court affirmed upon the merits the order denying the motion for a new trial, and remitted the case to the District Court. *State* v. *Holden*, 42 Minnesota, 350. In the latter court it was adjudged, February 18, 1890, that, as a punishment for the crime of which he had been convicted, Holden be confined in the common jail of Brown County, (there being no jail in Redwood County,) and that thereafter and after the lapse of three calendar months from the date of the sentence, and at a time to be designated in the

warrant of the governor of the State, he be taken to the place of execution and hanged by the neck until dead. Gen. Stat. Minn. 1878, c. 117, § 1.

On the 21st of May, 1890, the governor issued a warrant to the sheriff, which, after reciting the judgment, commanded and required him to cause execution of the sentence of the law to be done upon the convict on Friday, the 27th day of June, 1890, before the hour of sunrise of the day last named, at a place in the county of Redwood, to be selected by such officer, "conformably with the provisions of section 3 of an act entitled 'An act providing for the mode of inflicting the punishment of death, the manner in which the same shall be carried into effect, and declaring a violation of any of the provisions of this act to be a misdemeanor,' approved April 24, 1889."

The accused, being in custody under the above judgment and warrant, presented to the Circuit Court of the United States for the District of Minnesota his written application for a writ of *habeas corpus*, based upon the ground that he was restrained of his liberty in violation of the Constitution of the United States. The writ was issued, and the officers having charge of the accused made a return to which the petitioner filed an answer. The Attorney General of Minnesota appeared on behalf of the State, insisting that the detention of the petitioner was not in violation of the supreme law of the land. Upon final hearing the application for discharge was denied. From that order the present appeal was taken under section 764 of the Revised Statutes, as amended by the act of March 3, 1885. 23 Stat. c. 353, p. 437.

The principal question before us depends upon the effect to be given to the act, referred to in the governor's warrant, of April 24, 1889. That act is as follows:

"§ 1. The mode of inflicting the punishment of death shall in all cases be hanging by the neck until the person is dead.

"§ 2. Whenever the punishment of death is inflicted upon any convict in obedience to a warrant from the governor of the State, the sheriff of the county shall be present at the execution, unless prevented by sickness or other casualty; and

he may have such military guard as he may think proper. He shall return the warrant with a statement under his hand of doings thereon as soon as may be after the said execution to the governor, and shall also file in the clerk's office of the court where the conviction was had an attested copy of the warrant and statement aforesaid, and the clerk shall subjoin a brief abstract of such statement to the record of conviction and sentence.

"§ 3. The warrant of execution shall be executed before the hour of sunrise of the day designated in the warrant and within the walls of the jail in all cases where the jail is so constructed that it can be conveniently done therein; but when the jail is not so constructed, the warrant shall be executed within an enclosure which shall be higher than the gallows, and shall exclude the view of persons outside, and which shall be prepared for that purpose, under the direction of the sheriff, in the immediate vicinity of the jail, or, if there be no jail in the county, at some convenient place at the county-seat, to be selected by the sheriff.

"§ 4. After the issue of the warrant for execution by the governor, the prisoner shall be kept in solitary confinement, and the following persons shall be allowed to visit him, but none other, viz.: The sheriff and his deputies, the prisoner's counsel, any priest or clergyman the prisoner may select, and the members of his immediate family.

"§ 5. Besides the sheriff and his assistants, the following persons may be present at the execution, but none other: The clergyman or priest in attendance upon the prisoner and such other persons as the prisoner may designate, not exceeding three in number, a physician or surgeon, to be selected by the sheriff, and such other persons as the sheriff may designate, not exceeding six in number, but no person so admitted shall be a newspaper reporter or representative. No account of the details of such execution, beyond the statement of the fact that such convict was on the day in question duly executed according to law, shall be published in any newspaper.

"§ 6. Any person who shall violate or omit to comply with any of the provisions of this act shall be guilty of a misdemeanor.

"§ 7. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

"§ 8. This act shall take effect and be in force from and after its passage." Gen. Laws Minn. 1889, c. 20, p. 66.

The contention of the appellant is that by the law of Minnesota, in force when the alleged crime was committed, and up to the passage of the act of April 24, 1889, the punishment for murder in the first degree was death, without solitary confinement of the convict; that the act of that date adding the penalty of solitary confinement between the date of the governor's warrant and the execution, would, if applied to previous offences, be *ex post facto* in its nature, and, therefore, was inconsistent with the prior law; and that, inasmuch as that act made no saving as to previous offences, and repealed all acts and parts of acts inconsistent with its provisions, there was no statute in force, after the 24th of April, 1889, prescribing the punishment of death for murder in the first degree committed before that date. While this may not be expressed in terms, it is in fact the contention of the appellant, the argument in his behalf necessarily leading to this conclusion; for he insists that the repeal by the seventh section of the act of 1889 of all prior inconsistent laws was an act of complete amnesty in respect to all offences of murder in the first degree previously committed, making subsequent imprisonment therefor illegal. Whether such was the result of that act, interpreted in the light of prior statutes, is the principal question on this appeal.

By the General Statutes of Minnesota, in force at the close of the legislative session of 1878, it was provided (c. 94) that the killing of a human being, without the authority of law, and with a premeditated design to effect the death of the person killed, or any human being, was murder in the first degree, § 1; and that whoever was convicted thereof should suffer the penalty of death, and be kept in solitary confinement for a period of not less than one month nor more than six months, in the discretion of the judge before whom the conviction was had, at the expiration of which time it became the duty of the governor to issue his warrant of execution. (Gen. Stat. 1878, § 2, pp. 882–3.) Other sections of the same

chapter were as follows: "§ 3. The penalty of death as a punishment for crime is hereby abolished in this State, except in the cases provided for in section two of this act, and hereafter the penalty for the crime of murder in the first degree shall be as prescribed in sections two and three of this act. (1868, c. 88, § 1.) § 4. Whenever, upon the trial of any person upon an indictment for murder in the first degree, the jury shall have agreed upon a verdict of guilty of such offence, such jury may also determine in the same manner that the person so convicted shall be punished by death, and, if they so determine, shall render their verdict accordingly; and in such case the person so convicted shall be punished by death, as prescribed by section two of chapter ninety-four of the General Statutes for the punishment of murder in the first degree. (Id. § 2.) § 5. Whoever shall be convicted of murder in the first degree, if the jury upon whose conviction the penalty is inflicted shall not by their verdict prescribe the penalty of death, shall be punished by imprisonment at hard labor in the state prison during the remainder of the term of his natural life, with solitary confinement upon bread and water diet for twelve days in each year during the term, to be apportioned in periods of not exceeding three days' duration each, with an interval of not less than fourteen days intervening each two successive periods. (Id. § 3.) § 6. The provisions of this act shall not apply nor extend to any act done nor offence committed prior to the passage hereof; but the provisions of law now in force, and applicable to the crime of murder in the first degree, as well in respect to the penalty affixed to the commission of such crime as in all other respects, shall be and remain in full force and effect as to any such offence heretofore committed. (Id. § 4.) § 7. That in all cases where the time of imprisonment is during life, solitary imprisonment in the State prison is hereby abolished, except for prison discipline. (1876, c. 79, § 1.)"

By chapter 118 of the same General Statutes it was provided: "§ 3. When any person is convicted of any crime for which sentence of death is awarded against him, the clerk of the court, as soon as may be, shall make out and deliver to

the sheriff of the county a certified copy of the whole record of the conviction and sentence; and the sheriff shall forthwith transmit the same to the governor; and the sentence of death shall not be executed upon such convict until a warrant is issued by the governor, under the seal of the State, with a copy of the record thereto annexed, commanding the sheriff to cause the execution to be done; and the sheriff shall thereupon cause to be executed the judgment and sentence of the law upon such convict. § 4. The judge of the court at which a conviction requiring judgment of death is had, shall, immediately after conviction, transmit to the governor, by mail, a statement of the conviction and judgment, and of the testimony given at the trial." "§ 11. The punishment of death shall, in all cases, be inflicted by hanging the convict by the neck, until he is dead, and the sentence shall, at the time directed by the warrant, be executed at such place within the county as the sheriff shall select. § 12. Whenever the punishment of death is inflicted upon any convict, in obedience to a warrant from the governor, the sheriff of the county shall be present at the execution, unless prevented by sickness or other casualty; and he may have such military guard as he may think proper. He shall return the warrant, with a statement under his hand of his doings thereon, as soon as may be after the said execution, to the governor, and shall also file in the clerk's office of the court where the conviction was had, an attested copy of the warrant and statement aforesaid; and the clerk shall subjoin a brief abstract of such statement to the record of conviction and sentence."

The next statute in point of time was that of March 2, 1883, entitled "An act prescribing the punishment of murder in the first degree." It provided that "Whoever is guilty of murder in the first (1st) degree shall suffer the punishment of death: *Provided*, That if in any such case the court shall certify of record its opinion that by reason of exceptional circumstances the case is not one in which the penalty of death should be imposed, the punishment shall be imprisonment for life in the penitentiary." That act repealed sections three, four, five, and six of chapter 94 of the General Statutes of 1878, as well as

all acts and parts of acts inconsistent with its provisions. Minn. Sess. Laws, 1883, c. 122, p. 164.

Then came the act of March 9, 1885, establishing a Penal Code, and which went into effect January 1, 1886. It contained, among others, the following sections: "§ 152. The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when perpetrated with a premeditated design to effect the death of the person killed, or of another." "§ 156. Murder in the first degree is punishable by death: *Provided*, That if in any such case the court shall certify of record its opinion that by reason of exceptional circumstances the case is not one in which the penalty of death should be imposed, the punishment shall be imprisonment for life in the state prison." "§ 541. Chapters ninety-three, ninety-four, ninety-five, ninety-six, ninety-seven, ninety-eight, ninety-nine, one hundred and one hundred and one of the General Statutes of one thousand eight hundred and seventy-eight, and all acts, and parts of acts which are inconsistent with the provisions of this act, are repealed, so far as they define any crime or impose any punishment for crime, except as herein provided." Gen. Stat. Minn. Supplement, 1888, vol. 2, 969, 971, 978, 1050. It is important to be here observed that chapter 94, thus repealed, authorized (§ 2) the keeping of one convicted of a capital crime in solitary confinement for a period of not less than one nor more than six months, in the discretion of the judge before whom the conviction was had.

Such was the state of the law in Minnesota at the time of the commission by Holden of the crime for which he was indicted and convicted. As the Penal Code did not repeal chapter 118 of the General Statutes of 1878, except so far as the provisions of the latter were inconsistent with that Code, it is apparent that at the time his offence was committed the punishment therefor was, as prescribed in that chapter, death by hanging, and that his execution could not occur until a warrant for that purpose was issued by the governor. These provisions were not repealed by the act of April 24, 1889. In respect to the first and second sections of that act, it is clear that they contain nothing of substance that was not in sections

eleven and twelve of chapter 118 of the General Statutes of 1878. And it is equally clear that the provisions of an existing statute cannot be regarded as inconsistent with a subsequent act merely because the latter reënacts or repeats those provisions. As the act of 1889 repealed only such previous acts and parts of acts as were inconsistent with its provisions, it is inaccurate to say that that statute contained no saving clause whatever. By necessary implication, previous statutes that were consistent with its provisions were unaffected.

In reference to the third section of the act of 1889, it may be said that, while its provisions are new, it cannot be regarded as in any sense, *ex post facto;* for it only prescribes the hour of the day before which, and the manner in which, the punishment by hanging shall be inflicted. Whether a convict, sentenced to death, shall be executed before or after sunrise, or within or without the walls of the jail, or within or outside of some other enclosure, and whether the enclosure within which he is executed shall be higher than the gallows, thus excluding the view of persons outside, are regulations that do not affect his substantial rights. The same observation may be made touching the restriction in section five as to the number and character of those who may witness the execution, and the exclusion altogether of reporters or representatives of newspapers. These are regulations which the legislature, in its wisdom, and for the public good, could legally prescribe in respect to executions occurring after the passage of the act, and cannot, even when applied to offences previously committed, be regarded as *ex post facto* within the meaning of the Constitution.

The only part of the act of 1889 that may be deemed *ex post facto*, if applied to offences committed before its passage and after the adoption of the Penal Code, is section four, requiring that, after the issue of the warrant of execution by the governor, "the prisoner shall be kept in solitary confinement" in the jail, and certain persons only be allowed to visit him. The application for the writ of *habeas corpus* states that the appellant is kept in solitary confinement. But this was denied in the return to the writ, and there is no proof in

the record upon the subject. *Crowley* v. *Christensen*, 137 U. S. 86, 94. The appellant insists that we must presume that the officers holding him in custody have pursued the statute of 1889, and, consequently, that he is kept in solitary confinement. No such presumption can be indulged without imputing to the officers, charged with the execution of the governor's warrant, a purpose to enforce a statutory provision that cannot legally be applied to the case of the appellant. Even the governor's warrant furnishes no ground for such a presumption, because it did not require that the convict be kept in solitary confinement, but only that the judgment and sentence be carried into effect conformably to the third section of the act of 1889, which section, we have seen, has no reference to the mode of confinement.

We have proceeded in our examination of the case upon the ground that the prior statutes requiring the punishment of death to be inflicted by hanging, and the issuing by the governor of the warrant of execution before such punishment was inflicted, were consistent with and were not repealed by the act of 1889, and, therefore, so far as the mere imprisonment of the appellant, and his execution in conformity with prior statutes, were concerned, they could both occur without invoking the provision in the act of 1889, requiring solitary confinement after the warrant of execution was issued. This view, appellant contends, is not in harmony with the decision in *Medley, Petitioner*, 134 U. S. 160, where it was held that the effect of a clause in the Colorado statute, repealing all acts and parts of acts inconsistent with its provisions, was to bring Medley's case under that statute in *all* particulars of trial and punishment, except so far as the legislature had power to apply other principles to the trial and punishment of the crime of which he was convicted.

There are material differences between the Colorado and Minnesota statutes. The former provides that "the punishment of death must, in each and every case of death sentence pronounced in this [that] State, be inflicted by the warden of the state penitentiary," etc. § 1. It also contains this provision: "Whenever a person [be] convicted of crime, the punishment whereof

is death, and such convicted person be sentenced to suffer the penalty of death, the judge passing such sentence shall appoint and designate in the warrant of conviction a week of time within which such sentence must be executed; such week, so appointed, shall be not less than two nor more than four weeks from the day of passing such sentence. Said warrant shall be directed to the warden of the state penitentiary of this State, commanding said warden to do execution of the sentence imposed as aforesaid, upon some day within the week of time designated in said warrant, and it shall be delivered to the sheriff of the county wherein such conviction is had, who shall within twenty-four hours thereafter proceed to the said penitentiary and deliver such convicted person, together with the warrant as aforesaid, to the said warden, who shall keep such convict in solitary confinement until infliction of the death penalty." § 2. These provisions indicate the purpose of the legislature of Colorado that that act — no matter when the offence was committed — should control in every case *tried* after its passage in which the sentence of death was imposed. It was evidently intended that it should cover the whole subject of the trials and sentences in capital cases, as well as the mode of inflicting the punishment prescribed. It was so interpreted by the state court; for, although Medley's crime was committed before the passage of the Colorado statute under which he was tried, the imposition of solitary confinement was part of the very judgment and sentence against him. Thus interpreted, this court held the Colorado statute to be a legislative declaration that it was not fit that the existing law remain in force, and, consequently, that it abrogated all former laws covering the same subject, and was *ex post facto* when applied to prior offences.

No such case is before us, and no such construction of the Minnesota statute of 1889 is required. The sentence against the appellant did not require that he be kept in solitary confinement. Nor did that statute cover the whole subject of murder in the first degree, or prescribe the only rules that should control in the trial and punishment for crimes of that class. It did not touch the judgments to be pronounced in

such cases, nor interfere with the power of the governor to issue a warrant of execution. The provisions of the previous law, as to the nature of the sentence, the particular mode of inflicting death, and the issuing by the governor of the warrant of execution before the convict was hung, were, therefore, not repealed, although some of them were reënacted or repeated in the statute of 1889, and other provisions relating merely to the time and mode of executing the warrant, but not affecting the substantial rights of the convict, were added. Indeed, as the act of 1889 does not itself prescribe the punishment of death for murder in the first degree, the authority to inflict that punishment, even for an offence committed after its passage, must be derived from the previous law. The only interpretation of that act that will give full effect to the intention of the legislature in respect to the prior unrepealed law relating to sentences of death for murder in the first degree committed before its passage, is to hold, as we do, that its fourth section, prescribing solitary confinement, is an independent provision, applicable only to future offences, not to those committed prior to its passage.

In this view, and as it does not appear that the appellant is kept in solitary confinement, there is no ground upon which it can be held that his mere imprisonment, in execution of the sentence of death, is in violation of the constitutional provision against *ex post facto* laws. That sentence, the subsequent imprisonment of the convict under it, without solitary confinement, and the warrant of execution, are in accordance with the law of the State as it was when the offence was committed, and do not infringe any right secured by the Constitution of the United States.

Much was said at the argument in reference to section 3 of chapter 4 of the General Statutes of 1886, declaring that "whenever a law is repealed, which repealed a former law, the former law shall not thereby be revived, unless it is so specially provided, nor shall such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the law repealed." This section was admitted to be a part of the law

of Minnesota at the time the appellant's offence was committed, and when the act of 1889 was passed. On behalf of the State it is contended that the former law for the punishment of murder in the first degree is to be read in connection with that section. We have not deemed it necessary to consider whether that section is applicable to capital cases, or to determine whether the punishment of death is, within its meaning, a "penalty." Independently of that section, and for the reasons stated, we hold that the act of 1889, although applicable to offences committed after its passage, did not supersede the prior law prescribing, as the punishment for murder in the first degree committed prior to April 24, 1889, death by hanging, to be inflicted after the issue by the governor of a warrant of execution.

Among the assignments of error by the appellant is one to the effect that "the judgment of the State District Court that he be hanged at a time to be fixed by the governor of Minnesota was not a valid exercise of judicial authority or due process of law thus to deprive him of life at such time as the executive should arbitrarily appoint." We do not understand the counsel of the appellant to press this point. But as this assignment of error has not been formally withdrawn, and as human life is involved in our decision, it is proper to say that, under the law of Minnesota, at the time appellant committed the crime of which he was convicted, as well as when he was indicted and tried, the day on which the punishment of death should be inflicted depended upon the warrant of the governor. It is competent for the State to establish such regulations, and they are entirely consistent with due process of law. The court sentenced the convict to the punishment prescribed for the crime of murder in the first degree, leaving the precise day for inflicting the punishment to be determined by the governor. The order designating the day of execution is, strictly speaking, no part of the judgment, unless made so by statute. And the power conferred upon the governor to fix the time of infliction is no more arbitrary in its nature than the same power would be if conferred upon the court. Whether conferred upon the governor or the court, it is arbitrary in no

other sense than every power is arbitrary that depends upon the discretion of the tribunal or the person authorized to exercise it. It may be, also, observed that at common law the sentence of death was generally silent as to the precise day of execution. *Atkinson* v. *The King*, 3 Bro. P. C. 2d ed. 517, 529; *Rex* v. *Rogers*, 3 Burrow, 1809, 1812; *Rex* v. *Doyle*, 1 Leach, 4th ed. 67; *Cuthcart* v. *Commonwealth*, 73 Penn. St. 108, 115; *Costley* v. *Commonwealth*, *Commonwealth* v. *Costley*, 118 Mass. 1, 35. Of course if the statute so requires, the court must, in its sentence, fix the day of execution. Equally must it forbear to do that if the statute confers upon some executive officer the power to designate the time of infliction.

Judgment affirmed.

Mr. Justice Bradley and Mr. Justice Brewer concurred in the judgment.

BASSETT *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 110. Argued December 10, 1890. — Decided December 22, 1890.

The original bill of exceptions in this case, signed by the trial judge, and also certified by the clerk of the trial court, was transmitted to the Supreme Court of the Territory of Utah, and was filed, together with the record of the case, in that court. *Held*, that its identification and authentication were perfect and were sufficient to bring the questions raised by the record within the jurisdiction of this court.

The wife of a married man is not a competent witness in Utah against her husband on trial under an indictment for polygamy.

On the 23d of November, 1886, the grand jury of the District Court for the First Judicial District of Utah Territory found an indictment for polygamy against the plaintiff in error, charging him with having married one Kate Smith, on the 14th day of August, 1884, when his lawful wife, Sarah Ann Williams, was still living and undivorced.

A motion was made to set aside and dismiss the indictment

on the ground that it had not been found and presented in the manner prescribed by law, because it had been found without any other evidence than that of the legal wife. This motion was overruled.

The accused pleaded not guilty and was tried by a jury, on the 6th day of January, 1887. He was convicted, and, on the same day, sentenced to be imprisoned in the penitentiary of Utah for five years and to pay a fine of five hundred dollars.

An appeal was taken to the Supreme Court of Utah Territory where the judgment of the District Court was affirmed. The defendant sued out this writ of error.

The plaintiff in error made in this court several assignments of error. Only the following was considered in the opinion.

"*First:* The District Court erred in permitting Mrs. Sarah Bassett, the former legal wife of the plaintiff in error, against his objection, to testify to a confidential communication made to her by him, while they were husband and wife, and not in the presence of any other person."

The Attorney General on the part of the government, contended that there was no competent bill of exceptions. The ground for this objection is stated in the opinion of the court.

Mr. Franklin S. Richards for plaintiff in error. *Mr. Charles C. Richards* was with him on the brief.

Mr. Attorney General for defendants in error.

If the bill of exceptions is to be regarded as in the record, it is necessary to consider the questions made in the brief for plaintiff in error.

It is insisted that there is no evidence in this case of the second marriage, except the confession of the defendant, and that such confession uncorroborated is insufficient. In the first place, this statement made by Bassett to his wife was not "a confession" within the meaning of the law. He stated that he had married a second wife, but he did not state or admit that he had committed a crime. This question seems

to be covered by the decision in *The State* v. *Crowder*, 41 Kansas, 110, 111. But, as a matter of fact, this confession has corroboration in the evidence. And it is not the rule that a prisoner will not be convicted upon a confession without corroborative evidence. In *Hopt* v. *Utah*, 110 U. S. 574, 584, this court gives its sanction to the statement that "a confession, if freely and voluntarily made, is evidence of the most satisfactory character. Such a confession, said Eyre, C. B., 1 Leach, 263, 'is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and, therefore, it is admitted as proof of the crime to which it refers.' Elementary writers of authority concur in saying that while from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution, a deliberate, voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession."

The decision in *Bergen* v. *People*, 17 Illinois, 436, *S. C.* 65 Am. Dec. 672, cited and relied on by plaintiff in error, states that the corroborative circumstances need not go to the proof of the *corpus delicti*, but may be sufficient if they are corroborative of any part of the testimony. It is also stated in the same case that the text-books generally say that a confession alone is sufficient.

The main question argued on the other side, is whether the plaintiff's first wife was a competent witness to the matters of which she testified. It is beyond question that, unless the common law rule is changed by the statute of Utah, this testimony was incompetent. The material matter to which she testified was a conversation between her husband and herself while the relation of husband and wife existed, in the absence of any third person except a little child, in which the husband admitted that he had married the second time; in other words, had committed the crime against which this prosecution is directed. It was claimed on behalf of the Government that section 1156 of the code of civil procedure of Utah embodies the law determinative of this question. That

section is as follows: "A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either, during the marriage or after, without the consent of the other, be examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or a proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other."

It was insisted that under the last clause of that section the wife was a competent witness. It was also insisted, as it is insisted in the opinion of Chief Justice Zane, that the crime under prosecution was a crime not merely against the people of Utah, but in the sense of the statute was a crime committed against the wife; and that, therefore, for her own protection she must be permitted to testify. The decisions cited, in the opinion of the Chief Justice, from the Supreme Court of Iowa and the Supreme Court of Nebraska, directly support this position: *State* v. *Sloan*, 55 Iowa, 217; *State* v. *Hughes*, 58 Iowa, 165; *State* v. *Bennet*, 31 Iowa, 24; *Lord* v. *State*, 17 Nebraska, 526.

There seems to be much force and sound reason in this doctrine. Certainly no man can commit a greater wrong upon his wife than in acts of this character. Such an act is a much greater outrage upon any right thinking woman than a blow, or almost any sort of abuse.

On the other hand, plaintiff in error insists that in arriving at the law of Utah upon this question, section 1156 of the Civil Code must not be considered alone, but in connection with section 421, Criminal Code, which is in the following language: "Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife are competent witnesses for or against each other in a criminal action or proceeding to which one or both are parties."

Section 1156 is the later enactment. It seems to cover the whole subject matter. True, it is found in the Civil Code, but it is in express terms made applicable to criminal actions and covers the whole subject matter. The change from the

language of section 421, substituting "criminal action" for "criminal violence" seems to have been with the purpose and to sanction the view, entertained by the Supreme Court of Utah, that the law was intended to cover cases in which the crime was committed against the wife, not involving the elements of violence. To hold otherwise, it is necessary to make so much of section 1156 as applies to criminal cases meaningless and without effect as against the provisions of section 421. We are not at liberty to give it such a construction. Being the later act, and the subject matter being within the competency of the legislature, it must be assumed that the substitution of "criminal action" for "criminal violence" was intentional, and give it effect accordingly.

The rule as found in § 421 was the rule of the common law, and § 1156 designed to and did change that rule. It seems to me clear, therefore, that the wife was a competent witness to give testimony against the husband in this action.

A more difficult question, however, is presented by the fact that her testimony in this case was as to a communication made by him to her pending their marital relations and in the absence of any third person. The question is whether the language of section 1156 is sufficiently broad to cover testimony as to such a communication. If given full scope and its widest meaning, it undoubtedly is; for the limitation is not as to the character of the testimony, but as to the character of the action; and, as we have already seen, the character of the action described in the statute seems to be fully met by the facts in this case. And not only is the action such an one as to be within the exception of this statute, but the communication itself is strictly within the language of the exception.

The general provision of the section is that "neither husband nor wife shall be examined as to *any* communication made by one to the other during the marriage." Then follows the exception: "But this exception does not apply . . . to a criminal action or proceeding for a crime committed by one against the other."

It is not merely that each is permitted to be a witness, but according to the language of this section each is permitted to

testify to "any communication" made by the one to the other during the marriage. As already said, the language seems clearly to cover and justify, not merely ordinary testimony by one against the other, but "any communication made by one to the other."

At the same time it must be conceded that confidential communications under the law of evidence have stood upon a rule peculiar to themselves. The question is whether the statute making the husband and wife competent witnesses against each other, and authorizing them to testify as to "any communication" between them during the marriage relations, covers confidential communications.

I ask that a careful examination be given to the discussion of this question in the opinion of Chief Justice Zane. The decision of this court in the case of the *Connecticut Mutual Life Insurance Company* v. *Schaefer*, 94 U. S. 457, may be worthy of consideration in this connection.

Mr. Justice Brewer delivered the opinion of the court.

On November 23, 1886, the grand jury of the First Judicial District Court of Utah found an indictment for polygamy against the plaintiff in error, charging him with having married one Kate Smith on the 14th day of August, 1884, when his lawful wife, Sarah Ann Williams, was still living and undivorced. Upon trial before a jury a verdict of guilty was returned, and he was sentenced to imprisonment for a term of five years and to pay a fine of five hundred dollars. Such sentence, on appeal, was affirmed by the Supreme Court of the Territory, and is now brought to this court for review.

A preliminary question is presented by the Attorney General. It is urged that there was no proper bill of exceptions as to the proceedings in the trial court, and therefore nothing is presented which this court can review. But we are reviewing the judgment of the Supreme Court of the Territory; and the rule in this court is not to consider questions other than those of jurisdiction, which were not presented to the court whose judgment we are asked to examine. *Clark* v. *Freder-*

icks, 105 U. S. 4. Beyond the fact that the proceedings of the trial court were examined and considered by the Supreme Court of the Territory, and are, therefore, presumably reviewable by this court, is this matter, noticed by this court in the case of *Hopt* v. *Utah*, 114 U. S. 488, that a large liberty of review is given by the statutes of Utah to the Supreme Court of the Territory, even in the absence of a formal bill of exceptions. See also *Stringfellow* v. *Cain*, 99 U. S. 610; *O'Reilly* v. *Campbell*, 116 U. S. 418.

But it is unnecessary to rest upon this recognition by the Supreme Court of the Territory, or the presumptions arising therefrom. The record shows the pleadings, proceedings and exceptions to the charge of the trial judge, all certified properly by T. A. Perkins, the clerk of the trial court. At the close of his certificate, which is of date January 20, 1887, is this statement: "And I further certify that a copy of defendant's bill of exceptions in said cause is not made part hereof because said bill of exceptions is in the possession of defendant's counsel, at the City of Salt Lake, and because I am informed by said counsel that it has been stipulated by and between themselves and the United States district attorney for Utah Territory that the original thereof in place of such copy should be used in the Supreme Court upon this appeal." The bill of exceptions referred to by him in this statement is signed by the trial judge and thus endorsed: "No. 984. First Dist. Court, Utah. *The United States* v. *William E. Bassett.* Polygamy. Bill of exceptions. Filed Jan'y 19th, 1887. T. A. Perkins, clerk"; and also by the clerk of the Supreme Court of the Territory as "Filed Feb'y 2nd, 1887," the date of the filing of the transcript of the proceedings of the trial court. The import of all this is that the bill of exceptions signed by the trial judge was filed in the trial court; and that, for the purposes of economy, time and convenience, such original bill, together with the record of the proceedings, was brought to and filed in the Supreme Court after having been filed in the trial court. It needs but this suggestion, that if a copy is good the original is equally good. The identification of such bill of exceptions is perfect, vouched by the sig-

natures of the trial judge, the clerk of the District Court, and the clerk of the Supreme Court. To ignore such authentication would place this court in the attitude of resting on a mere technicality to avoid an inquiry into the substantial rights of a party, as considered and determined by both the trial court and the Supreme Court of the Territory. In the absence of a statute or special rule of law compelling such a practice, we decline to adopt it.

Passing from this question of practice to the merits, the principal question, and the only one we deem necessary to consider, is this: The wife of the defendant was called as a witness for the prosecution, and permitted to testify as to confessions made by him to her in respect to the crime charged, and her testimony was the only direct evidence against him. This testimony was admitted under the first paragraph of section 1156 of the Code of Civil Procedure, enacted in 1884, section 3878 of the Compiled Laws of Utah, 1888, which reads: "A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other." And the contention is, that polygamy is within the language of that paragraph a crime committed by the husband against the wife. We think this ruling erroneous. A technical argument against it is this: The section is found in the Code of Civil Procedure, and its provisions should not be held to determine the competency of witnesses in criminal cases, especially when there is a Code of Criminal Procedure, which contains sections prescribing the conditions of competency. Section 421 of the Code of Criminal Procedure, section 5197 of the Compiled Laws, 1888, is as follows: "Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife are competent witnesses for or against each other, in a criminal action or proceeding to

which one or both are parties." Clearly under that section the wife was not a competent witness. It is true that the Code of Criminal Procedure was enacted in 1878, and the Code of Civil Procedure in 1884, so that the latter is the last expression of the legislative will; but a not unreasonable construction is, that the last clause of this paragraph was inserted simply to prevent the rule stated in the first clause from being held to apply to the cases stated in the last, leaving the rule controlling in criminal cases to be determined by the already enacted section in the Code of Criminal Procedure. This construction finds support in the fact that the same legislature which enacted the Code of Civil Procedure passed an act amending various sections in the Code of Criminal Procedure, among them the section following section 421, quoted above, and did not in terms amend such section, (Laws of Utah, 1884, chapter 48, page 119); and in the further fact that the same legislature passed an act for criminal procedure in justices' courts, and in that prescribed the same rule of competency, and in the same language as is found in section 421, (Laws of Utah, 1884, chapter 54, section 100, page 153). It can hardly be believed that the legislature would establish one rule of competency for a trial in a justices' court, and a different rule for a trial of the same offence on an appeal to the District Court. And there are many offences of which justices' courts have jurisdiction, which are like polygamy in their social immorality and their wrong to the wife.

But we do not rest our conclusion on this technical argument. If there were but a single section in force, and that the one found in the Code of Civil Procedure we should hold the testimony of the wife incompetent. We agree with the Supreme Court of California, when, in speaking of their codes, which in respect to these sections are identical with those of Utah, it says in *People* v. *Langtree*, 64 California, 256, 259, "we think upon a fair construction both mean the same thing, although the Penal Code is more explicit than the other. On this, as on nearly every other subject to which the codes relate, they are simply declaratory of what the law would be if there were no codes." See also *People* v. *Mullings*, 83 California, 138.

Opinion of the Court.

It was a well-known rule of the common law that neither husband nor wife was a competent witness in a criminal action against the other, except in cases of personal violence, the one upon the other, in which the necessities of justice compelled a relaxation of the rule. We are aware that language similar to this has been presented to the Supreme Courts of several States for consideration. Some, as in Iowa and Nebraska, hold that a new rule is thereby established, and that the wife is a competent witness against her husband in a criminal prosecution for bigamy or adultery, on the ground that those are crimes specially against her. *State* v. *Sloan*, 55 Iowa, 217; *Lord* v. *State*, 17 Nebraska, 526. While others, as in Minnesota and Texas, hold that by these words no departure from the common law rule is intended. *State* v. *Armstrong*, 4 Minnesota, 251; *Compton* v. *State*, 13 Texas App. 271, 274; *Overton* v. *State*, 43 Texas, 616. This precise question has never been before this court, but the common law rule has been noticed and commended, in *Stein* v. *Bowman*, 13 Pet. 209, 222, in which Mr. Justice McLean used this language: "It is, however, admitted in all the cases that the wife is not competent, except in cases of violence upon her person, directly to criminate her husband, or to disclose that which she has learned from him in their confidential intercourse." "This rule is founded upon the deepest and soundest principles of our nature, principles which have grown out of those domestic relations that constitute the basis of civil society, and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down and impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence." We do not doubt the power of the legislature to change this ancient and well-supported rule; but an intention to make such a change should not lightly be imputed. It cannot be assumed that it is indifferent to sacred things, or that it means to lower the holy relations of husband and wife to the material plane of simple contract. So, before any departure from the rule affirmed through the ages of the

common law, — a rule having its solid foundation in the best interests of society, — can be adjudged, the language declaring the legislative will should be so clear as to prevent doubt as to its intent and limit. When a code is adopted, the understanding is that such code is a declaration of established law, rather than an enactment of new and different rules. This is the idea of a code, except as to matters of procedure and jurisdiction which often ignore the past, and require affirmative description.

We conclude, therefore, that the section quoted from the Code of Civil Procedure, if applicable to a criminal case, should not be adjudged as working a departure from the old and established rule, unless its language imperatively demands such construction. Does it? The clause in the Civil Code is negative, and declares that the exception of the incompetency of wife or husband as a witness against the other does not apply to a criminal action or proceeding for a crime committed by one against the other. Is polygamy such a crime against the wife? That it is no wrong upon her person is conceded; and the common law exception to the silence upon the lips of husband and wife was only broken, as we have noticed, in cases of assault of one upon the other. That it is humiliation and outrage to her is evident. If that is the test, what limit is imposed? Is the wife not humiliated, is not her respect and love for her husband outraged and betrayed, when he forgets his integrity as a man and violates any human or divine enactment? Is she less sensitive, is she less humiliated, when he commits murder, or robbery, or forgery, than when he commits polygamy or adultery? A true wife feels keenly any wrong of her husband, and her loyalty and reverence are wounded and humiliated by such conduct. But the question presented by this statute is not how much she feels or suffers, but whether the crime is one against her. Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation than against the wife; and, as the statute speaks of crimes against her, it is simply an affirmation of the old familiar and just common law rule. We conclude,

therefore, that under this statute the wife was an incompetent witness as against her husband.

Other questions in the record need not be considered, as they will probably not arise on a new trial.

The judgment of the Supreme Court of the Territory of Utah is reversed, and the case remanded, with instructions to order a new trial.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY *v.* ARTERY.

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

No. 91. Argued November 25, 1890. — Decided December 22, 1890.

Section 1307 of the Code of Iowa of 1873 in regard to the liability of a railway corporation for damages to its employés in consequence of the neglect of their coemployés, in connection with the use and operation of the railway, construed.

The decisions of the Supreme Court of Iowa as to the statute, reviewed.

An injury sustained by an employé while riding on a car propelled by hand-power, through the negligence of a coemployé riding on the same car, is one sustained in connection with the use and operation of the railway, within section 1307.

If a witness is to be impeached, in consequence of his having made, on some other occasion, different statements, oral or written, from those which he makes on the witness stand, as to material points in the case, his attention must first be called, on cross-examination, to the particular time and occasion when, the place where, and the person to whom he made the varying statements.

The Circuit Court erred in laying it down as a rule, that a written statement signed by a witness and admitted by him to have been so signed, could not be used in cross-examining him as to material points testified to by him; and in announcing it as a further rule, that the only way to impeach a witness by showing contradictory statements made by him, is to call as a witness the person to whom or in whose presence the alleged contradictory statements were made.

The rule of evidence, that if, on cross-examination, a witness admits a letter to be in his handwriting, he cannot be questioned by counsel as to whether statements, such as the counsel may suggest, are contained in it, but the

whole letter must be read as the evidence of the existence of the statements, does not apply to the present case, because the opposite party did not take the objection that the whole statement was not, but should have been, read as evidence, and the court, with his assent, excluded it from being read in evidence.

THE plaintiff below (defendant in error) sued the plaintiff in error (defendant below) to recover for injuries inflicted through the neglect of a coemployé, and recovered judgment. The case in this court is stated in the opinion.

Mr. John W. Cary for plaintiff in error.

Mr. Delos E. Lyon for defendant in error. *Mr. H. B. Fouke* was with him on the brief.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law, brought in the District Court of Dubuque County, in the State of Iowa, by James Artery against the Chicago, Milwaukee and St. Paul Railway Company, a Wisconsin corporation, to recover damages for a personal injury, and removed by the defendant into the Circuit Court of the United States for the Northern District of Iowa.

The petition alleges that the defendant owns and operates a line of railroad from Dubuque in Iowa to La Crosse in Wisconsin and St. Paul in Minnesota, and in the operation of it uses locomotives propelled by steam, hand-cars propelled by hand, and cars drawn by its locomotives; that the plaintiff, on March 5, 1883, and for several months prior thereto, was in the employ of the defendant in the use and operation of the road in the county of Allamakee, in Iowa, in working upon its road and road-bed, in keeping the ties in good order, in keeping the road well and properly ballasted, in removing obstructions from its track, in keeping its culverts and crossings in repair, in keeping the iron on the road properly spiked and fastened, and in keeping the road-bed fit for use and operation along its line of road and right of way in the county of Allamakee; that in doing such work, cars propelled by steam and hand-cars were used by the plaintiff and others, the cars being

furnished by the defendant; that while in such employ, the plaintiff left the village of Harper's Ferry, in said county, with other employés, under a foreman of the defendant, named Rellehan, and went north some ten miles, making repairs on the road; that, after doing such work, and towards evening, the foreman ordered a start to return to Harper's Ferry, on a small hand-car, on which were placed seven or eight men, and more than the car could or ought to carry; that, when the hand-car was ordered by the foreman to start to Harper's Ferry, it was started at the time that a train of cars was due, of which the plaintiff then had no knowledge; that the snow had been falling and there was snow on the rails, and the foreman ordered the plaintiff to get a shovel and seat himself on the front of the hand-car, and hold the shovel on the top of the rail, in order to move the snow as the hand-car went forward; that on the hand-car there were no places provided for the feet to rest upon while performing such duty; that the plaintiff was compelled, in order to hold the shovel, to exert all his strength, and by muscular exertion hold up his feet and at the same time guide and hold the shovel; that the hand-car was run ahead of the train then due, at the rate of more than ten miles an hour, being a dangerous speed; that while it was so running, and the plaintiff was holding the shovel, and while it was crossing over a cattle-guard in the road, and without any fault or negligence on his part, his foot was caught and he was thrown off and under the hand-car, his body doubled up, his spine injured, and his backbone broken; that by reason thereof he has been confined to his bed ever since, unable to work and suffering great pain in body and mind; and that all this happened by the negligence of the defendant in furnishing unfit and improper hand-cars, in requiring onerous and dangerous duty from the plaintiff, in running the hand-car at a dangerous rate of speed, and in overloading it. Damages are claimed in the sum of $20,000, besides the sum of $1000 for money paid for board, care, and surgical and medical treatment. The petition was afterwards amended by alleging further, that the hand-car was not constructed with reasonably safe appliances to push the snow off from the rails, which

appliances could easily have been furnished by the defendant; that it was wanting in the proper kind of a brake and the proper kind of a foot-rest for doing the kind of work which the plaintiff was ordered to do; that, when the plaintiff was ordered by the foreman to sit down on the front of the hand-car and hold the shovel, he was unaware of any danger therefrom, and had reason to believe and did believe that the hand-car would be run by the foreman at a safe rate of speed; that it was run at an unreasonable and unnecessarily fast and dangerous speed, which the plaintiff could not control, nor could he leave the car while it was in motion; that the cattle-guard was made of three-cornered pieces of wood, placed negligently on top of the ties, across the track instead of lengthwise, and some of the three-cornered pieces stood higher than the surface of the rail, of which fact the plaintiff was not then aware; and that, by reason of such negligent construction of the cattle-guard, the speed of the hand-car, and the dangerous and tiresome position in which the defendant placed the plaintiff, he was injured, either by his foot or feet coming in contact with the rail or the three-cornered pieces, or by the shovel getting caught on the rail or on such pieces, or by all of such circumstances.

The answer of the defendant contains a general denial and an allegation of contributory negligence on the part of the plaintiff. The case was tried by a jury, which rendered a verdict for the plaintiff of $13,500, for which, with costs, he had judgment, to review which the defendant has brought a writ of error.

One of the principal points taken by the defendant is that this was a case of an injury resulting from the negligence of a coemployé, namely, the foreman Rellehan, in the management and running of the hand-car, and did not fall within the provisions of the statute of Iowa on the subject.

On the 8th of April, 1862, a statute was enacted in Iowa, Laws of 1862, c. 169, sec. 7, p. 198, as follows: "Sec. 7. Every railroad company shall be liable for all damages sustained by any person, including employés of the company, in consequence of any neglect of the agents or by any mismanagement of the

engineers or other employés of the corporation to any person sustaining such damage."

This provision was afterwards modified by section 1307 of the Code of Iowa of 1873, which was in force at the time of this accident, and read as follows: "SEC. 1307. Every corporation operating a railway shall be liable for all damages sustained by any person, including employés of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employés of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employés, when such wrongs are in any manner connected with the use and operation of any railway, on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding." The modification introduced by the later statute is, that the wrongs for which the corporation is to be liable must be wrongs connected with the use and operation of the railway on or about which the employés are employed.

It is contended by the defendant that, under the decisions of the Supreme Court of Iowa upon this statute, only employés engaged in operating and moving trains, and who are injured by such trains, and employés who, while in the discharge of their duty, are injured by trains used in operating the railway, are within the statute, and that, in the present case, the plaintiff was not engaged in operating and moving a train, and was not injured by a train used in operating the railway. But we cannot concur in this view.

In *Deppe* v. *Chicago, Rock Island &c. Railway*, 36 Iowa, 52, it was held, under the act of 1862, that the statute included the case of an employé who was engaged in connection with a dirt train, and was injured while loading a car, by the falling of a bank of earth; and in *Frandsen* v. *Chicago, Rock Island &c. Railway*, 36 Iowa, 372, that a person employed as a section hand, in the business of keeping a certain part of the road in repair, and going with his coemployés on the track in a hand-car for that purpose, was within the act of 1862, he being injured through a collision with the engine of a passenger train,

which struck the hand-car and threw it against the plaintiff while he was on the ground and engaged in trying to remove the hand-car out of the way of the engine.

The case of *Schroeder* v. *Chicago, Rock Island &c. Railway*, 41 Iowa, 344, arose under section 1307 of the Code. It was said in that case, that that section applied only to accidents growing out of the use and operation of the road, and did not apply to all persons employed by the corporation, without regard to their employment, and it was held, therefore, that it did not cover the case of Schroeder, who was not connected with the operation of the road, but who, while engaged in removing the timbers of an abandoned bridge and loading them on cars, was injured by some of the timbers which fell from a car. The same view was held in *Potter* v. *Chicago, Rock Island &c. Railway*, 46 Iowa, 399, where Potter, a laborer in the machine shop of the company, was injured by a locomotive driving-wheel which he and other employés were moving by hand.

It was held, in *Schroeder* v. *Chicago, Rock Island &c. Railway*, 47 Iowa, 375, that where a person was required, in the course of his employment by the railroad company, to get upon a train, and did so, he was to be regarded as being engaged in its operation, although his employment might not be connected with the running of the train; and that the company was liable to him for injuries resulting from the negligence of a coemployé.

In *Pyne* v. *Chicago, Burlington &c. Railway*, 54 Iowa, 223, Pyne was employed by the railroad company as a private detective, and, while walking on the track, in the performance of his duties, and in obedience to the orders of the company, was injured, without negligence on his part, through the negligence of the engineer of a passing train, and it was held that his case fell within the provisions of section 1307, and that he was entitled to recover from the company for the injuries received by him.

In *Smith* v. *Burlington &c. Railway*, 59 Iowa, 73, where it appeared that the plaintiff was only a section-hand, and, when injured, was engaged in loading a car, and it did not appear that

his service pertained to the operation of the road, it was held that he could not recover for an injury which occurred through the negligence of a coemployé, the court remarking that, under section 1307 of the Code, it must be shown that his employment was connected with the operation of the railway.

It was held, in *Malone* v. *Burlington &c. Railway*, 61 Iowa, 326, that a person whose duty it was to wipe the company's engines and to do other work about the round-house, and to open the doors of that house so as to allow the engines to pass in and out, and who, while endeavoring to shut those doors, was injured by the carelessness of his coemployés who were at the time engaged with him in the same effort, could not recover under section 1307, for the injury, because it was not "in any manner connected with the use and operation" of the railway, as contemplated by that section.

In *Foley* v. *Chicago, Rock Island &c. Railway*, 64 Iowa, 644, it was held that a car-repairer, whose duty it was to repair cars on the track, but who had nothing to do with cars in motion, except to ride on passenger or freight trains to and from the places where his services were required, was not engaged in the operation of a railway, within the meaning of section 1307, and could not recover of the company for an injury received while in the discharge of his duties, through the negligence of a coemployé. Foley was engaged at the time in making repairs on a car, and was injured while under the car, through its being moved improperly.

The *Malone Case* came up again, in 65 Iowa, 417, and it was there held that Malone, whose duty it was to wipe engines, open and close the doors of an engine-house, and remove snow from a turn-table and connecting tracks, was not, by reason of such duties, employed in the operation of the railroad, within the meaning of section 1307; and that, for an injury received by him while performing such duties, and through the negligence of a coemployé, he could not recover against the company, although he might have had other duties to perform which did pertain to the operation of the road.

It was held, in *Luce* v. *Chicago, St. Paul &c. Railroad*, 67 Iowa, 75, that a person employed in a coal-house of the

railroad, and injured by the negligence of a coemployé while loading coal upon a car, could not recover from the company under section 1307, because the injury was not in any manner connected with the use and operation of the railway.

In *Matson* v. *Chicago, Rock Island &c. Railway*, 68 Iowa, 22, the plaintiff was a member of a construction gang on the road, and his duties required him to ride upon, and to work upon and about, the company's cars and tracks. He was injured by the negligence of a coemployé in throwing a heavy stone upon his hand, while he was engaged in placing stones under the ends of the ties. It was held that the injury was not connected with the use and operation of the railway, as contemplated in section 1307, and that the company was not liable.

It was held, in *Stroble* v. *Chicago, Milwaukee &c. Railway*, 70 Iowa, 555, that a person whose sole duty it was to elevate coal to a platform convenient for delivering it to the tenders of engines, was not employed in the use and operation of the railway, within section 1307, because he was in no way concerned with the moving and operation of trains.

In *Pierce* v. *Central Iowa Railway*, 73 Iowa, 140, a mechanic from a shop of the company was working, under orders, upon a ladder which leaned against one of the cars of a train. The train-men moved the train backward, without notice to him, the ladder fell, and he was injured. It was held that the negligence, whether that of the train-men or of the foreman in not giving the requisite information to the train-men, was connected with the use and operation of the railway, and was the negligence of some one employed on it, so as to make the company liable, under section 1307, for the injury sustained by the plaintiff, and this although he was not engaged in the operation of the railway.

It was held, in *Nelson* v. *Chicago, Milwaukee &c. Railway*, 73 Iowa, 576, that the working, on the railway, of a ditching machine which was operated by the movement along the track of the train of which it formed a part, was an employment connected with the use and operation of the railway, within the meaning of section 1307, and made the company liable for

injury to an employé through the negligence of a coemployé, although the plaintiff was not engaged in the actual movement of the train, but was only one of the crew necessary for the performance of the work intended to be done by the train and its machinery and appliances.

In *Rayburn* v. *Central Iowa Railway*, 74 Iowa, 637, the plaintiff and others were section-hands of the company, engaged in removing snow and ice from the track, when a train of cars loaded with slack came along, moving slowly, and the conductor and others in charge of the train directed them to get upon the train to unload the slack. They requested that the train be stopped, but were told that if it was stopped it could not be started again. In attempting to obey the order, the plaintiff was thrown down by a jerk of the train and injured. It was held that he was not precluded from recovering against the company under section 1307, on the ground that the negligence complained of was not connected with the use and operation of the railway.

From this statement of the decisions of the Supreme Court of Iowa, we are clearly of opinion that, in the present case, the defendant was liable, under section 1307 of the Code, for the injury to the plaintiff caused in the manner set forth in the petition, and in the evidence contained in the bill of exceptions. The plaintiff was upon a moving car propelled by hand-power. The movement of the car, its speed, the position of the plaintiff upon it, and the duties he had to discharge in that position, were under the direction of the foreman, who was upon the same car. The injury was directly connected with the use and operation of the railway, in whose common service the foreman and the plaintiff were, and they were coemployés. The injuries to the plaintiff were, by the petition and the evidence, sought to be attributed to the smallness of the hand-car, its being over-crowded, the failure to provide it with contrivances for removing snow from the track, the absence of a proper brake, the want of foot-rests, and the arrangement of the cattle-guard. The railway was being used and operated in the movement of the hand-car, quite as much as if the latter had been a train of cars drawn by a

locomotive. If a single locomotive be on its way to its engine-house, after leaving a train which it has drawn, or if it be summoned to go alone for service to a point more or less distant, and, in either case, by the negligence of one employé upon it, another employé is injured, the injury takes place in the use and operation of the railway, under section 1307, quite as much as if it takes place while the locomotive is drawing a train of cars. This we understand to be the manifest purport and effect of the decisions of the Supreme Court of Iowa on the subject, as well as obviously the proper interpretation of the statute.

But, although this is so, we are of opinion that a new trial must be granted, on account of errors in the exclusion of evidence offered by the defendant.

At the trial, one Jerry Artery, a brother of the plaintiff, was called as a witness by him. He was on the hand-car with the plaintiff at the time of the accident and saw all that occurred. He testified as to the speed of the car, and as to its size and its cramped and crowded condition, and as to the fact that there was nothing on it in front upon which the plaintiff could rest his feet while he was holding the shovel, and as to the arrangement of the cattle-guards. In the course of his cross-examination, the following proceedings occurred:

"Q. On the 23d of March, 1886, at Harper's Ferry, in the presence of Mr. Buell, did you sign a written statement, stating what you knew about this case and about the accident to your brother, after the written statement had been read over to you? A. Yes, sir. Q. I will show you now the written statement and ask you whether that is your signature? Written statement shown the witness hereto attached and marked Exhibit A. A. That is my signature there. Q. In the written statement which I have just shown you you state as follows: 'At the time Jim got hurt we were running from 4½ to 5 miles an hour — certainly not to exceed 5 miles.' Is that statement correct? Objected to by plaintiff; objection sustained.

"The grounds upon which the court sustained the objections to interrogatories to this and other witnesses, based upon

a written statement signed by the witness, and to the introduction of the written statements themselves, were, that it appeared that the statements were not volunteered by the witnesses, but that the company had sent its claim agent, after the happening of the accident, to examine the employés of the company who were present at the time of the accident, in regard to the transaction; that the statements made by the witnesses were not taken down in full, but only a synopsis thereof made by the agent, the correctness of which is questioned by the witnesses in some particulars, although such written statement was signed by the witness; that, upon the trial of this case, these statements, thus obtained, were sought to be used not alone as a means of impeaching the witness, but as evidence of the matters therein recited; that it is apparent to the court that, whether so intended or not, these statements become a ready means of confusing and intimidating witnesses before the jury, and that, if it be permitted to parties to thus procure written statements in advance from witnesses, and then use the same in examining such witnesses, it will enable parties to shape and control the evidence in a cause by committing the witnesses to particular statements, couched in the language not of the witness, but of the person carrying on such *ex parte* examination; that these growing abuses can only be prevented by entirely excluding such statements, thus procured, from being introduced in evidence for any purpose; that, if the party desired to impeach a witness by showing contradictory statements made by him, the person to whom or in whose presence such alleged contradictory statements were made should be called as a witness, so that opportunity might be afforded of placing before the jury the statements actually made by the witness sought to be impeached, and not a mere synopsis thereof made by another person, and the accuracy of which, in some particulars, was challenged. Exception by defendant."

The following further proceedings took place on the cross-examination of the same witness: "Q. On the occasion I have referred to, did you make this statement: 'Six men on a hand-car have plenty of room. We often have had 8 and 10 men

on a hand-car of the same size'? Objected to by plaintiff; objection sustained; exception by defendant. Q. Did you, on the occasion I have referred to, at Harper's Ferry, say as follows: 'I am a larger man than Jim ever was, and my legs are a great deal longer. I have never had any trouble in keeping my feet up when I sat on the front of the car'? Objected to by plaintiff; objection sustained; exception by defendant. Q. On the occasion referred to, did you state as follows: 'If a man is holding a shovel on the rail and he is sitting on the front of a hand-car there is no way for him to get hurt unless he forgets himself and lets his feet drop down'? Objected to by plaintiff; objection sustained; exception by defendant. Q. On the occasion referred to, did you state: 'The hand-car was in good condition, nothing broken about it in any way. It was an ordinary car, full size'? Objected to by plaintiff; objection sustained; exception by defendant. Q. Did you, on the occasion referred to, state as follows: 'I am foreman at present on section No. 20. The top of the ribbons on the ties of the cattle-guard was about level with the ball of the rail'? A. Well, sir, I don't remember whether I did or not say that. Q. If you did say that, was it the truth or not? Objected to by plaintiff; objection sustained; exception by defendant."

Subsequently, while the defendant was putting in its evidence, the bill of exceptions says: "Thereupon the defendant offered in evidence, for the purpose of impeachment, the statement under date of March 23, 1886, shown the witness Jerry Artery, and hereto attached, marked Exhibit A, which, on objection by plaintiff, was ruled out by the court; to which ruling the defendant at the time excepted." The court, in sustaining the objection, stated that it deemed the proper method to be to produce the person to whom the alleged statement was made, and to prove by him what the witness may have said on the occasion. Exhibit A, thus referred to, is a paper signed by the witness, and contains the statements set forth in the six questions thus excluded, as above.

That the evidence covered by the six questions was material to the issue, is apparent. They related to the speed of the

car, to the question of its size and whether it was crowded or not, to the question whether the plaintiff could have kept up his feet without a foot-rest, and to the question of the condition of the cattle-guard.

It is an elementary principle of the law of evidence, that if a witness is to be impeached, in consequence of his having made, on some other occasion, different statements, oral or written, from those which he makes on the witness-stand, as to material points in the case, his attention must first be called, on cross-examination, to the particular time and occasion when, the place where, and the person to whom he made the varying statements. In no other way can a foundation be laid for putting in the impeaching testimony.

In the present case, it is apparent that the views of the court, as set forth in the bill of exceptions immediately after the exclusion of the first question which is above stated to have been excluded on the cross-examination of the witness Jerry Artery, must have been founded not only upon what had at that time transpired, but also upon the subsequent proceedings at the trial, and were the views of the court upon additional and kindred questions which arose in the case, because, at the time such first question was asked upon cross-examination and excluded, it had not yet appeared in evidence under what circumstances the written statement was made by the witness. Moreover, it was stated by the court that the written statements of the witnesses "were sought to be used not alone as a means of impeaching the witness, but as evidence of the matters therein recited;" whereas, when the statement signed by the witness Jerry Artery was offered in evidence and excluded, it was distinctly offered "for the purpose of impeachment," and it is not otherwise stated in the bill of exceptions that it was offered for any other purpose; and, in excluding it, the court excluded it as so offered.

We think the Circuit Court erred in laying it down as a rule, that a written statement signed by a witness and admitted by him to have been so signed cannot be used in cross-examining him as to material points testified to by him; and in announcing it as a further rule, that the only way to im-

peach a witness by showing contradictory statements made by him, is to call as a witness the person to whom or in whose presence the alleged contradictory statements were made. The foundation must be first laid for impeaching a witness, by calling his attention to the time, place and circumstances of the contradictory statements, whether they were in writing or made orally; and the court, in the present case, excluded that from being done.

The written statement having been presented to the witness, and he having admitted that what purported to be his signature to it was his signature, it was perfectly open to him to read it, and he could have been inquired of as to the circumstances under which it was taken down and signed, so as to advise the jury as to its authenticity and the credit to be given to it. The bill of exceptions does not show that the plaintiff's counsel asked the witness to read the statement, or asked the court to have it read to him, or that the witness did not read it, or did not have it read to him. The exclusion of the first question put to him and excluded, namely, "Is that statement correct?" did not refer to the entire written statement, but to the statement in it as to the speed at which the car was running. That inquiry was directly pertinent to the issue that was being tried.

The rule of evidence invoked by the plaintiff, and laid down in *The Queen's Case*, 2 Brod. & Bing. 284, 288, is, that if, on cross-examination, a witness admits a letter to be in his handwriting, he cannot be questioned by counsel as to whether statements, such as the counsel may suggest, are contained in it, but the whole letter must be read as the evidence of the existence of the statements. This principle is not applicable to the present case, because the plaintiff did not take the objection that the whole statement was not, but should have been, read as evidence; and the court, with the assent of the plaintiff, excluded it from being read in evidence.

The case of *Vicksburg & Meridian Railroad* v. *O'Brien*, 119 U. S. 99 is not in point. In that case, which was a suit against a railroad company to recover for personal injuries received by an accident to a train, a written statement as to

the nature and extent of the injuries, made by the plaintiff's physician while treating him for them, was held not to be admissible as affirmative evidence for the plaintiff, even though it was attached to a deposition of the physician, in which he swore that it was written by him and that it correctly stated the condition of his patient at the time referred to. The question was not one which arose on the cross-examination of a witness or in regard to his impeachment.

Nor was the present case one involving the well-established proposition, that incompetent questions are not allowable on cross-examination in order to predicate upon them an impeachment or contradiction of the witness.

The judgment is reversed, and the case is remanded to the Circuit Court, with a direction to grant a new trial.

WELLFORD *v.* SNYDER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 105. Argued December 5, 8, 9, 1890. — Decided December 22, 1890.

A testator bequeathed to four daughters the sum of $20,000 apiece, to be invested in public securites and held in trust by his executors for his said daughters respectively, and the income, as it accrued, applied to their several use and benefit; and directed that "from and after the intermarriage of any of them," the executors should hold the securities "belonging to the said daughter so marrying, in trust for the following purposes," namely, for the maintenance of her and her husband and the survivor of them for life, and after the death of both "for such issue as she may leave at the time of her death; and in case she shall die without leaving such issue," then for her surviving sisters and the issue of any deceased sister; and declared his intention that both principal and income should be free from the control of any husband; "and the better to secure the payment of these my daughters' fortunes," directed that, if a fund appropriated to the payment of debts and legacies should be insufficient, his whole estate should be charged "to make up the deficiency to my said daughters." *Held*, that the principal of the sum bequeathed to a daughter, who never married, vested in her absolutely, and passed by her will.

Statement of the Case.

THIS was a bill in equity, in the nature of a bill of interpleader, for the construction of the will, dated July 1, 1824, of John Tayloe, by which, after providing for his wife, giving an annuity of $1200 to a daughter-in-law, making a devise to a grandson, and devising and bequeathing the greater part of his lands and personal property to his six sons, he provided for his daughters as follows:

"Having, at the time of the intermarriage of my daughter Mrs. Henrietta Hill Key, settled upon her ten thousand dollars, I give and bequeath to the said Henrietta ten thousand dollars more to be settled upon her, to her own separate use during her life, and after her death upon her children and their descendants. I wish however to be taken, as a part of the ten thousand dollars now bequeathed, about fifteen hundred and seventy-two dollars ninety and a half cents, which I paid on account of her husband a short time since, and for which a settlement of slaves has already been made upon her. And also any other sums of money which I have heretofore paid, or may hereafter pay or become liable for on account of her said husband. These sums are to form a part of the ten thousand dollars hereby directed to be settled, and are not to be taken in addition thereto.

"I give and bequeath to my daughters Catharine, Elizabeth M., Virginia and Anne O. Tayloe twenty thousand dollars apiece, to be vested in United States Bank stock or in government securities, which stock or securities I do hereby direct that my executors hereinafter named shall hold in trust for my said daughters respectively, and shall apply the dividends, interest or profits of the said stock or securities to the use and benefit of my said daughters Catharine, Elizabeth M., Virginia and Anne O. Tayloe severally and respectively, as the said dividends, interest and profits shall accrue; and from and after the intermarriage of any of them, then my said executors shall hold the said bank stock or other securities belonging to the said daughter so marrying, in trust for the following purposes, that is to say, in trust for the maintenance of her and her husband during their joint lives, then in trust for the survivor of the said husband and wife during his or her life, and after the

death of such survivor, then in trust for such issue as she may leave at the time of her death. And in case she shall die without leaving such issue, then in trust for her surviving sisters (my other daughters) and the issue of any deceased sister — such issue taking such share as the deceased sister whom they represent would have taken, had she been alive to take. And it is my intention that the said stock and securities, as also the dividends, interest or profits thereof, shall be utterly free from the power or control of the husbands of my said daughters. And the better to secure the payment of these my daughters' fortunes, I do hereby direct that, if the funds hereinafter particularly appropriated for the payment of debts and legacies shall be insufficient for payment of debts and legacies, my estate generally must be charged to make up the deficiency to my said daughters."

He then set apart, as a fund for the payment of debts and legacies, certain real and personal estate, and all the residue of his estate of every kind not specifically devised or bequeathed; and gave to his sons any surplus of this fund remaining after payment of debts and legacies.

By a codicil, dated March 4, 1825, he provided as follows: "James Baker, Esq., having intermarried with my daughter Catharine, I have given him, in part of the fortune intended to be bequeathed to my said daughter, the sum of five thousand dollars, and my said son-in-law having expressed a wish that all the rest of the fortune intended for his said wife should be settled upon her, I have annexed this codicil for the purpose of carrying that wish into effect, and do hereby declare that all estate and interest whatsoever bequeathed by my said will to my said daughter Catharine (except the five thousand dollars given as aforesaid in part thereof) shall be taken and received to be in trust to my said daughter Catharine to her separate use and to her representatives, as designated and limited in that clause of my will in which I have made provision for my daughters, it being my intention that no further part of the said Catharine's fortune shall be enjoyed by the said James Baker, but as the separate estate of his wife."

The will and its codicils were admitted to probate March 14, 1828.

Citations for Appellants.

The case was set down for hearing on bill and answers, and was as follows: John Tayloe's daughters Catharine, Elizabeth M. and Anne O. married and died, leaving children or grandchildren. His daughter Virginia died unmarried, leaving a will by which she bequeathed the sum of $20,000, bequeathed to her by her father, to a daughter of Anne O. The question presented to the court was whether by the will of John Tayloe this sum vested in his daughter Virginia so as to pass by her will, as her legatee and administrator contended; or, as contended by the grandchildren of Elizabeth M., went, upon the death of Virginia unmarried and without issue, to her sisters or their issue.

The court entered a decree in favor of Virginia Tayloe's legatee. 5 Mackey, 443. The grandchildren of Elizabeth M. appealed to the court.

Mr. Leigh Robinson for appellants cited: *Sheets' Estate*, 52 Penn. St. 257; *Urich's Appeal*, 86 Penn. St. 386; *Terry* v. *Wiggins*, 47 N. Y. 512; *Bell* v. *Warn*, 4 Hun, 406; *Collier* v. *Grimesey*, 36 Ohio St. 17, 22; *Baxter* v. *Bowyer*, 19 Ohio St. 490; *Smith* v. *Bell*, 6 Pet. 68; *Lucas* v. *Lockhart*, 10 Sm. & Marsh. 466; *S. C.* 48 Am. Dec. 766; *Woodruff* v. *Woodruff*, 32 Georgia, 358; *Barrus* v. *Kirkland*, 8 Gray, 514; *Butler* v. *Gray*, L. R. 5 Ch. 26; *Noe* v. *Miller*, 31 N. J. Eq. 234; *Dean* v. *Hart*, 62 Alabama, 308; *Pillow* v. *Wade*, 31 Arkansas, 678; *Kelly* v. *Bronson*, 26 Minnesota, 359; *O'Neall* v. *Boozer*, 4 Rich. Eq. 22; *Keith* v. *Perry*, 1 Dessaus. 353; *Roberts* v. *Watson*, 4 Jones, Law, 319; *Rose* v. *McHose*, 26 Missouri, 590; *Roberts* v. *Moseley*, 51 Missouri, 282; *Hanson* v. *Worthington*, 12 Maryland, 418; *Bentley* v. *Kauffman*, 86 Penn. St. 99; *Prewett* v. *Land*, 36 Mississippi, 495; *Blann* v. *Bell*, 5 DeG. & Sm. 658; *Innes* v. *Mitchell*, 6 Ves. 464; *Wetherell* v. *Wetherell*, 4 Giff. 51; *S. C.* 1 DeG. J. & S. 134; *Hamilton* v. *Lloyd*, 2 Ves. Jr. 416; *Brandon* v. *Robinson*, 18 Ves. 429; *Dick* v. *Pitchford*, 1 Dev. & Bat. Eq. 480; *Havens* v. *Healy*, 15 Barb. 296; *Akers* v. *Akers*, 23 N. J. Eq. 26; *Leggett* v. *Perkins*, 2 Comstock, 297; *Fales* v. *Currier*, 55 N. H. 392; *Bain* v. *Lescher*, 11 Sim. 397; *Newman* v. *Night-*

ingale, 1 Cox Ch. 341; *Hollister* v. *Shaw*, 46 Connecticut, 248; *Hatfield* v. *Sohier*, 114 Mass. 48; *Varley* v. *Winn*, 2 K. & J. 700; *Mackinnon* v. *Peach*, 2 Keen, 555; *Home* v. *Pillans*, 2 Myl. & K. 15; *Salisbury* v. *Pelty*, 3 Hare, 86; *Edwards* v. *Edwards*, 15 Beavan, 357; *Whitney* v. *Whitney*, 45 N. H. 311; *Briggs* v. *Shaw*, 9 Allen, 516; *Montagu* v. *Nucella*, 1 Russ. 165; *Henry* v. *McLaughlin*, 1 Price, 264; *Galland* v. *Leonard*, 1 Swanston, 161; *Da Costa* v. *Keir*, 3 Russ. 360; *Johnston* v. *Antrobus*, 21 Beavan, 556; *Hoxsey* v. *Hoxsey*, 37 N. J. Eq. 21; *Burbank* v. *Whitney*, 24 Pick. 146; *S. C.* 35 Am. Dec. 312; *Frazer* v. *Peoria County Supervisors*, 74 Illinois, 282; *Reinders* v. *Koppelmann*, 68 Missouri, 482; *Wead* v. *Gray*, 78 Missouri, 59; *Giles* v. *Little*, 104 U. S. 291; *Hagerty* v. *Albright*, 52 Penn. St. 274.

Mr. William Pinkney Whyte and *Mr. Henry Wise Garnett*, for appellees, cited: *Bowly* v. *Lammot*, 3 Harr. & Johns. 4; *Dougherty* v. *Mouett*, 5 G. & Johns. 459; *Chamberlain* v. *Owings*, 30 Maryland, 447; *Evans* v. *Iglehart*, 6 G. & Johns. 171; *Cassilly* v. *Meyer*, 4 Maryland, 1; *Edelin* v. *Mitchell*, 9 Gill, 161; *Page* v. *Leapingwell*, 18 Ves. 463; *Humphrey* v. *Humphrey*, 1 Sim. (N. S.) 536; *Kerry* v. *Derrick*, Cro. Jac. 104; *Manning* v. *Craig*, 3 N. J. Eq. 436; *S. C.* 41 Am. Dec. 739; *Collier* v. *Collier*, 3 Ohio St. 369; *Garret* v. *Rex*, 6 Watts, 14; *Pennsylvania Co.'s Appeal*, 83 Penn. St. 312; *Millard's Appeal*, 87 Penn. St. 457; *Elton* v. *Sheppard*, 1 Bro. Ch. 532; *Haig* v. *Swiney*, 1 Sim. & St. 487; *Adamson* v. *Armitage*, 19 Ves. 415; *Craft* v. *Snook*, 13 N. J. Eq. 121; *S. C.* 78 Am. Dec. 94; *Gulick* v. *Gulick*, 27 N. J. Eq. 498; *Earl* v. *Grim*, 1 Johns. Ch. 494; *McMichael* v. *Hunt*, 83 N. Car. 344; *Sproul's Appeal*, 105 Penn. St. 438; *Fairfax* v. *Brown*, 60 Maryland, 52; *Rawlings* v. *Jennings*, 13 Ves. 39; *Stretch* v. *Watkins*, 1 Madd. 253; *Clough* v. *Wynne*, 2 Madd. 188.

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

The decision of this case depends upon the true construction of that paragraph in John Tayloe's will by which he be-

queathes to four of his daughters the sum of $20,000 each. Neither the other paragraphs of the will, nor the codicils, appears to us to have any material bearing.

The testator begins by giving and bequeathing to each of these four daughters the sum of $20,000 apiece, to be invested in United States Bank stock or in government securities, which he directs his executors to hold in trust for his said daughters respectively, and to apply the income thereof, as it shall accrue, to their several use and benefit. Had the testator stopped here, there could be no doubt that the bequest to each daughter of the principal sum and of the income thereof vested in her the absolute property in that sum, which would pass by her will, or, if she died intestate, to her representatives. *Page* v. *Leapingwell*, 18 Ves. 463, 467; *Adamson* v. *Armitage*, 19 Ves. 416; *S. C.* Cooper, 283; *Garret* v. *Rex*, 6 Watts, 14; *Fairfax* v. *Brown*, 60 Maryland, 50. The last sentence of the paragraph, by which the testator, if a fund afterwards appropriated for the payment of debts and legacies shall be insufficient, charges his whole estate with the payment of "these my daughters' fortunes," and "to make up the deficiency to my said daughters," tends to the same conclusion.

The operation of such general words to pass an absolute title may doubtless be restricted by a context manifesting an intention that the legatee shall take an estate for life only. *Wetherell* v. *Wetherell*, 4 Giff. 51, and 1 DeG. J. & S. 134; *Sheet's Estate*, 52 Penn. St. 257. The real question, therefore, is how far the intermediate provisions, in the paragraph under consideration, restrict the effect of the general words of bequest to the four daughters.

The testator introduces those provisions by directing that "from and after the intermarriage of any of them" his executors shall hold the stock or securities "belonging to the said daughter so marrying, in trust for the following purposes," expressed in three sentences: 1st. For the maintenance of her and her husband and the survivor of them for life, and after the death of both "for such issue as she may leave at the time of her death." 2d. "And in case she shall die without leaving such issue," then for her surviving sisters and the issue of any

deceased sister. 3d. The testator declares it to be his intention that both principal and income "shall be utterly free from the power or control of the husbands of my said daughters."

By the order and connection of these sentences, and by the natural and grammatical meaning of the words used, none of them apply to daughters who never marry. The preliminary supposition or postulate, that "from and after the intermarriage of any of them" the executors shall hold the stock or securities "belonging to the said daughter so marrying, in trust for the following purposes," underlies and attends all the provisions by which those purposes are defined. Of those provisions, as above classified, the first and the third, making mention of husbands, cannot possibly apply except to married daughters; and immediately after the last words of the first, by which upon the death of a married daughter and her husband her share is to go to "such issue as she may leave at the time of her death," follow the words, "And in case she shall die without leaving such issue," which define the event in which the second provision shall take effect. In this connection, the word "she" in the singular, and the words designating her issue, relate grammatically, as well as naturally, to the married daughter and her issue, just mentioned; and not to the four daughters, married or unmarried, and to issue of unmarried ones. The three provisions, whether viewed separately and according to the letter, or as a whole and according to the manifest spirit and intent, all have one aim, and one only, that the share of any married daughter (the income only being received by herself and her husband for life) shall never pass into the husband's ownership or control, but shall vest in her issue, if she leaves any, otherwise in the testator's other daughters or their issue.

The general design of the testator is manifest to give all his daughters equal portions; the provisions with regard to the shares of those who marry are not inconsistent with this design, but are intended to preserve the benefit of the bequest to the daughters and their children; and those provisions do not affect the absolute title of a daughter who never marries.

This conclusion is in accord with a long line of English deci-

sions of high authority in similar cases. *Whittell* v. *Dudin*, 2 Jac. & Walk. 279; *Hulme* v. *Hulme*, 9 Sim. 644; *Winckworth* v. *Winckworth*, 8 Beavan, 576; *Gompertz* v. *Gompertz*, 2 Phillips, 107; *Lassence* v. *Tierney*, 1 Macn. & Gord. 551; *S. C.* 2 Hall & Twells, 115; *Corbett's Trusts*, H. R. V. Johnson, 591; *Kellett* v. *Kellett*, L. R. 3 H. L. 160, 168, 169. See also *Gulick* v. *Gulick*, 10 C. E. Green, 324, and 12 C. E. Green, 498.

The court below, therefore, rightly held that the principal of the sum bequeathed to Virginia Tayloe, who never married, vested in her absolutely, and went to her legatee.

Decree affirmed.

ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY *v.* PHELPS.

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

No. 26. Argued and submitted November 6, 1890. — Decided December 22, 1890.

The grant of lands to the Territory of Minnesota by the act of March 3, 1857, 11 Stat. 195, c. 99, and the grant to the State of Minnesota by the act of March 3, 1865, 13 Stat. 526, c. 105, were grants *in praesenti*, and took effect by relation upon the sections of land as of the date of the grant, when the railroads were definitely located, both as to so much of the grants as was found within the limits of the State of Minnesota as defined by the act admitting it as a State, and as to so much thereof as was within the limits of the Territory of Minnesota under the territorial organization of 1857, but was not within the limits of the State when admitted as a State.

It cannot be safely asserted that it has been the general policy of the United States government to restrain a grant of land made to a State in aid of railways, to lands within such State, when a part of the line of road extends into one of the Territories.

Where the language of a series of statutes is dubious, and open to different interpretations, the construction put upon them by the Executive Department charged with their execution has great and generally controlling force with this court; but where a statute is free from all ambiguity, the letter of it is not to be disregarded in favor of a presumption as to the policy of the government, even though it may be the settled practice of the Department.

Opinion of the Court.

Congress may authorize a territorial corporation to construct a railroad in a Territory, and may make land grants in aid thereof, which will be valid after a part of the Territory becomes a State.

The various land grant statutes reviewed.

Lands within Indian Territory, covered by said grant of March 3, 1857, passed on the extinguishment of the Indian title.

IN EQUITY, to quiet title. The case is stated in the opinion.

Mr. S. U. Pinney for appellant.

Mr. James McNaught, *Mr. A. H. Garland* and *Mr. H. J. May*, for appellee, submitted on their brief.

MR. JUSTICE LAMAR delivered the opinion of the court.

This was a suit in equity brought by the St. Paul, Minneapolis and Manitoba Railway Company, a Minnesota corporation, against Ransom Phelps, to quiet the title to about 80 acres of land in Richland County, North Dakota, particularly described as the east half of the southeast quarter of section 13, township 132, range 48, alleged to belong to the plaintiff, and which was claimed by the defendant.

The bill was filed April 29, 1884, and set forth at great length the various steps by which the plaintiff derived its claim of title, averred that the defendant had no valid title to the land, by reason of plaintiff's prior right in the premises, and prayed that its own equitable title be quieted and protected, and the defendant be enjoined from setting up any claim whatever to the land, and for other and further relief, etc. The defendant answered, denying all the material allegations of the bill, and the plaintiff filed a replication. The case was tried upon an agreed statement of facts, and on the 3d of March, 1886, the Circuit Court announced its decision and opinion in writing, pursuant to which it ordered that the bill be dismissed at complainant's cost. The opinion is reported in 26 Fed. Rep. 569. On the 4th of March, 1886, a final decree was entered, dismissing the bill of complaint, and an appeal to this court was taken and allowed.

The material facts in the case are, briefly, as follows: The plaintiff claims the land in dispute as the present beneficiary under the acts of Congress approved March 3, 1857, 11 Stat.

195, c. 99; and March 3, 1865, 13 Stat. 526, c. 105, making a grant of lands to the Territory of Minnesota, to aid in the construction of railroads. The provisions of the act of 1857 material to this issue are as follows:

"*Be it enacted*," *etc.*, "That there be and is hereby granted to the Territory of Minnesota, for the purpose of aiding in the construction of railroads, from Stillwater, by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via Saint Cloud and Crow Wing, to the navigable waters of the Red River of the North, at such point as the legislature of said Territory may determine; from St. Paul and from St. Anthony, via Minneapolis, to a convenient point of junction west of the Mississippi, to the southern boundary of the Territory in the direction of the mouth of the Big Sioux River, with a branch, via Faribault, to the north line of the State of Iowa, west of range sixteen; from Winona, via Saint Peters, to a point on the Big Sioux River, south of the forty-fifth parallel of north latitude; also from La Crescent, via Target Lake, up the valley of Root River, to a point of junction with the last-mentioned road, east of range seventeen, every alternate section of land, designated by odd numbers, for six sections in width on each side of each of said roads and branches; but in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of preëmption has attached to the same, then it shall be lawful for any agent, or agents, to be appointed by the governor of said Territory or future State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much 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 rights of preëmption have attached, as aforesaid; which lands (thus selected in lieu of those sold, and to which preëmption rights have attached as aforesaid, together with the sections and parts of sections designated by

odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the Territory or future State of Minnesota for the use and purpose aforesaid: *Provided*, That the land to be so located shall in no case be further than fifteen miles from the lines of said roads or branches, and selected for and on account of each of said roads or branches."

Section 3 provides: "That the said lands hereby granted to the said Territory or future State shall be subject to the future disposal of the legislature thereof for the purposes herein expressed and no other."

Section 4 defines the manner in which the lands granted shall be disposed of by the Territory or future State.

The act of 1865 enlarged the original grant from six to ten sections per mile on each side of the road, and the indemnity limits from fifteen to twenty miles.

To carry out the provisions of the granting act, the territorial legislature passed an act creating the Minnesota and Pacific Railroad Company, and bestowed upon it the lands which had been granted to the Territory; and by the same act the terminus of the main line of the road was fixed at Breckinridge, at the mouth of the Sioux Wood River, as the point "between the foot of Big Stone Lake and the mouth of Sioux Wood River," referred to in the act of Congress.

On the 5th of December, 1857, the company filed with the Commissioner of the General Land Office a map showing the definite location of the main line of the road as far west as Breckinridge; but as the public surveys at that time extended only to the west line of range 38 — about half the length of the road — it was not accepted as the map of definite location by the land office any farther west than the surveys extended. After the surveys had been completed as far west as Breckinridge, the company filed another map of definite location for the remaining part of the road, which was, in reality, a map of the original location made to conform to the public surveys. The exact date of the filing of this latter map and its acceptance by the land department does not appear in the record, but it was prior to May 25, 1869.

The railroad was completed to Breckinridge within the time

limited by the act of March 3, 1865, *supra*. It is conceded that the tract in controversy is part of an odd section lying within six miles of the line of the road, and that the appellant has succeeded to all the rights and privileges respecting the grant that were originally conferred upon the Territory of Minnesota and by its legislature conferred upon the Minnesota and Pacific Railroad Company.

The main contention of the appellee is, that this land, although within six miles of the line of the road as definitely located and as actually constructed, and otherwise conforming to the description of the lands granted by the act of 1857, was not granted by that act, because it lies outside of the limits of the present State of Minnesota, within what is now the State of North Dakota, although at the date of the grant it lay within the limits of Minnesota Territory. This contention is based upon the following theory: At the time the grant of 1857 was made Minnesota was a Territory, whose western boundary was the Missouri River. Five days prior thereto, to wit, February 26, 1857, Congress passed an enabling act for the proposed State, 11 Stat. 166, which designated the western boundary thereof as follows: "Beginning at the point in the centre of the main channel of the Red River of the North, where the boundary line between the United States and the British possessions crosses the same; thence up the main channel of said river to that of the Boix des Sioux River; thence [up] the main channel of said river to Lake Travers; thence up the centre of said lake to the southern extremity thereof; thence in a direct line to the head of Big Stone Lake; thence through its centre to its outlet; thence by a due south line to the north line of the State of Iowa." Under this enabling act the State of Minnesota was organized and admitted into the Union May 11, 1858. 11 Stat. 285. It is said that it has been the settled policy of the government to confine land grants made in aid of railroads wholly within a State or Territory to lands lying within the same State or Territory, and that, therefore, inasmuch as the land in this case is outside of the State of Minnesota, although within the limits of the Territory as it existed at the date of the grant, it cannot be in-

cluded in the grant to this branch of the road lying wholly within the State.

This was the conclusion reached by the Circuit Court, in view of the ruling of the land department and the refusal of the Secretary of the Interior, in the adjustment of the grant to this branch of the road, to certify to the State any lands lying beyond its western boundary line, which ruling the court expressed itself unwilling to reverse or to jeopardize the rights and large interests (including a prosperous village) that were said to have grown up on the faith of it. Against this conclusion there are strong, and, in our view, unanswerable, objections.

It was admitted that, according to the plain letter of the statute, the grant would include lands west of the Bois des Sioux River, in Dakota, and that the land in controversy is within that grant. It is also conceded that Congress has the power to grant to a State lands in another State or Territory, to aid in the construction of a railroad wholly within its own limits. But it is argued that the positive and express provision of the law must give way, and be controlled by the presumption founded upon an alleged policy of the government, that Congress, having in view the probable organization of Minnesota Territory into a State, intended to restrict the grant in question to lands within the limits of such future State. We see much in the act itself and in the circumstances which attended its enactment that repels such presumption. In the first place, what is called the uniform and settled policy of the government to confine land grants, in the manner described, as far as it exists, was established by the express provisions of statutory enactments, and not by any construction of the Interior and Law Departments of the government, wherein they have assumed to find an opposition between the actual text of the law, and the public policy of the government, making the former yield to the latter as expressive of the intent of Congress.

In most if not all of the grants of land made to the various States in aid of railroads within their respective limits, some words of limitation were used to denote that the grant was

restricted to lands within each particular State, when such restriction was intended. Thus, in the act of 1857 now under consideration, the terminus of the second line of road provided for was at "the southern boundary of the Territory," and the terminus of the branch of that road was at the "north line of the State of Iowa." The act of June 29, 1854, 10 Stat. 302, c. 72, which was repealed August 4, 1854, 10 Stat. 575, c. 246, § 2, granted lands to the Territory of Minnesota to aid in the construction of certain railroads, one of which was to run from the southern line of the Territory via certain mentioned points to the eastern line of the Territory. The act of June 3, 1856, 11 Stat. 20, c. 43, granted lands to Wisconsin in aid of a railroad from Fond du Lac northerly to the state line; and an act of the same date, 11 Stat. 21, c. 44, made a grant of lands to Michigan in aid of a road to run from Little Bay de Noquet via certain points to "the Wisconsin state line." The act of March 3, 1863, 12 Stat. 772, c. 98, granted lands to Kansas in aid of a railroad to run from Leavenworth via certain other points to the "southern line of the State;" and also in aid of a railroad to run from Atchison via Topeka to the "western line of the State." The act of May 5, 1864, 13 Stat. 64, c. 79, granted to the State of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior "every alternate section of public land, etc., within Minnesota." The act of July 4, 1866, 14 Stat. 87, c. 168, granted lands to Minnesota to aid in the construction of a road from Houston to the "western boundary of the State," and for another road from Hastings to a point on the "western boundary of the State." The act of July 26, 1866, 14 Stat. 289, c. 270, § 28, granted lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific Railroad, which was designated to run from Fort Riley via certain named points to the "southern line of the State of Kansas." See also the Florida-Alabama grant hereafter referred to; act of May 15, 1856, 11 Stat. 9, c. 28, granting lands to the State of Iowa to aid in the construction of certain railroads in that State; act of May 12, 1864, 13 Stat. 72, c. 84, granting lands to the State of Iowa to aid in the construction of a railroad in that State;

and act of July 2, 1862, 12 Stat. 503, c. 130, donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts.

These statutes are all in harmony with the construction which we think should be put upon the act under consideration. In almost the same language in which those statutes grant lands to States, this act provides "that there be and is hereby granted to the Territory of Minnesota, for the purpose of aiding in the construction of railroads," and then proceeds, in words no less express and precise than the words of the statutes above cited, to define the lines of the different roads and branches, to designate the points of their termini, and to declare the terms, extent, location and limitations of the grants, all within the limits of the Territory. Not a word in any section or provision of the act indicates an intention of Congress to confine the grant within the limits of the contemplated State. The words of the grant are: "Every alternate section of land designated by odd numbers for six [ten] sections in width on each side of each of said roads and branches." Each of what roads and branches? Such as are by the express terms of the act confined within the proposed boundaries of the future State? The question is answered by the act itself. It provides for four separate roads and two branches, particularly designating the points from which each is to start, and the limits within which the terminus of each may be fixed. It expressly designates the terminus of the third of these roads (the Winona and St. Peters) at "a point on the Big Sioux River, south of the forty-fifth parallel of north latitude," some 30 or 40 miles beyond the boundary of the State; and that of the one under consideration which might have been, if so directed by the territorial legislature, also fixed beyond the western boundary, and yet be within the terms of the act. These provisions are all embodied in the same section, and all of them alike constituted legislation in reference to the proposed State, and if one was limited by the presumption of the rule of construction contended for, so were all the others. For they all prescribed with respect to the extent of the grant, the same terms, putting each grant on the same footing in proportion

to the length of the road, *i.e.* "every alternate section of land designated by odd numbers for six [ten] sections in width on each side of each of said roads and branches." Again, it is to be observed, that after the State of Minnesota was organized and admitted into the Union, with its boundaries fixed by the enabling act, Congress passed an act, May 12, 1864, as to one of these roads, 13 Stat. 74, c. 84, § 7, and March 3, 1865, 13 Stat. 526, c. 105, as to all the others, renewing the grant of 1857, and enlarging it from six to ten miles on each side of said roads and branches, and nothing is said in either of them to indicate any restriction to the State limits of the lands originally granted, or those added to the grant. We think that the language of those acts is too plain and unequivocal to need or even to admit the aid of an extrinsic rule of construction to get at the intent and meaning of Congress. The assumption of the appellee, that the uniform policy of the government, as it is called, arose from the construction put by the administrative department upon railroad grants, and that it arose with respect to the very first grant made by Congress in aid of a railroad, is erroneous. Counsel for the appellee have failed to bring to our attention any instance of such a construction, except the one now before the court. Had any such cases been presented when the language of the statutes under consideration was dubious and open to different interpretations, the established construction of them by the department charged with their execution would have very great force and generally a controlling one in the formation of the judgment of this court; but where a statute, as in this case, is clear and free from all ambiguity, we think the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the government, even though it may be the settled practice of the department.

We have already stated what we think the general policy established by Congress has been in respect to the restriction of land grants made in aid of railroads to be constructed wholly within a State or Territory; but we are of opinion that the alleged general policy of the government in the matter under consideration is hardly so broad as is claimed for it. We do

not think it can be safely asserted that it has been a general policy of the United States government to restrict a grant made to a State, in aid of railroads, to lands within such State, where a part of the line of road extended into one of the Territories. As we have already shown, that part of the grant to the Winona and St. Peters division, by the act of 1857, was never construed to have that effect.

Another case to which we now refer is conclusive upon that question. By the first section of the act of Congress of July 23, 1866, 14 Stat. 210, c. 212, there was granted to the State of Kansas, for the use and benefit of the St. Joseph and Denver City Railroad Company, a Kansas corporation, to aid in the construction of a railroad from Elmwood, Kansas, westwardly via Marysville in that State, so as to effect a junction with the Union Pacific Railroad, or any branch thereof, not further west than the one hundredth meridian of west longitude, every alternate section of land designated by odd numbers, for ten sections in width on each side of the road to the point of intersection. Such point of intersection was in what was then the Territory of Nebraska. The company filed a map of definite location of its line of road to a connection with the Union Pacific Railroad Company in Nebraska, March 25, 1870, and built sections of the road, from time to time, as far as Hastings, Nebraska, where it made a junction with the Burlington and Missouri River Railroad, July 15, 1872. It never made a junction with the Union Pacific Railroad unless the Burlington road is a branch thereof. The road as built did not follow its line of definite location, but deviated from it in some places a few rods, in others, several miles. The company filed its articles of incorporation in the office of the Secretary of State of Nebraska, April 1, 1873, but did not otherwise attempt to comply with the laws of that State in respect to foreign corporations extending their lines into that State. April 13, 1870, which was after the definite location of the road, one Van Wyck entered, at the Beatrice land office in Nebraska, a portion of an odd section of land in that State within ten miles of the road as definitely located and as actually built, and on the 15th of November, 1871, obtained a

patent therefor from the United States. The tract having been claimed by the railroad company, as a part of its grant, was sold by it to one Knevals, who brought suit in the Circuit Court for the District of Nebraska against Van Wyck, and obtained a decree in that court, declaring that Van Wyck had received his patent and the title it conveyed, in trust for the company, and that at the commencement of the suit he held the lands in trust for the complainant, to whom it was further decreed that he convey them. That decree was affirmed by this court at October term, 1882, the case being reported as *Van Wyck* v. *Knevals*, 106 U. S. 360. One of the defences interposed to the suit was that the company had not complied with the laws of Nebraska allowing foreign railroad corporations to extend their roads into that State. In treating of that point this court said (p. 369): "As to the want of compliance with the conditions imposed by the laws of Nebraska, allowing railroad companies organized in other States to extend and build their roads within its limits, it is sufficient to say that when the grant was made to the company Nebraska was a Territory, and it was entirely competent for Congress to confer upon a corporation of any State the right to construct a road within any of the Territories of the United States. The grant of land and a right of way for the construction of a road to a designated point within the Territory was sufficient authority for the company to construct the road to that point. It may be well doubted whether the State subsequently created out of the Territory could put any impediment upon the enjoyment of the right thus conferred."

Adopting the reasoning of the court in that case, we say that if it was entirely competent for Congress to confer upon a state corporation the right to construct a railroad in any of the Territories, and obtain lands in a Territory in aid thereof, *a fortiori*, might a territorial corporation, under congressional authority, construct a railroad in such Territory and obtain its full quota of lands, even though a part of the Territory embracing the granted lands should afterwards become a State.

The counsel for appellee, to sustain their statement as to the ruling and action of the administrative department upon the

land grant legislation, cite the construction given by Attorney General Crittenden to the act of September 20, 1850, 9 Stat. 466, c. 61, granting lands to the States of Illinois, Mississippi and Alabama, in aid of a railroad from Chicago to Mobile. The first section of that act granted a right of way one hundred feet wide through the public lands to the State of Illinois, for the construction of a railroad through the public lands within the same limits, followed by provisions, in the first six sections, declaring the terms, limitations and restrictions of the grant, with two other branches.

By the second section there was granted to the State, for the purpose of aiding in the construction of such railroad and branches, every alternate section of public land designated by even numbers, for six sections in width on each side of said road and branches. The third, fourth, fifth and sixth sections detailed the manner in which the grant should be administered, etc., and the seventh section provided as follows: "That in order to aid in the continuation of said Central Railroad from the mouth of the Ohio River to the city of Mobile, all the rights, privileges and liabilities hereinbefore conferred on the State of Illinois shall be granted to the States of Alabama and Mississippi, respectively, for the purpose of aiding in the construction of a railroad from said city of Mobile to a point near the mouth of the Ohio River, and that public lands of the United States, to the same extent in proportion to the length of the road, on the same terms, limitations and restrictions in every respect, shall be, and is hereby, granted to said States of Alabama and Mississippi, respectively."

In the adjustment of the grant, the States of Alabama and Mississippi claimed the right to take lands not only for those portions of the road within the boundaries of those States, but also for that portion in Kentucky and Tennessee, and that question was submitted to the Attorney General for an opinion. In a well-considered and clear opinion that officer held that such claim of those States could not be sustained, and that each grant was confined to the portion of the line within the territorial limits of the grantee State. There is in that opinion not the slightest reference to the settled policy of

the government as a rule of construction, or as in any way indicating the intention of Congress; not the slightest hint that the words of the statute should be controlled by any presumption based on what is termed the public policy of the government, as to the restriction of land grants. His conclusion was based upon the language of the act, holding that "the meaning and intention of" Congress "as contained in the seven sections of the act will be expressed and clearly understood" by taking the first six sections of the act and applying them first to the State of Alabama and then to the State of Mississippi, etc. Quoting some of the words of the act, he says: "To give to those words a different construction . . . would lead to inexplicable difficulties and to consequences irreconcilable with plain provisions of the act." 5 Opinions Attys. Gen. 603.

The other case cited arose under the act of May 17, 1856, 11 Stat. 15, c. 31, granting lands to the States of Florida and Alabama "to aid in the construction of certain railroads in said States." The claim of the State of Alabama to select indemnity lands lying in Florida was denied by the then Attorney General upon the authority of the opinion of Attorney General Crittenden in the Alabama-Mississippi case above referred to. Neither of these cases supports the general policy contended for by the appellee, and each is entirely unlike the one under consideration, where the entire line of road and the entire grant of lands claimed by the appellant are within the limits of the Territory to which the grant was made as it then existed.

Furthermore, at the time the grant of 1857 was made, the State of Minnesota had no existence, and there was no absolute certainty of there being such a State before the road was definitely located and built. Congress was, therefore, very careful as to the terms in which the grant was made. In the granting clause the language is "that there be and is hereby granted to the *Territory of Minnesota*," etc., while in other parts of the act, even in the same section, the grant is referred to as having been made to the Territory *or* future State. It is thus seen that the language of the act was framed to pro-

vide for the administering of the grant either by the Territory or by the future State. The object to be accomplished was the building of railroads to those parts of the then Territory which were the most thickly settled, and thus give to the settlers so many highways of commerce to the Eastern markets; and it was of little concern to Congress whether the then Territory or the future State was the means of accomplishing the object. Now, had the grant been wholly administered by the Territory, the question under consideration would never have arisen. For had no State been created until after the grant was administered, it is not conceived how the question could have arisen. It hardly seems probable that Congress intended the grant to mean one thing if administered by the Territory, and another thing if administered by the State; or, to speak more accurately, that the grant should be of a certain extent if administered by the Territory, and be greatly diminished if administered by the State.

Again, it is settled law that railroad grants, such as the one under construction, are grants *in præsenti*, and take effect upon the sections of land, when the road is definitely located, by relation, as of the date of the grant. *Van Wyck* v. *Knevals*, 106 U. S. 360. Had this line of road been definitely located before the State of Minnesota was admitted — that is to say, if the right of the road had attached to its granted lands while Minnesota was yet a Territory — would it be seriously contended for an instant that the land now in dispute did not pass under the grant? We think not, and yet such is the legitimate consequence of the appellee's contention.

It is also urged that these lands did not pass under the grant of 1857, because at that time they were in the occupancy of the Sisseton and Wahpeton bands of Indians. The sixth section of the act, however, made provision for such an emergency. It is there declared as follows: "That, in case any lands on the line of said roads or branches are within any Indian territory, no title to the same shall accrue, nor shall the same be entered upon by the authority of said Territory or State until the Indian title to the same shall have been extinguished." By that section the right of Minnesota to

lands within the Indian country was made somewhat in the nature of a float, to become vested when the Indian title was extinguished. When the road was definitely located and the Indian title was extinguished, the land passed to the State for the benefit of the road. *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55. The title of the appellant is complete, and neither the appellee nor the Northern Pacific Railroad under which he claims ever had any title to the land in controversy.

It is immaterial that the appellant did not begin its suit at an earlier date. The decision against it by the Secretary of the Interior, in 1871, was not binding as to the law of the case, and the bringing of the suit in 1884 was in time.

Decree reversed, and cause remanded to the Circuit Court with directions to enter a decree in consonance with this opinion.

MERRITT *v.* CAMERON.

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

No. 84. Argued November 19, 20, 1890. — Decided December 22, 1890.

The ascertainment and liquidation of duties by a collector of customs, under Rev. Stat. § 2931, is the decision of that officer as to what the duties shall be, made after the measurement, weighing or gauging of the merchandise, its inspection and appraisal, the determination of its dutiable value, and the taking of such other steps as the law may call for; and, so far from this being required to be delayed until the importer chooses to withdraw his goods for consumption, it may take place at any time after the original entry of the merchandise, and should follow, in the regular course of business, as soon after the entry as is convenient, just as in the case of merchandise entered for immediate consumption.

Westray v. *United States*, 18 Wall. 322, explained.

The ten days referred to in Rev. Stat. § 2931, within which an importer is allowed to protest against the liquidation of duties, begin to run upon their ascertainment and liquidation.

A construction of a doubtful or ambiguous statute by the Executive Department charged with its execution, in order to be binding upon the courts, must be long continued and unbroken.

Opinion of the Court.

THIS was an action at law against the collector of customs for the port of New York, brought to recover duties alleged to have been illegally exacted. Verdict for the plaintiffs, and judgment on the verdict. Defendant sued out this writ of error. The case is stated in the opinion.

Mr. Solicitor General for plaintiff in error.

Mr. Stephen G. Clarke for defendants in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

This was an action at law by Donald Cameron and Donald E. Cameron, composing the firm of Cameron & Co., importers, against the collector of the port of New York, to recover certain duties alleged to have been illegally exacted on a cargo of sugar and molasses. The only defence that appears to have been pleaded was, that the protest of the importers against such exaction of duties had not been made within ten days from the ascertainment and liquidation of the duties, as required by section 2931 of the Revised Statutes. The case was tried before Judge Shipman and a jury, resulting in a verdict and judgment in favor of the importers for the sum of $1759.84; and the collector thereupon sued out a writ of error.

The bill of exceptions, made part of the record, shows the following undisputed facts: On the 26th of July, 1880, Cameron & Co. imported into the United States at the port of New York, from Demerara, by the steamer Restless, a cargo of sugar and molasses, and made entry of the same for warehouse, in bond, under the laws of the United States for the warehousing of merchandise in bond. The estimated duties on the whole cargo amounted to $11,195.11; and, pursuant to law, the importers gave a bond to the United States, in the penal sum of $23,000, (about double the amount of the estimated duties,) containing the following condition: "That if, within one year from the said date of original importation, the said goods, wares and merchandise shall be regularly and lawfully withdrawn from public store or bonded warehouse on payment of the legal duties and charges to which they

shall then be subject; or if, after the expiration of one year and within three years from the said date of original importation, they shall be so withdrawn upon the like payment, with ten per centum added upon the amount of such duties and charges; or if, at any time within three years from the said date of original importation, they shall be so withdrawn for actual export beyond the limits of the United States, then the above obligation to be void; otherwise, to remain in full force."

On the 4th of August, 1880, the importers withdrew the sugar from warehouse for consumption, and paid to the collector the sum of $10,913.55 as the estimated duties thereon, and on account of the duties to be afterwards ascertained and liquidated by him. The appraisement of both the sugar and molasses was made on the 6th of August, and on the 20th of August the collector ascertained and liquidated the duties on the whole cargo, as imported, fixing them at $12,157.76, and stamped upon the entry "Liquidated, and notified importer August 20, 1880." What was meant by "liquidated," as thus used, was, that the entry had been passed regularly through the various divisions of the collector's office, and the duties thereon had been finally ascertained and fixed by the custom officials. "Notified importer" meant that the fact of the liquidation had been stated on a sheet of paper which was hung up in the custom-house for the information of the importer. On the 10th of September, 1880, the importers withdrew the molasses from the warehouse for consumption, and paid to the collector the balance of the duties assessed on the whole cargo, to wit, $1244.21, of which $327.50 was the whole amount of the duty on the molasses, and $916.71 was the balance of the duties assessed on the sugar.

On the 15th of September, 1880, the importers protested in writing against the exaction of the duties on the sugar as excessive and illegal, and on the same day appealed from the decision of the collector to the Secretary of the Treasury. On the 22d of January, 1881, the Secretary affirmed the collector's decision, and on the 19th of April, 1881, the importers brought this suit to recover the duties claimed in their protest.

The evidence introduced by the plaintiffs showed that the excess of duties paid by them, over and above the legal duties, including interest on such over-payments, amounted to $1759.84. It also showed that where merchandise, all of which was covered by one bond, was withdrawn from a warehouse, for consumption, in separate quantities, at different times, the duties paid on the several withdrawals conformed to the estimated duties on the original entry, except that the last or final withdrawal was not paid or settled until it was compared with the warehouse ledger to see whether the correct amount of duties had been paid on the merchandise previously withdrawn. If either too much or too little had been paid, it was noted on the last withdrawal, and a settlement was then made on the basis of the duties, as liquidated. The withdrawal entry of the molasses made September 10, 1880, bore the endorsement in red ink, "To close, $1244.21;" which endorsement meant that that amount of duties, as liquidated, was yet due on the original cargo of merchandise covered by the bond. Evidence was also introduced tending to show that the practice of the custom-house in New York, and the action of the collector in the case of the importation in suit, were in accordance with the following paragraph of Art. 616 of the general regulations under the custom-house and navigation laws of the United States, etc., issued by the Treasury Department, January 1, 1874: "Goods withdrawn for consumption may be taken at average valuation — care being had that on the last withdrawal the entire balance of duties be collected. Should the final withdrawal entry be for export or transportation, and there be any difference between the actual duty and the amount due, to close the sum due on the warehouse entry, the excess, if any, shall be refunded on the last withdrawal for consumption, and the deficiency, if any, collected on amendment to the entry."

At the close of the testimony the plaintiffs moved the court to direct the jury to find a verdict in their favor for the sum of $1759.84; and the defendant moved for a verdict in his favor, on the ground that the protest of the plaintiffs had not been made within ten days after the ascertainment and liqui-

dation of the duties assessed by him as collector, as required by section 2931 of the Revised Statutes. The court denied the defendant's motion, and granted that of the plaintiffs. The jury, thereupon, under the direction of the court, found a verdict for the plaintiffs for the sum above specified; and, judgment having been entered on the verdict, the defendant sued out a writ of error, as before stated.

There is but one question in the case, viz.: Was the protest of the importers made within the time prescribed by section 2931 of the Revised Statutes? That section reads as follows: 'On the entry of . . . any merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid . . . on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless . . . the owner, importer, consignee or agent of the merchandise . . . shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury."

Inasmuch as the ascertainment and liquidation of the duties in this case was, in fact, made on the 20th of August, 1880, and the protest of the importers was not filed until September 15 of the same year, (twenty-six days thereafter,) it would seem to have been clearly too late under the statute quoted. The contention of the defendants in error, however, seems to be that the ascertainment and liquidation of the duties referred to in section 2931, from which the ten days begin to run, should have been made, under the law, at the date of the last or final withdrawal of the merchandise covered by the bond; and that, as the protest was filed only five days after that date, it was in time. The decision of this court in *Westray* v. *United States*, 18 Wall. 322, 329, and the rulings of the Treas-

ury Department in force at the time the proceedings in this case took place in the custom-house, are relied on as sustaining their view.

It is undisputed that from 1876 to May 2, 1885, (which period embraced the time when the proceedings in this case took place in the custom-house,) the ruling of the Treasury Department was, that a protest was in time if made within ten days from the last or final withdrawal of the merchandise covered by the bond. That ruling appears to have been based upon some expressions found in the opinion of this court delivered by Mr. Justice Strong in *Westray's Case*, *supra*, decided at October term, 1873. But in that case, as appears from an examination of it, the question as to when the ascertainment and liquidation of the duties should take place was not involved. The case had reference, it is true, to section 14 of the act of June 30, 1864, 13 Stat. 214, c. 171, now embodied in section 2931 of the Revised Statutes, and was a suit by the United States on a bond given by the importers on the entry of goods for warehousing conditioned for the payment of the duties thereafter to be ascertained. The merchandise was withdrawn for consumption before any ascertainment or liquidation of the duties had taken place, upon the payment of the estimated duties. The collector afterwards ascertained and liquidated the duties, and upon the refusal of the importers to pay the difference between the duties as liquidated and the duties as estimated at the date of the entry, suit was brought on the bond, in the name of the United States, to recover that difference. At the trial, the importers offered to prove that the duties as liquidated were excessive and illegal, and that they had never received any notice of the liquidation of them by the collector. It was held, however, that the law did not require the collector to notify the importer of the liquidation of the duties, but that the latter was under obligation to take notice of the collector's settlement of the amount of them; that, as no protest had been made, and no appeal had been taken to the Secretary of the Treasury, the decision of the collector had become final; and that evidence to prove that the duties as liquidated were excessive and illegal was

not admissible. The language of the opinion which the Treasury Department evidently relied upon as authorizing the ruling that the withdrawal of the merchandise from the warehouse for consumption was the liquidation of the entry, referred to in section 2931 of the Revised Statutes, and which is relied upon here to sustain the contention of the defendants in error, is as follows: "The statute, and the Treasury regulations established under it, require that the duties must be ascertained whenever an entry is made, whether it be for warehousing or for withdrawal. In practice, it is true, the liquidation at the time of entry for warehousing is little more than an approximate estimate, and it is mainly for the purpose of determining the amount of the bond to be given. It is made, and the bond is given, before the goods are sent to the warehouse, or even to the appraisers' stores, and before they are weighed, gauged or measured. But the importer enters them and gives the bond the amount of which is regulated by the estimated amount of duties. It is due to his inattention, therefore, if he does not know what that estimate is at the time when it is made. Equally true is it that he has ample means of knowledge of the second or correct liquidation — that made at the time of the withdrawal entry. One of the conditions of his bond is that he pay the amount of duties *to be ascertained* under the laws then existing or thereafter enacted. He is thus informed that there is to be another liquidation, and that the law requires it to be made at the time when he shall make his withdrawal entry, and when the duties are required to be paid."

But in view of the facts in that case the language referred to can hardly be considered as warranting the view of the defendants in error; for the withdrawal of the merchandise in that case occurred before the final liquidation of the duties thereon, and if the importer be required to protest within ten days from that date, it might follow that his protest would have to be made before the actual liquidation had taken place. That is to say, in order to guard against all contingencies he would be required to protest against a future liquidation which might prove to be satisfactory to him in all particulars. Such

a conclusion is not in harmony with the idea and object of the protest. True, as held in *Davies* v. *Miller*, 130 U. S. 284, the clause, "within ten days after the ascertainment and liquidation of the duties," merely fixes the limit beyond which the notice of protest shall not be given, and not the first point of time at which it may be given. That is to say, the notice of protest may be given before the ascertainment and liquidation of the duties, (as was specifically ruled in that case,) but it is not required to be given until some time within ten days after the liquidation.

Indeed, in another part of the same opinion in *Westray's Case*, the learned justice used language entirely inconsistent with the theory of the defendants in error. After stating that the decision of the collector had become final by reason of no protest having been made and no appeal having been taken to the Secretary of the Treasury, he said: "The same considerations lead to the conclusion that the Circuit Court correctly refused to rule that the ten days prescribed by the statute, within which notice of dissatisfaction is required to be given, did not begin to run until notice of the collector's liquidation was given to the plaintiffs in error, or until they had knowledge thereof. The limitation of the right to complain or to appeal commences with the date of liquidation, whenever that is made. No notice is required, but the importer who makes the entries is under obligation to take notice of the collector's settlement of the amount of duties." p. 330. And in the syllabus of the case by the reporter it is said: "The right of the importer to complain or appeal begins with the date of the liquidation, whenever that is made." These quotations abundantly show, we think, that the question as to when the ascertainment and liquidation should take place was not considered by the court at all, further than that it should take place some time after the entry of the merchandise for warehouse.

We find nothing in the statutes or in any of the decisions of this court warranting the construction contended for by the defendants in error, that the ascertainment and liquidation of the duties referred to in section 2931 should be made at the

date of the final withdrawal of the merchandise from the bonded warehouse. On the contrary, we think the ascertainment and liquidation of the duties on merchandise entered in bond for warehouse should follow, in the regular course of business, as soon after the entry as is convenient, just as in the case of merchandise entered for immediate consumption. The statutory regulations as to the ascertainment and liquidation of the duties are the same in the one instance as in the other. The measurement, weighing or gauging of the merchandise, the inspection and appraisal of it, and the determination of its dutiable value are required to be proceeded with exactly the same in each instance. After the ascertainment of those facts in relation to the entry, the collector has to decide what the duties are in each case. His decision at that time is the ascertainment and liquidation of the duties referred to in section 2931; and there would seem to be no good reason for his delaying that decision in the case of merchandise entered in bond for warehouse until the convenience of the importer shall suggest the removal of the merchandise from the warehouse.

It is urged, however, that section 2970 of the Revised Statutes, when construed *in pari materia* with section 2931, leads to the conclusion that the liquidation of the duties on merchandise entered in bond should be made when the merchandise is withdrawn for consumption. We do not think so. That section is as follows: "Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within one year from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal; and after the expiration of one year from the date of original importation, and until the expiration of three years from such date, any merchandise in bond may be withdrawn for consumption on payment of the duties assessed on the original entry and charges, and an additional duty of ten per centum of the amount of such duties and charges."

In our opinion that section was intended to provide for cases in which a change in the rate of duty had been made by stat-

ute while the merchandise was in the bonded warehouse. *Fabbri* v. *Murphy*, 95 U. S. 191; act of March 14, 1866, 14 Stat. 8, c. 17. The first clause of the section means simply that if there has been a change in the rate of duty after the merchandise has been entered in bond, and the withdrawal of the merchandise takes place afterwards, and within one year from the date of the importation, the duties to be paid are such as are fixed by the law in force at the date of the withdrawal. The second clause of section 2970 provides that if the merchandise remain in the bonded warehouse more than one year it may be withdrawn for consumption at any time within three years upon the payment of the duties and charges assessed upon the original entry, and ten per centum in addition. The phrase "duties assessed on the original entry," etc., evidently means the duties on the original entry as finally ascertained and liquidated, within the meaning of those terms, as used in section 2931. In either case, if the statute changing the rate of duties goes into effect after the liquidation of the original entry, a reliquidation must necessarily take place. The two clauses of the section differ in one respect only, viz., in a ten per cent increase of duties, where the merchandise remains in the warehouse more than one year, and is withdrawn within three years from the date of importation. This construction renders the two sections of the statute harmonious.

Upon a careful examination of the question at issue, we are of opinion that the ascertainment and liquidation of the duties upon merchandise entered in bond for warehouse may take place at any time after the original entry of the merchandise, and that it is not required to be delayed until the importer chooses to withdraw his goods for consumption. The ten days referred to in section 2931, within which the importer is allowed to protest, begin to run upon such ascertainment and liquidation of the duties; and, therefore, the protest in the case at bar was too late.

In arriving at this conclusion we are not unmindful of the fact that the defendants in error made their protest in accordance with the regulations of the Treasury Department in force at that time. A regulation of a department, however, cannot

repeal a statute; neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country, unless such construction has been continuously in force for a long time. The cases cited go to that extent and no further. In regard to the law under consideration the construction of it by the Treasury Department has not been uniform. The construction contended for by defendants in error first arose in 1876 and lasted only until 1885, since which time the construction has been the same as in this decision. There is no such long and uninterrupted acquiescence in a regulation of a department, or departmental construction of a statute, as will bring the case within the rule announced at an early day in this court, and followed in very many cases, to wit, that in case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect, and should not be disregarded without the most cogent and persuasive reasons. *Edwards* v. *Darby*, 12 Wheat. 206; *United States* v. *Hill*, 120 U. S. 169, 182; *Robertson* v. *Downing*, 127 U. S. 607, and very many other cases.

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with directions to set aside the verdict and grant a new trial.

Mr. Justice Brewer dissented from this opinion and judgment, on the ground that the practice of the Department at the time the proceedings in the custom-house took place, and the action of the Secretary of the Treasury in the matter of the protest and appeal, ought to take the case out of what he conceded to be the correct construction of the statute.

CADWALADER *v.* PARTRIDGE.

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

No. 311. Submitted November 25, 1890. — Decided December 22, 1890.

Merritt v. *Cameron*, *ante*, 542, affirmed and followed.

A change in the ruling of the Treasury Department whereby merchandise in bond, such as is involved in this case, is held dutiable at a greatly reduced rate, is of no aid to an importer who has not protested against the previous ruling.

This was an action against the collector of the port of Philadelphia to recover duties alleged to have been illegally exacted. Judgment for the plaintiffs, to review which the defendant sued out this writ of error. The case is stated in the opinion.

Mr. Solicitor General for plaintiff in error.

Mr. Frank P. Prichard for defendants in error.

Mr. Justice Lamar delivered the opinion of the court.

This was an action at law by Artemus Partridge and Thomas D. Richardson, trading as Partridge & Richardson, against John Cadwalader, collector of customs for the District of Philadelphia, to recover back certain alleged illegal and excessive duties exacted on merchandise imported at that port by them.

The only defence set up by the collector was, that the protest of the importers against the assessment of the duties was not filed with him within ten days from the ascertainment and liquidation of them, as required by section 2931 of the Revised Statutes.

The case was tried by the court and a jury, which returned a special verdict, substantially as follows: On June 28, and July 22, 1886, the plaintiffs, who were merchants in Philadel-

phia, imported into that port three cases of buttons, which were duly entered for warehouse, in bond, the proper bonds being given on each entry. On the 27th of July, and the 14th of August, 1886, respectively, the collector liquidated the duties on the entries, at the sum of $139.50, being at the rate of 45 per cent ad valorem as brass buttons, under section 6 of the act of March 3, 1883, which rate was in accordance with the instructions of the Treasury Department then in force. No protests were made by the plaintiffs against these liquidations, and no appeal was taken from those decisions of the collector. On November 6, December 4 and December 8, 1886, the plaintiffs withdrew the buttons from the warehouse for consumption. In the meantime, the Treasury Department had decided that the proper rate of duties on buttons of the character of those imported was but 25 per cent ad valorem, as buttons not specially enumerated or provided for. When the buttons were withdrawn from the warehouse for consumption, at the dates aforesaid, the plaintiffs were compelled to pay the duty as assessed and liquidated by the collector, to wit, $139.50. Within ten days from the date of such withdrawals, the plaintiffs protested against that exaction of duty, and afterwards appealed to the Secretary of the Treasury, who, on February 25, 1887, affirmed the collector's decision. This suit was brought on March 15, 1887. The amount of the duty exacted, over and above the amount claimed by the plaintiffs to be due, was $62.

The verdict concludes as follows: "And the said jurors say that they are ignorant, in point of law, on which side they ought, upon the facts, to find the issue; but that if the court should be of opinion that plaintiffs were obliged to protest against the liquidation made at the time of the entry of the goods for warehouse, in order to take advantage of the illegality of the exaction of the duties at the time of the entry for consumption, and application to withdraw from the warehouse, then they find for defendant; but that if the court should be of opinion that plaintiff's protest, made within ten days of the defendant's refusal to allow the goods to be withdrawn from the warehouse, except upon payment of the duties

in accordance with the liquidation made at the time of entry for warehouse, was in time, then they find for the plaintiffs in the sum of $62, with interest from December 8, 1886." On this verdict the Circuit Court, on the 28th of October, 1887, entered a judgment for $62 in favor of the plaintiffs, and the collector thereupon sued out this writ of error.

This case is similar in all essential features to *Merritt* v. *Cameron*, *ante*, 542, just decided, except that the proceedings in the custom-house in this case took place after May 2, 1885, when the Treasury Department adopted the rule that protests should be filed within ten days after the ascertainment and liquidation of the duties; and we are not confronted, therefore, with a Treasury ruling at variance with the construction we have put upon section 2931 of the Revised Statutes. The protests in this case, as appears from the facts above set forth, were too late, and the decision of the collector upon the ascertainment and liquidation of the duties thus became final.

We do not think the change in the ruling of the Treasury Department, whereby merchandise such as is involved in this case was held dutiable at a greatly reduced rate, makes any material difference between this case and *Merritt* v. *Cameron*. On this point we are inclined to adopt the view of the Solicitor General that a decision by the Secretary, or by a court, reversing a previous erroneous ruling of the Department, is of no aid to an importer who has not duly protested against a similar ruling with respect to another importation.

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with a direction to set aside the verdict and grant a new trial.

MACKALL *v.* CASILEAR.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 97. Argued November 26, December 1, 1890. — Decided December 22, 1890.

The plaintiff, having averred in his complaint the execution of a deed by him to his father, and having conceded its delivery, and there being no prayer for specific relief as to it, and no averments that would entitle him to have it set aside for want of acknowledgment under the prayer for general relief, he cannot set up that the deed is not operative, even as between the parties, for want of proper acknowledgment and record.

When a deed is void on its face the interference of a court of equity is unnecessary.

Where the difficulty of doing entire justice by reason of the death of the principal witness or witnesses, or from the original transactions having become obscured by time, is attributable to gross negligence or deliberate delay, a court of equity will not aid a party whose application is thus destitute of conscience, good faith and reasonable diligence.

The mere assertion of a claim, unaccompanied by any act to give effect to it, cannot avail to keep alive a right which would otherwise be precluded.

Negotiations for settlement of a disputed matter, which one party hopes may result in a settlement and adjustment, do not operate to bar in equity the defence of laches, when the other party gives no encouragement to such hopes, never promises a settlement, never concedes that his own claims are doubtful, and never recognizes the other's claims.

The bill in this case alleged that in a suit in equity in the Supreme Court of the District of Columbia in which the plaintiff here was defendant, the conveyance under which the plaintiff in this suit claims had been decreed to be invalid, from which decree the plaintiffs in that suit had appealed as to other matters involved; and it set up the pendency of that suit as excuse for the delay of nineteen years in bringing this one. *Held*,

(1) That, the plaintiff not having appealed, it was difficult to see why that decree was not a bar in this suit;

(2) That it furnished no satisfactory explanation of his *laches* herein.

Brooke Mackall, Jr., filed his bill of complaint in the Supreme Court of the District of Columbia on the first day of June, 1885, against George W. Casilear and wife; Leonard Mackall and wife; Don Barton Mackall, Benjamin Mackall; Louise Owens and husband; Catherine Christy and husband; Edmund Brand and Mary E. Keller; alleging that Leonard, Don Barton and Benjamin were his brothers, and Louise

Owens and Catherine Christy his sisters, all being the sole surviving children of Brooke Mackall, Sr., and Martha Mackall, his wife; and that Edmund Brand and Mary E. Keller were the sole surviving children of Louis Brand.

The bill then stated: That on or about December 21, 1863, complainant became owner in fee simple, through a conveyance to him from Charles W. Pairo, George Randolph, executor, and Brooke Mackall, Sr., of lots in the city of Washington, D.C., as follows:

Lot 2, square 5; lots 3 and 7, square 17; lot 3, square 31; lot 15, square 41; lot 2, square 42; lot 5, square 43; lot 12, square 56; lot 10, square 62; lots 13, 14 and 17, square 76; and a copy of the deed was annexed. That on or about May 5, 1866, complainant executed his promissory notes to the order of his father, and a deed of trust to said Brooke Mackall, Sr., as trustee, which deed was acknowledged before the latter as notary public, upon lot 2, square 5; two parts of lot 12, square 56; and lots 14, 17 and part of 13, square 76, which was recorded June 5, 1867, and a copy whereof was annexed; that there was no consideration for these notes, but they were made for the accommodation of complainant's father for the purpose of borrowing money for the benefit of both, but no money was borrowed, and it was not intended that any claim on the notes should be set up against the complainant, and there was no default in the payment of the same; that about seven years after, a variance occurring between complainant and his father, his father, having possession of the notes, without complainant's knowledge or consent, advertised said property for sale, except one subdivision of lots 13 and 14, square 76, which had in the meantime been otherwise disposed of by complainant; that the advertisement (a copy of which was annexed) was published only on three successive days, though the trust deed required a publication of sixty days; that it was intended that the sale should be kept concealed from complainant, and it was not held on the premises, but at the rooms of the auctioneer; that no bidders were present, and at the instance of his father the property was struck off nominally to one Joseph B. Hill, but really for the benefit of com

plainant's father, no money being ever paid by Hill, and his name being used that it might not appear that the trustee was a purchaser at his own sale; that this was a scheme devised by the father to divest the son of his property and obtain it himself without paying anything whatever for it; that in pursuance of such scheme, a deed (a copy of which was annexed) was executed by Brooke Mackall, Sr., as trustee, to Hill, for the nominal consideration of $2000, though Hill paid nothing; and complainant charged that the deed was void and of no effect. This deed was dated June 26, and recorded July 2, 1873.

The bill further averred that on or about March 13, 1867, complainant conveyed to one Morsell (a copy of which deed was attached) lot 15, square 41, and lot 5, square 43, in trust to secure complainant's promissory note for $1000, payable one year after date, to the order of his father, which note was indorsed over to Mills and wife, and was paid in full and so admitted to be paid by a deed conveying the same property, dated July 14, 1868, by Morsell, Mills and wife, and complainant to Louis Brand to secure in trust complainant's promissory note for $2000, payable to his father's order one year after date (a copy of which instrument was attached); that the $2000 note was an accommodation note and made to raise money for the common benefit of both parties, but no money was raised, and there was no consideration for the note; that about five years thereafter, there occurring a variance between father and son, the father, in pursuance of a similar scheme as that charged as to the other parcels, procured Brand to advertise the property for sale, and though publication for three weeks was required, the advertisement was published only four times successively, and for three days; that this was without the consent or knowledge of complainant, and without written request as prescribed, and the place of sale was at the private rooms of the auctioneer; that there were no bidders at the sale, but at the request of Brooke Mackall, Sr., lot 15, square 41, and sublots 2, 3, 4 and 5, lot 5, square 43, were struck off to Hill at the nominal sum of $2000, he paying no money, and Brooke Mackall, Sr., being the real purchaser, and

no payment or account was made to complainant, whereupon a conveyance in the handwriting of Brooke Mackall, Sr., was executed by said Louis Brand, trustee, to Hill, a copy of which was annexed, showing that the deed was recorded July 28, 1873; and complainant charged that the sale and deed were void. Complainant further averred that on the 4th of August, 1873, Hill executed a conveyance (a copy of which was annexed) to John C. McKelden and Edward McB. Timoney, as trustees, to secure a note of $3000 of B. Mackall, Sr., to F. A. Casilear, due in one year from the date thereof; that said trustees and said Casilear had full knowledge of the defects of title herein mentioned, and were not *bona fide* purchasers or creditors; that in October, 1874, default having been made by B. Mackall, Sr., in payment of the note of $3000, the trustees McKelden and Timoney advertised the property secured in the deed of trust to them for sale, and thereupon the complainant, at the date and place of sale so advertised, and before the sale, read a notice and caused copies thereof to be served upon Timoney and McKelden, and Williams the auctioneer, which notice was attached to the bill, and was to the effect that Timoney, McKelden and Williams had no authority to sell the premises, and that Mackall, Jr., would insist upon all his legal rights to the premises against them and against any purchaser or purchasers thereof, and protested against the sale; that the trustees proceeded to sell, and thereupon Casilear bid in the property at $2722.95, and a deed was given by McKelden and Timoney, as trustees, of sublots 2 and 3 of lot 5, square 43; lot 17, square 76; and two parts of lot 12, square 56; that on the 13th day of January, 1874, Hill as trustee and in his own right, and B. Mackall, Sr., joined in a conveyance to Leonard Mackall, as trustee, of lot 15, in square 41; sublots 2, 3, 4 and 5 of lot 5, square 43; lots 13, 14 and 17 in square 76; and two parts of lot 12, square 56, for the use and benefit of Mackall, Sr., and subject to his absolute control and disposal; that Mackall, Sr., departed this life February 28, 1880, and the brothers and sisters of complainant claim the property so conveyed to Leonard Mackall as trustee, as his heirs and devisees; that Casilear claims title to lot 17, square

76, and two parts of lot 12, square 56, as derived from the deed of Mackall, Sr., to Hill, and to sublots 2 and 3 of lot 15, square 43, as derived from the deed of Brand to Hill; that complainant's brothers and sisters claim title to lots 13, 14 and 17, square 76, and two parts [of] lot 12, square 56, as derived from the deed of B. Mackall, Sr., to Hill, and lot 15, square 41, and sublots 2, 3, 4 and 5, square 43, as derived from the deed of Louis Brand to Hill, which two deeds of B. Mackall, Sr., are declared to be void, but a cloud upon the property; and that complainant, though not having the legal title, but being equitably entitled thereto, was entitled to have such deeds with all subsequent claims of title decreed null and void. Complainant further stated that some of the reasons for the delay which had occurred in his not before having filed a bill to set aside the said conveyances were as follows:

"As to Casilear, he at all times has protested against his claim, notifying him at the time of his purchase that he should not submit to the sale, and he has since then been engaged in negotiations from time to time with him, orally and by mutual correspondence in writing, which he has hoped would result in a settlement and adjustment of their differences in regard to the property held by him. He has received large amounts by way of rents and proffts of said property and has made no substantial improvements thereon.

"As to the remainder of such property, he says that soon after the execution of the deeds made in 1874 the said B. Mackall, Sr., became reconciled to complainant, they living together and sharing the benefit of all property possessed by each in common. He, said B. Mackall, Sr., constantly assured complainant that he would rectify all that was wrong in said conveyances to the best of his ability, which assurance was relied upon by complainant and was satisfactory to him.

"Said B. Mackall, Sr., drew up forms of reconveyance to complainant of such property or parts thereof, one of which he signed and delivered to complainant, and which are now in possession of complainant.

"In Feb'y, 1880, he did execute a reconveyance of all his interests in said property, which was entirely satisfactory to

the complainant, though such reconveyance was attacked by his said brothers and sisters, and a decree was made adjudging the same to be void as to the property herein claimed by complainant, from which decree, however, they claim to have taken an appeal to the Supreme Court of the United States, and which appeal they claim is now pending, though such claim is not admitted by complainant. While such litigation was pending, however, there was, as believed by complainant, no propriety in bringing suit to enforce what he claimed to have been sufficiently performed by the execution of said deed of his father's to him of Feb'y 28th, 1880, and such litigation was pending at a very recent date."

Complainant prayed process and that the defendants might answer the bill under oath; that the two deeds of B. Mackall, Sr., trustee, and Brand, trustee, to Hill be adjudged and decreed to be null and void, together with all deeds, etc., under the same; that complainant be adjudged to be the owner of the property free and clear of all claims and demands of the defendants, and entitled to an account; and that an account be taken and for general relief.

To this bill the defendants Casilear and wife demurred upon the ground of multifariousness, laches and want of equity, and the other defendants also demurred upon the ground of prior decree, multifariousness, etc. The latter demurrer was sustained January 19, 1886, and the bill dismissed. On the 28th day of January it was stipulated on behalf of the Casilears that the bill might be considered as amended by adding the averments: "That the complainant had no knowledge of the sales to Hill or either of them at the time of the conveyance to McKelden and McB. Timoney;" that "the fair value of the property sold by McKelden and McB. Timoney, trustees, to Casilear was $7500;" and that "Brooke Mackall, Sr., left complainant only one dollar by his will, giving all the rest of his estate to his other children," etc. The demurrer on behalf of the Casilears was then sustained and the bill dismissed. The cause was taken from the special to the general term of the court and the decree of the special term affirmed. Thereupon an appeal was taken to this court.

Citations of Counsel.

Mr. Samuel Shellabarger, (with whom was *Mr. Jeremiah M. Wilson* on the brief,) for appellant, cited: (1) as to the insufficiency of the acknowledgment of the deed from Mackall, Jr., to Mackall, Sr., and the invalidity of the deed by reason of want of acknowledgment and record — *West* v. *Krebaum*, 88 Illinois, 263; *Davis* v. *Beazeley*, 75 Virginia, 491; *Hammers* v. *Dole*, 61 Illinois, 307; *Groesbeck* v. *Seeley*, 13 Michigan, 329; *Withers* v. *Baird*, 7 Watts, 227; *S. C.* 32 Am. Dec. 754; *Wilson* v. *Traer*, 20 Iowa, 231; *Goodhue* v. *Berrien*, 2 Sandford Ch. 630; *Brown* v. *Moore*, 38 Texas, 645; *Stevens* v. *Hampton*, 46 Missouri, 404; *Beaman* v. *Whitney*, 20 Maine, 413; *Wasson* v. *Connor*, 54 Mississippi, 351; *Bowers* v. *Bowers*, 29 Grattan, 697; *Van Ness* v. *United States Bank*, 13 Pet. 17; *Schultz* v. *Moore*, 1 McLean, 520; *Greenleaf* v. *Birth*, 6 Pet. 302; *Scott* v. *Reed*, 10 Pet. 524; *Wood* v. *Owings*, 1 Cranch, 239: and (2) as to laches — 2 Story Eq. Jur. § 1520 and cases cited: *Hill* v. *Law*, 102 U. S. 461; *Clarke* v. *Boorman*, 18 Wall. 493, 505; *Michoud* v. *Girod*, 4 How. 503; *Wagner* v. *Baird*, 7 How. 234; *Godden* v. *Kimmell*, 99 U. S. 201; *Prevost* v. *Gratz*, 6 Wheat. 481; *Bryan* v. *Kales*, 134 U. S. 126.

Mr. J. J. Darlington, for Casilear and wife, appellees, cited as to laches: *Elmendorf* v. *Taylor*, 10 Wheat. 152; *Cholmondeley* v. *Clinton*, 2 Jac. & Walk. 1; *Miller* v. *McIntyre*, 6 Pet. 61; *Hovenden* v. *Annersley*, 2 Sch. & Lef. 633; *Piatt* v. *Vattier*, 9 Pet. 405; *McKnight* v. *Taylor*, 1 How. 161; *Lewis* v. *Baird*, 3 McLean, 82; *Maxwell* v. *Kennedy*, 8 How. 210; *Landsdale* v. *Smith*, 106 U. S. 391; *Sullivan* v. *Portland &c. Railroad*, 94 U. S. 806; *Godden* v. *Kimmell*, 99 U. S. 201; *Jenkins* v. *Pye*, 12 Pet. 241; *Brown* v. *Buena Vista County*, 95 U. S. 157; *Harwood* v. *Railroad Co.*, 17 Wall. 78; *Hayward* v. *National Bank*, 96 U. S. 611; *Richards* v. *Mackall*, 124 U. S. 183; *Roberts* v. *Tunstall*, 4 Hare, 257; *Hunt* v. *Ellison*, 32 Alabama, 173; *Hamlin* v. *Mebane*, 1 Jones Eq. 18; *Sullivan* v. *Portland & Kennebec Railroad*, 4 Cliff. 212; *Graham* v. *Boston, Hartford &c. Railroad*, 14 Fed. Rep. 753; *Speidell* v. *Henrici*, 15 Fed. Rep. 753.

Mr. S. S. Henkle for devisees of Brooke Mackall, Senior, appellees.

Opinion of the Court.

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

Apart from the prayers for process, an account, and for general relief, the specific relief sought is, that the two deeds of B. Mackall, Sr., trustee, and Louis Brand, trustee, to Joseph B. Hill be decreed to be null and void, together with all deeds, written instruments, and claims of title whatever derived through the same, and that complainant be adjudged to be the owner of the property free and clear from all claims and demands of the defendants or either of them.

The deed of complainant to Mackall, Senior, was dated May 5, 1866, and recorded June 5, 1867. The deed of Mackall to Hill was dated June 26, and recorded July 2, 1873. Brand's title was derived through a conveyance by complainant to Morsell, dated March 13, 1867, and the conveyance of Morsell, Mills and complainant to him, dated July 14, 1868. The deed from Brand to Hill was dated and acknowledged July 29, 1873, and presumably recorded the same day, though the record gives the date as July 28. The bill was filed June 1, 1885. The death of Mackall, Sr., was stated to have occurred February 28, 1880. This attack was delivered, then, more than nineteen years after the deed to Mackall; about seventeen after that to Brand; and nearly twelve years after the other two deeds were recorded.

It is charged that the deed of May 5, 1866, was given to secure complainant's two notes, amounting to nearly $600 in the aggregate, for the purpose of borrowing money for the use of father and son, but that no money was ever borrowed thereon; and that the deed to Brand was given to secure a note for $2000 payable to Mackall, Sr., for the same purpose, likewise not carried out.

Counsel for complainant insisted, upon the argument, that the deed from Mackall, Jr. to Mackall, Sr., was void, because Mackall, Sr., took the acknowledgment, and that the sales made by Brand and Mackall, Sr., to Hill were invalid by reason of the omission to advertise for the time prescribed, and the want of publicity in the conduct of the sales, and because

these transactions were merely covers for the purchase by Mackall himself in fraud of complainant's rights.

If the general rule that an acknowledgment is not essential to the validity of a deed as between the parties applies, the fact that a grantee cannot take the acknowledgment of a conveyance to himself would be immaterial in this case. The execution of this deed to Mackall was expressly averred by complainant and its delivery conceded, but he alleged that it was given to secure notes for the purpose of borrowing money for himself and his father, and that this was not done.

There is no prayer for specific relief in relation to it, nor do we think the averments such as would entitle complainant to resort to the prayer for general relief, to set it aside, by reason of the want of acknowledgment, if that were a proper ground; and, if void upon its face, as now contended, the interference of a court of equity would seem to be unnecessary. *Phelps* v. *Harris*, 101 U. S. 370, 375. We shall not, therefore, review the various statutes of Maryland, acts of Congress, and authorities referred to by counsel as tending to justify the position that in the District of Columbia a deed is not operative, even as between the parties, notwithstanding delivery, unless it be acknowledged and recorded.

As already stated, nineteen years after the conveyance to Mackall, Sr., seventeen after that to Brand, twelve after the deeds to Hill, and five after Mackall's death, the son charges the father with what his counsel calls "actual, active and intense fraud;" and, in explanation of the delay in seeking to be relieved from the consequences of this conduct on his father's part, says that "soon after the execution of the deeds made in 1874," (the conveyances by Hill and Mackall, Sr., to Leonard Mackall, and by McKelden and Timoney to Casilear, were in 1874,) his father became reconciled to him, and they lived together and shared the benefit of all property possessed by each in common, and his father constantly assured him that he would rectify all that was wrong in said conveyances to the best of his ability, which assurance was relied upon by complainant and was satisfactory to him; that his father drew up forms of reconveyance to him of such property

or parts thereof, one of which he signed and delivered to complainant; and that "in February, 1880, he did execute a reconveyance of all his interests in said property, which was entirely satisfactory to complainant, though such reconveyance was attacked by his said brothers and sisters, and a decree was made adjudging the same to be void as to the property herein claimed by complainant, from which decree, however, they claim to have taken an appeal to the Supreme Court of the United States, and which appeal they claim is now pending, though such claim is not admitted by complainant. While such litigation was pending, however, there was, as believed by complainant, no propriety in bringing suit to enforce what he claimed to have been sufficiently performed by the execution of said deed of his father's to him of February 28, 1880, and such litigation was pending at a very recent date."

As complainant did not appeal from the decree passed against him in favor of his brothers and sisters in relation to this property, it must still stand as a bar, and it is not easy to see why, under the circumstances stated by complainant, that litigation did not include the same matters and things which are drawn in controversy in this suit.

Supposing that the bill of the complainant's brothers and sisters attacked the deed of February 28, 1880, upon the ground that its execution was secured by undue influence, would it not devolve upon the defendant in that case, the complainant herein, to set up that he was in fact the owner of the property; that his father had obtained the conveyance from him under circumstances constituting a fraud upon him; and that the deed of February, 1880, was given by the deceased in order to restore to the defendant, complainant here, what he had been wrongfully deprived of? And as complainant contends such were the facts, why was not that defence set up? If such were not the facts, what becomes of the complainant's bill?

But assuming that the matters relied on here are not necessarily inconsistent with that decree, then according to his own contention complainant occupies this position: having accepted

a deed from his father completely condoning the causes of complaint which he alleges he had against him, he now, after his father's death, seeks to go behind that final and satisfactory compromise, because upon some ground, outside of anything litigated in this suit, his brothers and sisters succeeded in defeating the deed in a controversy between him and them. This we think he cannot do; nor can we admit complainant's ideas of propriety in bringing this bill, while that was pending, or in declining to litigate these matters in that action, as furnishing any satisfactory explanation of the laches which has characterized his conduct. If that laches could in any respect be held to be excused by reason of his expectations from his father, we cannot allow him to plead, that because those expectations in part failed of realization through some external cause, therefore he is any the less bound, so far as his dead father is concerned, by a delay which would otherwise be fatal.

The doctrine of laches is based upon grounds of public policy, which require for the peace of society the discouragement of stale demands. And where the difficulty of doing entire justice by reason of the death of the principal witness or witnesses, or from the original transactions having become obscured by time, is attributable to gross negligence or deliberate delay, a court of equity will not aid a party whose application is thus destitute of conscience, good faith and reasonable diligence. *Jenkins* v. *Pye*, 12 Pet. 241; *McKnight* v. *Taylor*, 1 How. 161, 168; *Godden* v. *Kimmell*, 99 U. S. 201; *Landsdale* v. *Smith*, 106 U. S. 391; *Le Gendre* v. *Byrnes*, 44 N. J. Eq. 372; *Wilkinson* v. *Sherman*, 45 N. J. Eq. 413.

The time for this son to have attacked his father on the ground of fraud was prior to that father's death; yet no movement was made to set aside these alleged fraudulent conveyances, until five years after that event transpired. The father died testate, and by his will the property in controversy, subject to the Casilear conveyances, passed to the brothers and sisters of complainant, as the father's devisees, who were natural objects of the bounty of the testator, and, so far as this record shows, entitled to his consideration. The allega-

tions of the bill fall far short of discharging the burden, which rested on the complainant, of satisfying the court that his delay had not operated to the prejudice of these parties.

Without regard to the deed of February, 1880, the rule in question would forbid relief, and, so far as that deed is concerned, complainant could not elect to take under it and then claim that delay was excused while he experimented in trying his case by piecemeal. Of course it must be admitted that an affectionate son would feel a natural reluctance to make a charge of fraud against his father, but where the time consumed in overcoming this is prolonged, as in this instance, we cannot recognize the relationship as sufficient explanation of the laches.

These views are applicable to the defendants Casilear. Casilear purchased at a sale under a trust deed given to secure a note for $3000, in respect to which there is no allegation that the note was not for value received. The excuse for the delay is that complainant protested against Casilear's claim and notified him that he would not submit to the sale; but the mere assertion of a claim, unaccompanied by any act to give effect to it, cannot avail to keep alive a right which would otherwise be precluded. It is said, however, that complainant had been engaged in negotiations from time to time with Casilear, orally and by mutual correspondence in writing, which complainant hoped would result in a settlement and adjustment of their differences in regard to the property held by him; but the bill does not state that Casilear gave any encouragement to such hopes, or ever promised any settlement or adjustment, or ever conceded that his purchase was in any respect doubtful, or ever in any way recognized the claims of the complainant.

Under the circumstances we entertain no doubt that the demurrers were properly sustained and the decree is

Affirmed.

BALTIMORE AND POTOMAC RAILROAD COMPANY *v.* FIFTH BAPTIST CHURCH.

SAME *v.* SAME.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Nos. 121, 122. Argued December 18, 19, 1890. — Decided January 5, 1891.

At the trial of an action of tort upon a plea of *nul tiel corporation*, evidence that the plaintiff, after filing a defective certificate of incorporation under a general corporation law, acted for years as a corporation, and recovered a judgment as such in a similar action against the defendant without any objection made to its capacity to sue, is competent and sufficient to prove it a corporation *de facto*, and therefore entitled to maintain this action.

Misnomer of a corporation plaintiff is pleadable in abatement only, and is waived by pleading to the merits.

Baltimore & Potomac Railroad v. *Fifth Baptist Church*, 108 U. S. 317, approved.

At a trial by jury in a court of the United States, the presiding judge may express his opinion upon matters of fact which he submits to their determination.

In an action for the continuance of a nuisance, the jury cannot, for the purpose of reducing the damages, take into consideration judgments recovered for the earlier maintenance of the same nuisance.

THE case is stated in the opinion.

Mr. Enoch Totten for plaintiff in error.

Mr. J. J. Darlington and *Mr. Martin F. Morris* (with whom was *Mr. G. E. Hamilton* on the brief) for defendant in error.

MR. JUSTICE GRAY delivered the opinion of the court.

These two actions are in the nature of actions on the case for the continuance of a nuisance to the plaintiff's use and enjoyment of its house of public worship, by the noise, smoke, cinders, ashes and vapors from the defendant's adjoining engine house, repair shop and locomotive engines, and by the

obstruction of access to the plaintiff's building by the defendant's unlawful use of its side track in front of it.

The plaintiff heretofore brought in the court below a similar action against the defendant for maintaining the same nuisance from April 1, 1874, to March 22, 1877, and at the trial thereof on the general issue recovered a verdict and judgment for $4500, which was affirmed by this court, and the amount thereof, with interest, was paid by the defendant. *Baltimore & Potomac Railroad* v. *Fifth Baptist Church*, 108 U. S. 317.

The present actions were brought and tried separately; one of them was brought March 24, 1880, for damages since March 24, 1877, and resulted on March 24, 1886, in a verdict and judgment for $6000; and the other was brought June 11, 1883, for damages since June 11, 1880, and resulted on April 22, 1886, in a verdict and judgment for $7000. In each of these two actions there were the following proceedings:

The declaration was headed "The Fifth Baptist Church of Washington, D.C., by its Trustees *v.* The Baltimore and Potomac Railroad Company;" and alleged that the plaintiff was a body corporate in the District of Columbia, under and by virtue of the general corporation act of May 5, 1870, c. 80, § 2. 16 Stat. 99, 100; Rev. Stat. D. C. §§ 533–544.

The defendant pleaded in bar: 1st. "That the said plaintiff was not at the time of the commencement of this suit, and never was, a body corporate or politic, as set forth and alleged in and by said declaration." 2d. Not guilty. The plaintiff joined issue on these pleas.

The plaintiff, upon the issue presented by the first plea, and to prove its user of corporate rights, offered the following evidence, which was admitted against the defendant's objection and exception:

1st. The original of the following certificate of incorporation, signed and sealed by the six persons named therein:

"We, C. C. Meador, George M. Kendall, John N. Henderson, Samuel M. Yeatman, James C. Deatley and Samuel S. Taylor, of Washington City in the District of Columbia, do hereby certify that we have been duly elected 'Trustees of the Fifth Baptist Church of Washington City, D.C.' (commonly

called 'the Island Baptist Church'), and that this certificate is made, signed and sealed for the purpose of obtaining corporate rights and privileges for the said 'Fifth Baptist Church,' a religious society worshipping at present in their church edifice on D Street South, between Four-and-a-half and Sixth Streets in said city of Washington, under the provisions of an act of Congress approved May 5, 1870, entitled 'An act to provide for the creation of corporations in the District of Columbia by general law.'

"In testimony whereof we hereunto set our hands and affix our seals this twenty-fourth day of August in the year of our Lord one thousand eight hundred and seventy-one."

Annexed to this paper were a notary public's certificate of its acknowledgment on the same day by these six persons; an affidavit of one of them, dated May 1, 1885, that the statements in the certificate of incorporation were true; a memorandum of the recorder that the paper was recorded September 5, 1871; and another memorandum that it was recorded May 1, 1885.

2d. A recorder's copy of the certificate of incorporation, acknowledgment and affidavit, as recorded May 1, 1885.

3d. That in the year 1871 it became necessary for the plaintiff, in order to complete its church edifice, to borrow money upon a mortgage of its land; and that to promote this object, and upon the recommendation of its finance committee, a special meeting was called, and was held on July 2, 1871, at which the church (which had been known as the Island Baptist Church) resolved to become incorporated under the name stated in the above certificate of incorporation, and elected as its trustees the six persons named therein, and fixed their term of office at three years; and thereupon that certificate was prepared and signed by the trustees and recorded.

4th. Three deeds, respectively dated September 26, 1871, September, 18, 1872, and November 10, 1874, from the six persons named in the above certificate of incorporation, describing themselves as "trustees of the Fifth Baptist Church of Washington City, D.C." reciting its incorporation under the general corporation act, and its resolution authorizing them

to execute the deeds, and conveying the church building and land, in trust and by way of mortgage, to secure the payment of various sums of money.

5th. Two deeds of release of the same building and land, dated November 9, 1874, from the grantees to the grantors in the first two of the trust deeds aforesaid.

6th. The record of the judgment in the former action between these parties.

The plaintiff also introduced, without objection, evidence tending to show "that its present church edifice was begun about the year 1866 and was completed at a cost of about $22,000, exclusive of the ground; that the property is worth about $30,000, and has been occupied and used by the plaintiff's society or congregation since the year 1867 as its place of religious worship; and that during the period covered by this suit its actual church membership, consisting, as in all Baptist churches, of persons who have been baptized after a profession of faith, numbered about four hundred persons, exclusive of the persons attending services there as members of the congregation who were not members of the church."

It may be that, as held by the court below in 4 Mackey, 43, at a former stage of one of these cases, the original certificate of incorporation, not stating the date of election or the term of office of the trustees, nor supported by affidavit, as required by statute, was not sufficient of itself to prove the plaintiff's existence as a corporation, either *de jure* or *de facto;* and that the adding of an affidavit to the certificate, and recording it anew, since the commencement of these actions, could not avail the plaintiff.

But the certificate of incorporation, as originally drawn up, taken in connection with the other evidence now introduced, and especially the record of the former action in which this plaintiff as a corporation recovered judgment against this defendant without any objection being taken to the plaintiff's capacity to sue, is clearly competent and sufficient, as between these parties, to prove that the plaintiff had in good faith attempted to legally organize as a corporation, and had long acted as such, and was at least a corporation *de facto*, which

is all that is necessary to enable it to maintain an action against any one, other than the State, who has contracted with the corporation, or who has done it a wrong. *Bank of United States* v. *Dandridge*, 12 Wheat. 64, 72; *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386, 450; *Chubb* v. *Upton*, 95 U. S. 665; *Williamsburg Ins. Co.* v. *Frothingham*, 122 Mass. 391; *Searsburgh Turnpike Co.* v. *Cutler*, 6 Vermont, 315; *Cincinnati &c. Railroad* v. *Danville & Vincennes Railroad*, 75 Illinois, 113; *Stockton & Linden Co.* v. *Stockton & Copperopolis Railroad*, 45 California, 680.

It is objected that the evidence admitted, if sufficient to prove that the plaintiff was a corporation, did not prove that it was the corporation which brought this action; because the evidence was that the corporate name was "The Fifth Baptist Church of Washington, D.C.," whereas the action, as stated in the declaration, was brought by "The Fifth Baptist Church of Washington, D.C., by its Trustees."

It may well be doubted whether the words "by its Trustees," as here used, are part of the name of the plaintiff. They may have been inserted, like "by attorney" or "by next friend," to indicate by whose agency, and not in whose behalf, the action is brought. By the general corporation act, both the title in real estate, and the right to sue, are vested in the trustees "by the name and style assumed as aforesaid," that is to say, in the name and behalf of the corporation. Act of May 5, 1870, c. 80, § 2, 16 Stat. 99, 100; Rev. Stat. D.C., §§ 534, 539, 540.

But if these words in the declaration can be taken as part of the plaintiff's name, the most that is shown is a mistake in that name. While *nul tiel corporation*, or that the plaintiff is not and never was a corporation, is a good plea in bar, because it goes to show that the plaintiff can never maintain any action whatever; yet *misnomer*, or mere mistake in the name of a corporation plaintiff, which does not affect its capacity to sue in the right name, is pleadable in abatement only, and is waived by pleading to the merits. Bro. Ab. Misnomer, 73; *Society for Propagating the Gospel* v. *Pawlet*, 4 Pet. 480, 501; *Christian Society* v. *Macomber*, 3 Met. 235, 237; Gould Pl. c. 5, § 79.

Opinion of the Court.

Upon the issue of not guilty, the plaintiff and the defendant respectively further introduced evidence similar to that given at the trial of the former action, and stated in 108 U. S. 318–320.

The court, at the plaintiff's request, gave the following instructions to the jury, to each of which the defendant excepted:

"If the jury find from the evidence that the church property of the plaintiff, described in the declaration, was acquired and held as a place of religious worship by said plaintiff before the engine house and repair shop of the defendant were built, and that said engine house and repair shop, during the three years immediately preceding the filing of the declaration, as they were used by the defendant, rendered it impossible for the plaintiff to occupy its building with comfort as a place of public worship; that the hammering in the shop, the rumbling of the engines passing in and out from the engine house, the blowing off of steam, and the smoke from the chimneys, with its cinders, dust and offensive odors, created during said period a constant and serious disturbance of the religious exercises of the church; that the noise was frequently so great that the voice of the pastor while praying or preaching could not be heard; that the chimneys of the engine house were, during the three years embraced in this suit, allowed to continue lower in height than the windows of the church, and that smoke and cinders from them were thrown into the church in such quantities as to cover the seats with soot and soil the garments of the worshippers; that disagreeable odors, added to the noise, smoke and cinders, rendered the place uncomfortable as a place of worship and unsuitable for the purposes to which it was devoted; then the plaintiff is, as a matter of law, entitled to recover, and it is the duty of the jury to measure in damages the extent of the injury suffered by the plaintiff from these various grievances during the three years immediately preceding the bringing of this suit."

"In the estimate of damages, the plaintiff is entitled to recover because of the inconvenience and discomfort caused to the congregation assembled, if you find such inconvenience

and discomfort to have been occasioned, thus tending necessarily to destroy the use of the building for the purposes for which it was erected and dedicated. The congregation had the same right to the comfortable enjoyment of its house for church purposes, that a private gentleman has to the comfortable enjoyment of his own house; and it is the discomfort and annoyance in its use for those purposes for the three years covered by this suit which is the primary consideration in allowing damages. There may be no arithmetical rule for the estimate of damages. There is, however, an injury, the extent of which the jury may measure."

It is objected to these instructions, that the evidence did not warrant the assumption that the use of the defendant's engine house and repair shop rendered it "impossible" for the plaintiff to occupy its building with comfort; or that the noise, smoke and cinders created a "constant" disturbance; or that the voice of the preacher, while praying and preaching, "could not be heard;" or that the smoke and cinders were thrown into the church in such quantities as to "cover the seats with soot;" or that there had been inconvenience and discomfort caused to the congregation, "tending necessarily to destroy" the use of the building for the purposes for which it was erected and dedicated.

But all the expressions objected to were taken from the opinion of this court in the former case, and are open to no just exception in matter of law. 108 U. S. 329, 335. And if they can be construed as expressing an opinion upon the facts, the expression of such an opinion is within the discretion of the judge presiding at a trial by jury in any court of the United States, and, 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. *Vicksburg & Meridian Railroad* v. *Putnam*, 118 U. S. 545; *United States* v. *Philadelphia & Reading Railroad*, 123 U. S. 113; *Lovejoy* v. *United States*, 128 U. S. 171.

The only other point relied on arises upon the defendant's request for an instruction to the jury, in the second of the present actions, that if they should be satisfied from the evi-

dence that the plaintiff was entitled to a verdict, then in estimating damages they might take into consideration the payment by the defendant to the plaintiff of the judgment in the former action, and the judgment against the defendant in the first of the present actions. The court refused so to instruct the jury, except with this qualification: "But the fact of such previous recoveries against the defendant is not admissible for the purpose of reducing the amount of damages, if any, to which the jury may find the plaintiff is justly entitled in the present action." The defendant excepted to this instruction, as well as to the refusal to give the instruction requested.

The instruction, as given, was quite favorable enough to the defendant. The design of the request, as avowed in the brief of its counsel, "was to give the jury an opportunity to equalize the verdicts, should they deem either of the other two either too high or too low, and to do justice according to their notions."

But the jury in the last case had nothing to do with the assessment of damages in either of the earlier cases. The three actions were brought to recover damages for injuries during distinct and successive periods of three years each. The former action was not for damages which were the necessary or natural effect of the erection of the defendant's structures, which might be recovered once for all; but it was for the injury suffered before the commencement of that action by reason of the wrongful use of those structures. And each of the present actions was brought, not for damages consequential upon the injury for which the plaintiff had already recovered judgment, but for damages caused by the new injury from the continuance of the nuisance, which could only be recovered in each action for the three years before its commencement. The judgments recovered in the former action and in the first of the present actions could not therefore have any effect to bar the last action, or to diminish the measure of the damages to be recovered by it. *Troy* v. *Cheshire Railroad*, 3 Foster, 83, 102; *Warner* v. *Bacon*, 8 Gray, 397, 402, 405, 406; *Fowle* v. *New Haven & Northampton Co.*, 107 Mass. 352, 355, and 112 Mass. 334.

Counsel for Parties.

The cases at bar afford a good illustration of the rule of law, and of its application, as stated by Blackstone: "Indeed every continuance of a nuisance is held to be a fresh one; and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it." 3 Bl. Com. 220.

If the damages assessed by the jury in either of these two actions were thought excessive, the defendant's only remedy was by motion for a new trial in the court below, and that has already been resorted to without success. 5 Mackey, 269.

Judgments affirmed.

LLOYD *v.* McWILLIAMS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

No. 109. Argued and submitted December 10, 1890. — Decided December 15, 1890.

When a trial by jury in a Circuit Court is waived by agreement, and the case is tried by the court, no questions are open for revision here, unless the record shows a finding of facts in accordance with the provisions of Rev. Stat. §§ 649, 700; and in such case, when brought here, the judgment of the Circuit Court will be presumed to be right and will be affirmed, if it appears that that court had jurisdiction of the subject matter and of the parties.

This was an action to recover duties alleged to have been illegally exacted. When the cause was reached on the docket, argument was begun on the part of the plaintiff in error; but the court interrupted the counsel and declined to hear further argument. The case is stated in the opinion.

Mr. J. P. Tucker for plaintiff in error. *Mr. Charles Levi Woodbury* was with him.

Mr. Assistant Attorney General Maury for defendant in error.

Argument for the Motion.

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

In this cause, trial by jury was waived by agreement of the parties in writing, duly filed, and the case was tried by the court. But the record discloses no finding upon the facts, either general or special, in accordance with the statute, (Rev. Stat. §§ 649, 700,) and no questions are therefore open to our revision as an appellate tribunal.

As the Circuit Court had jurisdiction of the subject matter and the parties, its judgment must be presumed to be right, and on that ground *Affirmed.*

SMITH *v.* GALE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

No. 580. Submitted December 22, 1890. — Decided January 5, 1891.

The day of the entry of judgment or decree must be excluded in computing the time for taking an appeal or bringing a writ of error to review it.

THIS was a motion to dismiss an appeal, on the ground that it "was not taken within the time prescribed by law." It appeared that the final decree was entered of record by the Supreme Court of the Territory of Dakota, on the 25th of May, 1886. The appeal from this decision was allowed, the supersedeas bond was offered and the citation was signed on the 25th day of May, 1888, by the chief justice of that court, and these papers were all filed on that day in the clerk's office of that court.

Mr. A. G. Safford and *Mr. Park Davis* (with whom was *Mr. Melvin Grigsby*) for the motion.

Final judgment was entered in this action on the 25th day of May, 1886, and the appeal to this court was allowed on the 25th day of May, 1888. This motion is made upon the ground that the appeal was not taken within the prescribed time.

It is a general rule that where the computation is to be made *from an act done*, the day on which the act is done is to be included. *Arnold* v. *United States*, 9 Cranch, 104. In common and popular usage the day *a quo* has always been included, and such has been the rule both of the Roman and the common law. *Griffith* v. *Bogert*, 18 How. 158. These cases were cited with approval in *Dutcher* v. *Wright*, 94 U. S. 553.

The foregoing cases are distinguishable from another class of cases wherein the computation is to be made *from a particular day*, and not *from an act done*. The general current of the latter authorities is that the day thus designated is excluded. *Sheets* v. *Selden*, 2 Wall. 177; *Best* v. *Polk*, 18 Wall. 112.

The case falls within the rule laid down in the former class of decisions. The entry of judgment was an act done on the 25th day of May, 1886, and inasmuch as no fraction of a day can be considered, it must be referred to the earliest moment of that day, and the day should be counted. By counting that day the two years within which the appeal could be taken expired on the 24th day of May, 1888, and the appeal was allowed one day too late.

Mr. Enoch Totten opposing.

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

In computing the two years after the entry of a final judgment, decree or order, sought to be reviewed in this court, within which the writ of error must be brought or the appeal taken, the day of the entry of such judgment, decree or order should be excluded. *Credit Co.* v. *Arkansas Central Railway Co.*, 128 U. S. 258.

The motion to dismiss the appeal in this cause is therefore

Denied.

SIRE *v.* ELLITHORPE AIR BRAKE CO.

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

No. 1479. Submitted December 15, 1890. — Decided January 5, 1891.

In this case, on a motion to dismiss a writ of error, for want of jurisdiction in this court, or to affirm the judgment, it was held that, though this court had jurisdiction, there was sufficient color for the motion to dismiss to warrant this court in considering the motion to affirm, and that the latter motion must be granted.

The propriety of questions put to a witness cannot be passed upon intelligently unless the bill of exceptions shows the character of the evidence previously put in.

The case having been tried by the court without a jury, it was held that the facts found justified the conclusion of law.

A paper which forms no part of a bill of exceptions, and is signed only by an attorney, and purports to be exceptions to findings of fact and the conclusion of the judge thereon, cannot be regarded as a bill of exceptions, or as part of the bill of exceptions signed by the judge, irrespectively of the point that this court cannot review the findings of fact.

As the writ of error appeared to have been sued out merely for delay, the judgment was affirmed with damages at the rate of ten per cent.

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

Mr. Samuel Ashton for the motion.

Mr. J. Hubley Ashton, *Mr. Chauncey Shaffer* and *Mr. Albert I. Sire* opposing.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law, brought in the Circuit Court of the United States for the Southern District of New York, by the Ellithorpe Air Brake Company, an Illinois corporation, against Henry B. Sire. The plaintiff is engaged in the business of constructing elevators and putting them into buildings. The complaint sets forth a contract between the plaintiff and the defendant for the plaintiff to furnish and erect for the

defendant two hydraulic passenger elevators and two safety steam passenger elevators, in buildings in the city of New York, in eighty to ninety days from the date of the receipt of approved plans, for $6750, one half to be payable when the machines were in the buildings, and the other half when the elevators were in running order, with a provision that if the defendant should delay the plaintiff in shipping or erecting the elevators, then both of the payments should be due on the date named for completion, and that any deferred payment should bear interest. The complaint further alleges that the plaintiff caused the elevators to be constructed, ready for shipment, within the time specified, and to be set up, in running order, in the buildings, in accordance with the contract; that the two hydraulic elevators were duly shipped, and within the time specified the machinery was placed in the buildings, and one of them was set up in running order, and the other one was very nearly set up, when the plaintiff and its workmen were stopped and prohibited by the defendant from further proceeding with the work; that, after the two safety steam elevators were ready for shipment, and were about to be shipped, the defendant requested the plaintiff not to ship them, as he was not ready for them and desired to make some changes, and he directed it to hold them in store until further orders from him, all of which the plaintiff caused to be done; that the defendant refused to accept the same or permit the plaintiff to ship them or set them up; that the plaintiff is and always has been willing to carry out its agreement to furnish and erect all of the elevators; that the defendant has refused to permit the plaintiff to perform its contract, or to allow the elevators to be erected, or to make the payments therefor, except the sum of $1900 on account; that, in consequence, the elevators have become wholly lost to the plaintiff, and it has sustained damage to the amount of $6750 and the interest thereon, no part of which has been paid, except the $1900; that the plaintiff has sustained additional loss by way of special damage, and has been compelled to employ extra workmen and to do extra work and labor in the buildings, and to incur other expenses, amounting to $2500, to

the damage of the plaintiff in all of $7000, for which amount, with interest from the commencement of the suit, it asks judgment.

The answer of the defendant sets up a general denial, except that he admits that he has paid $1900; and avers that the contract between the parties, in respect to the four elevators, was in writing; and that the plaintiff has failed to perform the provisions of the contract, while the defendant has observed them. It also sets up a counter-claim, and claims $6000 damages for the failure of the plaintiff to perform the contract, alleging that by reason thereof the defendant had been prevented from renting the buildings or occupying part of them himself.

Under a written stipulation duly filed, the case was tried before the court, held by Judge Shipman, without a jury; and he, on the 6th of March, 1890, made his findings and decision (41 Fed. Rep. 662), in pursuance of which a judgment was entered in favor of the plaintiff for $2485, with $158.60 interest from March 14, 1889, amounting in all to $2643.60, and $330.05 costs, making a total of $2973.65. To review this judgment, the defendant has brought a writ of error. The plaintiff now moves to dismiss such writ or to affirm the judgment.

One of the grounds alleged for the motion to dismiss is, that this court has no jurisdiction of the case, because of informalities in the bill of exceptions, the only exceptions presented thereby being alleged errors in rulings admitting evidence. The bill of exceptions does not set forth any part of the evidence on which the questions which were admitted were based. The propriety of the admission of the questions depended entirely upon the state of the evidence, and the bill of exceptions fails to show that. It is further contended, in favor of the motion to dismiss, that deducting the $1900 from the $6750 left only the sum of $4850, with the special damage claim of $2500; that the plaintiff's judgment amounted only to $2485; and that, although the defendant set up a counter-claim for $6000, the record fails to disclose any evidence sustaining it, and therefore the actual amount in controversy between the parties was only $2485, with interest.

We think, however, that inasmuch as the defendant loses by the judgment $2485, exclusive of interest and costs, and in addition to that does not recover anything on account of his counter-claim of $6000, the aggregate amount is sufficient to give this court jurisdiction.

We think, also, that there was sufficient color for the motion to dismiss, to warrant us in considering the motion to affirm; and that the judgment ought to be affirmed.

The bill of exceptions shows objections and exceptions by the defendant to six questions put by the plaintiff to one of its witnesses; but, as before stated, inasmuch as the bill of exceptions fails to show what the character of the evidence was which previously had been put in, it is impossible intelligently to pass upon the propriety of the questions admitted. They related to what was done by the plaintiff with regard to fulfilling the contract, after the plaintiff's proposal to erect the elevators was accepted by the defendant; to the market value of two of the elevators; to what was said between the general manager of the plaintiff and the defendant in regard to those two elevators; to the purpose of the general manager in coming to New York as the representative of the plaintiff; to the value of the work that was done in respect of another elevator; and to the market value of the two hydraulic elevators. It cannot be seen that these questions were improper, or that the answers to them caused any injury or disadvantage to the defendant.

There is no finding of facts by the Circuit Court, separate from that which is contained in the opinion of the judge; but that finding is very full, and is introduced by the words: "Upon said trial, the following facts were found to have been proved and to be true." The facts as found clearly justified the conclusion of law drawn by the court. In its opinion, the court states that neither party complied with the contract, and the plaintiff did not complete the elevators in one of the buildings within the specified time, but that this non-compliance was fully waived by the defendant; that the defendant broke the contract, and there was no wilful abandonment of the work on the part of the plaintiff; that the loss of rent by the

defendant was attributable to his own conduct; that upon the counter-claim no loss or damage was proved for which the plaintiff was liable; that the plaintiff was at all times ready and willing to perform its part of the contract, except in the matter of time, which breach was waived by the defendant; that the plaintiff having in good faith built and completed one of the elevators, though not within the time specified by the contract, and the defendant having accepted the work, the plaintiff could recover the value of that elevator; and that, in regard to another of the elevators, as the plaintiff had delivered it to the defendant, and nearly completed the work of setting it up, and was prevented, without its fault, by the defendant, from completing the performance of the contract, it was entitled to recover its loss, which was its outlay, and amounted to $2050, and also damages for the virtual refusal of the defendant to have the contract carried out in regard to the steam elevators.

There is in the record a paper filed in the Circuit Court eight days after the opinion and findings of the court were filed, which paper forms no part of the bill of exceptions which is signed by the judge, but is a paper signed only by the attorney for the defendant, and purports to be exceptions to certain findings of fact made by the judge and to his conclusion based upon such findings. This paper cannot be regarded as a bill of exceptions, or as part of the bill of exceptions signed by the judge, irrespectively of the point that this court cannot review the findings of fact.

Judgment affirmed, with damages at the rate of ten per cent, as the writ of error appears to have been sued out merely for delay.

Counsel for Parties.

AYERS *v.* WATSON.

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

No. 1356. Argued December 4, 1890. — Decided January 5, 1891.

The allowance of an amendment to an application for the removal of a cause from a State Court, if allowable at all, is a matter of discretion, to which error cannot be assigned.

When the monuments and other landmarks upon a tract of land in Texas correspond in part with the field notes of the survey, and in part either do not conform to it or cannot be found, the footsteps of the original surveyor may be traced backward as well as forward, and any ascertained monument in the survey may be adopted as a starting point for its recovery.

A memorandum made by a public surveyor in Texas at the time of the survey, and deposited in the General Land Office at the time when the title was deposited there, is admissible in evidence to aid in proving the actual footsteps of the surveyor when making the survey.

Original field notes of a public surveyor deposited in the General Land Office of Texas are held by the highest court of that State to be competent evidence to identify the granted premises; and this court, if it doubted as to their admissibility for that purpose, would be largely influenced by such decisions.

A writ of error does not lie for granting or refusing a new trial.

In seeking to trace a survey on the ground, the corner called for in the grant as the "beginning" corner does not control more than any other corner equally well ascertained, and it is not necessary to follow the calls of the grant in the order in which they stand in the field notes; but they may be reversed, and should be when by doing it the land embraced would most nearly harmonize all the calls and objects of the grant.

If an insurmountable difficulty is met with in running the lines of a survey of public land in one direction, and all the known calls of the survey are met by running them in the reverse direction, it is only a dictate of common sense to follow the latter course.

When an instruction asked for has been substantially given, with proper qualifications, it is no error to refuse it.

EJECTMENT. The case is stated in the opinion.

Mr. William E. Earle for plaintiffs in error.

Mr. W. Hallett Phillips for defendant in error.

Opinion of the Court.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case has been before us on two former occasions; in October term, 1884, (*Ayers* v. *Watson*, 113 U. S. 594,) and in October term, 1889 (*Ayers* v. *Watson*, 132 U. S. 394). It has had six trials by jury, in three of which the juries disagreed, and in the other three verdicts were found for the plaintiff.

The case comes before us, as heretofore, on a bill of exceptions, and the first assignment of error relates to a matter of a preliminary character. When the cause came on for trial, the defendant below, Ayers, asked leave to file an amendment to his application for the removal of it from the state court, for the purpose of making additional allegations as to the amount in controversy, as to the citizenship of the parties, etc. The court refused to allow such amendment, and the defendant excepted to this ruling. The allowance of such an amendment (if allowable at all) is a matter of discretion, and error cannot be assigned upon the decision. When the cause was here the first time, one of the errors assigned was, that the court below had refused to remand the cause to the state court. We then held that in this refusal there was no error, and we do not see how this question can be further litigated between the parties.

The principal facts of the case, as elicited by the evidence and shown in the bill of exceptions, are stated in the reports above referred to, and only so much will be repeated as is necessary to an understanding of the points now raised.

The plaintiff, Watson, claimed title to one-third of a league of land situated in Bell County, Texas, being a rectangular tract granted by patent of the State of Texas to the heirs of Walter W. Daws, September 16, 1850, the location and boundaries of which are not disputed; and, on the trial, it was agreed by the parties that the plaintiff was entitled to all the right, title and interest granted by said patent. The defendant Ayers, claimed title under a grant of the government of Coahuila and Texas to one Maximo Moreno, dated October 18, 1833, for a tract containing eleven leagues of land;

and it was admitted on the trial that the defendant held and owned all the right, title and interest created by the said grant. This being the older title, the verdict should have been for the defendant if he had shown that the Moreno grant covered the Daws tract owned by the plaintiff; and whether it did or not was the question in controversy in the cause. The Maximo Moreno grant lies on the north side of the river San Andres, with a perpendicular breadth, easterly and westerly, of about seven miles, and extending back into the country, north-northeasterly, about fourteen miles. The Daws tract, owned by the plaintiff, is situated near the north end of the Maximo Moreno grant, about midway between the eastern and western lines of the same, and the question is, whether the north boundary line of the Maximo Moreno grant is situated so far to the north, as to include the plaintiff's land, or whether it runs southwardly of it.

The field notes of the Moreno grant, embodied in the grant itself, are in the Spanish language, and, translated into English, are as follows:

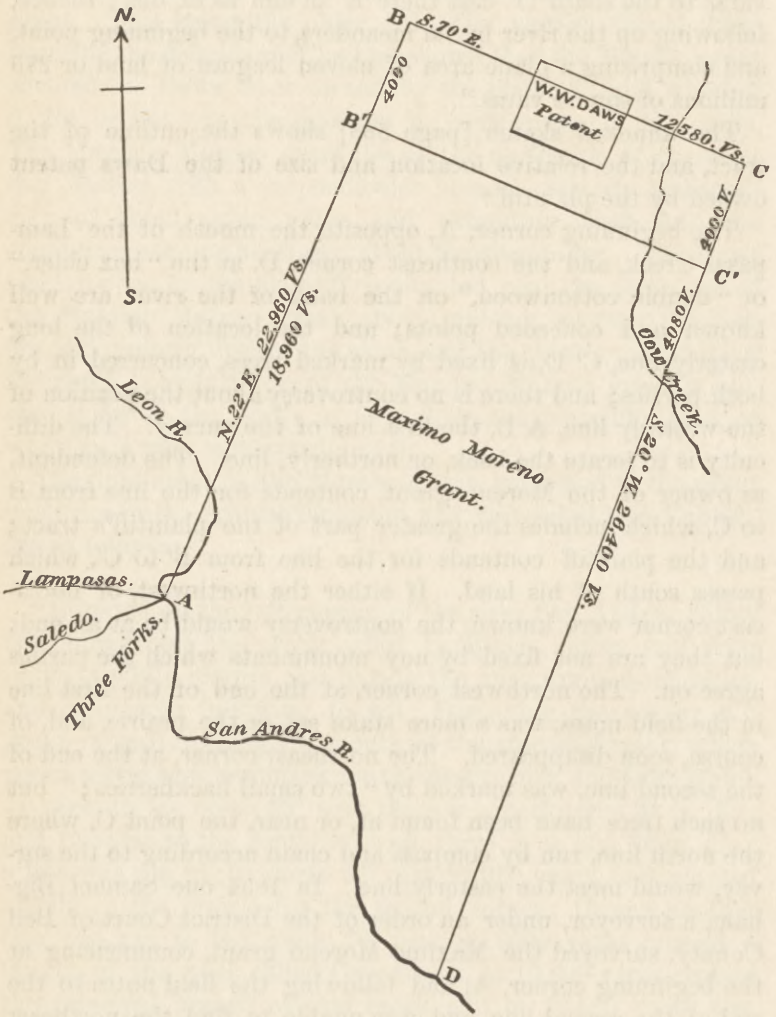
"Situated on the left margin of the river San Andres, below the point where the creek called Lampasas enters said river on its opposite margin, and having the lines, limits, boundaries, and landmarks following, to wit: Beginning the survey at a pecan (nogal) fronting the mouth of the aforesaid creek, which pecan serves as a landmark for the first corner, and from which 14 varas to the north 59° west there is a hackberry 24 in. dia., and 15 varas to the south 34° west there is an elm 12 in. dia.; a line was run to the north 22° east 22,960 varas, and planted a stake in the prairie for the second corner; thence another line was run to the south 70° east, at 8000 varas crossed a branch of the creek called Cow Creek, at 10,600 varas crossed the principal branch of said creek, and at 12,580 varas two small hackberries serve as landmark for the third corner; thence another line was run to the south 20° west, and at 3520 varas crossed the said Cow Creek, and at 26,400 varas to a tree (palo) on the aforesaid margin of the river San Andres, which tree is called in English 'box elder,' from which 7 varas to the

south 28° west there is a cottonwood with two trunks, and 16 varas to the south 11° east there is an elm 15 in. dia.; thence, following up the river by its meanders, to the beginning point, and comprising a plane area of eleven leagues of land or 275 millions of square varas."

The annexed sketch [page 588] shows the outline of the tract, and the relative location and size of the Daws patent owned by the plaintiff:

The beginning corner, A, opposite the mouth of the Lampasas Creek, and the southeast corner, D, at the "box elder," or "double cottonwood," on the bank of the river, are well known and conceded points; and the location of the long easterly line, C′ D, is fixed by marked trees, concurred in by both parties; and there is no controversy about the position of the westerly line, A B, the first line of the survey. The difficulty is to locate the back, or northerly, line. The defendant, as owner of the Moreno grant, contends for the line from B to C, which includes the greater part of the plaintiff's tract; and the plaintiff contends for the line from B′ to C′, which passes south of his land. If either the northwest, or northeast corner were known, the controversy would be at an end; but they are not fixed by any monuments which the parties agree on. The northwest corner, at the end of the first line in the field notes, was a mere stake set in the prairie, and, of course, soon disappeared. The northeast corner, at the end of the second line, was marked by "two small hackberries;" but no such trees have been found at, or near, the point C, where the north line, run by compass and chain according to the survey, would meet the easterly line. In 1854 one Samuel Bigham, a surveyor, under an order of the District Court of Bell County, surveyed the Maximo Moreno grant, commencing at the beginning corner, A, and following the field notes to the end of the second line, and was unable to find the northeast corner, or the easterly line. Some months afterwards he tried again, and by running across the front of the survey, the distance usually taken for an eleven-league front (13,750 varas), he found the eastern line, marked with blazes, which led him to the southeastern corner of the grant (D), when he found

Opinion of the Court.



A. Beginning corner — well known.
D. S. E. corner — well known.
B. N. W. corner, as claimed by defendant.
B'. N. W. corner, as contended by plaintiff.
C. N. E. corner as claimed by defendant.
C'. N. E. corner as contended by plaintiff — 2 hackberries.
C' D. Marked line, well known, 14 miles long.

and identified the trees called for in the field notes. From this point, following the line back N. 20° E., he found the line plainly marked with old blazes for 26,400 varas, (the length called for in the field notes,) crossing Big Elm or Cow Creek at the exact distance from the S. E. corner required by the field notes; and proceeding onward about 560 varas further, on the same course, he found two small hackberries in Cow Creek bottom, at which point, as he testifies, the line gave out. The line passed between these hackberries, and they were each marked on the inside with old blazes facing each other. He took those hackberries to be the identical ones called for in the grant, and fixed upon that point as the northeast corner of the survey. This is the point which the plaintiff claims to be the true northeast corner, and is marked C′ in the sketch. A line run from this point N. 70° W., the reverse of the line called for in the survey, would be the line B′ C′ on the map, and would fall to the south of the plaintiff's land. But B′, the point at which this line would intersect the west line of the survey, would be only about 18,700 varas from the beginning corner, instead of 22,960 varas, as called for in the field notes, or a deficiency of over 4000 varas.

On the other hand, if the field notes are followed, by running the first line from the S. W. corner, N. 22° E., 22,960 varas, and the second line thence S. 70 E., 12,580 varas, the upper line, B C, would be followed, but the distance, 12,580 varas, would fall short of the eastern line at C by about 570 varas, the true distance from B to C being 13,150 varas instead of 12,580. Then, running from C to D, the whole distance is found to be about 30,400 varas instead of 26,400 (as called for in the grant), or about 4000 too much ; and the distance from C to Cow Creek is found to be 7500 or 8000 varas, instead of 3520, as called for in the field notes, or 4000 too much. So that the northeast corner of the tract, as fixed by Bigham at the two hackberries, corresponds very nearly with the several distances called for on the east line, but makes the west line 4000 varas too short ; whilst the northeast corner, as fixed by running the west line its full length as called for by the field notes, and then running the north line as directed therein, and

extending it so as to meet the easterly line, makes the easterly line 4000 varas too long.

The truth is, the original survey must in some parts have been imperfectly executed, or errors must have crept into the field notes. Frank W. Johnson was the surveyor — long well known as principal surveyor of the Austin and Williams colony. His deposition was taken in 1878, and again in 1880, forty-five and forty-seven years after the survey was made. He does not say what time of the year he made the survey, but William Duty, his chain-bearer, says it was in the spring. Both say that it was made in 1833, and was never made but once. Johnson is positive that he followed the courses and distances designated in the field notes of the grant for the first two lines, but that the last line, the easterly one of the tract, though run and marked, was not measured, but only estimated as to length or distance. But the field notes give the distance from the N. E. corner to Cow Creek 3520 varas, and from the N. E. corner to the San Andres River 26,400 varas, which would make the distance from Cow Creek to the San Andres 22,880 varas, which, by subsequent surveys, is found to be precisely accurate. This correspondence for such a long distance (over 12 miles) could hardly have been the result of conjecture; and the evidence of the chain-bearer is, that the easterly line, as well as the westerly and northerly lines, was actually measured by chaining. If this was so, (and it was for the jury to determine whether it was or not,) the judge was entirely right in charging that the footsteps of the original surveyor might be traced backward as well as forward; and that any ascertained monument in the survey might be adopted as a starting point for its recovery. This is always true where the whole survey has been actually run and measured, and ascertained monuments are referred to in it. *Ayers* v. *Harris*, 64 Texas, 296; *Ayers* v. *Lancaster*, 64 Texas, 305; *Scott* v. *Pettigrew*, 72 Texas, 321.

On the question of the true location of the northern boundary line of the Moreno grant, evidence was adduced by both parties. The defendant showed by surveyors who had recently gone over the lines that there were old marked trees in the

north line of the survey claimed by him, and that the easterly line was continued to that line by old marked trees extending northerly from the two hackberries discovered by Bigham. The plaintiff, in rebuttal, adduced evidence to show that by blocking these trees the marks and blazes relied on were found to be of comparatively recent origin not more than 18 or 20 years old in 1886.

Duty, the chain-bearer, who was examined several times on the subject, and contradicted himself a good deal, on his last examination, taken by deposition in 1886, testified that the two hackberries found by Bigham, and established by him as the northeast corner, appeared to him (Duty) to be in a location like that where the northeast corner was established in 1833, and that the northeast corner, as claimed by the defendant, is in a location entirely different from that in which said corner was established in the original survey. He also said that the corner was made, not in the prairie, but in the bottom timber, and that he does not think that the corner is a hundred varas from the place claimed by the plaintiff.

The testimony of this witness is not entitled to much weight, but, being corroborated by the existence of the two hackberries discovered by Bigham, and by the distances from that point to Cow Creek and to the San Andres River, it may be regarded as not so entirely worthless as to be absolutely rejected. The testimony of several other witnesses, including surveyors, was taken to show the situation of the different lines and points named in the grant, and of the condition of the marked trees claimed by the respective parties to be indicative of the true location.

In addition to the two hackberries, relied on by the plaintiff as fixing the position of the N. E. corner and the northerly line of the Moreno survey, he contended that the respective distances of the creeks and water-courses, called for by the field notes on said line, corresponded with the actual distances found on the line run from said hackberries, and did not correspond with the actual distances found on the line claimed by the defendant. To show this more clearly, the plaintiff offered in evidence a certified copy of certain field notes in a

field book on file in the General Land Office of Texas, as the original English field notes of the Moreno survey made by Frank W. Johnson. In his deposition, Johnson had testified that his field notes of the survey were made in English, and reported to the empressario, and by him transcribed and translated into Spanish, and thus carried into the title. C. W. Pressler, chief draughtsman of the General Land Office, testified that these field notes were claimed to have been made by Johnson. DeBray, Spanish clerk in the land office, testified that he had heard Johnson claim that this field book was written by him. There was also a map or sketch of old surveys, including the Moreno survey, bound up in an atlas, regarded as the work of Johnson, and which had been in the General Land Office as far back as the witnesses had knowledge of it. Pressler testified that it was claimed by Johnson to have been filed by him, and that he (Pressler) had known it to have been in the land office since December, 1850, and that the words and figures on it resembled Johnson's handwriting. A certified copy of this map, and the said certified copy of the original field notes of the Moreno eleven-league survey, as also a photographic copy of the latter, were admitted in evidence against the objection of the defendant.

The following is a copy of the field notes referred to:

"Sunday, 21st, surveyed for Samuel Sawyer 11 leagues of land, beginning on the N. side of San Andres, opposite the mouth of Lampasas, at a pecan 18 in. diam., bearing N. 59 W. — vs. from a hackberry 24 in. and S. 34 W. 15.2 vs. from an elm 12 in.; thence N. 22 E. 22,960 vs. to the corner, a stake in the prairie; thence S. 70 E. 1690 vrs. to a branch of Cow Creek, 4500 vrs. to 2nd branch, 8000 vrs. to 3rd branch, 11,060 vrs. to Cow Creek, 12,580 vrs. to the corner, two small hackberries; thence S. 20 W. 3520 vrs. to Cow Creek; 7500 to N. W. corner of 2nd tract, a stake bearing N. 77 E. 93.3 vrs. from a hackberry 8 in. to Spring branch 23,640 vrs., 23,700 vs.; to bottom prairie 24,360 vs.; crossed same branch to the corner, a box elder, 26,400 vs., bearing S. 48 W. 7.2 vs. from a forked cottonwood 48 in., and S. 11 E. 16.4 vrs. from an elm 15 in."

These are evidently the field notes of the same survey that was carried into the grant. It seems that it was made for one Sawyer, and afterwards used for the Moreno grant, which was not issued until October, 1833. Duty, the chain-bearer, says the survey was made in the spring of that year; and the 21st of April came on Sunday in the year 1833. These notes are more full than the field notes in the grant, as they call for four streams crossing the north line, whilst the grant mentions only two of them. The four are as follows: 1690 varas from the N. W. corner to a branch of Cow Creek; 4500 varas to a second branch; 8000 varas to a third branch; 11,060 varas to the Cow Creek itself. The witness Turner, for many years county surveyor of Bell County, who was employed by the defendant to trace the eastern and northern lines of the Moreno grant in 1880, testifies that by running the north line westerly from the two hackberries the first stream is reached at the distance called for in the field notes; that the distance between the first and second is also right; between the second and third the distance is too great; but between the third and fourth, and between the fourth stream and the N. W. corner (as claimed by the plaintiff), the distances agree with the field notes; — whilst the north line, as claimed by the defendant, crosses only three creeks, and none of them are in any way near the distances called for in any of the field notes. As rivers and streams are natural monuments, entitled to weight in any survey, it is manifest that these English field notes of Johnson must have had an important bearing in the trial.

The map or sketch, as before observed, contained an outline of the Moreno eleven-league tract, and of the streams which traverse it, with notes in Spanish of the courses and distances of the different lines. These notes begin with the easterly line, which is described as "Norte 20° Este, 26,400," [N. 20° E. 26,400]. The north line is partially obliterated, but enough of the notation remains to show that it was measured from east to west. The west line is described as "18,400 Sur 22° Oeste," [*i.e.* 18,400 S. 22° W.]. This shows that the length of the west line was therein made what it should be to correspond with the length of the east line as called for in all the surveys,

and, so far as it goes, is evidence of a survey beginning at the southeast corner and running north, and then west, and then south, the reverse of the course which Johnson says he pursued. When it is recollected that his testimony was given forty-five years after the survey was made, and that the field notes, which he undoubtedly had regard to, may have been written out in reverse order after the outdoor work was done, the fact that this old map or sketch exhibits a survey entirely consistent in all its parts, which the field notes do not, gives it considerable interest and value as independent evidence.

The admission of the field notes and map is one of the errors assigned on the present hearing; and the question of their admissibility will be now considered. These very field notes were admitted in evidence in a recent case in Texas, in an action between the appellant Ayers, as plaintiff, and Harris and others, defendants, and their admission was sanctioned by the Supreme Court of Texas on appeal. *Ayers* v. *Harris*, 77 Texas, 108. The court, in its opinion, says:

"The evidence, we think, places it beyond doubt that the survey mentioned in the field book as made for Samuel Sawyer was a survey of the same land that was titled to Maximo Moreno, and the only survey that was ever made of it. It cannot be doubted, upon this evidence, that Johnson having made the survey for Sawyer a few months before, adopted it when ordered to make a survey for Moreno, without making a resurvey.

"The memorandum made by him at the time of the survey and deposited in the General Land Office at the same time that the title itself was deposited there, and carefully preserved ever since, is spoken of by its custodians and produced as an archive. In the case of *Cook* v. *Dennis*, 61 Texas, 248, a similar document was spoken of by this court as an archive and held to be admissible in evidence.

"Even if it cannot strictly be held an archive of the General Land Office and admissible as such, it was clearly proved in this case to be a memorandum of the survey made by the surveyor at the time the work was done, and as such we think it was clearly admissible to aid in proving the actual footsteps of the surveyor when making the survey.

"Very great difficulty existed in ascertaining where the lines of the survey were actually run. Aided by all the evidence that could be secured, and guided by all the rules recognized as being proper to be observed in such cases, repeated trials of the question have been had with conflicting results.

"It is a well recognized rule that the declarations of the surveyor may be proved under the circumstances existing at the time of the trial of this cause. Such evidence can certainly rank no higher and cannot be so safe or satisfactory as evidence written down by the surveyor at the time. The only difference that we can see between the field notes taken from the field book and those contained in the title is with regard to the number and distances of some of the objects called for, and we think the notes contained in the field book could not have had any other tendency than to aid in showing where the north line of the Moreno survey was actually placed by the surveyor.

"The photographic copy was admissible for what it was worth on the question as to whether the west line of the survey was actually measured.

"The charge requested and refused would have tended to destroy the effect of the evidence." pp. 114, 115.

By reference to the case of *Cook* v. *Dennis*, (61 Texas, 246,) cited in the above quotation, it seems that similar evidence in all respects was received in that case, and its admission approved by the Supreme Court. The court said:

". . . To aid in the identification of the land, appellant offered to read as evidence a certified copy of the original field notes of the survey. It seems that these field notes were made out in the English language, and passed to the commissioner for extending grants; that they were translated into the Spanish language, and, as thus translated, were incorporated into the grant. The courses and distances along the meanders of the river, as given in the original, were omitted in the translation. Therefore, it was to supply the omission and to aid the grant that the certified copy was offered in evidence. These original field notes were archives in the general land office, and would ordinarily be admissible in aid of the grant. But the objections urged in this case, and upon

which the court acted in excluding the evidence, were these: The survey was made some five months prior to extending the grants, and was made prior to the order of survey. At that early period, the practice of making the survey, and afterwards obtaining the order of survey, generally prevailed. While such proceedings might not have been strictly regular, such irregularity has never been considered as affecting the validity of the survey or the grant based thereon. The commissioner for extending grants having recognized the survey by extending the grant, it was not a valid objection to the admission of the certified copy that the survey was made before the order of survey, and previous to extending the grant. This rejected evidence would, to some extent at least, tend to establish the identity of the land embraced in the grant, and ought to have been admitted." pp. 247, 248.

It thus appears that these original field notes deposited in the General Land Office, though not forming a part of the documentary title, are nevertheless regarded by the Supreme Court of Texas as competent evidence for the purpose of aiding the grant in regard to the identification and boundaries of the granted premises. Courts have always been liberal in receiving evidence with regard to boundaries which would not be strictly competent in the establishment of other facts. Old surveys, perambulation of boundaries, even reputation, are constantly received on the question of boundaries of large tracts of land. The declarations of surveyors made at the time of making a survey have been admitted; and at all events, it seems to be now a recognized rule of the land law of Texas that field notes of surveyors, especially if deposited in the General Land Office, are to be received as evidence on this subject. If we had any hesitation on the admissibility of such evidence as a general question, we should be largely influenced in the present case by the decisions of the Supreme Court of the State. In our opinion, therefore, the admission of this evidence was not error. In this country a liberal rule on the subject has been adopted in most of the States. The point was considerably discussed by Mr. Justice Lamar in delivering the opinion of the court in *Clement* v. *Packer*, 125 U. S. 309,

a case arising in Pennsylvania, in which, in view of the law prevailing in that State, we held that the declarations of a deceased surveyor, whilst making a survey, were admissible to identify a monument pointed out by him as a corner of the same survey, established in making the original survey many years before, in which he had participated. In *Hunnicutt* v. *Peyton*, a Texas case, 102 U. S. 333, we held that by the decisions of that State such declarations, to be admissible, must be made on the spot whilst running or pointing out the line, or doing something with regard to it, and not at a different place, where it was only spoken of incidentally. Mr. Justice Strong, however, who delivered the opinion in that case, showed that the Texas decisions had gone the length of admitting the evidence of declarations of a deceased surveyor, whilst making a survey of the tract in question, and of a deceased chain-bearer who had pointed out to the witness the place of a corner. See the subject quite fully discussed by Mr. Justice Field, when Chief Justice of California, in *Morton* v. *Folger*, 15 California, 275, 279, 282. But the recent decisions of the Supreme Court of Texas, above cited, are sufficient to control our views in the present case.

The evidence being concluded, the judge delivered his charge, and the jury rendered a verdict for the plaintiff. Before examining the errors assigned in relation to the charge and refusals to charge as requested, the third assignment of error may be disposed of. This was the refusal of the court to grant a new trial. And as to this, we have only to repeat what we have so often endeavored to impress upon counsel, that error does not lie for granting or refusing a new trial.

Although no errors are expressly assigned on argument upon the charge itself, but only upon the refusal of the judge to give certain instructions asked for by the defendant, yet in order to show the general view of the case which was taken by the judge, and the bearing of the instructions asked and refused, we give below the principal portion of the charge actually given. The judge said:

"Our purpose and your duty is to follow the tracks of the surveyor, so far as we can discover them on the ground with

reasonable certainty, and where he cannot be tracked on the ground we have to follow the course and distance he gives, so far as not in conflict with the tracks we can find that he made; and you will constantly bear in mind, in considering the proof in this case, that in fixing the boundaries of a grant the rule requires that course shall control distance as given in the calls of the field notes of the survey, and that marked trees, designating a corner or a line on the ground, shall control both course and distance. In order to reconcile or elucidate the calls of a survey in seeking to trace it on the ground the corner called for in the grant as the 'beginning' corner does not control more than any other corner actually well ascertained, nor are we constrained to follow the calls of the grant in the order said calls stand in the field notes there recorded, but are permitted to reverse the calls and trace the lines the other way, and should do so whenever by so doing the land embraced would most nearly harmonize all the calls and the objects of the grant.

"There has been proof given you tending to show where the two small hackberries called for as the intersection of the eastern and north lines of the grant actually stood at a distance from the lower corner on the river corresponding to the length of the eastern line of said grant; and if the proof satisfies you that the two hackberries mentioned in the testimony of the witnesses Sam. and Pat. Bigham were the hackberries called for and marked by the original surveyor as a corner of said grant, in that case a line drawn from the point where said hackberries stood N. 70 W. until it intersects the western line of said grant will bound the eleven-league grant upon the north, and if the Daws one-third of a league is situated wholly north of this line it does not conflict with said eleven-league grant, and you will find for the plaintiff.

"If the proof does not satisfy you that the two hackberries mentioned in the testimony of the witnesses were the two hackberries called for by the original surveyor to serve as a landmark for corner at the intersection of the back (or north) line with the east line of said grant, and if a consideration of the whole proof satisfies you that the original surveyor began

the survey at the 'cottonwood' corner (the S. E. corner) and marked and measured the east line and did not actually trace and measure the west line of said grant, you should follow these footsteps of the surveyor, and from the point where you find his footsteps stop (for it is not disputed that this line is marked to a greater distance than the distance called for in the grant as the length of this line) — from this point where you find the footsteps stop you will run a line N. 70 W. to the west line of said grant for the north or back line; and if this line so run will fall wholly south of the Daws survey you will find for the plaintiff.

"If from the proof you are not able to fix the place where the two hackberries called for in the grant as a landmark to designate the N. E. corner of the Moreno grant then stood, and the proof does not satisfy you that to reverse the calls and trace the lines the other way would most nearly harmonize all the calls with the footprints left by the surveyor, you will fix the boundaries of the Moreno grant by the courses and distances of the first and second lines of the survey, extending the second line so as to meet the recognized east line, extended on its course to the point of intersection with the extended second or north line; and if the north line so fixed will embrace in the Moreno grant any part of the Daws survey, you will find for the defendant."

In our judgment this charge was justified by the testimony in the cause, and, on the whole, gave a correct view of the questions to be solved. The general rules laid down at the commencement are undoubtedly sound. The judge was also correct in saying, as we have already remarked, that the beginning corner does not control more than any other corner actually ascertained, and that we are not constrained to follow the calls of the grant in the order they stand in the field notes, but may reverse them and trace the lines the other way, whenever by so doing the land embraced would more nearly harmonize all the calls and the objects of the grant.

The next paragraph, relating to the two small hackberry trees, and instructing the jury that, if the proof satisfied them that they were the hackberries called for in the original sur-

vey, the north line must be drawn from them, and the verdict must be for the plaintiff, was undoubtedly correct.

The third paragraph, which directed the jury, if the hackberries were not sufficiently proved, and they were satisfied, from a consideration of all the proof, that the original surveyor began the survey at the S. E. corner and marked and measured the east line, and did not actually trace and measure the west line of the grant, they should trace his footsteps, and where they found them to stop they should run a line N. 70° W. for the north line, was, in our view, also correct. There was some evidence to show that the surveyor did commence the survey at the S. E. corner. The old map or sketch clearly showed this; and the correspondences of distances and other evidence showed that the east line must have been actually measured, contrary to the recollection of Mr. Johnson, the surveyor.

The last paragraph directed the jury, if not able to identify the hackberries as the original corner, and not satisfied that to reverse the calls would more nearly harmonize all the calls with the footprints left by the surveyor, they must follow the courses and distances of the survey, which, of course, would give the land to the defendant. This direction was clearly correct. And taking the whole charge together, it covers the whole case.

The first error assigned in regard to the charge is for the refusal of the judge to give the following instruction, requested by the defendant, to wit:

"If the proof satisfies you that there are old blazes along the east line above the hackberries said to have been found by Bigham in 1854, and that such blazes extend to a distance of 4000 varas to the point of intersection with the course of the north or back line as run from the northwest corner as established by its calls, and that such back or north line is also marked with old blazes, and that these lines were so run and marked by the original surveyor in 1833, then in that case you will find for the defendant."

This instruction was substantially given, with proper qualifications, in the first paragraph of the charge, declaring it the

duty of the jury to follow the tracks of the surveyor, so far as discoverable on the ground, with reasonable certainty; and declaring that marked trees, designating a corner or a line on the ground, should control both courses and distances. This gave the defendant the benefit of all he could legitimately ask for in the instruction which he requested; and gave it in a form which better comported with the judge's view of the impression due to the evidence on the subject. A judge is not bound to adopt the categorical language which counsel choose to put into his mouth. Nothing would be more misleading. If the case is fairly put to the jury, it is all that can reasonably be asked. The instruction as requested, if given as an independent proposition, without qualification, was calculated to mislead the jury and draw their attention away from other marks and monuments equally or more controlling. The most controlling evidence of all, if the jury believed it, was that which identified the two hackberries discovered by Bigham as the original trees at the N. E. corner of the tract. Believing that, it ended the controversy. Believing that, the marked trees found farther north in the same easterly line, and the marked trees found in the northerly line, must be considered as having been marked at a later period, as several witnesses who examined them testified. It would not have been fair therefore, to have put forward the instruction asked as a naked independent proposition; for though it be strictly true that if those trees were marked by the original surveyor, they denoted the position of the true line, there were so many considerations affecting the determination of the truth on that point, that an unqualified statement of the proposition as an independent one was not proper. It would have ignored, not only the hackberries, but the Cow Creek bottom, in which there was much evidence to show that the N. E. corner was originally located; and the stream-crossings on the north line itself. Of course, it may be said that all these circumstances would affect the belief of the jury in the identity of the marked trees referred to with those marked by the original surveyor. But the instruction as proposed would have tended to withdraw the minds of the jury from a consideration of this evi-

dence. We think the charge was more correct as the judge delivered it, than it would have been if he had adopted the instruction as proposed by the defendant.

The last paragraph of the charge also gave the defendant the benefit of the lines sought to be established by him, by directing the jury to follow the courses and distances of the survey contained in the grant, if they were not satisfied as to the identity of the two hackberries with those called for in the grant, nor that the original survey was commenced at the S. E. corner. This direction would have led the jury to the identical marked trees referred to in the instruction.

We think there was no error in its refusal.

The fifth assignment of error is for the refusal of the judge to give the following instruction:

"The jury are charged that the field notes which entered into and formed part of the title originally made to Maximo Moreno are those which are to control them in their findings in respect to the work of the surveyor in the field; that they will not consider any field notes of a survey purporting to have been made for Sawyer unless the evidence should show that the field notes last mentioned entered into and were incorporated in the grant made to Moreno, and unless the proof shows that the Sawyer field notes are those which entered into and formed part of the title to Moreno; otherwise they will disregard the Sawyer field notes, and look only to the field notes in the title issued to Moreno."

We think that the refusal was justifiable. The direction that the field notes in the title should control the jury in their findings would have been too absolute and unqualified. There is no real contradiction between the original field notes found in the General Land Office and the field notes contained in the title. The former are only somewhat fuller than the latter in specifying the water-courses crossed by the survey, some of which were omitted in the title; and if the jury were satisfied that the field notes produced from the Land Office were genuine, they would have a right to take them into consideration, and not be governed wholly by the field notes in the title.

The sixth assignment of error is for refusing to give the following instruction:

"If the testimony is not sufficient to identify the two hackberries claimed by the plaintiff as the northeast corner of the Maximo Moreno grant with those called for in the grant, and the jury cannot fix the northeast corner nor the back line by any other marks or monuments, then they shall fix it by the courses and distances of the first and second lines of the survey, except that the second line shall be extended so as to meet the recognized east line, as marked and extended beyond the hackberries, and in that case they shall find for the defendant."

This charge was substantially contained in the last paragraph of the charge actually given by the judge, with this qualification, that the jury should not be satisfied that the original survey was commenced at the S. E. corner of the tract. We think that the qualification was correctly made, and that the charge was right, and that in the refusal to give the instruction asked for there was no error.

The seventh assignment relates to the refusal to give the following instruction:

"If the testimony is not sufficient to identify the two hackberries claimed by the plaintiff as the northeast corner of the Maximo Moreno grant with those called for in the grant, and the jury believe from the evidence that the Maximo Moreno survey was actually made on the ground by commencing at the beginning corner as called for in the grant and actually running out and tracing with a chain the upper or western line as called for (except the offset to avoid crossing the river), and that the northwest corner was fixed at a point on the course called for in the grant at the end of the northwest corner so established, the surveyor did actually run out and trace with a chain on the course called for to the northeast corner, they must find for the defendant."

This instruction was also substantially given in the last paragraph of the charge, and is involved in the whole charge taken together. We think there was no occasion for it, and no error in refusing to give it.

The last assignment of error relates to the refusal of the following instruction, to wit:

"It would not be proper to reverse the calls of the grant made to Maximo Moreno and to run in reverse course from the southeast corner for the purpose of ascertaining where the northeast corner would be found by the measurement called for in the grant, if the evidence satisfies the jury that the surveyor actually began the survey at the corner called the beginning corner in the field notes and from that corner ran and measured the western and northern lines on the ground."

We think the instruction was properly refused. As already intimated, the judge was right in holding as he did, and in instructing the jury, that the beginning corner of a survey does not control more than any other corner actually well ascertained, and that we are not constrained to follow the calls of the grant in the order said calls stand in the field notes, but are permitted to reverse the calls and trace the lines the other way, and should do so whenever by so doing the land embraced would most nearly harmonize all the calls and the objects of the grant. If an insurmountable difficulty is met with in running the lines in one direction, and is entirely obviated by running them in the reverse direction, and all the known calls of the survey are harmonized by the latter course, it is only a dictate of common sense to follow it.

The judgment is *Affirmed.*

PRESTON *v.* PRATHER.

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

No. 115. Argued December 11, 1890. — Decided January 5, 1891.

When a case is heard, on stipulation of the parties, by the court without the intervention of a jury, and its special findings cover all the disputed questions of fact, and there is in the record no bill of exceptions taken to rulings in the progress of the trial, the correctness of the findings on the evidence is not open for consideration here.

Gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negligence in its keeping; and whether that neg-

Statement of the Case.

ligence existed is a question of fact for the jury to determine; or to be determined by the court where a jury is waived.

The reasonable care which a bailee of another's property entrusted to him for safe keeping without reward must take, varies with the nature, value and situation of the property and the bearing of surrounding circumstances on its security.

Persons depositing valuable articles with banks for safe-keeping without reward have a right to expect that such measures will be taken as will ordinarily secure them from burglars outside and from thieves within; that whenever ground for suspicion arises an examination will be made to see that they have not been abstracted or tampered with; that competent men, both as to ability and integrity, for the discharge of these duties will be employed; and that they will be removed whenever found wanting in either of these particulars.

In this case persons engaged in business as bankers received for safe-keeping a parcel containing bonds, which was put in their vaults. They were notified that their assistant cashier, who had free access to the vaults where the bonds were deposited, and who was a person of scant means, was engaged in speculations in stocks. They made no examination as to the securities deposited with them, and did not remove the cashier. He stole the bonds so deposited. *Held*, that the bankers were guilty of gross negligence, and were liable to the owner of the bonds for their value at the time they were stolen.

When bonds originally deposited with a bank for safe-keeping are by agreement of the bailor and bailee made a standing security for the payment of loans to be made by the bank to the owner of the bonds, the bailee becomes bound to give such care to them as a prudent owner would extend to his own property of a similar kind.

The plaintiffs below, the defendants in error here, were citizens of Missouri, and for many years have been copartners, doing business at Maryville, in that State, under the name of the Nodaway Valley Bank of Maryville. The defendants below were citizens of different States, one of them of Michigan and the others of Illinois, and for a similar period have been engaged in business as bankers at Chicago, in the latter State. In 1873 the plaintiffs opened an account with the defendants, which continued until the spring of 1883. The average amount of deposits by them with the defendants each year during this period was between two and four hundred thousand dollars. Interest was allowed at the rate of two and one-half per cent on the deposits above three thousand dollars, but nothing on deposits under that sum.

On the 7th of July, 1880, the plaintiffs purchased of the

defendants four per cent bonds of the United States to the nominal amount of twelve thousand dollars; but, the bonds being at a premium in the market, the plaintiffs paid for them, including the accrued interest thereon, thirteen thousand and five dollars. The purchase was made upon a request by letter from the plaintiffs; and all subsequent communications between the parties respecting the bonds, and the conditions upon which they were to be held, are contained in their correspondence. The letter directing the purchase concluded with a request that the defendants send to the plaintiffs a description and the numbers of the bonds, and hold the same as a special deposit. In the subsequent account of the purchase rendered by the defendants the plaintiffs were informed that the bonds were held on special deposit subject to their order. The numbers of the bonds appear upon the bond register kept by the defendants, and the bonds remained in their custody until some time between November, 1881, and November, 1882, when they were stolen and disposed of by their assistant cashier, one Ker, who absconded from the State on the 16th of January, 1883. The present action was brought to recover their value.

[It appeared that about a year before he absconded, information was given to the bank that some one in its employ was speculating on the Board of Trade in Chicago, and an inquiry revealed the fact that Ker was that person. Although he was supposed to be dependent entirely on his salary, and although he had free access to the vaults where the securities of the bank, including these bonds, were deposited, he was continued in the service of the bank until the theft took place.

At the trial a jury was waived by stipulation. The court found special findings of fact, which were not excepted to, and gave judgment for the plaintiffs. 29 Fed. Rep. 498. The defendants sued out this writ of error.]

Mr. John P. Wilson for plaintiffs in error, with whom was *Mr. P. S. Grosscup* for Kean, one of the plaintiffs in error.

I. The stolen bonds were held as a special deposit at the date when they were stolen. *Reynes* v. *Dumont*, 130 U. S.

354; *Duncan* v. *Brennan*, 83 N. Y. 487; *Wyckoff* v. *Anthony*, 90 N. Y. 442; *Neponset Bank* v. *Leland*, 5 Met. 259.

II. The bonds being held on special deposit, plaintiffs in error would be liable for their loss only in the event of such loss being caused by their gross negligence, which is not established by the facts found by the court. *Foster* v. *Essex Bank*, 17 Mass. 479; *S. C.* 9 Am. Dec. 168; *Giblin* v. *McMullen*, L. R. 2 P. C. 317; *Whitney* v. *National Bank of Brattleboro*, 55 Vermont, 154; *Allentown Bank* v. *Rex*, 89 Penn. St. 308; *Tompkins* v. *Saltmarsh*, 14 S. & R. 275; *National Bank* v. *Graham*, 100 U. S. 699.

III. The facts found by the court are insufficient to sustain the judgment, even if the bonds were held under an agreement that the same should be collateral for overdrafts. *Smith* v. *First National Bank*, 99 Mass. 605; *S. C.* 97 Am. Dec. 59; *Allentown Bank* v. *Rex*, 89 Penn. St. 308; *Scott* v. *National Bank of Chester Valley*, 72 Penn. St. 471.

Mr. W. P. Fennell and *Mr. M. D. Brainard* also filed a brief for Gray, plaintiff in error.

Mr. Huntington W. Jackson for defendants in error.

Mr. Robert Hervey also filed a brief for defendants in error.

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

By the defendants it was contended below in substance, and the contention is renewed here, that the bonds being placed with them on special deposit for safe-keeping, without any reward, promised or implied, they were gratuitous bailees, and were not chargeable for the loss of the bonds, unless the same resulted from their gross negligence, and they deny that any such negligence is imputable to them.

On the other hand, the plaintiffs contended below, and repeat their contention here, that, assuming that the defendants were in fact simply gratuitous bailees when the bonds were deposited with them, they still neglected to keep them with the care which such bailees are bound to give for the protec-

tion of property placed in their custody; and further, that subsequently the character of the bailment was changed to one for the mutual benefit of the parties.

Much of the argument of counsel before the court, and in the briefs filed by them, was unnecessary — indeed, was not open to consideration — from the fact that the case was heard, upon stipulation of parties, by the court without the intervention of a jury, and its special findings cover all the disputed questions of fact. There is in the record no bill of exceptions taken to rulings in the progress of the trial, and the correctness of the findings upon the evidence is not open to our consideration. Rev. Stat. § 700. The question whether the facts found are sufficient to support the judgment is the only one of inquiry here.

Undoubtedly, if the bonds were received by the defendants for safe-keeping, without compensation to them in any form, but exclusively for the benefit of the plaintiffs, the only obligation resting upon them was to exercise over the bonds such reasonable care as men of common prudence would usually bestow for the protection of their own property of a similar character. No one taking upon himself a duty for another without consideration is bound, either in law or morals, to do more than a man of that character would do generally for himself under like conditions. The exercise of reasonable care is in all such cases the dictate of good faith. An utter disregard of the property of the bailor would be an act of bad faith to him. But what will constitute such reasonable care will vary with the nature, value and situation of the property, the general protection afforded by the police of the community against violence and crime, and the bearing of surrounding circumstances upon its security. The care usually and generally deemed necessary in the community for the security of similar property, under like conditions, would be required of the bailee in such cases, but nothing more. The general doctrine, as stated by text writers and in judicial decisions, is that gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negligence in its keeping. But gross negligence in such cases is nothing

more than a failure to bestow the care which the property in its situation demands; the omission of the reasonable care required is the negligence which creates the liability; and whether this existed is a question of fact for the jury to determine, or by the court where a jury is waived. See *Steamboat New World* v. *King*, 16 How. 469, 474, 475; *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 383; *Milwaukee & St. Paul Railway* v. *Arms*, 91 U. S. 489, 494. The doctrine of exemption from liability in such cases was at one time carried so far as to shield the bailees from the fraudulent acts of their own employés and officers, though their employment embraced a supervision of the property, such acts not being deemed within the scope of their employment.

Thus, in *Foster* v. *Essex Bank*, 17 Mass. 479, the bank was, in such a case, exonerated from liability for the property entrusted to it, which had been fraudulently appropriated by its cashier, the Supreme Judicial Court of Massachusetts holding that he had acted without the scope of his authority, and, therefore, the bank was not liable for his acts any more than it would have been for the acts of a mere stranger. In that case a chest containing a quantity of gold coin, which was specified in an accompanying memorandum, was deposited in the bank for safe-keeping, and the gold was fraudulently taken out by the cashier of the bank and used. It was held, upon the doctrine stated, that the bank was not liable to the depositor for the value of the gold taken.

In the subsequent case of *Smith* v. *First National Bank in Westfield*, 99 Mass. 605, 611, the same court held that the gross carelessness which would charge a gratuitous bailee for the loss of property must be such as would affect its safe-keeping, or tend to its loss, implying that liability would attach to the bailee in such cases, and to that extent qualifying the previous decision.

In *Scott* v. *National Bank of Chester Valley*, 72 Penn. St. 471, 480, the Supreme Court of Pennsylvania asserted the same doctrine as that in the Massachusetts case, holding that a bank, as a mere depositary, without special contract or reward, was not liable for the loss of a government bond depos-

ited with it for safe-keeping, and afterwards stolen by one of its clerks or tellers. In that case it was stated that the teller was suffered to remain in the employment of the bank after it was known that he had dealt once or twice in stocks, but this fact was not allowed to control the decision, on the ground that it was unknown to the officers of the bank that the teller gambled in stocks until after he had absconded, but at the same time observing that:

"No officer in a bank, engaged in stock gambling, can be safely trusted, and the evidence of this is found in the numerous defaulters, whose peculations have been discovered to be directly traceable to this species of gambling. A cashier, treasurer, or other officer having the custody of funds, thinks he sees a desirable speculation, and takes the funds of his institution, hoping to return them instantly, but he fails in his venture, or success tempts him on; and he ventures again to retrieve his loss, or increase his gain, and again and again he ventures. Thus the first step, often taken without a criminal intent, is the fatal step, which ends in ruin to himself and to those whose confidence he has betrayed."

As stated above, the reasonable care which persons should take of property entrusted to them for safe-keeping without reward will necessarily vary with its nature, value and situation, and the bearing of surrounding circumstances upon its security. The business of the bailee will necessarily have some effect upon the nature of the care required of him, as, for example, in the case of bankers and banking institutions, having special arrangements, by vaults and other guards, to protect property in their custody. Persons therefore depositing valuable articles with them, expect that such measures will be taken as will ordinarily secure the property from burglars outside and from thieves within, and that whenever ground for suspicion arises an examination will be made by them to see that it has not been abstracted or tampered with; and also that they will employ fit men, both in ability and integrity, for the discharge of their duties, and remove those employed whenever found wanting in either of these particulars. An omission of such measures would in most cases be deemed cul-

pable negligence, so gross as to amount to a breach of good faith, and constitute a fraud upon the depositor.

It was this view of the duty of the defendants in this case, who were engaged in business as bankers, and the evidence of their neglect, upon being notified of the speculations in stocks of their assistant cashier who stole the bonds, to make the necessary examination respecting the securities deposited with them, or to remove the speculating cashier, which led the court to its conclusion that they were guilty of gross negligence. It was shown that about a year before the assistant cashier absconded the defendant Kean, who was the chief officer of the banking institution, was informed that there was some one in the bank speculating on the Board of Trade at Chicago. Thereupon Kean made a quiet investigation, and the facts discovered by him pointed to Ker, whom he accused of speculating. Ker replied that he had made a few transactions, but was doing nothing then and did not propose to do anything more, and that he was then about a thousand dollars ahead, all told. It was not known that Ker had any other property besides his salary. His position as assistant cashier gave him access to the funds as well as the securities of the bank, and he was afterwards kept in his position without any effort being made on the part of the defendants to verify the truth of his statement, or whether he had attempted to appropriate to his own use the property of others.

Again, about two months before Ker absconded, one of the defendants, residing at Detroit, received an anonymous communication, stating that some one connected with the bank in Chicago was speculating on the Board of Trade. He thereupon wrote to the bank, calling attention to the reported speculation of some of its employés, and suggesting inquiry and a careful examination of its securities of all kinds. On receipt of this communication Kean told Ker what he had heard, and asked if he had again been speculating on the Board of Trade. Ker replied that he had made some deals for friends in Canada, but the transactions were ended. The defendants then entered upon an examination of their books and securities, but made no effort to ascertain whether the special depos-

its had been disturbed. Upon this subject the court below, in giving its decision, *Prather* v. *Kean*, 29 Fed. Rep. 498, after observing that the defendants knew that Ker had been engaged in business which was hazardous and that his means were scant, and after commenting upon the demoralizing effect of speculating in stocks and grain, as seen in the numerous peculations, embezzlements, forgeries and thefts plainly traceable to that cause, and the free access by Ker to valuable securities, which were transferable by delivery, easily abstracted and converted, and yet his being allowed to retain his position without any effort to see that he had not converted to his own use the property of others, or that his statements were correct, held that it was gross negligence in the defendants not to discharge him or place him in some position of less responsibility. In this conclusion we fully concur.

The second position of the plaintiffs is also well taken, that, assuming the defendants were gratuitous bailees at the time the bonds were placed with them, the character of the bailment was subsequently changed to one for the mutual benefit of the parties. It appears from the findings that the plaintiffs, subsequently to their deposit, had repeatedly asked for a discount of their notes by the defendants, offering the latter the bonds deposited with them as collateral, and that such discounts were made. When the notes thus secured were paid, and the defendants called upon the plaintiffs to know what they should do with the bonds, they were informed that they were to hold them for the plaintiffs' use as previously. The plaintiffs had already written to the defendants that they desired to keep the bonds for an emergency, and also that they wished at times to overdraw their account, and that they would consider the bonds as security for such overdrafts. From these facts the court was of opinion that the bonds were held by the defendants as collateral to meet any sums which the plaintiffs might overdraw; and the accounts show that they did subsequently overdraw in numerous instances.

The deposit, by its change from a gratuitous bailment to a security for loans, became a bailment for the mutual benefit of both parties, that is to say, both were interested in the

transactions. For the bailor it obtained the loans, and to that extent was to his advantage; and to the bailee it secured the payment of the loans, and that was to his advantage also. The bailee was therefore required, for the protection of the bonds, to give such care as a prudent owner would extend to his own property of a similar kind, being in that respect under an obligation of a more stringent character than that of a gratuitous bailee, but differing from him in that he thereby became liable for the loss of the property if caused by his neglect, though not amounting to gross negligence.

Two cases cited by counsel, one from the Court of Appeals of Maryland and the other from the Court of Appeals of New York, declare and illustrate the relation of parties under conditions similar to those of the parties before us.

In the case from Maryland, *Third National Bank* v. *Boyd*, 44 Maryland, 47, it appeared that a firm by the name of William A. Boyd & Co. was a large customer of the Third National Bank of Baltimore, and on the 5th of February, 1866, was indebted to it in about $5000. Subsequently, the senior member of the firm, pursuant to an agreement between him and the president of the bank, deposited with the bank certain bonds and stocks as collateral security for the payment of all obligations of himself and of the firm then existing or that might be incurred thereafter, with the understanding that the right to sell the collaterals in satisfaction of such obligations was vested in the officers of the bank. Some of the bonds were subsequently withdrawn and others deposited in their place. While these collaterals were with the bank the firm kept a deposit account, having an average of about $4000, and from time to time, as it needed, obtained on the security of the collaterals discounts ranging from three to fifteen thousand dollars. The firm was not indebted to the bank subsequently to July, 1872, when it paid its last indebtedness; the bonds, however, were not then withdrawn, but left in the bank under the original agreement. In August, 1872, the bank was entered by burglars and certain of the bonds were stolen. In an action by the senior partner against the bank to recover the value of the bonds stolen, it was held: "First.

That the contract entered into by the bank was not a mere gratuitous bailment. . . . Third. That the original contract of bailment being valid and binding, the obligation of the bank for the safe custody of the deposit did not cease when the plaintiff's debt had been paid. Fourth. That the defendant was responsible if the bonds were stolen in consequence of its failure to exercise such care and diligence in their custody and keeping as, at the time, banks of common prudence in like situation and business usually bestowed in the custody and keeping of similar property belonging to themselves; that the care and diligence ought to have been such as was properly adapted to the preservation and protection of the property, and should have been proportioned to the consequence likely to arise from any improvidence on the part of the defendant. Fifth. That the proper measure of damages was the market value of the bonds at the time they were stolen. Whether due care and diligence have been exercised by a bank in the custody of bonds deposited with it as collateral security, is a question of fact exclusively within the province of the jury to decide."

In the case from New York, *Cutting* v. *Marlor*, 78 N. Y. 454, it appeared that the defendant, as collateral security for a loan made to him by a bank, delivered to it certain securities, which were taken and converted by the president to his own use. In an action by the receiver of the bank to recover the amount loaned it was found that the trustees of the bank left the entire management of its business with the president and an assistant, styled manager; that they received the statements of the president without question or examination; that they had no meetings pursuant to the by-laws, and made no examination of the securities, and exercised no care or diligence in regard to them; also, that the president had been in the habit of abstracting securities and using them in his private business, most of them being returned when called for; and that the manager, who had knowledge of this habit, did not take any means to prevent it, nor did he notify the trustees. It was held that the bank was chargeable with negligence, and that the defendant was entitled to counter-

claim the value of the securities; that the bailment was for the mutual benefit of the parties; that the bailee was bound, for the protection of the property, to exercise ordinary care, and was liable for negligence affecting the safety of the collaterals, distinguishing the case from the liability of a gratuitous bailee, which arises only where there has been gross negligence on his part.

It follows, therefore, that whether we regard the defendants as gratuitous bailees in the first instance, or as afterwards becoming bailees for the mutual benefit of both parties, they were liable for the loss of the bonds deposited with them. And the measure of the recovery was the value of the bonds at the time they were stolen. *Judgment affirmed.*

Mr. Chief Justice Fuller did not sit in this case or take any part in its decision.

GREEN *v.* ELBERT.

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

No. 1099. Submitted December 15, 1890. — Decided January 5, 1891.

The transcript of the record of the court below may be filed at any day during the term succeeding the taking the appeal or bringing the writ of error, if the appellee or defendant in error has not in the meantime had the cause docketed and dismissed; but this cannot be done after the expiration of that term, except on application to the court, where a remedy may be found if the applicant was prevented from obtaining the transcript by fraud or contumacy, and is not guilty of laches.

When a return is made and the transcript deposited seasonably in the clerk's office, jurisdiction is not lost by not docketing the case before the lapse of the term; but it may still be docketed if in the judgment of the court it is a case to justify it in exercising its discretion to that effect.

The judgment in the court below in this case was entered July 27, 1887. The writ of error was dated October 3, 1887. It was filed that day in the court below, and was returnable here to October term, 1887, which closed May 14, 1888. The transcript reached the clerk May 10, 1888, but the fee required by the rules was not paid to the clerk. On January 13, 1890, the fee being paid, the transcript was filed and the cause was docketed, and the appearance of the plaintiff in error, who was a member of the bar of this court, was entered. On the 17th of November, 1890, the

Statement of the Case.

defendant in error moved to dismiss the writ of error on the ground of failure to file the transcript or docket the cause within the prescribed period, and notified the plaintiff in error that it would be submitted December 15. *Held*,

(1) That the defendant in error was not bound to have the case docketed and dismissed if he did not choose to do so;

(2) That the motion to dismiss for this cause could be made at any time before hearing, or the court could avail itself of the objection *sua sponte*;

(3) That, as the plaintiff in error was a member of this bar, and notified the clerk in transmitting the transcript that the case was one of his own, the appearance was properly entered;

(4) That the plaintiff in error, being such a member, was bound to know the rules of this court with regard to giving security or making a deposit with the clerk as a condition precedent to the filing of the record and docketing of the case;

(5) That the laches of the plaintiff in error were too gross to be passed over, and that the writ of error must be dismissed.

It is the duty of this court to keep its records clean and free from scandal; and in accordance therewith the court orders the brief of the plaintiff in error to be stricken from the files.

On the 20th day of January, 1887, Thomas A. Green brought his action at law in the Circuit Court of the United States for the District of Colorado against Samuel H. Elbert, William E. Beck, Joseph C. Helm, Merrick A. Rogers, Lucius P. Marsh and J. Jay Joslin, claiming damages in the sum of $50,000. April 18th, 1887, he filed his amended complaint in said cause, alleging a conspiracy on the part of defendants Rogers, Marsh and Joslin to bring about a disbarment of plaintiff for filing a bill in equity, in the discharge of his duties as solicitor of one Mrs. Newton and her husband, against Joslin, making certain charges against defendants Rogers and Marsh; and that the defendants Elbert, Beck and Helm, who were at the time judges of the Supreme Court of Colorado, confederated and conspired with defendants Rogers, Marsh and Joslin, to carry out and consummate the original conspiracy, and entered judgment disbarring the plaintiff accordingly.

The complaint purported to be brought and was claimed to be sustainable under sections 1979, 1980 and 1981 of the Revised Statutes, in connection with section 5407, (Rev. Stat. 2d ed., pp. 347, 348, 1047).

Statement of the Case.

Demurrers were filed on behalf of defendants Elbert, Beck and Helm, and, also, of defendants Rogers, Marsh and Joslin, which, upon argument, were sustained by the court, and judgment entered for the defendants, July 27, 1887.

On the third of October, 1887, plaintiff filed his bond, which was duly approved, and a writ of error was allowed and issued, and on the same day he filed a stipulation that the record might be filed in this court, and the cause be docketed at any time during the October term, 1887, of the court. Citation, returnable to October term, 1887, was taken out and served. On the 20th of April, 1888, the plaintiff filed in the Circuit Court in said cause his *præcipe* for transcript of record, which was accordingly made out, as directed, and certified by the clerk of that court May 5, 1888. On that day plaintiff wrote to the clerk of this court, as follows: "I herewith send you a record in a case of my own. Will send you a docket fee and a stipulation to submit under Rule 20 in a few days. Please send me two blanks for entering the appearance of attorneys for both parties." This letter and the transcript reached the clerk May 10, 1888, and he replied: "Yours of the 5th inst., also transcript of record in case of Green *v.* Elbert et al., duly received. I enclose two blank orders for appearance as requested. I notice what you say as to furnishing deposit on account of costs and sending stipulation to submit case under the 20th Rule." Nothing further appears to have been done in the premises until, on January 7, 1890, plaintiff in error wrote the clerk as follows: "I find on looking over my books at New Year's that I had forgotten to send you a docket fee in the case of Thomas A. Green *v.* Samuel Elbert, William E. Beck, Joseph C. Helm, Merrick A. Rogers, Lucius P. Marsh and J. Jay Joslin. This record was sent up from the U. S. Circuit Court for the District of Colorado, a year or more ago, on writ of error. If you have not docketed the case please do so at once, and inform me by return mail. I herewith send you draft on New York for $25." Upon the receipt of this letter, January 13, 1890, the transcript of record was filed, and the clerk wrote on the 15th: "Yours of the 7th inst., enclosing draft on N. Y. for $25, on account of deposit in case of Green

v. Elbert et al., duly received, and I have docketed the case No. 1541 for Oct. term, 1889, entering your appearance of counsel for pl'ff in error." To this plaintiff in error replied January 20: "Yours of the 15th inst. at hand. I have signed and herewith return my appearance in the case of Thomas A. Green *v.* Samuel E. Elbert et al., No. 1541."

November 17, 1890, defendants in error filed a motion to dismiss, with which was united a motion to affirm, and a brief in support thereof, and gave notice to plaintiff in error that such motion would be submitted on the 15th day of December. On the 13th of December a lengthy affidavit of plaintiff in error was filed in the cause, stating that plaintiff "is now and has been for many years past a member of the bar of the United States Circuit Court for the District of Colorado, and also a member of the bar of the Supreme Court of the United States;" that he had been attending to this suit in the Circuit Court and in the Supreme Court in person; that on or about the 5th day of May, 1887, [1888] he caused the transcript of the record, the writ of error, citation and bond, duly certified, to be forwarded to the clerk of the Supreme Court in accordance with a stipulation that the record and writs might be returned at any time during the October term, 1887, of the Supreme Court; and, "as he now remembers and believes, that he requested the clerk of the Supreme Court, at the city of Washington, to file said record as soon as the same should reach him; and affiant further states that he has not now any remembrance or recollection of having neglected anything at all on his part which was necessary for him to do in order to have said record filed in the clerk's office of the Supreme Court of the United States as soon as the same reached the said clerk in the city of Washington;" that he resides more than two thousand miles from the capital, and never has been and is not now familiar with the rules and customs of the clerk and with the manner in which business is transacted by him in his office, and that if he did not comply with all the requirements of the clerk with regard to the filing of the record, it was because he did not understand the same; and that he never has at any time knowingly and intentionally neglected anything

Statement of the Case.

whatever pertaining to the sending and filing of the record or the prosecution of the suit, but always intended to use all due diligence in having the record sent and filed and in vigorously prosecuting his suit; that he has had no time or opportunity, living at the distance he does and being compelled to prepare a brief and argument on the motion to dismiss, to investigate the reason why said record was not duly filed as soon as sent to the clerk; that whatever may have been the reason, affiant has not intentionally in any manner neglected what he supposed and believed was necessary for him to do in order to have the record filed, and has no knowledge or information why it was not filed "from early in May, 1887, [1888] until the 13th day of January, 1890," and that if the clerk had any good reason for not filing the record, or if affiant neglected anything that was necessary for him to do to secure it, this was the result of mistake and ignorance and not of intentional neglect or delay, and he does not believe himself to be in any manner to blame; that defendants in error made no effort to have the case dismissed until nearly one year after the record had been filed, and did not, during the time the record remained unfiled in the office, "if there ever was any such time;" that for at least one year past affiant had been watching said case with great care and diligence, and had just forwarded a complete assignment of errors, and had said case prepared so far as he could prepare the same, at the time he received notice of the motion to dismiss, and was awaiting the usual time when the record in said case should be printed and he could file his brief and argument and be ready to submit the case as soon as reached on the docket; that he had several times attempted to get the attorney for the defendants in error to submit the case under rule twenty, but said attorney had informed him that the defendants in error would not consent to anything of the kind or agree to anything whatever that would speed the final hearing; "that he supposed it was a matter of course, upon the return of the writ of error to the Supreme Court of the United States from a Circuit Court of the United States, that the clerk of the said Supreme Court would immediately, on such return of such writ and a tran-

script of the record, together with the necessary citation and bond, all regularly prepared, at once docket said cause without further delay or without anything more to be done on the part of affiant. Affiant does not now remember whether or not he sent to said clerk a docket fee, and affiant states that he may not at that time have known [or] regard[ed] it as absolutely necessary to do so before a record on the return of the writ of error would be filed in said office; but affiant states that according to the best of his remembrance that he has sent the said clerk the said docket fee, and that he sent the same just so soon as he knew the amount thereof and the said clerk demanded the same; and affiant further states that if there was any delay whatever in this regard, it was not at all intentional on his part and was a mere matter of mistake; and affiant further states that he does not now remember that there was any delay or any mistake made by him in sending said docket fee."

Affiant further says that he has prepared full and elaborate printed briefs, on the merits as well as on the motion, which he asks the court carefully to examine; and reiterates inadequacy of time to investigate the cause or reason why the record was not filed in the time required, if such was the case, as the motion "does not state anything at all to explain why said record was not filed in that time, but simply states that the filing mark upon said record shows that the same was filed in the clerk's office on the 13th day of January, 1890."

"Affiant further states that he has made this affidavit wholly from his remembrance of what he has done and intended to do touching the filing of said record, and from what he understands or did not understand in regard to such matters in the office of the clerk of the said Supreme Court, and if anything in this affidavit should turn out not to be wholly correct it is because affiant has not now and does not remember having had any information or knowledge to the contrary of what he has stated above in this affidavit."

Mr. George A. King, for the motion, submitted on his brief.

Mr. Thomas A. Green in person filed a brief in opposition, and submitted on the same.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

The transcript of the record may be filed at any day during the term succeeding the taking of an appeal or the bringing of a writ of error, if appellee or defendant in error has not in the meantime had the cause docketed and dismissed. But this cannot be done after the expiration of the term, because the writ of error has then become *functus officio*, and the appeal has spent its force. *Credit Co.* v. *Arkansas Central Railway Co.*, 128 U. S. 258; *Evans* v. *State Bank*, 134 U. S. 330. Remedies may be found where the plaintiff in error or appellant is entirely free from laches or want of diligence, and is prevented from obtaining the transcript by the fraud of the other party, the order of the court or the contumacy of the clerk. *United States* v. *Gomez*, 3 Wall. 752, 763; *Ableman* v. *Booth*, 21 How. 506; *Grigsby* v. *Purcell*, 99 U. S. 505.

When, however, a return is made, and the transcript seasonably deposited in the clerk's office, jurisdiction is not lost by the lapse of the term, but the cause may still be docketed, if the circumstances are such as to justify the court in exercising its discretion to that effect. *Edwards* v. *United States*, 102 U. S. 575; *Richardson* v. *Green*, 130 U. S. 104. This we cannot be called upon to do arbitrarily. To the proper conduct of the business of this court rules are necessary, and, having been prescribed, reasonable compliance with them is expected and must be insisted upon. When they are disregarded, dispensation from the consequences can only be extended where the circumstances furnish adequate excuse. Were this otherwise, our regulations might become more honored in the breach than the observance, and the recognition of due procedure would be seriously weakened and impaired.

The writ of error in this case bears date October 3, 1887, and was filed on that day in the Circuit Court. It was returnable to October term, 1887, of this court, which term closed by adjournment on May 14, 1888. The transcript reached the clerk May 10, 1888, and if then docketed would have been in time. And as jurisdiction was kept alive by the delivery of

the record, this court had power to direct it to be subsequently placed upon the docket, or to treat the act of the clerk in docketing it as providently done.

The transcript was filed and the cause docketed January 13, 1890. The judgment sought to be revised was entered July 27, 1887, and it thus appears that the case was not docketed until the expiration of considerably more than two years after the entry of such judgment, the statutory limitation upon the bringing of the writ of error. Rev. Stat. § 1008.

The defendants in error filed their motion to dismiss on November 17, 1890, and gave notice that it would be submitted December 15, following. They were not bound to docket and dismiss the case if they did not choose to do so, and the plaintiff in error occupies no position entitling him to complain because they did not. Nor did they wait until the two years had run before making their motion. On the contrary, that time had expired some months before the transcript was filed. The motion may be made at any time before hearing, or the objection be availed of by the court *sua sponte*, *Grigsby* v. *Purcell*, 99 U. S. 505, although delay in presenting the point has sometimes been referred to as an element in combination with others, justifying leniency in its disposition.

By Rule 9, the appearance of counsel for the party docketing the case must be entered upon the filing of the transcript. As the plaintiff in error was a member of this bar, and notified the clerk in transmitting the transcript that the case was one of his own, we think his appearance was properly entered when the record was filed, and might have been so on May 10, 1888, if the case had then been docketed. By Rule 10, the plaintiff in error, or appellant, is required, on docketing a case and filing the record, to enter into an undertaking with the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise to satisfy the clerk in that behalf. The practice, since the act of March 3, 1883, 22 Stat. 631, c. 143, has been for parties to deposit the sum of $25 in lieu of a fee bond, and the rule provides for the subsequent advance of the cost of printing the record and the fee for its preparation. The fee for docketing a case and filing and indorsing the trans-

cript of the record is fixed by the rule at five dollars, and the twenty-five dollars above referred to covers that sum and the estimated costs up to the time for printing.

The plaintiff in error was a member of this bar, and especially bound to know the rules, and that it was a condition precedent to the filing of the record and docketing of the case that security should be given to or that a deposit should be made with the clerk. But knowledge need not be imputed; for by his letter of May 5, 1888, accompanying the record, plaintiff in error showed actual knowledge of the necessity for the deposit, and assured the clerk that it would be forwarded, while at the same time he requested blanks for the entry of appearance of counsel on both sides. In view of this letter, it is impossible for us to doubt that the plaintiff in error was, as every member of our bar should be, sufficiently acquainted with our rules and the conduct of business in the clerk's office. But he forwarded no deposit nor fee bond, nor paid the specified fee for filing the transcript, nor transmitted a formal appearance, though blanks had been sent him May 10, 1888, as requested.

On January 7, 1890, a year and eight months after his letter of May 5, 1888, the plaintiff in error remitted to the clerk the sum of $25, which is the deposit required, and wrote that he found, on looking over his books at New Year's, that he had forgotten to send "a docket fee" in the case, and requested the case to be docketed at once if that had not already been done. The transcript was accordingly filed and the cause docketed January 13, 1890, as already stated, and plaintiff in error informed thereof.

We regard the laches of plaintiff in error as too gross to be passed over. We cannot treat his omission to forward the deposit soon after May 5, 1888, nor the twenty months' neglect that thereupon ensued, as attributable to ignorance or inadvertence, or as excusable upon any ground heretofore deemed sufficient. Mere carelessness in the inception may have finally resulted in forgetfulness; but we cannot, therefore, absolve him from the penalty legitimately attaching to this disregard of our rules. The writ of error must be dismissed.

We regret that we find ourselves compelled to add something further. The printed argument of plaintiff in error contains many allegations wholly aside from the charges made in his complaint, and bearing reproachfully upon the moral character of individuals, which are clearly impertinent and scandalous, and unfit to be submitted to the court. It is our duty to keep our records clean and free from scandal.

The brief of the plaintiff in error will be stricken from the files and the writ of error dismissed, and it is so ordered.

In re CONVERSE, Petitioner.

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

No. 1283. Argued and submitted December 18, 1890. — Decided January 5, 1891.

It is no defence to an indictment under one statute that a defendant might also be punished under another statute.

A State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court while acting within its jurisdiction.

When a person accused of crime within a State is subjected, like all other persons in the State, to the law in its regular course of administration in courts of justice, the judgment so arrived at cannot be held to be such an unrestrained and arbitrary exercise of power as to be utterly void.

The Fourteenth Amendment to the Constitution was not designed to interfere with the power of a State to protect the lives, liberty and property of its citizens, nor with the exercise of that power in the adjudications of the courts of the State in administering the process provided by its laws.

In convicting the petitioner of embezzlement under section 9151 of Howell's Annotated Statutes of Michigan, upon his confessing that he had been guilty of embezzlement as attorney-at-law, instead of under section 9152, the Supreme Court of Michigan did not exceed its jurisdiction, or deliver a judgment which abridged his privileges or immunities, or deprived him of the law of the land of his domicil.

THIS was a petition for a writ of *habeas corpus* upon the ground that the petitioner is "deprived of his liberty without

due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States." It appears from the record annexed to the petition that petitioner was arraigned in the Circuit Court for the county of Calhoun in the State of Michigan, upon an information in the words and figures following, to wit: "Herbert E. Winsor, prosecuting attorney for the county of Calhoun aforesaid, for and in behalf of the people of the State of Michigan, comes into said court, in the December term thereof, A.D. 1887, and gives here to understand and be informed that Eugene M. Converse, late of the city of Battle Creek, in the county of Calhoun and State of Michigan, heretofore, to wit, on the twenty-eighth day of July, in the year one thousand eight hundred and eighty-five, at the city of Battle Creek, in said county of Calhoun and State of Michigan, being then and there agent to John E. Dunning and Daniel W. Hall, the executors of the last will and testament of Rice Hall, deceased, and being then and there the agent of them, the said John E. Dunning and Daniel W. Hall, executors of the last will and testament of Rice Hall, deceased, and not being then and there an apprentice nor other person under the age of sixteen years, did, by virtue of his said employment, then and there and whilst he was such agent as aforesaid, receive and take into his possession certain moneys to a large amount, to wit, to the amount of four thousand dollars, of the value of four thousand dollars, of the property of the said John E. Dunning and Daniel W. Hall, as such executors, and which said money came to the possession of the said Eugene M. Converse by virtue of said employment, and the said money then and there fraudulently and feloniously did embezzle and convert to his own use without the consent of the said John E. Dunning and Daniel W. Hall, as such executors as aforesaid, his said employers, and that so the said Eugene M. Converse did then and there, in manner and form aforesaid, the said money, the property of the said John E. Dunning and Daniel W. Hall, as executors as aforesaid, his said employers, from the said John E. Dunning and Daniel W. Hall, as such executors as aforesaid, feloniously did steal, take, and carry away,

contrary to the form of the statute in such case made and provided and against the peace and dignity of the people of the State of Michigan;" and thereupon filed the following "memorandum of plea:" "As an attorney-at-law I am guilty of embezzlement of thirty-five hundred, $3500.00, dollars, that being the amount collected and received by me less my reasonable fees, as such attorney, for collecting the money;" which plea was entered by the circuit judge thus: "Eugene M. Converse, the respondent in this cause, having been duly arraigned at the bar in open court and the information being read to him by Herbert E. Winsor, prosecuting attorney, pleaded thereto 'guilty of embezzlement of money to the amount of three thousand five hundred dollars.'"

On the 12th of December, 1887, judgment was entered in these words:

"Eugene M. Converse, the respondent in this cause, having been, upon his plea of guilty, duly convicted of the crime of embezzlement, as appears by the record thereof, and the said court having examined into the facts of the case, and having also privately examined the respondent concerning the circumstances which induced him to plead guilty, and having therefrom ascertained that said plea was made freely, with full knowledge of the nature of the accusation and without undue influence, and the respondent thereafter having been, on motion of the prosecuting attorney, brought to the bar of the court for sentence, and having then and there been asked by the court if he had anything to say why judgment should not be pronounced against him, and alleging no reason to the contrary: therefore it is ordered and adjudged by the said court, now here, that said Eugene M. Converse be confined in the State prison at Jackson, Michigan, at hard labor, for the period of five years from and including this day."

Petitioner was thereupon committed to the State prison in accordance with the terms of said judgment.

September 11, 1888, this order was entered by the Calhoun Circuit Court:

"In this cause a motion to amend the respondent's plea by inserting the following words, 'As an attorney-at-law I am

guilty of embezzlement of thirty-five hundred, $3500.00, dollars, that being the amount collected and received by me, less my reasonable fees as such attorney for collecting the money,' having been duly entered, and after reading and filing affidavits, and after hearing John C. Patterson, of counsel for respondent, in favor of said motion, it is ordered by the court, now here, that said motion be, and the same is hereby, denied."

Application having been made to the Supreme Court of Michigan in that behalf, the following order was entered by the Calhoun Circuit Court on the 3d of December, 1888:

"Pursuant to an order of the Supreme Court made on the ninth day of October, eighteen hundred and eighty-eight, and on motion of John C. Patterson, attorney for the defendant for the purpose of this motion, it is ordered that the entry of the arraignment and plea of the said defendant in said cause, entered on the fifth day of December, in the year one thousand eight hundred and eighty-seven, upon journal number twelve of this court, at page 568, be, and the same is hereby, corrected now as of the date last named, so as to read as follows, to wit:

"Eugene M. Converse, the respondent in this cause, having been duly arraigned at the bar in open court and the information having been read to him by Herbert E. Winsor, prosecuting attorney, pleads thereto in the following words, to wit: 'As an attorney-at-law I am guilty of embezzlement of thirty-five hundred dollars, that being the amount collected and received by me, less my reasonable fees as such attorney for collecting the money.'"

The case was then taken to the Supreme Court of Michigan by writ of error, the following errors being assigned: "First. The court erred in rendering the judgment in said cause upon the plea of the defendant pleaded therein. Second. There is no sufficient plea in said cause to form a legal basis for the judgment rendered thereon. Third. The judgment is for a felony and the plea is for a misdemeanor only, and the judgment is broader than the plea, and the penalty imposed is unauthorized by the plea and statute. Fourth. The judgment

against the defendant is for embezzlement in the capacity of agent, and the defendant never pleaded guilty of such crime and he has never been convicted of such crime by a jury. Fifth. The information does not allege the money converted was the property of any private person or partnership within the statute, but avers it to be the property of the executors of an estate;" and upon due consideration the judgment was affirmed by that court. The opinion of the court was delivered by Sherwood, C. J., Champlin, Morse and Long, JJ., concurring, and Campbell, J., dissenting, and will be found reported in *People* v. *Converse*, 74 Michigan, 478.

The petition for the writ of *habeas corpus* alleged among other things, that the information charged an offence under section 9151 of Howell's Annotated Statutes of Michigan, and that the petitioner has never pleaded guilty to that offence in manner and form as charged, but that he had pleaded guilty of an offence or misdemeanor under section 9152 of said statute, and that the Calhoun Circuit Court had no authority or constitutional right to render the judgment against the petitioner, which was rendered.

The sections referred to are as follows:

"Section 9151. If any officer, agent, clerk, or servant of any incorporated company, or of any city, township, incorporated town or village, school district or other public or municipal corporation, or if any clerk, agent or servant of any private persons, or of a copartnership, except apprentices and other persons under the age of sixteen years, shall embezzle or fraudulently dispose of or convert to his own use, or shall take or secrete with intent to embezzle and convert to his own use without consent of his employer or master, any money or other property of another, which shall have come to his possession, or shall be under his charge by virtue of such office or employment, he shall be deemed, by so doing, to have committed the crime of larceny.

"Section 9152. If any attorney-at-law, solicitor in chancery, or other person holding himself out to the public to perform the services usually performed by attorneys or solicitors, in the management of causes, and the collection of judgments,

decrees or other demands, or any register in chancery, clerk of any court of record, sheriff, constable, justice of the peace, or any other officer, shall collect or receive in such capacity any money belonging to another, and shall neglect or refuse to pay the same to the person entitled thereto within a reasonable time after demand thereof, the person so neglecting or refusing, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding four times the amount of money so received, or both, at the discretion of the court." 2 Howell's Annotated Stats. Michigan, p. 2220.

The petition further set forth —

"That due process of law in the State of Michigan is provided for and prescribed by the constitution and statutes of said State in part by the following sections, to wit: 'In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than twelve men in all courts not of record; to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and have the assistance of counsel for his defence.' Constitution of Michigan, Article VI, Section 28.

"'No person shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.' Constitution of Michigan, Article VI, Section 32.

"'No person indicted for an offence, shall be convicted thereof, unless by confession of his guilt in open court, or by admitting the truth of the charge against him, by his plea or demurrer, or by the verdict of a jury, accepted and recorded by the court.' 2 Howell's Annotated Stats. Michigan, p. 2205, Sec. 9069.

"'No person who is charged with any offence against the law, shall be punished for such offence, unless he shall have been duly and legally convicted thereof, in a court having competent jurisdiction of the cause and of the person.' 2 Howell's Annotated Stats. Michigan, p. 2205, Sec. 9071.

"'When any person shall be arraigned upon an indictment, it shall not be necessary, in any case, to ask him how he will be tried; but if, on being so arraigned, he shall refuse to plead or answer, or shall not confess the indictment to be true, the court shall order a plea of not guilty to be entered, and thereupon the proceedings shall be the same as if he had pleaded not guilty to the indictment.' 2 Howell's Annotated Stats. Michigan, p. 2293, Sec. 9518."

The application for the writ was heard by Judge Brown, holding the Circuit Court of the United States for the Eastern District of Michigan, and denied, (his opinion being reported 42 Fed. Rep. 217,) whereupon the cause was brought to this court by appeal.

Mr. John C. Patterson for petitioner, appellant.

Mr. B. W. Huston, Attorney General of the State of Michigan, opposing, submitted on his brief.

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

The Supreme Court of Michigan held that the information charged the respondent with the crime of embezzlement; that the defendant was called upon to plead to this charge when arraigned; that he pleaded guilty of embezzlement, and undoubtedly understood when he made his plea that he was pleading guilty to the felony charged; that this conclusion was fortified by the private examination required by statute to be made by the judge before sentencing upon a plea of guilty, which was shown to have been had in this case; that the fact that the respondent collected the money as an attorney was immaterial; that if the act contained all the elements of embezzlement, he was guilty of the crime and was properly convicted; that an attorney when he collects money for his client acts as the agent of his client as well as his attorney, and if, after making the collection, he appropriates the money to his own use with the intention of depriving the owner of the same, he is guilty of the crime of embezzlement; that the

conviction was warranted by the plea; and that the judgment should therefore be affirmed. As remarked by Judge Brown, it is no defence to an indictment under one statute that a defendant might also be punished under another. And as the highest judicial tribunal of the State of Michigan ruled that the word "agent" in section 9151 of the statutes of that State applied to attorneys-at-law, and as the information charged the defendant with embezzlement under that section, and he pleaded guilty to embezzlement as an attorney-at-law, the affirmance of the conviction necessarily followed. In the view of the statute taken by the court, the plea admitted the truth of the charge.

It is not our province to inquire whether the conclusion reached and announced by the Supreme Court was or was not correct, for we are not passing upon its judgment as a court of error, nor can we consider the contention that the decision was not in harmony with the state constitution and laws.

The single question is whether appellant is held in custody in violation of the Fourteenth Amendment to the Constitution of the United States, in that the State thereby deprives him of liberty without due process of law; for there is no pretence of an abridgment of his privileges and immunities as a citizen of the United States, nor of a denial of the equal protection of the laws. But the State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction. And, conceding that an unconstitutional conviction and punishment under a valid law would be as violative of a person's constitutional rights as a conviction and punishment under an unconstitutional law, we fail to perceive that this conviction and judgment are repugnant to the constitutional provision. Appellant has been subjected, as all persons within the State of Michigan are, to the law in its regular course of administration through courts of justice, and it is impossible to hold that a judgment so arrived at is such an unrestrained and arbitrary exercise of power as to be utterly void.

We repeat, as has been so often said before, that the Four-

teenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offences, but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudications of the courts of a State in administering the process provided by the law of the State. The Supreme Court of Michigan did not exceed its jurisdiction or deliver a judgment abridging appellant's privileges or immunities or depriving him of the law of the land of his domicil. *Arrowsmith* v. *Harmoning*, 118 U. S. 194; *Baldwin* v. *Kansas*, 129 U. S. 52; *In re Kemmler*, 136 U. S. 436.

Judgment affirmed.

RED RIVER CATTLE COMPANY *v.* NEEDHAM.

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

No. 1362. Submitted December 15, 1890. — Decided January 5, 1891.

When the demand in controversy is not for money, but the nature of the action requires the value of the thing demanded to be stated in the pleadings, affidavits will not be received here to vary the value as appearing in the face of the record.

The filing of affidavits as to value will not ordinarily be permitted where evidence of value has been adduced below on both sides, and the proofs have been transmitted, either with or without the announcement of a definite conclusion deduced therefrom.

Where a writ of error is brought, or an appeal taken, without question as to the value, and the latter is nowhere disclosed by the record, affidavits may be received to establish the jurisdictional amount, and counter affidavits may be allowed if the existence of such value is denied in good faith.

If there be a real controversy as to the value of the demand in controversy, it should be settled below in the first instance, and on due notice; not here upon *ex parte* opinions.

The value of the property in dispute in this case was alleged in the petition, but was not an issuable fact. The Circuit Court allowed the writ of error on the *prima facie* showing made by the defendant. The plaintiffs

subsequently presented evidence to the contrary, but that court declined to decide the controversy and referred it to this court. *Held,*

(1) That, under such circumstances it was not proper to allow affidavits as to value to be filed here;

(2) That the jurisdictional value was not made out by a preponderance of evidence.

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

Mr. W. Hallett Phillips for the motion.

Mr. Sawnie Robertson opposing.

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

This was an action of trespass to try title, brought by Needham and others against the Red River Cattle Company in the Circuit Court of the United States for the Northern District of Texas.

The petition alleged the land to be of the reasonable value of $4400. Defendant pleaded not guilty and the statute of limitations. A verdict was rendered in favor of plaintiffs for an undivided one-half interest in the land sued for, and judgment was entered thereon January 24, 1890. A motion for new trial was overruled on the 10th of February, and on that day the defendant filed three affidavits, tending to show that the half interest had a value in excess of $5000, whereupon a writ of error was allowed.

On the 22d of February, plaintiffs filed a motion to set aside the allowance of the writ of error, (stating want of notice of the application for it,) accompanied by four affidavits and a letter from the county where the land was situated, tending to establish that the value of one-half was far less than $5000, upon which the Circuit Court entered the following order: "On this day came on to be heard the motion of the plaintiffs to set aside the writ of error granted herein; and the court having heard and considered said motion, and being of the opinion that the question of the value of the land in controversy is a question that the trial judge is not called upon to

decide, but one to be determined in the Supreme Court on the affidavits if they see fit to consider them, in order to determine their jurisdiction, it is ordered by the court that said motion be refused."

The record having been filed in this court, and notice of a motion to dismiss given, plaintiff in error, without leave first obtained, submits, with its brief upon the motion, eight additional affidavits in reference to value, and defendants in error ask that if these are considered, time may be given to them to produce counter affidavits.

As stated by Mr. Chief Justice Taney, in *Richmond* v. *Milwaukee*, 21 How. 391, in cases in which the value does not, according to the usual forms of proceeding, appear in the pleadings or evidence in the record, affidavits have been received to show that the value is large enough to give jurisdiction to this court; *Course* v. *Stead et ux.*, 4 Dall. 22; *Williamson* v. *Kincaid*, 4 Dall. 19; but "in *Bush* v. *Parker*, 5 Cranch, 257, Mr. Justice Livingston expressed his opinion strongly against giving time to file affidavits of value, and the court refused to continue the case for that purpose." And the Chief Justice added that a practice to postpone or reinstate a case in order to give the party time to furnish such affidavits "would be irregular and inconvenient, and might sometimes produce conflicting affidavits, and bring on a controversy about value occupying as much of the time of the court as the merits of the case." The rule was then declared that "where the value is stated in the pleadings or proceedings of the court below, affidavits here have never been received to vary it or enhance it, in order to give jurisdiction."

In *Talkington* v. *Dumbleton*, 123 U. S. 745, it was accordingly held that when the value of the property in dispute was necessarily involved in the determination of the case in the court below, this court would not, on a motion to dismiss for want of jurisdiction, consider affidavits tending to contradict the finding of that court in that respect; and Mr. Chief Justice Waite remarked: "In *Zeigler* v. *Hopkins*, 117 U. S. 683, 689, where affidavits were submitted, the finding of the court below as to value was not a material question in the case upon

its merits, but was more in the nature of an inquiry for the purpose of determining whether an appeal should be allowed, as in *Wilson* v. *Blair*, 119 U. S. 387. Here, however, the value of the property was one of the questions in the case and necessarily involved in its determination."

In *Zeigler* v. *Hopkins*, this court treated the finding of the court below upon the question of value as entitled to well-nigh conclusive weight; while in *Wilson* v. *Blair*, it was declared to be good practice for the Circuit Court to allow affidavits and counter affidavits of value to be filed, as calculated to save trouble to the parties and to the court. There, as in the case at bar, the district judge holding the Circuit Court, without the formality of deciding the question of value, allowed the writ of error, thus sending the case here on the affidavits free from any decision whatever as to their effect.

In *Gage* v. *Pumpelly*, 108 U. S. 164, the appeal was allowed after a contest as to the value of the matter in dispute, Judge Blodgett, who held the Circuit Court, filing an opinion upon the question; and Mr. Chief Justice Waite, speaking for the court, said: "When an appeal has been allowed, after a contest as to the value of the matter in dispute, and there is evidence in the record which sustains our jurisdiction, the appeal will not be dismissed simply because upon examination of all the affidavits we may be of the opinion that possibly the estimates acted upon below were too high."

The result of the cases may be fairly stated to be: (1) Where the demand is not for money but the nature of the action requires the value of the thing demanded to be stated in the pleadings, affidavits will not be received here to vary the value as appearing upon the face of the record; (2) nor will the filing of such affidavits be ordinarily permitted where evidence of value has been adduced below on both sides, and the proofs have been transmitted either with or without the announcement of a definitive conclusion deduced therefrom; (3) but where the writ of error is brought or appeal taken without question as to the value, and the latter is nowhere disclosed by the record, affidavits may be received to establish the jurisdictional amount, and counter affidavits may be

allowed if the existence of such value is denied in good faith.

The practice of permitting affidavits to be filed in this court arose from instances of accidental omission, where the value was not really in dispute, and it should not be encouraged to the extent of requiring us to reach a result upon that careful weighing of conflicting evidence, so frequently involved in determining issues of fact. If there be a real controversy on the point, let it be settled below in the first instance and on due notice; not here, upon *ex parte* opinions, which may embody nothing more than speculative conclusions.

In the case in hand, the value of the whole property was alleged in the petition, but was not an issuable fact, and the Circuit Court allowed the writ of error upon the *prima facie* showing made by the defendant, and on plaintiff's subsequently presenting evidence to the contrary, the controversy was referred to this court. This being the attitude of the case, we do not think it proper to allow affidavits to be filed here as if the question were now raised for the first time. Upon an examination of the record as returned, we are clear that the jurisdictional value is not made out by a preponderance of evidence. The motion to dismiss will, therefore, be sustained.

Writ of error dismissed.

UNITED STATES *ex rel.* REDFIELD *v.* WINDOM.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 1301. Argued December 18, 1890. — Decided January 12, 1891.

Cases cited in which it has been decided that a person holding public office may be compelled by writ of mandamus to perform the duties imposed upon him by law.

When the duty which the court is asked to enforce by mandamus is plainly ministerial, and the right of the party applying for the writ is clear, and he is without other adequate remedy, the writ may issue; but, where the effect of the writ is to direct or control the head of an Executive Department in the discharge of a duty involving the exercise of judgment or discretion, it should not issue.

Opinion of the Court.

Cases cited and referred to in which a writ of mandamus will not be issued to compel the performance of even a purely ministerial act.

M. furnished material and performed labor for the United States under a contract, and when the work was done and the materials furnished he presented his account to the proper officer for adjustment and settlement. The balance was found to be correct so far as the labor and material were concerned, but it was also found that through penalties and forfeitures that balance was liable to be materially reduced. It also appeared that M. was indebted to mechanics, sub-contractors, laborers and material men in a large amount for work done and materials furnished under the contract. The treasury officials agreed with M. that this account should be adjusted without enforcing the penalties and forfeitures, if he would consent that his said indebtedness should be paid out of the sum so allowed, and that the control of the money should not be given up until those claims were satisfied. He assented, and a draft was prepared accordingly. M. did not comply with those conditions, but instead thereof applied to the Supreme Court of the District of Columbia for leave to file an application for a writ of mandamus, to compel the Secretary of the Treasury to deliver the draft to him, without first making the agreed payments. That officer made a return to the petition, setting forth the foregoing facts. *Held*,

(1) That the return showed disputed questions of law and fact, which ought not to be tried in a proceeding for a mandamus, and that this was sufficient cause for the discharge of the rule and the refusal to issue the writ;

(2) That the agreement between M. and the accounting officers was lawful, and, if carried out, would have been proper.

THE case is stated in the opinion.

Mr. Franklin H. Mackey for the relator.

Mr. Assistant Attorney General Maury for the Secretary of the Treasury, in opposition.

MR. JUSTICE LAMAR delivered the opinion of the court.

This is a writ of error to the Supreme Court of the District of Columbia, to reverse a judgment of that court dismissing the relator's petition for a peremptory writ of mandamus against the respondent, William Windom, Secretary of the Treasury, commanding him to deliver to the relator a Treasury draft for $ 12,536 which had been lawfully assigned to the relator by William Mitchell, the payee.

Opinion of the Court.

The petition and its amendments allege that William Mitchell, in pursuance of a contract made with the United States on the third of September, 1886, furnished certain material and performed certain labor for the Life Saving Service, in the construction and repair of seven houses on the coast of Long Island in the State of New York; that his account therefor was adjusted on the 11th of February, 1888, by the Treasury Department, as shown by a letter from the Commissioner of Customs to Mitchell, stating that the sum of $12,536 was due to Mitchell, and adding, "draft will be remitted;" that the account having been so adjusted nothing remained to be done by the Treasury officials but the ministerial duty of issuing a warrant and remitting to Mitchell a draft for the amount so found to be due; and that a draft, dated the 15th of February, 1888, was issued to Mitchell, but instead of being delivered to him or paid, it was sent to Captain George W. Moore, of the Life Saving Service, at New York, with instructions not to deliver said draft, nor to pay its amount to Mitchell, until Mitchell should pay certain claims presented against him, at the Treasury Department, to persons alleging his indebtedness to them for materials and labor. The petition further averred that there was no discretion residing in the respondent, the Secretary of the Treasury, or in any other government officer, as to the delivery of said draft; that none of those officers had any right or authority to interfere with Mitchell's private business, or to adjust any claims against him; that such an attempt on their part was a violation of Mitchell's rights and of the rights of the relator as his assignee; that Moore, in pursuance of the Secretary's instructions, did not deliver the draft or pay the amount of it to Mitchell, but returned it to the Secretary of the Treasury, who still retains the same in his possession, and still refuses to deliver it or to pay any part thereof to either Mitchell or the relator; that the said claims against Mitchell are unjust, and amount to $12,503, or within $33 of the amount of said draft; that even if they were not unjust the relator has no authority, under the terms of the assignment, to pay them, and has no means to pay them until the said draft is either delivered or

paid to him; that the respondent does not deny the correctness of the account, or the amount found to be due to Mitchell, but bases his refusal to deliver the draft simply upon the ground that Mitchell has not paid the sums demanded of him by the persons who presented their claims at the Treasury Department; that about the 27th day of February, 1888, Mitchell, under certain proceedings under the laws of New York, set forth the indebtedness of the United States to him, and the detention of the draft as herein stated; that the Supreme Court of the city and county of New York, in the course of these proceedings, appointed the relator receiver of all of Mitchell's property, debts, equitable rights, interests, and effects, real and personal; that he, the relator, was duly qualified, and, by virtue of said order, was entitled to demand and to receive the said draft for $12,536; and that Mitchell, for the purpose of enabling the relator to demand and receive said draft, and to apply the proceeds thereof according to the order appointing him receiver, assigned said draft to relator, giving him thereby full power to demand and receive it or the amount expressed in it.

By an amendment, the petition further alleged that "a general appropriation was made by act of Congress to provide for the payment of work to be done in the building and repairing of life-saving stations prior to the performance of the work done under the said contract of September 3, 1886, and that there is sufficient money now in the Treasury of the United States applicable to the payment of the said work so done under said contract." The prayer is for a writ of mandamus against Hon. William Windom, Secretary of the Treasury, commanding him to deliver or cause to be delivered to the relator the said draft, or show cause at an early date, and that such further order may be made in the premises as law and justice may require, or show cause, etc.

This petition and the order to show cause having been agreed by stipulation to be taken as the alternative writ, a demurrer was interposed, which was overruled by the court, and the respondent ordered to make return. Before the return was made, the relator was allowed to make further amendments,

designed to reply to what was expected to be set forth in the return.

The facts stated in the return are averred mainly upon information and belief, as they occurred under a former Secretary, the predecessor of the respondent. It admits that an account was stated by the accounting officers of the Treasury Department on the 11th of February, 1888, under his predecessor, but that said account was stated, and a draft prepared for delivery upon condition, and under the circumstances expressed in the letters of certain officials of the Treasury Department which are filed by the relator as exhibits. It then sets out in substance, though not in the order as here stated, that the respondent is advised and believes that the said amount of $12,536 is not justly due and owing by the United States to Mitchell, or his lawful assignee, for the work done and materials furnished; that the account referred to in the petition was adjusted, and a draft prepared for delivery, upon the condition, previously agreed to by Mitchell, that part of the $12,536, so allowed, should be applied to the satisfaction of the claims of certain mechanics, laborers and material men, by whose work and materials the houses were built and repaired; that Mitchell, under his contract with the government, was liable to a penalty of thirty dollars per day for any delay in completing the work within the time stipulated; that he had actually incurred penalties for delays amounting to $6240; that the remission of these penalties would not have been approved or recommended, and said adjustment of the account would not have been made, and said draft would not have been prepared, but for the above-mentioned conditions agreed to by Mitchell, that he should allow the disbursing officer, to whom the draft was sent, to pay the sub-contractors and workmen out of the proceeds of the draft; that the conditions of the proposed waiver were not complied with by Mitchell, or the relator; that the government has the right to insist upon them, and deduct the penalties from the amount of said account; and that it is the legal right of the respondent to secure a restatement of said account, to cancel said draft, or to take such other course to secure said penalties and

forfeitures to the government as the laws and regulations of the Treasury Department may require. He further averred that to leave the relator to his remedy at law would enable the government to avail itself of the said forfeitures, or other just damages in the premises.

On the hearing, the court discharged the rule and denied the writ.

The main assignment of error is, that the court erred in not deciding that the duty of the Secretary to deliver the draft was purely a ministerial duty, of which the court should enforce the performance by a writ of mandamus. In order to determine whether the case presented by the record is a proper one for a mandamus, it is necessary to recur to certain statutory provisions bearing upon the powers and duties of the Secretary of the Treasury respecting the accounts to be settled in that department, and especially upon his relations to the accounting officers thereof.

The act of June 18, 1878, 20 Stat. 163, c. 265, to organize the Life Saving Service, and that of May 4, 1882, 22 Stat. 55, c. 117, to promote its efficiency, provide that the keepers of life saving stations, and the superintendents thereof, shall have the powers and perform the duties of inspectors of customs. The sections of the Revised Statutes material to be considered are the following:

Section 277 provides that —

"The First Auditor shall receive and examine all accounts accruing in the Treasury Department relating to the receipts from customs, including accounts of collectors, *and other officers of the customs* . . . and after examination of such accounts, relating to the receipts from customs, including the accounts of collectors and other officers of the customs, he shall certify the balances and transmit the same, with the vouchers and certificates, to the *Commissioner of Customs for his decision thereon*, and he shall certify the balances of all *other* accounts, and transmit the same in like manner, to the First Comptroller for his decision thereon."

Sec. 317 provides that —

"The Commissioner of Customs shall examine all accounts

settled by the First Auditor relating to the receipts from customs, including accounts of collectors and other officers of the customs, and certify the balances arising thereon to the Register, [and shall perform all the acts and exercise all the powers relating to the receipts from customs and the accounts of collectors, and the other officers of the customs or connected therewith, devolved by section two hundred and sixty-nine upon the First Comptroller in regard to other receipts and other accounts]."

"SEC. 191. The balances which may from time to time be stated by the Auditor and certified to the heads of Departments by the Commissioner of Customs, or the Comptrollers of the Treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of Departments, but shall be conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts. The head of the proper Department, before signing a warrant for any balance certified to him by a Comptroller, may, however, submit to such Comptroller any facts in his judgment affecting the correctness of such balance, but the decision of the Comptroller thereon shall be final and conclusive, as hereinbefore provided."

The contention of the counsel for the relator is, that Mitchell performed his contract with the United States to construct and repair certain houses for the Life Saving Service; that his account for the work done and the materials furnished was examined by the proper accounting officer; that a balance was found in Mitchell's favor in the amount of $12,536; that this balance was certified by the Commissioner of Customs to the Secretary of the Treasury; and that the Secretary did not dispute this indebtedness of the United States to Mitchell, nor submit to the proper accounting officers any facts affecting the correctness of the said balance, but assented to its correctness by issuing a warrant and having prepared a draft for its payment. It is insisted that the Secretary after issuing this warrant has no power to change or modify the balance thus found and certified; but that his duty to deliver the draft to Mitchell, or his assignee, is purely a ministerial one, and that

the writ of mandamus should issue to compel the performance of that duty.

This argument would be conclusive as to the right of the relator to the remedy prayed for if the facts which it assumes comprised all the facts presented by the record. The statutes which we have quoted are very explicit in designating the officers to whom the right and duty belong of examining and auditing the accounts therein referred to, and of certifying and transmitting the balances of the same to the Commissioner of Customs for his decision thereon; and they expressly provide that when those accounts are examined by those accounting officers in successive grades, the balances stated by the Auditor and certified to the heads of department by the Commissioner shall be conclusive upon the executive branch of the government. There is nothing in the language of these provisions which expressly or by implication vests in the Secretary the power to revise or disallow any part of these accounts. On the contrary, it is clearly his duty to issue a warrant for the payment of any balance without any change or modification, except that before issuing a warrant for any balance certified to by a Comptroller, he may submit to such Comptroller any facts in his judgment affecting the correctness of such balance; but the decision of the Comptroller thereon shall be final and conclusive.

The principles upon which persons holding public office may be compelled by a writ of mandamus to perform duties imposed by law have been distinctly defined and strictly adhered to in a great number and variety of cases before this court. *Marbury* v. *Madison*, 1 Cranch, 137; *Kendall* v. *United States*, 12 Pet. 524; *Decatur* v. *Paulding*, 14 Pet. 497; *Brashear* v. *Mason*, 6 How. 92, 101; *Goodrich* v. *Guthrie*, 17 How. 284; *Ex parte De Groot*, 6 Wall. 497; *Georgia* v. *Stanton*, 6 Wall. 50; *Gaines* v. *Thompson*, 7 Wall. 347; *United States* v. *Seaman*, 17 How. 225, 230; *Ex parte Bradstreet*, 7 Pet. 634; *Harrington* v. *Holler*, 111 U. S. 796; *Reeside* v. *Walker*, 11 How. 272, 290; *United States* v. *Schurz*, 102 U. S. 378, 394, 395; *Butterworth* v. *Hoe*, 112 U. S. 50; *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40.

That principle is that the writ of mandamus may issue where the duty, which the court is asked to enforce, is plainly ministerial, and the right of the party applying for it is clear and he is without any other adequate remedy; and it cannot issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion. The doctrine to be gathered from these cases, as well those in which mandamus was granted as those in which it was refused, especially from the two leading cases, *Kendall* v. *United States*, *supra*, and *Decatur* v. *Paulding*, *supra*, is thus enunciated in *United States ex rel. Dunlap* v. *Black*, *supra*, by Mr. Justice Bradley, who delivered the opinion of the court:

"The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them." p. 48.

It is proper here to remark, as applicable to the determination of this case, that, in the extreme caution with which this remedy is applied by the courts, there are cases when the writ will not be issued to compel the performance of even a purely ministerial act. In a case, for instance, where the intention of the officer, though acting within the scope of his duty, had been frustrated by a clerical mistake, *United States* v. *Schurz*, *supra*; or where the case is one of doubtful right, *N. Y. Life and Fire Ins. Co.* v. *Wilson*, 8 Pet. 291, 302; or in a case where the relator having another adequate remedy, the granting of the writ may in this summary proceeding affect the rights of persons who are not parties thereto, or where it will be attended with manifest hardship and difficulties, *People* v. *Forquer*, Breese, [1 Ill.] 68, (2d ed., 104); *Van Rensselaer* v. *Sheriff of Albany*, 1 Cowen, 501, 512; *Oakes* v. *Hill*, 8 Pick. 46. In *The King* v. *The Lord Commissioners of the Treasury*,

4 Ad. & El. 286, 295, Lord Denman, Chief Justice, said: "If, as has been suggested, it should on any occasion be unsafe, with reference to the public service, to make a payment of this kind, the fact may be stated on return to the mandamus. There might perhaps be occasions on which the Lords Commissioners would be bound to apply the money to particular purposes of a more pressing nature."

We repeat that, if we confine our view of this case, as the counsel for appellee contends that we should, to the adjustment of the account of Mitchell, as stated by the Auditor, the certificate of the balances of the Commissioner of Customs to the Secretary of the Treasury, the issue of the warrant by the latter for the payment of the balance so certified, the preparation of the draft, its transmission to the disbursing officer, the subsequent withholding of it by the Secretary of the Treasury, and his refusal to deliver it either to Mitchell or his assignee, the relator, the case is clearly one of ministerial duty. But the facts, circumstances and conditions set forth in the return of the Secretary of the Treasury place the matter in another and quite a different light. He states in his return that, under the contract of Mitchell with the United States, Mitchell had actually incurred, by defaults, penalties and forfeitures to a large amount, the deduction of which from the amount of his account, as rendered, would reduce that amount largely; that the entire adjustment of that account, including the waiver of the penalties incurred, the certification of the balances, and the issuing of the warrant and preparation of the draft for delivery, was upon the condition, agreed to by Mitchell, that out of the sum thus allowed by the department the claims of the mechanics, sub-contractors, laborers and material men, for work and material furnished by them in the erection of the station buildings, should be satisfied; that an essential part of this agreement with Mitchell was that the control of the money to be paid was not to be given up until these claims of the aforesaid parties should, in some way, be settled; that the draft for the amount agreed upon should be sent to the officer of the Life Saving Service at New York, by whom, with Mitchell, these parties, at some appointed time,

were first to be paid or satisfied out of said draft; and that, if this was not done, the draft was not to be delivered to Mitchell. He further states that Mitchell refused to perform this condition; and that the penalties would not have been waived but for that agreement; and says:

"In the opinion of the respondent said forfeitures and penalties may legally be insisted upon by the government and the amount thereof deducted from said draft, and it is the legal right of the respondent, in his opinion, to secure a restatement of said account, or to cancel said draft, or to take such other course to secure said penalties and forfeitures to the government as the laws and the regulations of the Treasury Department may require; and he avers that to leave the relator to his remedy at law would, in the respondent's opinion, enable the government to avail itself of the said forfeitures or other just damages in the premises."

We think that this return showed sufficient cause for a discharge of the rule and a refusal to issue the writ. It certainly raises disputed questions of law and fact as to the amount of the actual indebtedness of the United States to Mitchell; as to his agreement that the draft should not be delivered until the claims of the sub-contractors, mechanics and material men should be satisfied out of the proceeds of said draft; as to whether the remission of the forfeiture was absolute or conditional; as to the validity of such agreement; and as to the legal effect of Mitchell's non-fulfilment of the contract. We concur with the court below that these disputed questions of law and fact should not be tried in this proceeding; and that this is not a case in which the power of the court should be exercised.

We have given due consideration to the ingenious argument of counsel for appellee to show that the return in terms does not assert that the remission of the penalties was conditioned as stated by the court below; and that if such condition was agreed to between the accounting officers and Mitchell, such agreement was illegal and void. We think neither of these points is well taken. As to the first, the court below correctly stated the substance of the return, as we have also attempted

to do. The objection really is that the averments of the return, upon this point, lack the essential requisites of good pleading. It does not appear that any such ground was taken in the court below. As to the second point, it is our opinion that the agreement between Mitchell and the accounting officers, as stated in the return, was lawful, and if carried out by Mitchell would have been fair and proper. It was simply that the amount which would otherwise have been excluded by reason of Mitchell's default from the balance certified and from the warrant for payment, should go in part to the payment of the men by whose labor and means the houses of the Life Saving Service had been built for the United States.

The judgment of the court below is

Affirmed.

DUNCAN *v.* NAVASSA PHOSPHATE COMPANY.

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

No. 1203. Submitted January 9, 1891. — Decided January 19, 1891.

The right conferred by the United States, under the Guano Islands Act of August 18, 1856, c. 164, (Rev. Stat. tit. 72,) upon the discoverer of a deposit of guano and his assigns, to occupy, at the pleasure of Congress, for the purpose of removing the guano, an island determined by the President to appertain to the United States, is not such an estate in land as to be subject to dower, notwithstanding the act of April 2, 1872, c. 81, (Rev. Stat. § 5572,) extending the provisions of the act of 1856 "to the widow, heirs, executors or administrators of such discoverer" if he dies before fully complying with its provisions.

This was a petition for dower in a guano island. The Circuit Court of the United States for the District of Maryland, upon the bill of a citizen of Maryland against the Navassa Phosphate Company, a corporation of New York doing business in Maryland, having appointed receivers of all its property within the jurisdiction of the court, Isabella Duncan of Baltimore, in the State of Maryland, filed in the cause a petition containing the following allegations and prayer:

"1st. That she is the widow of Peter Duncan, late of Baltimore city, in the State of Maryland, and now deceased, having been married to said Peter Duncan on December 19, 1850, and said Peter Duncan having died on January 26, 1875.

"2d. That on July 1, 1857, her late husband, said Peter Duncan, discovered a deposit of guano on an island in the Caribbean Sea, not within the lawful jurisdiction of any government and not occupied by the citizens of any government, said island being called Navassa, and lying in latitude 18° 10′ north, longitude 75° west, and that on September 19, 1857, he took peaceable possession and was in occupation of said island in the name of the United States under and by virtue of the act of Congress of August 18, 1856, c. 164, (11 Stat. 119,) and did, on November 18, 1857, file his claim to said island in the Department of State of the United States, in accordance with the provisions of said act of Congress, and did afterwards furnish satisfactory evidence of his said discovery, occupation and peaceable possession to the said Department of State, and in respect to said island so discovered his assignee was declared to be entitled to the rights intended to be secured by said act.

"3d. That said Peter Duncan remained in lawful possession and was legally seized of said Island of Navassa from September 19, 1857, unto November 18, 1857; all of which will appear by the said claim of Peter Duncan as discoverer of said island and the affidavit in evidence thereof, on file with the records of the Department of State in Washington, D. C., certified copies whereof are filed herewith as part of this petition, and by the proclamation of the proper authorities of the United States," a certificate from the Department of State of the issue of which was also filed with the petition. Said claim and proclamation, and the substance of said affidavit, are set forth in *Jones* v. *United States*, *ante*, 202, 205, 206, 218.

"4th. That after remaining in possession and lawfully seized of said Island of Navassa from September 19, 1857, to November 18, 1857, as aforesaid, and which period of time was during the coverture of your petitioner, said Peter Duncan did grant and assign and convey his title and interest in said Island of Navassa to E. K. Cooper; and that by mesne assign-

ments the title to said island became vested in the Navassa Phosphate Company of New York, who now hold said island under and through the title of her late husband, said Peter Duncan, and through no other title; but does not know when said Navassa Phosphate Company became the owner of said island, or who were owners since the death of her said husband; but she avers that there was a reconveyance of said island to her husband about January 1, 1860, and a subsequent conveyance of the same by her husband to E. K. Cooper; but your petitioner has not said deeds of assignment, but believes they are in possession of the Navassa Company.

"5th. That she has never joined in the execution of any deed for said island, or in any other manner made conveyance or release of her dower interest in the same.

"6th. That she has been advised that by said act of Congress, the United States assumed jurisdiction of and over said Island of Navassa, and an heritable estate therein vested in her late husband, said Peter Duncan, from the time of his discovery and occupation of said Island of Navassa, and that, by reason of his seizin of said estate in said island during coverture, and alienation of the same without the joining of your petitioner, your petitioner did at the death of her said husband become by the common law of this land entitled to her dower interest in said Island of Navassa and of the rents and profits thereof; but by reason of legal and other impediments, and through no fault of hers, she has heretofore believed that a demand for said dower would be fruitless.

"That said island is covered largely with a deposit of guano, and the chief or entire profit of the said island consists in the sale of this guano, which constitutes a portion of the soil of said island; and she cannot ascertain in a court of law to how much and in what proportion of the said guano heretofore mined and removed by said Navassa Phosphate Company since the death of her husband she should be equitably entitled, and that all the title deeds are in possession of said Navassa Phosphate Company, and she is and has been since her widowhood unable to proceed at law for an assignment of her dower and accounts; and furthermore, said company being under

the immediate charge and control of this court, she is advised that she should ask for relief from this honorable court, which is also the proper tribunal to construe said act of Congress; and that the amount involved exceeds $5000.

"Your petitioner therefore prays that the said Navassa Phosphate Company of New York, and Thomas M. Lanahan and Walter B. McAtee, the receivers of the same, may be directed to bring into this court for the inspection of your petitioner all title deeds relating to said Island of Navassa; that they may discover, under oath, to your petitioner, the amount of guano mined and disposed of since the death of her said husband, Peter Duncan, and the net value or profit of the same; and that, to the extent of her dower interest therein, said Navassa Phosphate Company may be declared to have acted as trustee for your petitioner, and to hold the same in trust for her to the extent of her said dower interest, and may be directed to account with your petitioner and pay over to her such sum or amount as this court may find proper; and that this court may assign to your petitioner her dower in said Island of Navassa, or a gross sum as reasonable and just commutation for the same; and may grant such other and further relief as her case may require."

The Navassa Phosphate Company and the receivers demurred to the petition. The demurrer was sustained, and the petition dismissed. 35 Fed. Rep. 474. The petitioner appealed to this court.

Mr. Victor Smith and *Mr. D. Eldridge Monroe* for appellant.

Mr. S. Teackle Wallis for appellees.

Mr. Justice Gray delivered the opinion of the court.

It has been decided, at the present term, that the Guano Islands Act of August 18, 1856, c. 164, (11 Stat. 119,) reenacted in Title 72 of the Revised Statutes, is constitutional and valid; and that under that act, and by the action of the President, as appearing in documents of the Department of

State, and of which this court is bound to take judicial notice, the Island of Navassa must be considered as appertaining to the United States. *Jones* v. *United States*, *ante*, 202.

The question now presented is whether Peter Duncan, the discoverer of the deposit of guano on that island, had such an estate or interest as to entitle his widow to dower. This question is brought before us by her appeal from a decree of the Circuit Court for the District of Maryland, dismissing on demurrer her petition against the Navassa Phosphate Company and its receivers, which prayed an assignment of dower, or an allowance of a gross sum in commutation therefor.

Duncan's only interest in the island or in the guano thereon, asserted in the petition of his widow, or shown in the public documents relating to the matter, was derived from the United States, and is defined in section 2 of the act aforesaid, which provides that "the said discoverer or discoverers, or his or their assigns, being citizens of the United States, may be allowed, at the pleasure of Congress, the exclusive right of occupying said island," "for the purpose of obtaining said guano, and of selling and delivering the same to citizens of the United States, for the purpose of being used therein," at certain rates specified.

By the subsequent sections, the President is empowered to employ the land and naval forces of the United States to protect "the rights of the said discoverer or discoverers, or their assigns, as aforesaid;" the criminal laws of the United States, and the laws regulating the coasting trade, are extended to guano islands; and nothing contained in the act is to be construed as obligatory on the United States to retain possession of the islands after the guano shall have been removed. Congress has not legislated concerning any civil rights upon guano islands; but has left such rights to be governed by whatever laws may apply to citizens of the United States in countries having no civilized government of their own.

The whole right conferred upon the discoverer and his assigns is a license to occupy the island for the purpose of removing the guano; this right cannot last after the guano is removed; and by the express terms of the act it may be ter-

minated at any time "at the pleasure of Congress." The act, as well observed by Mr. Dana in his notes to Wheaton, "secures to citizens the usufruct of unoccupied guano deposits, which they have discovered and peacefully occupied, beyond the jurisdiction of any foreign State, upon certain terms as to the sale and exportation of the guano, and stipulates for nothing beyond the usufruct while the guano remains." Wheaton's International Law (8th ed.), note 104 to § 176.

It is a matter of grave doubt, to say the least, whether such a license, if irrevocable, could be treated as creating an estate subject to dower at common law, and whether the common law upon the subject could be held to be in force in the Island of Navassa.

But it is unnecessary to decide either of those questions, because, if both of them should be answered in the affirmative, there remains the insurmountable obstacle to the petitioner's claim, that the interest of her husband, if it can possibly be considered as an estate in land, is an estate at the will of the United States, from whom it was derived, and is therefore not subject to dower at common law. Even a copyhold, which was practically an estate of inheritance, yet, because it was legally an estate at the will of the lord, was not liable to dower, except by and according to local custom. 2 Bl. Com. 132; 1 Scribner on Dower (2d ed.) 369.

It is argued that, even if Duncan was only a tenant at will, yet the Navassa Phosphate Company, claiming under Cooper, the original assign of Duncan, by mesne assignments, among which were a reconveyance of the island by Cooper to Duncan, and a second conveyance by Duncan to Cooper, is estopped to deny that Duncan had an inheritable estate in the island. The conclusive answer to this argument is that the petition alleges that the Navassa Phosphate Company holds the island under and through the title of Duncan, and through no other title; and does not show that either of the two conveyances from Duncan to Cooper, or the intermediate reconveyance by Cooper to Duncan, or any of the mesne assignments under which the Navassa Phosphate Company claims, purported to be of an estate in fee, or of any other or greater interest than

the right secured by the act of Congress, and recognized by the proclamation of the President, referred to in the petition, and set forth in *Jones* v. *United States*, *ante*, 206. The question, argued by counsel, and upon which there is a conflict of authority, whether a grantee, accepting a deed purporting to convey a greater estate than the grantor actually had, is thereby estopped to deny, as against the grantor's widow, that he had such an estate, does not arise.

The petitioner's claim of dower is not aided by the act of Congress of April 2, 1872, c. 81, by which the provisions of the act of 1856 are "extended to the widow, heirs, executors or administrators of such discoverer, where such discoverer shall have died before perfecting proof of discovery or fully complying with the provisions of said act;" "provided, that nothing herein contained shall be held to impair any rights of discovery, or any assignment by a discoverer, heretofore recognized by the government of the United States." 17 Stat. 48; Rev. Stat. §§ 5572, 5574.

The petitioner claims, and can claim, no rights under that act, both because her husband had died before its passage, and because the assignment of his right to Cooper had been recognized by the United States in the proclamation of the President, above mentioned.

It is argued for the petitioner that the act of 1872 is "in the nature of a statutory recognition of the widow's derivative right, and the widow's only right at common law is dower."

But the statute does not purport to secure the right of the discoverer to his widow and heirs only. It mentions his "widow," who might be entitled to dower in his real estate, and to a share of his personal estate under the statute of distributions of his domicil; his "heirs," who as such would take real estate only, but as next of kin might take personal property; and his "executors or administrators," who would take personal property only, and no interest in real estate. Whether the statute intends that the whole right shall pass either to the widow, or to the heirs, or to the executors and administrators, in the order named, or that it shall be distributed among them under whatever law may regulate the succession

to his estate, according to its nature as realty or personalty, might be a question of some difficulty. But it is impossible to find in this act any manifestation of an intention of Congress that the interest of the discoverer should be subject to dower, or even that it should be considered as real estate rather than as personal property. *Decree affirmed.*

EGAN *v.* CLASBEY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 117. Submitted December 1, 1890. — Decided January 19, 1891.

The pleadings and findings in this case fully sustain the judgment of the court below, and it is therefore affirmed.

This was an action at law, brought in one of the Territorial Courts of Utah Territory, by Edward D. Egan against James T. Clasbey, to recover the value of 1475 shares of stock of the Bannock Gold and Silver Mining Company, a corporation organized under the laws of that Territory, which, it was alleged, had been received by the defendant, in excess of the number to which he was entitled, under the following agreement:

"Salt Lake City, 11*th Sept.*, 1885.

"This agreement, entered into on this the eleventh day of September, 1885, by and between Ed. D. Egan, party of the first part, and James T. Clasbey, party of the second part, and both of Salt Lake City and County, Utah Territory:

"That said Ed. D. Egan, party of the first part, does hereby agree to deliver to James T. Clasbey, party of the second part, stock in the mining claim at present known as Martin's Horn silver mine, and situated near Lava Beds, Idaho Territory.

"The amount of said stock to be of the value of five thousand ($5000) dollars, at its original cost; and it is further agreed that if said stock is not issued the said Ed. D. Egan, party of the first part, does agree to deliver to said James T.

Statement of the Case.

Clasbey, party of the second part, a deed for a portion of the aforesaid mining property, said deed to be equivalent to stock of the amount of five thousand ($5000) dollars.

"E. D. Egan.
"J. T. Clasbey.

"Witness: H. J. Love.

"$5000. Salt Lake City, 11*th Sept.*, 1885.

"Received of James T. Clasbey the sum of five thousand ($5000) dollars.

"This sum is in payment for the stock or deed mentioned in an agreement signed by me this day.

E. D. Egan."

The complaint alleged that on the 15th of September, 1885, said corporation was formed, as contemplated, between the owners of the other three-fourths of said mine, and the plaintiff and defendant as the owners of the remaining one-fourth; that the amount of the capital of said corporation was $10,000,000, divided into 100,000 shares of the face or par value of $100 each, making one-fourth interest in said mining property represent 25,000 shares; that the original cost of said stock was sixty-two and one-half cents per share, being $62,500 in the aggregate for such entire stock; that plaintiff was entitled under said agreement to 17,000 shares of such stock, and the defendant to 8000 shares thereof, being together one-fourth of the entire stock, and it being agreed by the two parties that such was the cost and proper division between them of such stock; but that in the articles of incorporation, by a mistake and inadvertence on the part of the draftsman of the instrument, 15,000 shares were erroneously set down as subscribed by plaintiff Egan and 10,000 shares by defendant Clasbey; that after said instrument was read to plaintiff he refused to sign the same as written on account of the mistake therein, but upon the distinct agreement and understanding between defendant and plaintiff that the mistake should be corrected, as between themselves, so that plaintiff should receive 17,000 and defendant only 8000 shares of stock, the plaintiff, in consideration of the defendant's promise to turn

over to him 2000 shares of the 10,000 so allotted to him, signed said articles, and the stock was issued according to the terms of the articles of incorporation as executed; and that afterwards defendant did turn over to plaintiff 525 shares of said excess, leaving a balance of 1475 shares, which the defendant retained and refused to turn over, and still refuses, although the plaintiff has demanded the same of him.

The plaintiff further averred the value of the stock to be $3 per share at the date of the suit, and asked judgment against the defendant for $4425, "with interest from the date hereof at the rate of ten per cent per annum."

The defendant denied on his part the making of any agreement with the plaintiff other than that first set forth in the complaint. He further denied that the original cost of said mining property, or of its equivalent, the capitalized stock, was $62,500, and averred that it was only $50,000. He denied that he ever agreed that such was the cost of said stock, and that the proper division thereof was as stated in the complaint. He denied that there was any mistake in drafting said articles of incorporation, or that there was any agreement between himself and plaintiff to transfer any portion of the stock allotted to him in said articles to plaintiff, and averred that at the time of making said contract plaintiff held an option to purchase one-fourth of said mining property, but that, being without means to perfect on his part the purchase under said option, plaintiff applied to defendant to contribute $5000 to the purchase thereof, with the understanding that the defendant should share in such purchase in such proportion as the $5000 should bear to the cost of such purchase, and thereupon he paid plaintiff the $5000, and said contract of September 11, 1885, was executed; that thereupon the plaintiff perfected said purchase, and at once thereafter said corporation was formed, but that defendant did not then know the actual cost of said property, or of such stock, and no agreement as to any definite number of shares had been made between them; that afterwards, and before defendant was aware of the cost of said property or of such stock, he delivered to the plaintiff 525 shares of said stock, not as a conceded right or in settlement

Statement of the Case.

of any claim of plaintiff, but at plaintiff's request, in order to enable him to fulfil contracts of sale made by him; that after learning that the actual original cost of said property and stock was only $50,000, and that he, defendant, under his contract, was entitled to have 10,000 shares, and that plaintiff was entitled to 15,000 shares, he demanded of plaintiff 525 shares of stock, which plaintiff refused, and claimed that the original cost was sixty-two and one-half cents per share; that the claim of plaintiff is unjust; that the defendant is entitled to 525 shares, which plaintiff has converted to his own use; that the stock is worth $3 per share; and he, therefore, prayed judgment against the plaintiff for the sum of $1575.

A jury having been waived, the case was tried by the court upon the pleadings and proofs, both oral and documentary.

The following findings of fact and conclusions of law by the trial court clearly set forth the material facts in the case:

"1. The plaintiff and defendant, on the 11th day of September, 1885, entered into the written contract exhibited in the complaint, whereby plaintiff, in consideration of the sum of $5000, then delivered to him by the defendant toward the purchase of one-fourth undivided of the Martin's Horn silver mine, at Era, Idaho, agreed to deliver to the defendant stock in such mining claim in amount equal to $5000, at its original cost; and, further, that if such stock was not issued he would deliver to defendant a deed to be equivalent to stock of the amount of $5000.

"2. Plaintiff and others bought an option on said mine, paying therefor $6000, from one Chambers (such price including $5000 paid by Chambers to Martin, the owner of the mine, on said option, and $1000 expenses incurred by Chambers), and on the 12th of September, 1885, paid to Martin $50,000, the balance of the purchase-money.

"3. On the 15th of September, 1885, a corporation was organized by the purchasers and others associated with them to work said mine, called the Bannock Gold and Silver Mining Company of Idaho, on a basis of 100,000 shares of capital stock, one-fourth of which (25,000 shares) were to be allotted

to plaintiff and defendant, to be divided between them according to their said contract.

"4. Plaintiff contributed one-fourth of the $6000 paid to Chambers and one-fourth of the $50,000 paid to Martin, using, with his own money, the said $5000 delivered to him by defendant.

"5. On the organization of the corporation the mine was conveyed to it, and plaintiff and four other corporators voluntarily loaned and advanced to the corporation $2000, of which sum the plaintiff contributed $500.

"6. Soon after the organization of the corporation, by consent and on motion of the plaintiff, the corporation assumed and paid a debt of $5000 to one McMasters, which had been incurred by plaintiff and one Thum, the original holders of said option, and afterward the corporation paid a claim for labor on the mine pending the option, which claim was estimated at $1500, but the amount actually paid thereon to Martin was $2127, paid by the corporation through plaintiff, its superintendent. The corporation also, in November, 1885, out of its net earnings refunded to the contributors the $6000 paid to Chambers, and the $2000 advanced as aforesaid, of which the plaintiff received $2000, the portion advanced by him. The advances and loan thus repaid and debts assumed and paid by the corporation amount to $14,127, leaving the sum of $50,000 as the actual outlay by plaintiff and the other purchasers of the mine.

"7. Of the $50,000 so paid by the purchasers the plaintiff paid one-fourth, or $12,500 (using for that purpose the $5000 delivered to him by defendant).

"8. The actual original cost of the 25,000 shares of stock was fifty cents per share.

"9. When the corporation was about to be organized the plaintiff claimed that the cost of stock was 62½ cents per share, and that he was entitled to subscribe for and hold 17,000 shares and the defendant only 8000 shares, but there was no agreement or settlement between defendant and plaintiff as to the claim and the matter was left for future adjustment by plaintiff and defendant.

"10. About the month of December, 1885, defendant, at request of plaintiff, delivered to plaintiff 500 shares of stock to enable the latter to fill a sale, and 25 shares which plaintiff desired to give to another person. This stock was delivered to plaintiff subject to the adjustment of their stock account.

"11. The parties never agreed upon the cost of the stock. Plaintiff demanded 1475 shares of stock from defendant, but defendant refused to comply, and plaintiff brought this action. After this, and before answering, defendant demanded of plaintiff the return of the 525 shares delivered as aforesaid, which was refused by plaintiff.

"12. The value of said stock when the action was brought and when defendant made his said demand was and is now three dollars per share.

"As conclusions of law the court doth find:

"1. That the plaintiff was entitled to subscribe for and hold 15,000 shares of said stock, and defendant was entitled to subscribe for and hold 10,000 shares.

"2. That plaintiff is not entitled to recover in this action, but the defendant is entitled to judgment against the plaintiff.

"3. That on his counter-claim the defendant is entitled to recover from the plaintiff the value of 525 shares of said stock, viz., $1575, together with his costs, to be taxed."

Judgment was accordingly entered in favor of the defendant for the sum of $1575. That judgment having been affirmed by the Supreme Court of the Territory of Utah, the present appeal was prosecuted.

Mr. J. L. Rawlins for appellant.

Mr. Samuel A. Merritt for appellee.

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

We find no exceptions in the record, and the only error assigned is, that the court erred in not giving judgment in favor of the plaintiff, as a necessary legal conclusion from the

findings of fact, the pleadings and the proper interpretation of the contract sued on. We think the findings of fact conclusively negative this contention. It seems that both parties agree (and it is the only point on which they are agreed), that according to the terms of the contract of the 11th of September, 1885, the share of Clasbey, the defendant, in the 25,000 shares of stock in the mining corporation was to be determined by the original cost of that stock. In other words, that if it was sixty-two and one-half cents per share, Clasbey was entitled to a subscription of only 8000 shares, and the plaintiff Egan to 17,000, in which case the allotment to Clasbey in the articles of incorporation was put there by the mistake and inadvertence of the draftsman, and subject to correction in a future adjustment between those two parties; but if it was fifty cents a share, then the defendant Clasbey was entitled to 10,000 shares and the plaintiff to 15,000 shares, in which case the defendant was under no obligation, in any future adjustment of stock between them, to turn over any part of his said shares to plaintiff.

The decisive question, therefore, to be determined is, what was the original cost of the 25,000 shares that, under the contract, were to be divided between the parties to this suit? The eighth finding of fact says: "The actual original cost of the 25,000 shares was fifty cents per share." This, in our opinion, is absolutely conclusive against the claim of the plaintiff. Such a finding cannot be twisted and turned into a conclusion of law. Nor do we consider as well taken the proposition of counsel for the appellant, that as a finding of fact it is inconsistent, in effect, with the other findings, respecting the original cost of either the mining property or its equivalent, the capitalized stock of the company. It is insisted that these findings show that, in addition to the original price of $50,000, the plaintiff, with other members of the company, advanced divers sums that increased the amount upwards of $62,000. The reply to this is, that the findings of fact show that those sums were advances and loans made to the corporation, were treated as such by the plaintiff, and those who contributed with him, and were refunded to them out of the net

earnings of said corporation, leaving the sum of $50,000 as the actual outlay by plaintiff and the other purchasers of the mine. They cannot, therefore, be included in the estimate of the original cost as between the two parties to this suit.

Equally conclusive, in our opinion, is the 10th finding of facts, taken in connection with the 8th, upon the question of the defendant's counter-claim. It appears from that finding that the defendant, at the request of the plaintiff, delivered to plaintiff 500 shares of stock to enable the latter to fill a sale, and 25 shares which the plaintiff desired to give to another person. This stock was delivered to plaintiff, subject to the adjustment of their stock account. We think the pleadings and findings in this case fully sustain the judgment of the Supreme Court of Utah Territory, and it is, therefore,

Affirmed.

PACKER *v.* BIRD.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 111. Submitted December 3, 1890. — Decided January 19, 1891.

The undoubted rule of the common law that the title of owners of land bordering on navigable rivers above the ebb and flow of the tide extends to the middle of the stream, having been adopted in some of the States, and not being recognized in other States, Federal Courts must construe grants of the general government without reference to the rules of construction adopted by the States for such grants by them.

Whatever incidents or rights attach to the ownership of property conveyed by the United States bordering on navigable streams, will be determined by the States in which it is situated, subject to the limitation that their rules do not impair the efficacy of the grant, or the use and enjoyment of the property by the grantee.

The legislation of Congress for the survey of the public lands recognizes the general rule as to the public interest in waters of navigable streams without reference to the existence or absence of the tide in them.

The highest court of California having decided that the Sacramento river being navigable in fact, a title upon it extends no farther than to the edge of the stream, this court accepts that decision as expressing the law of the State.

The plaintiff claimed land in California under a Mexican grant which was

Statement of the Case.

confirmed by a decree of the District Court of the United States for the Northern District of California, in which the land was described as follows: "Commencing at the northerly boundary of said rancho, at a point on the Sacramento River just two leagues northerly from the rancheria called Lojot, and running southerly on the margin of said river to a point," etc. The survey under that decree was incorporated into the patent, and described the eastern boundary of the tract as commencing at a certain oak post "on the right bank of the Sacramento River," and thence "traversing the right bank of the Sacramento River down stream" certain courses and distances. *Held*, that the title under this patent did not extend beyond the edge of the stream, and that it did not include an island opposite the tract, and separated from it by a channel of the river which lay between it and the principal channel.

This was an action for the possession of an island, embracing about eighty acres of land, in the river Sacramento, within the county of Colusa, in the State of California. The plaintiff alleged ownership of the premises in 1867, and his continued ownership afterwards, the entry of the defendants thereon in January, 1883, without right or title, and their continued unlawful possession thereof ever since, to his damage of two hundred dollars. The answer of the defendants was a general denial of the allegations of the complaint. The issues were tried by the court, without the intervention of a jury, by stipulation of the parties. The court found for the defendants, and directed judgment in their favor. A motion for a new trial was denied, and, on appeal to the Supreme Court of the State the judgment and the order refusing a new trial were both affirmed. To review that judgment the case was brought to this court.

The river Sacramento is navigable from its mouth or outlet to a point above the premises in controversy. Indeed, it is one of the great rivers of the State, and is navigable over two hundred and fifty miles.

The muniments of title, introduced by the plaintiff, consisted of a patent of the United States, issued in December, 1857, to Francis Larkin and others, for a tract of land in the county of Colusa, known as the rancho of Larkin's children; a decree partitioning the land among the patentees, and intermediate conveyances from one of them to the plaintiff. In June, 1857, a survey of the land covered by the patent was made by the

proper officers of the United States, pursuant to a decree of the District Court of the United States for the Northern District of California, rendered in January, 1856, confirming an imperfect Mexican grant of the tract, and ascertaining and determining its location. That decree described the land as follows:

"Commencing at the northerly boundary line of said rancho, at *a point on the Sacramento River*, just two leagues northerly from the rancheria called Lojot, and running southerly *on the margin of said river*, to a point which is five leagues south of the place of beginning; thence west two leagues; thence north in a parallel line with said river, and two leagues therefrom, five leagues; and thence east two leagues to the place of beginning; and so as to contain the area of ten square leagues within said lines."

The survey, which was incorporated in the patent, described the eastern boundary line of the tract as commencing at a certain oak post "on the right bank of the Sacramento River," and thence "traversing the right bank of the Sacramento River down stream" certain courses and distances.

Among other things the court found that from 1853 to 1858, and both prior and subsequent thereto, the waters of the Sacramento River divided into two streams at the upper or northerly end of the island in controversy; that one of the streams flowed through a channel extending around the easterly side of the island, and the other through a channel extending around the westerly side; that during this period both of the channels were plain and well defined, and had high banks, and the waters of the river flowed and still continued to flow through both of them at all seasons of the year; that the two channels and streams of water reunited at the lower or southerly end of the island; and that each of the channels and streams constituted a part of the Sacramento River, which was navigable, "both in fact and by statute;" that during the greater portion of each year the channel on the westerly side of the land in dispute was navigable, and was during the period mentioned actually navigated; but that the usual and most direct route for steamers was along the channel running east of the island.

Argument for Plaintiff in Error.

Mr. W. C. Belcher for plaintiff in error.

We contend that the land conveyed by the patent in question, extends *at least* to the margin of the navigable channel of the river; that the land in controversy is a part of the land so conveyed, unless it is separated from that land by a navigable channel of the river; and that the state court therefore erred in holding that it is not material whether the slough to the west of this tract is navigable or not navigable.

If the river mentioned in the patent were not navigable in law, the lands granted, being bounded by the "margin" of the river, would extend to the thread of the stream. *Ex parte Jennings*, 6 Cowen, 518; *S. C.* 16 Am. Dec. 447; *Jones* v. *Soulard*, 24 How. 41; *Howard* v. *Ingersoll*, 13 How. 381.

The doctrine of these cases includes cases like the present, where the stream, though navigable in fact, is above tide-water. But later cases in this court disregard that distinction, and hold that the title to lands bordering on streams navigable in fact, whether tidal or not, stops, under the acts of Congress, at the stream.

It is not necessary in this case to discuss this distinction. Treating this river as navigable in the common law sense, it is manifest that the grant in question extends to the *stream*, that the grantee is a riparian proprietor, with the right of access to the *channel*, and that there can be no vacant land left for appropriation between the river and the river boundary of such tract. *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, 287; *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 63.

This being so, it is clear that, unless plaintiff's land extends to the navigable channel, it is not bounded by the river at all. It is only the navigability of the river which prevents his title from running to the middle of the stream. But that very fact entitles him to access to the navigable channel, and to the right to construct landings and wharves for the convenience of commerce and navigation. If the "slough" on the west of this parcel of land is not navigable, and is yet the eastern boundary of plaintiff's land, it would follow that plaintiff is deprived of all access to the river for purposes of

commerce and navigation, and that there is vacant land left for appropriation between his land and the river; — neither of which things can legally be true. A slough of this character cannot be considered a part of the river, so as to constitute a boundary, unless it is itself navigable. This necessarily follows from the ruling in *Railroad Company* v. *Schurmeir*. It was there held that, by the terms of the acts of Congress regulating the survey of the public lands, the margin of a navigable river should constitute the boundary of lands bordering thereon. By this must be intended the navigable stream itself, not some unnavigable branch or fork of it. Indeed, when the boundaries of land are described as extending to a river, the main river, and not a branch, slough, or bayou, is the termination of those lines. *Graves* v. *Fisher*, 5 Greenl. 69.

The state court sought to distinguish this case from the Schurmeir case, saying: "The court in the case cited manifestly did not hold the land in controversy to be an island. The slough, so-called, in that case was not nor was it held to be a part of the Mississippi River."

This is, of course, true. But, when we examine the facts of that case, we find that the reasons for so holding apply equally to this case. The land in that case was a parcel which, at very low water, was separated from the main body by a slough or channel, twenty-eight feet wide, through which no water flowed, but in which water remained in pools; at medium water, the water flowed through the slough, making an island of the parcel; and, at high water, the whole parcel was submerged. No mention was made of any such channel in the official survey under which the patent was issued. It is evident that those facts correspond with those held by the state court in this case to be sufficient to prevent a recovery by plaintiff. The slough there was as much a part of the Mississippi River as the slough here is a part of the Sacramento River. Each of them was connected with the river at each end, and each received its water from the river. The reason why this court held the slough in the former case not to be a part of the Mississippi River, was because it was not navigable,

and because, if it were held to be the boundary, there would remain vacant land between the navigable stream and the land in terms bounded on that stream, thus cutting off the riparian owner from access to the stream. But that is the precise proposition which the state court held to be immaterial in this case; and, in so ruling, that court manifestly misconstrued the acts of Congress under which plaintiff's title was obtained.

Mr. Charles N. Fox for defendant in error.

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

The question presented is, whether the patent of the United States, describing the eastern boundary of the land as commencing *at a point on the river*, which was on the right and west bank, and running southerly *on its margin*, embraces the island within it, or whether, notwithstanding the terms of apparent limitation of the eastern boundary to the margin of the river, the patent carries the title of the plaintiff holding under it to the middle of the stream. The contention of the plaintiff is that the land granted and patented, being bounded on the river, extends to the middle of the stream, and thus includes the island. It does not appear in the record that the waters of the river at the point where the island is situated are affected by the tides; but it is assumed that such is not the case. The contention of the plaintiff proceeds upon that assumption.

It is undoubtedly the rule of the common law that the title of owners of land bordering on rivers above the ebb and flow of the tide extends to the middle of the stream, but that where the waters of the river are affected by the tides, the title of such owners is limited to ordinary high-water mark. The title to land below that mark in such cases is vested in England in the Crown, and in this country in the State within whose boundaries the waters lie, private ownership of the soils under them being deemed inconsistent with the interest

of the public at large in their use for purposes of commerce. In England this limitation of the right of the riparian owner is confined to such navigable rivers as are affected by the tides, because there the ebb and flow of the tide constitute the usual test of the navigability of the streams. No rivers there, at least none of any considerable extent, are navigable in fact, which are not subject to the tides. In this country the situation is wholly different. Some of our rivers are navigable for many hundreds of miles above the limits of tide-water, and by vessels larger than any which sailed on the seas when the common law rule was established. A different test must, therefore, be sought to determine the navigability of our rivers, with the consequent rights both to the public and the riparian owner, and such test is found in their navigable capacity. Those rivers are regarded as public navigable rivers in law which are navigable in fact. And, as said in the case of *The Daniel Ball*, 10 Wall. 557, 563: "they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

The same reasons, therefore, exist in this country for the exclusion of the right of private ownership over the soil under navigable waters when they are susceptible of being used as highways of commerce in the ordinary modes of trade and travel on water, as when their navigability is determined by the tidal test. It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either of the waters or the soils under them. The common law doctrine on this subject, prevailing in England, is held in some of the States, but in a large number has been considered as inapplicable to the navigable waters of the country, or, even if prevailing for a time has given way, or been greatly modified, under the different conditions there.

It has been adopted in most, if not all, of the New England States. In New York, in the earlier cases, it was considered

as in force; and in *Ex parte Jennings*, 6 Cowen, 518, was formally declared. There a patent of lands by the State, bounded *on the margin of a river* above tide-water, was held to carry the land granted to the middle of the stream, the court stating that the rule was otherwise where the land was bounded on a navigable river, but adding that by the term "navigable river," the law did not mean such as is navigable in common parlance; that the smallest creek might be so to a certain extent as well as the largest river, without being legally a navigable stream; and that the term has in law a technical meaning, and applies to all streams, rivers or arms of the sea where the tide ebbs and flows. This doctrine was modified and finally overruled in subsequent cases.

In *People* v. *Canal Appraisers*, 33 N. Y. 461, 499, the whole subject of the rights of riparian owners on navigable streams, whether affected or not by the ebb and flow of the tide, was elaborately considered, with a careful examination of the adjudged cases in the different States, and the conclusion reached was against the applicability of the common law rule in this country. The court in its opinion refers to the great embarrassment experienced by courts, judges and text-writers in applying the principles of the common law to the waters of this continent, the variant conclusions reached by them, and the contradictory and unsatisfactory reasons given for the results arrived at; and, after tracing the progress of judicial discussion of the doctrine of the common law on the subject, it expresses satisfaction that the discussion had culminated in the decision by the court of ultimate appeal repudiating the applicability of the doctrine to the rivers of that State, and establishing what it terms "the better doctrine of the civil law."

In Pennsylvania the common law doctrine was never recognized. In *Monongahela Bridge Co.* v. *Kirk*, 46 Penn. St. 112, 120, the Supreme Court of that State, in holding that the river Monongahela was a navigable stream, and that its soil up to low-water mark, and the river itself, were the property of the Commonwealth, said:

"We are aware that by the common law of England such streams as the Mississippi, the Missouri, the rivers Amazon and

Platte, the Rhine, the Danube, the Po, the Nile, the Euphrates, the Ganges and the Indus, were not navigable rivers, but were the subject of private property, whilst an insignificant creek in a small island was elevated to the dignity of a public river, because it was so near the ocean that the tide ebbed and flowed up the whole of its petty course. The Roman law, which has pervaded Continental Europe, and which took its rise in a country where there was a tideless sea, recognized all rivers as navigable which were really so, and this common sense view was adopted by the early founders of Pennsylvania, whose province was intersected by large and valuable streams, some of which are a mile in breadth."

In the courts of the Western States there is much conflict of opinion, some, like the courts of Illinois, adopting the common law rule to its fullest extent; and others, like the courts of Iowa, repudiating its application in determining the navigability of the great rivers, and the rights of riparian owners upon them. A very elaborate consideration of the adjudged cases on the subject is found in *McManus* v. *Carmichael*, 3 Iowa, 1. Indeed, the opinion of the Supreme Court of Iowa in that case, and the opinion of the Court of Appeals of New York in *People* v. *Canal Appraisers*, above cited, contain an exhaustive and instructive consideration of the whole subject, with a careful review of the decisions of the courts of the States. In this case we accept the view of the Supreme Court of California in its opinion as expressing the law of that State, "that the Sacramento River being navigable in fact, the title of the plaintiff extends no farther than the edge of the stream." *Lux* v. *Haggin*, 69 California, 255.

The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee. As an incident of such ownership the right of the riparian owner, where the waters are above the influ-

ence of the tide, will be limited according to the law of the State, either to low or high-water mark, or will extend to the middle of the stream. It is, therefore, important to ascertain and determine what view will be taken by the courts of the United States in the construction of grants of the general government in conferring ownership, when they embrace lands bordering on navigable waters above the influence of the tide. How far will such grants be deemed to extend into the water, if at all? From the conflicting decisions of the state courts cited, it is evident that there is no such general law on the subject as will be deemed to control their construction.

In the courts of the United States the rule of the common law in determining the navigability of rivers, and the effect thereof upon the jurisdiction of the court, has been disregarded since the decision of the case of *The Genesee Chief*, 12 How. 443, 455. This court there said that there was nothing in the ebb and flow of the tide which made a stream suitable for admiralty jurisdiction, nor anything in the absence of the tide that rendered it unfit; that if a stream was a public navigable water, on which commerce was carried on between different States and nations, the reason for the jurisdiction was precisely the same; and that any distinction made on that account was merely arbitrary, without any foundation in reason, and indeed would seem to be inconsistent with it. The eminent Chief Justice who delivered the opinion in that case explained how in England the ebb and flow of the tide became the test of the navigability of a stream, as we have stated it above; that there tide-waters, with a few small and unimportant exceptions, meant nothing more than public rivers as contradistinguished from private ones; and that hence arose the doctrine of admiralty jurisdiction, which was confined to the ebb and flow of the tide; in other words, to public navigable waters. He then added: "As the English definition was adopted in our courts, and constantly used in judicial proceedings and forms of pleading, borrowed from England, the public character of the river was in process of time lost sight of, and the jurisdiction of the admiralty treated as if it was limited by the tide. The description of a public navigable river was sub-

stituted in the place of the thing intended to be described. And under the natural influence of precedents and established forms, a definition originally correct was adhered to and acted on, after it had ceased, from a change in circumstances, to be the true description of public waters."

In *Barney* v. *Keokuk*, 94 U. S. 324, 338, the same subject in some of its features was under consideration in this court, and the language used is especially applicable to cases like the one before us. That action was against the city of Keokuk and a steam packet company, to recover the possession of certain premises occupied by them with railroad tracks, buildings and sheds on the bank of the Mississippi River, and in that city. The court, in considering the question presented, observed that "the confusion of navigable with tide-water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British Island and that of the American Continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principle was laid down in *Martin* v. *Waddell*, 16 Pet. 367; *Pollard's Lessee* v. *Hagan*, 3 How. 212; and *Goodtitle* v. *Kibbe*, 9 How. 471. These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *The Genesee Chief*, 12 How. 443, has declared that the great lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the

admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water."

The legislation of Congress for the survey of the public lands recognizes the general rule as to the public interest in waters of navigable streams without reference to the existence or absence of the tide in them. As early as 1796, in an act providing for the sale of such lands in the territory northwest of the river Ohio and above the mouth of Kentucky River, Congress declared "that all navigable rivers within the territory to be disposed of by virtue of the act shall be deemed to be and remain public highways; and that in all cases where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall become common to both." Act of May 18, 1796, c. 29, § 9, 1 Stat. 468.

In *Railroad Company* v. *Schurmeir*, 7 Wall. 272, 288, the court said that in view of this legislation and other similar acts it did not "hesitate to decide, that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways." The same rule applies when the survey is made and the patent is issued upon a confirmation of a previously existing right or equity of the patentee to the lands, which in the absence of such right or equity would belong absolutely to the United States, unless the claim confirmed in terms embraces the land under the waters of the stream.

The language of the decree of confirmation describing the tract confirmed, and the language of the survey incorporated in the patent, both clearly indicate that the margin of the river was intended as the eastern boundary of the tract con-

firmed, and we find nothing either in any act of Congress or in any decision of the Federal courts which would enlarge the effect of the grant. The title of one claiming under the patent does not, therefore, extend beyond the edge of the stream.

The judgment of the court below is accordingly

Affirmed.

UNITED STATES *v.* PAGE.

APPEAL FROM THE COURT OF CLAIMS.

No. 1249. Submitted January 5, 1891. — Decided January 19, 1891.

The decision of the President confirming or disapproving the sentence of a general court-martial in time of peace extending to the loss of life or the dismission of a commissioned officer, or in time of peace or war respecting a general officer, under the provisions of the 65th Article of war, is a judicial act to be done by him personally, and is not an official act presumptively his; but it need not be attested by his sign manual in order to be effectual.

Runkle v. *United States*, 122 U. S. 543, distinguished from this case.

Frank A. Page filed his petition in the Court of Claims on the 31st day of August, 1887, stating:

"I. That he is a citizen of the United States and a resident of the District of Columbia. II. That on the 18th day of January, A.D. 1865, he was duly appointed and commissioned as a second lieutenant in the Veteran Reserve Corps of the volunteer army of the United States, and served as such officer until the 20th day of September, A.D. 1866, when he was honorably mustered out of such military service of the United States. III. That on the 3d day of October, A.D. 1866, he was duly appointed and commissioned as a second lieutenant in the Forty-fourth Regiment of Infantry of the Army of the United States, to rank as such from the 28th day of July, A.D. 1866, and that he accepted such appointment on the 3d day of October, 1866. IV. That he served in said capacity until the 3d day of August, 1870, when he was transferred to the Tenth Infantry. V. That he continued to serve in said last-

named regiment until the 22d day of September, 1871, when, by order of the President, he was, upon the recommendation of the retiring board of the U. S. Army, retired from active service, and was placed upon the retired list of the Army as such second lieutenant. VI. That from said last-mentioned date to the date of the filing of this petition he has ever since remained a second lieutenant upon the said retired list, subject to all the regulations and orders governing officers upon the retired list; yet, notwithstanding, ever since the 27th day of May, 1874, he has been refused all pay and emoluments to which he is lawfully entitled, by reason, as alleged, of a certain order issued by the Adjutant General of the Army, dated War Department, Adjutant General's Office, May 27, 1874, and purporting to be General Court-Martial Orders, No. 42, wherein and whereby, by paragraph III of said order, it is asserted that your petitioner ceases to be an officer of the Army from the date of said order, by reason whereof the proper officers of the Pay Department of the Army have refused to pay to your petitioner the pay and emoluments to which he is lawfully entitled. VII. Your petitioner avers that the said order, so far as the same purports to dismiss him from the Army of the United States, or to deprive him of his said office, is null and void, and that he is entitled to receive his lawful pay, and to have and retain the said office, notwithstanding the said order; that the court-martial proceedings upon which the said order was predicated were never submitted to or approved by the President of the United States, and without such approval no power existed in the Adjutant General or the Secretary of War to deprive him of his commission or his lawful pay as such second lieutenant.

"And your petitioner claims the sum of seventeen thousand eight hundred and thirty-five dollars and sixty cents ($17,835.60) as and for his pay as such second lieutenant for the period from the 28th day of May, 1874, to the 30th day of June, 1887."

Petitioner subsequently departed this life testate, and the suit was revived in favor of Sally E. Page, as executrix, and, by leave of court, she amended the petition "so as to claim

pay for said deceased as second lieutenant for the period from the 28th day of May, 1874, to the 12th day of October, 1889, being the sum of $20,816.33."

The findings of fact and conclusion of law of the Court of Claims were as follows:

"*Findings of Fact.*

"I. On January 18, 1865, the claimant was mustered in as a second lieutenant in the Veteran Reserve Corps of Volunteers, and served as such till September 20, 1866, when he was honorably mustered out.

"October 3, 1866, he was appointed second lieutenant in the Forty-fourth Regiment of Infantry, U. S. Army, and accepted the appointment the same day.

"August 3, 1870, he was transferred to the Tenth Regiment of Infantry.

"September 29, 1871, by order of the President, he was retired from active service and placed on the retired list of the Army, on account of wounds received in battle, *i.e.*, the loss of his right arm.

"II. April 29, 1874, a court-martial was convened at New York City by virtue of Special Orders, No. 73, dated April 7, 1874, Headquarters Military Division of the Atlantic, for the trial of Second Lieutenant Frank A. Page (retired). Before this court-martial Lieut. Page was arraigned and tried on the following charges and specifications."

[Here follow three charges, there being one specification under charge I, one specification under charge II, and three specifications under charge III. To these charges and specifications the accused pleaded not guilty. The court found him guilty of the specification under charge I, excepting as to certain words, for which it substituted others, but not guilty of the charge; guilty of charge II and the specification; guilty of charge III and of the second and third specifications thereunder, and guilty of the first specification, excepting as to certain words, and as to those not guilty. The sentence was, "to be dismissed the service of the United States." The charges, specifications, findings and sentence are set forth at length in Finding II of the Court of Claims.]

"III. The proceedings, findings and sentence were transmitted to the Secretary of War, who wrote upon the record the following order, viz.:

"WAR DEPARTMENT,

"WASHINGTON CITY, *May* 27, 1874.

"In conformity with the 65th of the Rules and Articles of War, the proceedings of the general court-martial to the foregoing case, have been forwarded to the Secretary of War, and by him submitted to the President.

"The proceedings and the findings upon the second charge and specification, and upon the third charge under its second and third specifications, are approved.

"With regard to the other findings, the remarks noted by Major General Hancock, who convened the court, are concurred in as follows:

"'The finding to the first specification is not approved. The sale of Lieutenant Page's pay accounts and right of pay to the Piedmont and Arlington Life Insurance Company is not sustained by the evidence. The transaction was unquestionably a pledge as collateral security. But the court having found that it was a sale, it is difficult to account for the rest of the finding to this specification, which describes the subsequent presentation of a claim against the United States for the same pay as false and fraudulent, although it acquits Lieutenant Page of knowing that it was such.

"'In order to constitute fraud there must be a knowledge that the property belongs to another and a design to deprive him of it. If these are wanting it is not fraud. So the word "false," used in this connection, implies an intent to cheat or defraud. Moreover, if the transaction with the Piedmont and Arlington Life Insurance Company was a sale, as the court found it to be, how could the accused, knowing that he had made such a sale, present a claim for the same pay without knowing that it was false and fraudulent? By its finding to the specification the court convicts the accused of presenting a claim against the United States for his pay which was false and fraudulent, and yet acquits him of the charge of "present-

Counsel for Parties.

ing for payment a false and fraudulent claim against the United States." The finding to the first charge is therefore likewise disapproved.

"'Again, having by its finding to the specification of the 1st charge characterized the presenting of a claim for pay as false and fraudulent, the court, by its finding to the 1st specification of the 3d charge, say that he did not do it "fraudulently and dishonorably," nor "knowing that he had no right or property in said claim or payment," and this, notwithstanding that he is by the same finding found guilty of "defrauding the United States."

"'The finding to this specification, however, convicts the accused of the facts upon which it is based.'

"The sentence is approved.

"Second Lieut. Frank A. Page (retired) accordingly ceases to be an officer of the Army from the date of this order.

"WM. W. BELKNAP, *Secretary of War.*

"The said Secretary also issued, May 27, 1874, General Court-Martial Order, No. 42, announcing the sentence of the court-martial, and that 'Second Lieut. Frank A. Page (retired) ceases to be an officer of the Army from the date of this order.' From the date of this order the claimant's name has not been borne on the Army Register, and he has received no pay as an officer of the Army since that time.

"*Conclusion of Law.*

"Upon the foregoing facts, the court determines that the claimant is entitled to recover the sum of $11,572.75:

"That amount being the sum due the decedent within the statute of limitation of six years before the commencement of the suit."

Judgment was rendered in favor of the claimant accordingly, and the case brought to this court by appeal.

Mr. Solicitor General and *Mr. John C. Chaney* for appellant.

Mr. Joseph E. McDonald and *Mr. John C. Fay* for appellee.

Opinion of the Court.

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

It is contended that the sentence of dismissal was a nullity because it does not sufficiently appear from the record of the court-martial proceedings and the endorsements thereon that the findings and sentence were approved by the President.

The 65th Article of War, act of April 10, 1806, 2 Stat. 367, c. 20, which was in force at the time of these proceedings, provided:

"Any general officer commanding an army, or colonel commanding a separate department, may appoint general courts-martial, whenever necessary. But no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court-martial, in time of peace, extending to the loss of life, or the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval, and orders, in the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer, for the time being, as the case may be."

Undoubtedly the action required of the President under this article is judicial action. He decides personally, and the judgment is his own personal judgment, and not an official act presumptively his. But that judgment need not be attested by his sign manual in order to be effectual. This was so held by Attorney General Wirt (2 Opinions Attys. Gen. 67), Attorney General Cushing (7 Opinions Attys. Gen. 473), and Attorney General Devens (15 Opinions Attys. Gen. 290); and in the opinion of the latter, numerous instances of the attestation of the President's determination by the Secretary of War are given.

It is argued that the President was required by paragraph

896 of the Army Regulations of 1863, then in force, to affix his signature to the statement of his decision. That paragraph provided: "The Judge Advocate shall transmit the proceedings, without delay, to the officer having authority to confirm the sentence, who shall state, at the end of the proceedings in each case, his decision and orders thereon." But the next paragraph, 897, read: "The original proceedings of all general-courts-martial, after the decision on them of the reviewing authority, and all proceedings that require the decision of the President under the 65th and 89th Articles of War, and copies of all orders confirming or disapproving, or remitting the sentences of courts-martial, and all official communications for the Judge Advocate of the Army, will be addressed to 'The Adjutant General of the Army, War Department,' marked on the cover, 'Judge Advocate.'"

This provision, as is pointed out by Attorney General Devens (15 Opinions Attys. Gen. 292), "shows that paragraph 896 was intended to embrace proceedings other than those requiring the decision of the President, namely, proceedings which may be confirmed by the officer who ordered the court to assemble, or the commanding officer for the time being, as the case may be." And the Attorney General concludes that: "In the case of the confirmation of a sentence of dismissal by a court-martial, no formality appears to be prescribed by law for attesting the determination of the President; and as, in cases of that sort, the attestation of such determination by a written statement, signed by the Secretary of War, is in accordance with long usage, that mode of attesting the President's action, confirming a sentence of dismissal, is to be considered as sufficient" (p. 295). We are satisfied that this view is correct.

Since, therefore, it appeared by the order of the Secretary of War, written upon the record of the court-martial in controversy, that the proceedings had "been forwarded to the Secretary of War, and by him submitted to the President," and that the proceedings and findings upon certain charges and specifications were approved, and that the sentence was approved, the only possible conclusion to be drawn from such statement is that the approval was by the President, in whom

alone was reposed the authority to act. The Secretary of War declared that he had submitted the proceedings in conformity with the 65th of the Rules and Articles of War; and the 65th article required the whole proceedings to be laid before the President for his confirmation or disapproval, and orders, in the case. By what process of reasoning can the conclusion be justified that, although these proceedings were laid before the President for his confirmation or disapproval, yet the findings and sentence were approved by some one else, who had no authority to act in the premises? On the contrary, where the record discloses that the proceedings have been laid before the President for his orders in the case, the orders subsequently issued thereon are presumed to be his, and not those of the Secretary by whom they are authenticated; and this must be the result here, where the approval follows the submission in the same order.

In *Runkle* v. *United States*, 122 U. S. 543, the record failed to show the vital fact of the submission of the proceedings to the President. The findings of the Court of Claims in that case upon this point were that the proceedings, findings and sentence of the court-martial were transmitted to the Secretary of War, who wrote upon the report that such proceedings, findings and sentence were approved. But it was not found, nor did the Secretary's endorsement show, that the whole proceedings had been submitted to the President. The Secretary did, indeed, conclude his order with the statement that, in view of the unanimous recommendation by the members of the court and the previous good character of the accused, and in consideration of evidence by affidavit as to his physical condition, presented to the War Department since the trial, and credible representations as to his inability to pay the fine imposed, the President was pleased to remit all of the sentence, except so much thereof as directed cashiering; but this court held that the order was capable of division into two separate parts, one relating to the approval of the proceedings and sentence, and the other to the executive clemency which was invoked and exercised; and that it was only in relation to the latter that the President seemed to have exercised a personal

power under the Constitution, the power, namely, of granting pardons, while the former indicated on its face departmental action only. And this conclusion was fortified, in the judgment of the court, by the order of President Hayes stating that the record of official action showed that the approval of the proceedings of the court was by the Secretary; that Runkle had presented a petition to President Grant on the day the order cashiering him was issued, averring that the proceedings had not been approved by the President; that this petition was referred to the Judge Advocate General for review and report; and that this report was made; and by which order President Hayes, taking up the matter as unfinished business, and acting as though the proceedings had never been approved, disapproved of the same. "Under such circumstances," said Mr. Chief Justice Waite for the court, "we cannot say it positively and distinctly appears that the proceedings of the court-martial have ever in fact been approved or confirmed in whole or in part by the President of the United States, as the Articles of War required, before the sentence could be carried into execution." And he closed the opinion in these words:

"Such being our view of the case it is unnecessary to consider any of the other questions which were referred to the Court of Claims. Neither do we decide what the precise form of an order of the President approving the proceedings and sentence of a court-martial should be, nor that his own signature must be affixed thereto. But we are clearly of opinion that it will not be sufficient unless it is authenticated in a way to show otherwise than argumentatively that it is the result of the judgment of the President himself, and that it is not a mere departmental order which might or might not have attracted his personal attention. The fact that the order was his own should not be left to inference only."

Inasmuch as it did not affirmatively appear that the whole proceedings had been laid before the President, and it was argued that this must have been so because of the exercise of executive clemency, though the latter was declared to have been influenced by matters subsequent to the trial, it was thought that the order of approval could not be presumed to

have been made by the President upon the strength of an inference drawn from the remission of a part of the sentence. The inference that the President had personally acted could, indeed, be properly drawn from the substantive fact of the submission of the proceedings to him, if that had appeared, but presumption could not supply that fact, and then a presumption upon that presumption be availed of to make out that the approval was the President's personal act. This, as the Chief Justice remarked, would leave the fact that the order was his own, to inference only.

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

COPE *v.* COPE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 1327. Submitted December 22, 1890. — Decided January 19, 1891.

The statute of Utah of 1852, (Compiled Laws of Utah, 1876, sec. 677,) which provides that "illegitimate children and their mothers inherit in like manner from the father, whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the court that he was the father of such illegitimate child or children," was an act of legislation within the powers conferred upon the Territorial legislature by Congress by the act of September 9, 1850, 9 Stat. 453, c. 51, § 6; and was not abrogated, annulled or repealed by the act of July 1, 1862, 12 Stat. 501, c. 126, to prevent the practice of polygamy and annulling certain acts of that Territory.

The distribution of and the right of succession to the estates of deceased persons are matters exclusively of State cognizance, and may be dealt with by a Territorial legislature as it sees fit, in the absence of a prohibition by Congress.

Annulments of statutes by implication, like repeals by implication, are not favored by the courts.

No statute of a Territory will be declared void because it may indirectly, or by a construction which is possible but not necessary, be repugnant to an act of Congress annulling legislation of the Territory; but such a result must be direct and proximate in order to invalidate the statute.

The several acts of Congress respecting polygamy considered.

Opinion of the Court.

THIS was an appeal from a decree of distribution, originally pronounced by the Probate Court of Salt Lake County, affirmed by the District Court of the Third Judicial District of Utah, and again by an equal division of the Supreme Court of the Territory.

The sole question presented for consideration was, whether George H. Cope, the illegitimate child of Thomas Cope, was, under the facts of the case, the heir of Thomas Cope, deceased. The finding of facts, so far as the same are material, was as follows:

1. That Thomas Cope, deceased, died at Salt Lake County, Utah Territory, intestate, on the — day of August, 1864, leaving certain real estate therein, the description of which is immaterial.

2. That said Thomas Cope left at the time of his death surviving him, Janet Cope, his lawful wife, Thomas H. Cope, his only legitimate son, and George H. Cope, his illegitimate son by Margaret Cope, his polygamous or plural wife, and that the marriage of the said deceased with Margaret Cope was contracted while the said Janet Cope was the living and undivorced wife of said deceased.

And as conclusions of law the court found:

1. That the sole heirs-at-law of said Thomas Cope, deceased, are Janet Cope and Thomas H. Cope, who are alone entitled to share in the distribution of the estate of said Thomas Cope, and that all the real estate above mentioned descended to and vested in said Janet Cope and Thomas H. Cope, subject to the administration upon such estate.

2. That the said George H. Cope is not an heir of said Thomas Cope, deceased, and not entitled to any share of said Thomas Cope's estate.

Mr. J. G. Sutherland for appellant.

Mr. R. N. Baskin for appellees.

MR. JUSTICE BROWN, after stating the case, delivered the opinion of the Court.

The appellant, George H. Cope, who is admitted to be the illegitimate child of Thomas Cope, by Margaret Cope, his polygamous wife, claims the right to inherit a share of his father's estate under a Territorial statute of Utah, enacted in 1852, which provided as follows: "Section 25. Illegitimate children and their mothers inherit in like manner" [as legitimate] "from the father, whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the court that he was the father of such illegitimate child or children." Compiled Laws of Utah, 1876, § 677.

While this statute is an innovation upon the common law, and in some particulars a novelty in legislation, we perceive no objection to its validity. By section 6 of the act of September 9, 1850, 9 Stat. 453, 454, establishing a Territorial government for Utah, it is provided: "That the legislative power of said Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act; 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. All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect." With the exceptions noted in this section, the power of the Territorial legislature was apparently as plenary as that of the legislature of a State. *Maynard* v. *Hill*, 125 U. S. 190, 204. The distribution of and the right of succession to the estates of deceased persons are matters exclusively of State cognizance, and are such as were within the competence of the Territorial legislature to deal with as it saw fit, in the absence of an inhibition by Congress. Indeed, legislation of similar description is by no means unprecedented. By the laws of many States natural children are permitted to inherit from the mother, and also from the father in case of the after marriage of their parents, or where there are no lawful children, or where an adoption is made in due form, or where recognition is made by will. And if the

question of parentage be satisfactorily settled, there would seem to be power in the legislature to endow even the children of an adulterous intercourse with inheritable blood from the father.

Legislation admitting illegitimate children to the right of succession is undoubtedly in derogation of the common law, and should be strictly construed, and hence it has generally been held that laws permitting such children, whose parents have since married, to inherit, do not apply to the fruits of an adulterous intercourse. *Sams* v. *Sams' Executors*, 85 Kentucky, 396.

But, while it is the duty of the courts to put a construction upon statutes, which shall, so far as possible, be consonant with good morals, we know of no legal principle which would authorize us to pronounce a statute of this kind, which is plain and unambiguous upon its face, void, by reason of its failure to conform to our own standard of social and moral obligations. Legislatures are as competent as courts to deal with these subjects, and, in fixing a standard of their own, are beyond our control. Thus in *Brewer* v. *Blougher*, 14 Pet. 178, 198, it was said by Mr. Chief Justice Taney, speaking for this court, that the expediency and moral tendency of a similar law was a question for the legislature and not for this court; and it was held in that case that a statute of Maryland, endowing illegitimate children with inheritable blood, applied to such as were the offspring of an incestuous connection.

It is true that the peculiar state of society existing at the time this act was passed, and still existing in the Territory of Utah, renders a law of this kind much wider in its operation than in other States and Territories; but it may be said in defence of this act that the children embraced by it are not responsible for this state of things, and that it is unjust to visit upon them the consequences of their parents' sins. To recognize the validity of the act is in the nature of a punishment upon the father, whose estate is thus diverted from its natural channel, rather than upon the child; while to hold it to be invalid is to treat the child as in some sense an outlaw and a *particeps criminis*.

It is contended by respondents, however, that, even conceding the validity of this statute, it was abrogated and annulled by the anti-polygamy Act of Congress of July 1, 1862, 12 Stat. 501, c. 126, the second section of which annuls by title the ordinance for the incorporation of the Mormon Church, and then adds: "and all other acts and parts of acts heretofore passed by the said legislative assembly of the Territory of Utah, which establish, support, maintain, shield or countenance polygamy, be, and the same hereby are, disapproved and annulled: *Provided*, That this act shall be so limited and construed as not to affect or interfere with the right of property legally acquired under the ordinance heretofore mentioned, nor with the right 'to worship God according to the dictates of conscience,' but only to annul all acts and laws which establish, maintain, protect, or countenance the practice of polygamy," etc. As this act was passed before the death of Thomas Cope, and of course before descent cast upon his children, it applies to this case if the argument of respondents be sound. The question is then presented, does the Territorial act of 1852 establish, support, maintain, shield or countenance polygamy? It clearly does not establish, support or maintain it. Does it shield or countenance it? It does not declare the children of polygamous marriages to be legitimate; in fact, it treats them as illegitimate, or rather, it does not, except by indirection or inference, mention them at all; but it puts all illegitimate children, whether the fruits of polygamous or of ordinary adulterous or illicit intercourse, upon an equality and vests them with inheritable blood.

Nothing is better settled than that repeals, and the same may be said of annulments, by implication, are not favored by the courts, and that no statute will be construed as repealing a prior one, unless so clearly repugnant thereto as to admit of no other reasonable construction. *McCool* v. *Smith*, 1 Black, 459; *Bowen* v. *Lease*, 5 Hill, 221; *Ex parte Yerger*, 8 Wall. 85, 105; *Furman* v. *Nichol*, 8 Wall. 44; *United States* v. *Sixty-seven Packages*, 17 How. 85; *Red Rock* v. *Henry*, 106 U. S. 596.

In order to subject the Territorial act of 1852 to the annul-

ling clause of the act of Congress, its tendency to shield or countenance polygamy should be direct and unmistakable. No law will be declared void because it may indirectly, or by a possible, and not a necessary, construction be repugnant to an annulling act. Its direct and proximate results are alone to be considered. While, as before observed, the act may have been passed in view of the existing state of things, and as an indirect method of recognizing the legitimacy of polygamous children, it has no tendency in itself to shield or countenance polygamy so far as it applies to children. Legislation for the protection of children born in polygamy is not necessarily legislation favorable to polygamy. There is no inconsistency in shielding the one and in denouncing the other as a crime. It has never been supposed that the acts of the several States legitimating natural children, whose parents intermarry after their birth, had the slightest tendency to shield or countenance illicit cohabitation, but they were rather designed to protect the unfortunate children of those who were willing to do all in their power towards righting a great wrong. So, if the act in question had been passed in any other jurisdiction, it would have been considered as a perfectly harmless, though possibly indiscreet exercise of the legislative power, and would not be seriously claimed as a step towards the establishment of a polygamous system.

As this act annuls only such Territorial laws as shield or countenance polygamy, if we sustain the construction urged by the respondents here, it must necessarily follow that the children of polygamous marriages would be deprived of their power to inherit from the father, while the offspring of other illicit relations would be left to inherit under the act. This would seem to be at war with the intent of the legislature.

But whatever doubts there may be regarding the proper construction of this act, we think they are dispelled by a scrutiny of the subsequent legislation upon the same subject. In 1876 the legislature of Utah, being evidently in some doubt as to the proper interpretation of the Congressional act of 1862, passed another act declaring that "every illegitimate child is, in all cases, an heir to its mother. It is also heir to

its father when acknowledged by him." This was followed March 22, 1882, by an act of Congress, commonly known as the Edmunds law, 22 Stat. 30, c. 47, which, while providing for further punishment for polygamy and its accompanying evils, in section 7 expressly legitimates the issue of polygamous or Mormon marriages born prior to January 1, 1883. If the Territorial act of 1852 be open to the charge of shielding or countenancing polygamy, much more so is this act, which not only admits polygamous children to the right of inheritance, but actually legitimates them for all purposes. The law remained substantially in this condition until March 3, 1887, when the act of Congress known as the Edmunds-Tucker law, 24 Stat. 635, c. 397, was passed, the 11th section of which provides that "the laws enacted by the legislative assembly of the Territory of Utah which provide for or recognize the capacity of illegitimate children to inherit, or to be entitled to any distributive share in, the estate of the father of any such illegitimate child, are hereby disapproved and annulled; and no illegitimate child shall hereafter be entitled to inherit from his or her father, or to receive any distributive share in the estate of his or her father: *Provided*, That this section shall not apply to any illegitimate child born within twelve months after the passage of this act, nor to any child made legitimate by the 7th section of the act" of 1882.

Here, then, is the first clear and unqualified declaration of Congress of its disapproval of the legislation of Utah recognizing the inheritable capacity of the issue of polygamous marriages; and so careful is Congress of rights acquired or existing under these laws that it excepts by special proviso all children declared to be legitimate by the 7th section of the act of 1882, as well as all illegitimate children born within twelve months after the passage of this act.

These several acts of Congress, dealing as they do with the same subject matter, should be construed not only as expressing the intention of Congress at the dates the several acts were passed, but the later acts should also be regarded as legislative interpretations of the prior ones. *United States* v. *Freeman*, 3 How. 556, 564; *Stockdale* v. *Insurance Co.*, 20

Statement of the Case.

Wall. 323. Now if it had been intended by the act of 1862 to annul the Territorial act of 1852, fixing the inheritable capacity of illegitimate children, why did Congress in 1882 recognize the legitimacy of children born of polygamous or Mormon marriages, prior to January 1, 1883? Or why, in the act of 1887, did it save the rights of such children as well as of all others born within twelve months after the passage of that act? The object of these enactments is entirely clear. Not only does Congress refrain from adding to the odium which popular opinion visits upon this innocent but unfortunate class of children, but it makes them the special object of its solicitude, and at the same time offers to the parents an inducement, in the nature of a *locus penitentiæ*, to discontinue their unlawful cohabitation.

Our conclusion is that the appellant George A. Cope is entitled to share in his father's estate, and the decree of the Supreme Court of the Territory must, therefore, be

Reversed.

MASSACHUSETTS BENEFIT ASSOCIATION *v.* MILES.

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

No. 1380. Submitted December 1, 1890. — Decided January 19, 1891.

This court has jurisdiction over a judgment entered in a Federal Court in Pennsylvania "in favor of the plaintiff and against the defendant on the verdict," when interest on the verdict antecedent to the judgment appealed from is included in such judgment, and the amount, with the added interest, exceeds $5000.

The question of interest is always one of local law.

This was a motion to dismiss a writ of error upon the ground that the "matter in dispute" did not exceed the sum or value of five thousand dollars, as required by Revised Statutes, section 691, as amended by section 3 of the act of February 16, 1875, 18 Stat. 315, c. 77, to give this court jurisdiction.

Sarah G. Miles, the plaintiff below, brought an action in the

Opinion of the Court.

Court of Common Pleas of Philadelphia County, in the State of Pennsylvania, against the Massachusetts Benefit Association, to recover five thousand dollars, with interest, due to her as beneficiary in a policy of insurance, issued by the defendant company upon the life of her husband, John S. Miles. The insured died on January 16th, 1888. After the issue was made up, the defendant company removed the case to the Circuit Court for the Eastern District of Pennsylvania, where it was duly called for trial October 16th, 1889. Defendant set up no counter-claim, but denied all liability upon the ground that the policy had lapsed by non-payment of an assessment. Upon October 18th, the jury returned a verdict for the plaintiff, and assessed her damages at five thousand dollars.

Motion for new trial was made, and on October 31st the motion was denied, and judgment was entered in open court in the following words: "Motion for new trial denied, and judgment ordered to be entered in favor of the plaintiff, and against the defendant, on the verdict. Whereupon judgment is entered accordingly."

The defendant having taken out its writ of error, this motion was made to dismiss.

Mr. Richard P. White for the motion.

Mr. Frederick Carroll Brewster, *Mr. Ernest L. Tustin* and *Mr. William F. Johnson*, opposing.

Mr. Justice Brown delivered the opinion of the court.

Our jurisdiction to review this case upon writ of error depends upon the amount of the judgment, and the sole question is, whether upon the face of this record, the judgment is for five thousand dollars, or for that amount with interest from the date of the verdict. Under the peculiar practice obtaining in Pennsylvania, the judgment was not entered up for a definite amount in dollars and cents, but, generally, "in favor of the plaintiff, and against the defendant, on the verdict." As the verdict was rendered thirteen days before this entry, the amount actually due at the date of the judgment, if interest be computed upon the verdict, was $5010.83.

At common law neither verdicts nor judgments bore interest; but by Revised Statutes, section 966, "interest shall be allowed on all judgments in civil causes, recovered in a Circuit or District Court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such State; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such State."

Did the case rest solely upon this statute, it is difficult to see how interest could be computed upon this verdict, inasmuch as the specific allowance of interest upon judgments would seem to exclude the inference that interest should be allowed upon verdicts before judgment. But by an act of the legislature of Pennsylvania, passed in 1859, it is declared to "be lawful for any party or parties, in whose favor any verdict may be rendered for a specific sum of money, to collect and receive interest upon such sum from the date of the verdict; and every general judgment entered upon such verdict, whether by a court of original jurisdiction, or by the Supreme Court, shall be deemed and held to be a judgment for the sum found by the verdict, with interest thereon from the date of such finding." Purdon's Digest, Verdict, pl. 3.

We regard this statute as settling the question in favor of our jurisdiction. Section 966, while providing only for interest upon judgments, does not exclude the idea of a power in the several States to allow interest upon verdicts, and where such allowance is expressly made by a State statute, we consider it a right given to a successful plaintiff, of which he ought not to be deprived by a removal of his case to the Federal court. The courts of the State and the Federal courts sitting within the State should be in harmony upon this point. Both in *Holden* v. *Trust Company*, 100 U. S. 72, and in *Ohio* v. *Frank*, 103 U. S. 697, it was held that the question of interest is always one of local law. This is also recognized in the 23d Rule of this court, which allows interest upon the judgment of the inferior courts, at such rate as similar judgments

bear interest in the courts of the State where such judgment is rendered, whenever upon writ of error from this court the judgment of such inferior court is affirmed. Where interest antecedent to the judgment appealed from is included in such judgment, and the amount, with the added interest, exceeds $5000, jurisdiction will attach. *The Patapsco*, 12 Wall. 451; *The Rio Grande*, 19 Wall. 178; *Zeckendorf* v. *Johnson*, 123 U. S. 617; *District of Columbia* v. *Gannon*, 130 U. S. 227; *New York Elevated Railroad* v. *Fifth Nat. Bk.*, 118 U. S. 608; *Keller* v. *Ashford*, 133 U. S. 610.

The motion to dismiss will therefore be

Denied.

CALDWELL *v.* TEXAS.

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

No. 1541. Submitted December 15, 1890.—Decided January 12, 1891.

No State can deprive particular persons or classes of persons of equal and impartial justice under the law, without violating the provisions of the Fourteenth Amendment to the Constitution.

Due process of law, within the meaning of the Constitution, is secured when the laws operate on all alike, and no one is subjected to partial or arbitrary exercise of the powers of government.

No question of repugnancy to the Federal Constitution can be fairly said to arise when the inquiry of a State court is directed to the sufficiency of an indictment in the ordinary administration of criminal law, and the statutes authorizing the form of indictment do not obviously violate these fundamental principles.

An indictment, framed in accordance with the laws of Texas, which charges that the prisoner at a time and place named did, "unlawfully and with express malice aforethought, kill one J. M. Shamblin by shooting him with a gun, contrary to the form of the statute" *et cet.*, does no violation to the provisions of the Fourteenth Amendment to the Constitution.

MOTION TO DISMISS. The case was stated by the court as follows:

William Caldwell was arraigned upon the following indictment found by the grand jury of Fort Bend County, Texas:

Statement of the Case.

"In the name and by the authority of the State of Texas.

"The grand jurors, good and lawful men of the State of Texas, county of Fort Bend, duly tried on oath by the judge of the District Court of said county touching their legal qualifications as grand jurors, elected, empanelled, sworn and charged to inquire into and true presentments make of all offences against the penal laws of said State committed within the body of the county aforesaid, upon their oaths present in the District Court of said county that William Caldwell, late of the county of Fort Bend, laborer, on or about the first day of August, in the year of our Lord one thousand eight hundred and eighty-eight, with force of arms, in the said county of Fort Bend and State of Texas, did then and there, unlawfully and with express malice aforethought, kill one J. M. Shamblin by shooting him with a gun, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the State."

The venue was subsequently changed to Harris County, Texas, and on trial of the case, upon Caldwell's plea of not guilty, before a jury duly empanelled, a verdict was found against him of guilty of murder in the first degree, and awarding the punishment of death.

A motion for a new trial was made and overruled, and judgment entered on the verdict, from which an appeal was taken to the Court of Appeals of the State of Texas, which affirmed the judgment, the opinion being delivered by Willson, J. (*Caldwell* v. *The State*, 28 Texas App. 566). Application for a rehearing was subsequently made upon the ground that "the indictment is fatally and fundamentally defective and void under the constitution of the State, and does not, either in form or substance, set out a valid charge of murder or any other offence known to the criminal law of the State, and is not due process of law under the 14th Amendment to the Constitution of the United States." This motion was heard on oral and printed arguments on both sides, and overruled. The opinion was delivered by Hurt, J. (28 Texas App. 576), and stated that but one ground was urged for rehearing, namely, the sufficiency of the indictment, the objections to which were,

that it failed to charge that the accused murdered the deceased; that it omitted to charge the time and place of the alleged shooting; and the infliction of a mortal wound; and the date of the wounding and that of the death; and that the shooting was done unlawfully and with malice aforethought; and was fatally defective for want of certainty. The court held that as the indictment charged that Caldwell on the first day of August, A.D. 1888, in the county of Fort Bend, unlawfully and with express malice aforethought, killed Shamblin by shooting him with a gun, it charged all of the acts constituting murder, and with the requisite particularity, and that consequently the indictment was sufficient; and said: "Now, we have held that the legislature of this State has no authority to prescribe a form of indictment, and make the same sufficient, which fails to contain all of the elements of the crime. But we have never held that the legislature could not prescribe a form for indictment which would not be good if the facts constituting the crime sought to be charged are contained in the form. If the offence is sufficiently particularized so as to come within the rule of pleading, we would hold that such form would not be obnoxious to constitutional objections, either Federal or State."

A writ of error was sued out from this court and allowed by the presiding judge of the Court of Appeals of Texas, and the case comes on upon a motion to dismiss.

Section 10, article I, of the constitution of Texas reads: "In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him and to have a copy thereof. He shall not be compelled to give evidence against himself. He shall have the right of being heard by himself or counsel, or both; shall be confronted with the witnesses against him, and shall have compulsory process for obtaining witnesses in his favor. And no person shall be held to answer for a criminal offence, unless on indictment of a grand jury, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases arising in

the army or navy, or in the militia, when in actual service in time of war or public danger."

By art. 605 of the Texas Penal Code, "murder" is thus defined:

"Every person with a sound memory and discretion who shall unlawfully kill any reasonable creature in being within this State, with malice aforethought, either express or implied, shall be deemed guilty of murder. Murder is distinguishable from every other species of homicide by the absence of the circumstances which reduce the offence to negligent homicide or manslaughter, or which excuse or justify the homicide." Willson's Criminal Texas Stats. pt. I, p. 203.

The Code of Criminal Procedure of Texas provides:

"Art. 416. All felonies shall be presented by indictment only, except in cases specially provided for."

"Art. 419. An indictment is the written statement of a grand jury, accusing a person therein named of some act or omission, which, by law, is declared to be an offence.

"Art. 420. An indictment shall be deemed sufficient if it has the following requisites: 1. It shall commence 'In the name and by the authority of the State of Texas.' 2. It must appear therefrom that the same was presented in the District Court of the county where the grand jury is in session. 3. It must appear to be the act of a grand jury of the proper county. 4. It must contain the name of the accused, or state that his name is unknown, and in case his name is unknown give a reasonably accurate description of him. 5. It must show that the place where the offence was committed is within the jurisdiction of the court in which the indictment is presented. 6. The time mentioned must be some date anterior to the presentment of the indictment, and not so remote that the prosecution of the offence is barred by limitation. 7. The offence must be set forth in plain and intelligible words. 8. The indictment must conclude 'Against the peace and dignity of the State.' 9. It shall be signed officially by the foreman of the grand jury.

"Art. 421. Everything should be stated in an indictment which it is necessary to prove, but that which it is not necessary to prove need not be stated.

"Art. 422. The certainty required in an indictment is such as will enable the accused to plead the judgment that may be given upon it, in bar of any prosecution for the same offence."

"Art. 428. In an indictment for a felony it is not necessary to use the words 'felonious' or 'feloniously.'" Willson's Cr. Texas Stats. pt. II, p. 109 *et seq.*

Sections 1, 4, 11, 12 and 17 of an act of the legislature of Texas of March 26, 1881, entitled "An act to prescribe the requisites of indictments in certain cases," are as follows:

"Section 1. That an indictment for any offence against the penal laws of this State shall be deemed sufficient which charges the commission of the offence in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offence with which he is charged, and enable the court on conviction to pronounce the proper judgment; and in no case are the words 'force and arms,' or 'contrary to the form of the statute,' necessary."

"Sec. 4. An indictment for an act done with intent to commit some other offence, may charge in general terms the commission of such act with intent to commit such other offence, without stating the facts constituting such other offence."

"Sec. 11. The following forms of indictments in cases in which they are applicable are sufficient, and analogous forms may be used in other cases:" . . .

"Form No. 2: Murder. A B did with malice aforethought kill C D by shooting him with a gun, or by striking him with an iron weight, or by poisoning him, etc." . . .

"Sec. 12. Nothing contained in the 11th section of this act shall be construed to dispense with the necessity for proof of all the facts constituting the offence charged in an indictment, as the same is defined by law."

"Sec. 17. An indictment shall not be held insufficient, nor shall the trial, judgment or other proceedings thereon be affected by reason of any defect or imperfection of form in such indictment, which does not prejudice the substantial

rights of the defendant." Laws Texas 1881, p. 60 *et seq.*, and Willson's Criminal Texas Stats. pt. II, p. 115.

It is stated in Willson's Criminal Texas Stats. pt. II, p. 115, § 1969, that this statute is in force, so far as it has not been held unconstitutional, as some of the forms prescribed have been and as others seem to the annotator to be. The differences between the indictment in this case and that authorized by the statute of 1881 will be detected upon comparison.

The following errors were assigned in this court: "That the form of indictment in this case, as authorized by the act of the legislature of Texas of March 26, 1881, before cited, is not 'due process of law' under either the constitution of the State or that of the United States, and that the act referred to, establishing said form of indictment is violative of the provision of the Fourteenth Amendment of the Constitution of the United States which ordains that 'no State shall deprive any person of life, liberty or property without due process of law,' and, therefore, is null and void."

Mr. James S. Hogg, Attorney General of Texas, and *Mr. Richard H. Harrison*, for the motion.

Mr. J. Randolph Burns opposing.

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

By the Fourteenth Amendment the powers of the States in dealing with crime within their borders are not limited, but no State can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requisition is satisfied. 2 Kent Comm. 13. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Bank of Colum-*

bia v. *Okely*, 4 Wheat. 235, 244. The power of the State must be exerted within the limits of those principles, and its exertion cannot be sustained when special, partial and arbitrary. *Hurtado* v. *California*, 110 U. S. 516, 535. No question of repugnancy to the Federal Constitution can be fairly said to arise when the inquiry of the State courts is directed to the sufficiency of an indictment in the ordinary administration of criminal law, and the statutes authorizing the form of indictment pursued are not obviously violative of the fundamental principles above adverted to.

The case before us is destitute of the elements of a Federal question, since there was nothing special, partial or arbitrary, or in violation of fundamental principles, in the law of the State in accordance with which the indictment was found, and as applied in passing upon its sufficiency. The plaintiff in error was not denied the equal protection of the laws, nor deprived of the process due by the law of the land. The constitution of Texas secured to him the right to demand the nature and cause of the accusation against him, and the State court determined, as was its province, that this demand was satisfied by the indictment in question. His objections were in effect to the technical sufficiency of the indictment, but not that his rights had been determined by any other rules than those applied to the rest of the community, nor that the court had done more than commit errors in the disposition of a subject within its jurisdiction.

No title, right, privilege or immunity under the Constitution of the United States was specially set up or claimed in the trial court, or in the Court of Appeals, except as the petition for rehearing may be held to have constituted such claim. The validity of the existence of the court and its jurisdiction over the crime named in the indictment and over the person of the defendant were not drawn in question, nor was the validity of the laws of the State, except after judgment and upon the petition for a rehearing. The usual rule is that a contention thus delayed comes too late, but if this should be treated as an exception, on the ground that the Court of Appeals permitted argument on the question and delivered a

decision and opinion upon it, yet, where the misconception of the application of the Fourteenth Amendment is so obvious, we are unwilling to retain the cause for further argument, and may avail ourselves of the rule ordinarily applicable to the afterthoughts of counsel.

The writ of error is

Dismissed.

APPENDIX.

I.

In Memoriam.

SAMUEL FREEMAN MILLER, LL.D.

The court, on meeting pursuant to law, on the 13th of October, 1890, found Mr. Justice Miller lying critically ill at his house in Washington. The Chief Justice on the opening of the court said: "The court reassembles under the shadow of impending affliction. The visit customarily paid to the President of the United States on the first day of the term will be postponed. Cases assigned for the second Monday of the term (October 20) will be set down for the third Monday of the term, the 27th of October. Applications for admissions to the bar will be entertained, and after they are disposed of the court will adjourn until to-morrow."

That evening, at fifty-two minutes past ten o'clock, Mr. Justice Miller died. On the convening of the court on the 14th, the Chief Justice said: "It is with feelings of profound sadness that I announce the death of the senior Associate Justice of this court, Mr. Justice Miller, which occurred at his residence in this city, at fifty-two minutes past ten o'clock, last evening. No business will be transacted, and the court, as a mark of respect to the memory of its eminent associate, will adjourn until Monday next": which was accordingly done.

On the 16th of October the funeral services in Washington took place in the court room of the Supreme Court, and the body was taken to Keokuk, Iowa, for interment. Mr. Chief Justice Fuller and Mr. Justice Brewer accompanied it.

On the 18th of October, at 11 o'clock A.M., a meeting of the bar

and officers of the Supreme Court of the United States was held in the court room to take action upon his death. Mr. Samuel F. Phillips was chosen chairman, and Mr. James H. McKenney, secretary. Messrs. William M. Evarts, Wayne MacVeagh, C. K. Davis, A. H. Garland, John T. Morgan, W. C. Goudy, George F. Edmunds, Thomas J. Semmes, George G. Vest, W. D. Davidge, J. M. Wilson, J. M. Woolworth, John B. Henderson and Enoch Totten, were appointed a committee to prepare suitable resolutions, and the meeting adjourned to the 6th day of December, at the same hour and place.

On Monday, October 20, the court met pursuant to adjournment: Present: Mr. Justice Field, Mr. Justice Bradley, Mr. Justice Gray, Mr. Justice Blatchford and Mr. Justice Lamar.

Mr. Justice Field said: "The Justices of this court who accompanied the body of Mr. Justice Miller to its place of burial, in Iowa, have not returned to Washington. There is therefore not a quorum of Justices present to-day, and the court will consequently stand adjourned until to-morrow at 12 o'clock."

On the 6th of December, 1890, the members of the bar and the officers of the court met pursuant to adjournment.

Mr. William M. Evarts, on behalf of the committee, reported for consideration the following resolutions:

"*Resolved*, That the members of the bar, practising in the Supreme Court of the United States, are affected with profound sensibility at the loss suffered by the court, and by the profession of the law, and the community at large, which has fallen upon them in the sudden death of this eminent lawyer, jurist and magistrate, when at the height and full exercise of his great powers in the service to the nation, in the exalted place which he had so long occupied.

"*Resolved*, That the length of years, falling not much short of a whole generation, which the judicial service of Mr. Justice Miller has given to the administration of justice in the high functions and the wide scope which belong to the great tribunal in which he sat, and the period of the service, concurring with the march of events in the life of the nation through the civil war, and the difficult tasks of the restoration of order and unity in the working of our government and the reëstablishment of the calm and prevalent maintenance of law throughout the land, place him in the front rank and in close association with the greatest judges that have shed lustre upon the court, in its historic fame and permanent benefits upon the welfare of the people.

"*Resolved*, That the members of this bar, besides fully sharing in the universal and grateful public estimate of the character and life of this great judge, and grief at his loss, may properly, from their close and constant observation of his personal traits and his relations with the court and the bar in his discharge of his daily duties, bear witness to his admirable conduct in these duties and relations, so just, so firm, so amiable, and feel a personal sorrow at his death.

"*Resolved*, That a copy of these resolutions be presented by the president and secretary of the meeting to the family of Mr. Justice Miller, with the sincere sympathy of the profession in their bereavement, and that the Attorney General be requested to present to the Supreme Court in session the proceedings of this meeting."

After appropriate remarks by Mr. Wayne MacVeagh, Mr. A. H. Garland, Mr. C. K. Davis, Mr. John B. Henderson, Mr. Henry E. Davis, Mr. J. H. Embry, Mr. R. D. Mussey and Mr. Wm. M. Evarts, these resolutions were unanimously adopted, and the meeting was adjourned *sine die*.

On Monday, December 15, 1890, the Chief Justice and the associate Justices being all present, Mr. Attorney General presented and read these resolutions to the Court, and said:

MAY IT PLEASE THE COURT:

It was a saying of Solon, the lawgiver, that no one ought to be called happy until after death, since storms and calamities in the evening may change the character of the brightest day. Tried by this supreme test, Samuel Freeman Miller was a happy man.

Born of pioneer stock, amid humble surroundings in the simple life of Kentucky, during the second decade of this century, a life from which advancement could be had only along the rugged paths of frugality, integrity and hard work, he was fortunate in the time and place of his nativity.

It is not uncommon to refer to a successful man as having started without extraneous help, as if this rendered the career more remarkable. Quite the reverse is true. To the unambitious youth, content upon the plains of comfortable mediocrity, wealth and influence may be desirable. But one who aspires to the high places of earth, to climb mountains, and from their summits take in wider landscapes, to be a leader among his fellows, must generally strive under the spur of necessity, along paths impassable to luxury.

In this, also, Mr. Miller's life was happy. Necessity compelled, and an indomitable resolution impelled him to make his own way.

Full of ambition, though having only slight educational advantages, he chose medicine as a profession, and practised as a physician successfully in Kentucky for a number of years.

Dissatisfied, however, with his surroundings, especially hating the contaminating touch of African slavery, he determined to seek a new life, changing at once his residence and his profession.

In 1862, President Lincoln found Mr. Miller in Iowa, as a few years before the country had found Mr. Lincoln in Illinois, devoting his life to a somewhat obscure and unremunerative, though, for the place and time, successful practice of the law.

And the finding of such a judge by the President was only less fortunate than the finding of such a President by the country.

Indeed, Mr. Justice Miller rightly thought it one of the happiest incidents of his life, that he not only received his commission as Justice of this court at the hands of Abraham Lincoln, but that he received with it his friendship and confidence; and well he might, for who does not feel a pride that he was even a contemporary of that great and good man, and who does not view with regret the severance of any tie connecting that inestimable life with his own?

While we may take by the hand those who have lived and wrought by the side of Lincoln, we seem to be near him, and as by personal contact to take on something of the high inspiration and holy impulses of his character.

Alas, that but a single strand now connects him with the personality of this court. One member only remains, full of years and honors, discharging the high duties to which he was consecrated by the martyred President.

Serus in cœlum redeas.

Mr. Justice Miller was happy in his work and in its results.

To be appointed to a seat in this great tribunal was a signal mark of distinction; but to occupy that seat, in the estimation of the profession and of the whole people, for nearly thirty years, with the highest credit to himself and the greatest usefulness to his country, was honor indeed.

When Justice Miller ascended this bench, a political earthquake was shaking the foundations of Government, obliterating old landmarks, and filling the accustomed channels of public law with hitherto unsuspected difficulties and dangers. To safely guide this, the weakest and most sensitive branch of the Government, amid these shocks and through all the troublous times that fol-

lowed, so that, on the one hand, no just power of the General Government should be lost, and on the other, no just right of a State or of a citizen should be sacrificed, was a task worthy of the best efforts of the greatest jurists; and worthily has the work been done. It is not disparagement to others to say, that in this work, which will ever stand as a monument of honor to the court, and a bulwark of security to free institutions, Justice Miller was second to none.

The most striking feature of his mind was the logical faculty. Others, perhaps, had more culture, more legal learning; none had more legal wisdom. Intellectually, as morally, he was robust, rugged, simple and always honest. With him, logical conclusions were moral convictions, and to abide by them was an intellectual and moral necessity. Like Martin Luther at the Diet of Worms, he could "do no otherwise."

Undiscriminating eulogy has said that Judge Miller was wont to sweep away the law in order that justice might prevail. Such a statement would not have been accepted by him as praise. He loved justice, but he knew, as all men fit for judges know, that justice, humanly speaking, can have its perfect work only through the law; that obedience to law by the magistrate, as well as by the private citizen, is essential to justice, as it is a condition of liberty.

In his social and home life also, our friend was happy. A vigorous, healthy constitution in a stalwart body, a genial temperament, a great fondness for and unfaltering trust in his friends, made the grasp of his hand always hearty, and his presence a delight in every social gathering.

His religious views were broad and very practical. The essence of his creed was "to do justice, to love mercy, and to walk humbly" before God and man.

In the Odyssey, the much suffering Ulysses thus depicts the highest earthly bliss:

> "There is no better, no more blessed state,
> Than when the wife and husband in accord
> Order the household lovingly. Then those
> Repine who hate them, those who wish them well
> Rejoice, and they themselves the most of all."

After a long life of such domestic felicity and of such public usefulness, loved by a multitude of friends, revered of all men, our friend, still instant in duty, with length of days in his right hand, and in his left hand wisdom and honor, awaited the call of

the Master. The call came, sudden, peremptory, and it found him ready.

I move that the resolutions of the bar be spread upon the records of the court.

THE CHIEF JUSTICE responded as follows:

The court deeply sympathizes with the resolutions and the remarks of the Attorney General. The loss so universally felt in the death of Mr. Justice Miller comes home in an especial degree to his brethren, participants in his toil and sharers of his intimate friendship.

When he became a member of the court its deliberations were presided over by Chief Justice Taney, and Catron and Nelson and Grier and Clifford were among his Associates, together with the venerable Wayne, the last survivor of the bench as constituted under John Marshall. Of the forty-five Associate Justices up to the time of his death only Catron equalled, and Washington, William Johnson, Story, McLean and Wayne exceeded him in length of service. We need not say how cordially we reciprocate the wish that our colleague, his ancient comrade, may be spared to pass far beyond that limit, while we extend the aspiration to that other veteran who has sat in judgment with him for more than twenty years.

The trans-Mississippi country had just entered upon its course of unexampled development, when the sagacity of Mr. Lincoln gave to it, in this appointment, a judicial representative. Wisconsin was one of the states of the circuit to which Mr. Justice Miller was first allotted, but was afterward detached, while Iowa, Kansas, Minnesota and Missouri remained with him from the beginning to the end, Arkansas, Colorado and Nebraska being subsequently added; and there is no part of that vast and powerful region that is not full of his labors. He lived to see a population in his circuit of three million expand into ten (two of the States admitted to the Union years after the commencement of his incumbency rising from the 63,000 of 1860 to the million and a half of 1890), while an equally marvellous increase in the products of the farm and of the mine, in commerce, in science, in invention and in wealth, corresponded with the progress of the great nation of which he was a judicial officer.

He came here in the prime of life, in the full vigor of his faculties, and with a mind trained by the experience of active practice in two professions, nearly ten years in that of medicine

and fifteen at the bar; a practice in either requiring for success learning, knowledge of men and things, acuteness, and, above all, the habit of decision.

When he took his seat the country was in the throes of internecine conflict; when his eyes closed it was upon a happy, prosperous and united people, living under the form of government devised by the fathers, the wisdom of whose fabric the event had vindicated. Great problems crowded for solution: the suspension of the habeas corpus; the jurisdiction of military tribunals; the closing of the ports of the insurrectionary States; the legislation to uphold the two main nerves, iron and gold, by which war moves in all her equipage; the restoration of the predominance of the civil over the military authority; the reconstruction measures; the amendments to the Constitution, involving the consolidation of the Union, with the preservation of the just and equal rights of the States — all these passed in various phases under the jurisdiction of the court, and he dealt with them with the hand of a master.

While he took his full share in the consideration of every subject of judicial investigation, notably in reference to some, as, for instance, those pertaining to the public lands, yet he chiefly distinguished himself in the treatment of grave constitutional questions, which brought into play the patience, the intuition, the deliberation, the foresight, the intellectual grasp and the breadth of view which characterize all who have deserved the name of statesmen. And, as with private controversies, so with those concerning the public and the Government, he sought to go by the ancient ways, and never to incur the curse denounced on him who removeth the landmarks. His style was like his tread, massive but vigorous. His opinions, from his first in the second of Black's Reports, to his last in the one hundred and thirty-sixth United States, some seven hundred in number (including dissents) running through seventy volumes, were marked by strength of diction, keen sense of justice, and undoubting firmness of conclusion.

He had that true legal instinct which qualified him to arrive at the very right of a cause and to apply settled principles to its proper disposition; while to courage was joined an integrity and simplicity that always commanded respect and generally carried conviction. Benignant in temperament, and with a heart full of sensibility, his intercourse with his fellows was so cordial and kindly as to endear him to all who came within the sphere of his influence.

And the power of routine so benefited him that through the long years of experience, which seem so brief now, he attained, as was remarked of Mansfield, "that dignity of disposition which grows with the growth of an illustrious reputation, and becomes a sort of pledge to the public for security."

The classical allusion of the Attorney General might well receive a wider application; for, to the last, having seen and known much of men, of councils and of governments, himself "not least, but honored of them all," he bent to the oar, seeking to explore new lines of coast along the well-nigh illimitable ocean of the law.

His last years were suffused with the glow of the evening-time of a life spent in the achievement of worthy ends and expectations; and he has left a memory dear to his associates, precious to his country, and more enduring than the books in which his judgments are recorded.

The court has heretofore adjourned as a mark of respect to the memory of the deceased, and a delegation from its number has attended the committal of his body to its congratural dust in the distant city from whence he came, among the people to whom he was so deeply attached, who with their fellow-countrymen had followed his career with pride and affection, and by whom his final resting-place will ever be held sacred.

The resolutions of the bar and the remarks of the Attorney General will be entered upon the record; and it is ordered that the memorials of the bars of New York, of St. Louis, of Portland, Oregon, and of the eastern and western districts of Arkansas be placed on file, together with such other commemorative tributes as may be hereafter received.

II.

AMENDMENTS TO RULES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

Ordered, that the following additional rule of this court is adopted and promulgated:

35.

WRITS OF ERROR UNDER SECTION 6 OF THE ACT OF FEBRUARY 6, 1889, CHAPTER 113, (25 STAT. 656.)

1. The plaintiff in error shall file with the clerk of the court below, with his petition for the writ of error, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to, *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

2. The plaintiff in error shall cause the record to be printed, according to the provisions of sections 2, 3, 4, 5, 6 and 9 of Rule 10.

Promulgated November 3, 1890.

8.

It is ordered by the court that subdivision 5 of Rule 8 of this court be amended so as to read as follows:

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

Promulgated January 26, 1891.

9.

It is ordered by the court that subdivision 1 of Rule 9 of this court be amended so as to read as follows:

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

Promulgated January 26, 1891.

It is ordered by the court that subdivision 2 of Rule 9 of this court be amended so as to read as follows:

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of the court; and, if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

Promulgated January 26, 1891.

It is ordered by the court that subdivision 4, of Rule 9, be amended so as to read as follows:

4. In all cases where the period of thirty days is mentioned in Rule 8, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska and Idaho.

Promulgated January 26, 1891.

ADMIRALTY PRACTICE, 54.

It is ordered by the court that Rule 54 of the Rules of Practice in Admiralty be amended so as to read as follows:

54.

When any ship or vessel shall be libelled, or the owner or owners thereof shall be sued, for any embezzlement, loss or destruction by the master, officers, mariners, passengers or any other person or persons, of any property, goods or merchandise shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture done, occasioned or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the act of March 3, 1851, entitled "an act to limit the liability of ship owners and for other purposes," now embodied in sections 4283 to 4285 of the Revised Statutes, the said owner or owners shall and may file a libel or petition in the proper district court of the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of said act;

and upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same: and public notice of such monition shall be given as in other cases, and such further notice served, through the post-office, or otherwise, as the court, in its discretion, may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.

It is further ordered that the present heading to this rule be erased.

Promulgated January 26, 1891.

III.

ASSIGNMENTS TO CIRCUITS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

ORDER.

It is ordered, That the following allotment be made of the Chief Justice and Associate Justices of this 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, DAVID J. BREWER, Associate Justice.
For the ninth circuit, STEPHEN J. FIELD, Associate Justice.

November 3, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

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, HENRY B. BROWN, Associate Justice.
For the seventh circuit, JOHN M. HARLAN, Associate Justice.
For the eighth circuit, DAVID J. BREWER, Associate Justice.
For the ninth circuit, STEPHEN J. FIELD, Associate Justice.

January 19, 1891.

INDEX.

ADMIRALTY.

CASES EXPLAINED.

Westray v. *United States*, 18 Wall. 322, explained. *Merritt* v. *Cameron*, 542.

CHATTEL MORTGAGE.

See LOCAL LAW, 1, 2, 3.

CLAIMS AGAINST THE UNITED STATES.

1. The Court of Claims disallowed the claim of the administrator *de bonis non* of Colonel Francis Taylor, for five years' full pay to Taylor, as a colonel of infantry, under the resolution of the Continental Congress of March 22, 1783, (4 Jour. Cong. 178,) holding that he was not in the military service, in the continental line, to the close of the war of the Revolution in 1783. This court affirms the judgment. *Williams* v. *United States*, 113.
2. Nor was Colonel Taylor entitled to half pay for life under the resolutions of October 3 and 21, 1780, (3 Jour. Cong. 532, 538,) because he was not a "reduced" officer. *Ib.*
3. He was not entitled to recover under the provisions of the act of Congress of July 5, 1832, (4 Stat. 563.) *Ib.*
4. Under § 906 of the Revised Statutes, the decision of the governor of Virginia, made under the act of that State, of March 11, 1834, (Laws of 1834, c. 6, p. 22,) that Colonel Taylor was a "colonel in the continental line from October 1, 1775, to the close of the war," is not either obligatory in law, or conclusive as evidence, against the United States. *Ib.*
5. The Court of Claims did not err in refusing to find that Colonel Taylor "was an officer in the continental service on the 22d day of March, 1783, and continued therein as such officer to the end of the war," whether that was a conclusion of fact or one of law. *Ib.*

COMPUTATION OF TIME.

See PRACTICE, 6.

CONFLICT OF LAWS.

1. Although a judgment in one State against a citizen of another State may be held valid under local laws by the courts of the former, the courts of the latter are not bound to sustain it, if it would be invalid but for the special laws of the State where rendered. *Grover & Baker Sewing Machine Co.* v. *Radcliffe*, 287.
2. B., a citizen of Maryland, having executed a bond, containing a warrant authorizing any attorney of any court of record in the State of New York or any other State, to confess judgment for the penalty, and judgment having been entered against him in Pennsylvania by a prothonotary, without service of process, or appearance in person or by attorney, under a local law permitting that to be done, *Held*, (1) That in a suit upon this judgment in Maryland, the courts of Maryland

17. The 15th section of the act of the legislature of New York, approved June 6, 1885, provides that no action or special proceeding shall thereafter be maintained against the city of Brooklyn, or the Registrar of Arrears of that city, to compel the execution or delivery of a lease upon any sale for taxes, assessments or water rates, made more than eight years prior to the above date, unless commenced within six months after that date, and notice thereof filed in the office of the Registrar of Arrears; also, that that officer shall, upon the expiration of such six months, cancel in his office all sales made more than eight years before the passage of the act, upon which no lease had been given, and no action commenced and notice thereof filed, within the period limited as aforesaid, and that thereupon the lien of all such certificates of purchase should cease and determine. *Held*, (1) That this section is not repugnant to the clause of the Constitution of the United States forbidding a State to pass any law impairing the obligation of contracts, or to the clause declaring that no State shall deprive any person of property without due process of law; (2) That, consistently with those clauses, the legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced, provided, in each case, a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect. *Wheeler* v. *Jackson*, 245.
18. Section 4 of the Minnesota statute of April 24, 1889, (Gen. Laws Minn. 1889, c. 20,) providing that, in case of sentence of death for murder in the first degree, the convict shall be kept in solitary confinement after the issue of the warrant of execution by the governor, and only certain persons allowed to visit him, is an independent provision, applicable only to offences committed after its passage, and is not *ex post facto*. *Holden* v. *Minnesota*, 483.
19. Section 3 of that statute, which requires the punishment of death by hanging to be inflicted before sunrise of the day on which the execution takes place, and within the jail or some other enclosure higher than the gallows, thus excluding the view from persons outside, and limiting the number of those who may witness the execution, excluding altogether reporters of newspapers, are regulations that do not affect the substantial rights of the convict, and are not *ex post facto* within the meaning of the Constitution of the United States, even when applied to offences previously committed. *Ib.*
20. The statutes of Minnesota authorizing the governor to fix by his warrant the day for the execution of a convict sentenced to suffer death by hanging, are not repugnant to the constitutional provision that no person shall be deprived of life without due process of law; it being competent for the legislature to confer either upon the court or the executive the power to designate the time when such punishment shall be inflicted. *Ib.*

charges that the prisoner at a time and place named did, "unlawfully and with express malice aforethought, kill one J. M. Shamblin by shooting him with a gun, contrary to the form of the statute," *et cet.*, does no violation to the provisions of the Fourteenth Amendment to the Constitution. *Ib.*

CONTRACT.

1. If one party to a contract intends to rescind it on the ground of failure of performance by the other, a clear notice of such intention must be given, unless either the contract dispenses with notice, or it becomes unnecessary by reason of the conduct of the parties. *Hennessy* v. *Bacon*, 78.
2. The mere receipt of a bill on payment of money is not an assent to the proposition that the bill contains the whole contract between the parties; but whether it is so or not is a fact to be determined by the jury. *Bank of British North America* v. *Cooper*, 473.
3. A party receiving moneys from another to be transmitted for him to a named destination, in order that they may be used there to pay his liabilities, cannot change the destination at the desire of the party to whom the money is sent, without becoming liable for the loss, in case loss ensues in consequence of the change. *Ib.*
4. In the relation of principal and agent, strict compliance by the latter with the instructions of the former is an unvarying condition of exemption from liability. *Ib.*
5. C in New York, who had had business relations with M. & Co. of Glasgow, drew upon them for £5000, to mature February 29. On February 26th he bought of plaintiff in error, who had an office in London, a cable transfer of this amount in favor of M. & Co. to be transmitted in a check by post from London to Glasgow, and took from the bank a receipt "for cable transfer on the Bank of British North America, London, in favor of" M. & Co. "Glasgow." The cable message was accordingly sent, but the London office, under previous directions from M. & Co. as to all such matters, but without knowledge of C, instead of forwarding the check to Glasgow, deposited it to the credit of M. & Co. in the Bank of Scotland in London, which action was approved by M. & Co. On the 28th or 29th of February M. & Co. suspended. It was in evidence that on the 28th they applied similar moneys to the payment of similar obligations, and that if the check had been sent by mail as directed, it would have reached Glasgow on the morning of that day in time to be applied to the payment of C's draft. The Bank of Scotland appropriated the £5000 to the payment of the balance due from M. & Co. to it, and C was obliged to meet his draft. In an action by him against the Bank of British North America, *Held*, (1) That whether the bill contained the entire contract between the parties was a question for the jury; (2) That the bank, having received the money with knowledge that it belonged to C, and that it

CORPORATION.

EVIDENCE.

EXCEPTION.

1. Action on a motion for new trial is not a subject of exception. *Fitzgerald & Mallory Construction Co.* v. *Fitzgerald*, 98.
2. The original bill of exceptions in this case, signed by the trial judge, certified by the clerk of the trial court, was transmitted to and filed with the record of the case in the Supreme Court of the Territory of Utah. *Held*, that its identification and authentication were perfect and were sufficient to bring the questions raised by the record within the jurisdiction of this court. *Bassett* v. *United States*, 496.
3. The propriety of questions put to a witness cannot be passed upon intelligently unless the bill of exceptions shows the character of the evidence previously put in. *Sire* v. *Ellithorpe Air Brake Co.*, 579.
4. A paper which forms no part of a bill of exceptions, and is signed only by an attorney, and purports to be exceptions to findings of fact and the conclusion of the judge thereon, cannot be regarded as a bill of exceptions, or as part of the bill of exceptions signed by the judge, irrespectively of the point that this court cannot review the findings of fact. *Ib.*

See PRACTICE, 1, 2.

EXECUTIVE.

See COURT MARTIAL.

GARNISHEE PROCESS.

See JURISDICTION, C, 1.

GUANO ISLANDS ACT.

See CONSTITUTIONAL LAW, 7 to 16; DOWER.

HABEAS CORPUS.

See JURISDICTION, B, 3.

HOT SPRINGS LITIGATION.

INDICTMENT.

See CRIMINAL LAW.

INFANT.

See ARMY OF THE UNITED STATES, 4, 5.

INSURANCE.

INTEREST.

INTERNAL REVENUE.

JURISDICTION.

A. GENERALLY.

B. JURISDICTION OF THE SUPREME COURT.

JURISDICTIONAL VALUE.

1. When the demand in controversy is not for money, but the nature of the action requires the value of the thing demanded to be stated in the pleadings, affidavits will not be received here to vary the value as appearing in the face of the record. *Red River Cattle Co.* v. *Needham*, 632.
2. The filing of affidavits as to value will not ordinarily be permitted where evidence of value has been adduced below on both sides, and the proofs have been transmitted, either with or without the announcement of a definite conclusion deduced therefrom. *Ib.*
3. Where a writ of error is brought, or an appeal taken, without question as to the value, and the latter is nowhere disclosed by the record, affidavits may be received to establish the jurisdictional amount, and counter affidavits may be allowed if the existence of such value is denied in good faith. *Ib.*
4. If there be a real controversy as to the value of the demand in controversy, it should be settled below in the first instance, and on due notice; not here upon *ex parte* opinions. *Ib.*
5. The value of the property in dispute in this case was alleged in the petition, but was not an issuable fact. The Circuit Court allowed

a contract, and, when the work was done and the materials furnished, he presented his account to the proper officer for adjustment and settlement. The balance was found to be correct so far as the labor and material were concerned, but it was also found that, through penalties and forfeitures, that balance was liable to be materially reduced. It also appeared that M. was indebted to mechanics, sub-contractors, laborers and material men in a large amount for work done and materials furnished under the contract. The treasury officials agreed with M. that this account should be adjusted without enforcing the penalties and forfeitures, if he would consent that his said indebtedness should be paid out of the sum so allowed, and that the control of the money should not be given up until those claims were satisfied. He assented, and a draft was prepared accordingly. M. did not comply with those conditions, but instead thereof applied to the Supreme Court of the District of Columbia for leave to file an application for a writ of mandamus, to compel the Secretary of the Treasury to deliver the draft to him, without first making the agreed payments. That officer made a return to the petition, setting forth the foregoing facts. *Held*, (1) That the return showed disputed questions of law and fact, which ought not to be tried in a proceeding for a mandamus, and that this was sufficient cause for the discharge of the rule and the refusal to issue the writ; (2) That the agreement between M. and the accounting officers was lawful, and, if carried out, would have been proper. *Ib.*

MASTER AND SERVANT.

See RAILROAD, 5, 6, 7.

MICHIGAN.

See CONSTITUTIONAL LAW, 25.

MINERAL LAND.

See EVIDENCE, 1, 2.

MINNESOTA.

See LOCAL LAW, 5.

MORTGAGE.

See RAILROAD, 1, 2, 3, 4.

MOTION FOR NEW TRIAL.

See EXCEPTION, 1;
PRACTICE, 1, 2.

MOTION PAPERS.

See PRACTICE, 4.

PENNSYLVANIA.

See JURISDICTION, B, 14.

PLEADING.

See CORPORATION, 6, 7.

POLYGAMY.

See EVIDENCE, 3;
LOCAL LAW, 9.

PRACTICE.

RAILROAD.

REMOVAL OF CAUSES.

RIPARIAN OWNERS.

SUCCESSION.

SURVEY.

1. In seeking to trace a survey on the ground, the corner called for in the grant as the "beginning" corner does not control more than any other corner equally well ascertained, and it is not necessary to follow the calls of the grant in the order in which they stand in the field notes; but they may be reversed, and should be when by doing it the land embraced would most nearly harmonize all the calls and objects of the grant. *Ayers* v. *Watson*, 584.
2. If an insurmountable difficulty is met with in running the lines of a sur-