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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1890

J. C. BANCROFT DAVIS

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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.

WILLIAM HENRY HARRISON MILLER, Attorney General.

WILLIAM HOWARD TAFT, Solicitor General.

JAMES HALL McKENNEY, Clerk.

JOHN MONTGOMERY WRIGHT, Marshal.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1890.

JOY *v.* ST. LOUIS.

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

No. 106. Argued December 9, 10, 1890. — Decided January 19, 1891.

In this case it was held that, under two agreements made August 11, 1875, one between the St. Louis County Railroad Company and the St. Louis, Kansas City and Northern Railway Company, and the other called the "tripartite agreement," between the Commissioners of Forest Park in the city of St. Louis, the said County company and the said Kansas City company, and a deed of the same date from the former company to the latter company, the Wabash, St. Louis and Pacific Railway Company was bound to permit the St. Louis, Kansas City and Colorado Railroad Company to use its right of way from the north line of Forest Park, through the park, to the terminus of the Wabash company's road, at Union Depot, on Eighteenth Street, in St. Louis, for a fair and equitable compensation.

The covenants in paragraph 9 of the tripartite agreement, as to the use of the right of way by other railroad companies, are binding upon subsequent purchasers, with notice, from the Kansas City company.

That agreement being a link in the chain of title of the appellants, they must be held to have had notice of its covenants, and are bound by them, whether they be or be not strictly such as run with the land.

Paragraph 9 of the tripartite agreement created an easement in the property of the County company and the Kansas City company, for the benefit of the public, which might be availed of, with the consent of the public authorities, properly expressed, by other railroad companies which might

Statement of the Case.

wish to use not only the right of way through the park, but also that between the park and the Union Depot.

The two agreements and the deed constituted a single transaction, and should be construed together, and liberally in favor of the public.

Such easement covered the tracks through the park and the tracks east of the park to the Union Depot.

The Circuit Court had power to enforce the specific performance of the agreement by enjoining the appellants from preventing the Colorado company from using the right of way; and to fix the amount of compensation by its use.

A remedy at law would be wholly inadequate.

The rights of the public in respect to railroads should be fostered by the courts.

The object of protecting the park, and that of preserving and fostering the commerce of the city, were set forth in the tripartite agreement, and the city of St. Louis, a plaintiff in the suit, as charged with those duties, was not merely a nominal party to this suit.

This was an appeal by James F. Joy, Thomas H. Hubbard, Edgar T. Welles, and O. D. Ashley, as purchasing committee, the Central Trust Company of New York and James Cheney, as trustees, and the Wabash, St. Louis and Pacific Railway Company, a Missouri corporation, (hereinafter called the Wabash company,) from a decree of the Circuit Court of the United States for the Eastern District of Missouri, made December 31, 1886, on a bill of intervention filed July 12, 1886, in the same court, by the City of St. Louis, a municipal corporation of the State of Missouri, and the St. Louis, Kansas City and Colorado Railroad Company, a Kansas corporation, (hereinafter called the Colorado company,) against the Wabash company and its receivers. This bill of intervention was filed in two causes pending in the same court consolidated into one. One of them was a bill in equity filed by the Wabash company against the Central Trust Company of New York and others, on the 27th of May, 1884, for the appointment of receivers of the Wabash company, because of its insolvency, setting forth that it had executed two mortgages, one known as the "general mortgage," and the other as the "collateral trust mortgage," the first of them June 1, 1880, to the Central Trust Company of New York and James Cheney, as trustees, and the other of them May 1, 1883, to the Mercantile Trust

Company of New York. In the said suit, a cross-bill was filed in the same court, on June 9, 1884, by the Central Trust Company of New York and James Cheney, as trustees, to foreclose the said "general mortgage" and certain sustaining mortgages executed in aid of it. An amended bill was filed June 15, 1884, and an amended cross-bill October 14, 1884. The second suit was one brought January 13, 1885, by the Central Trust Company of New York and James Cheney, as trustees, in the Circuit Court of the city of St. Louis in Missouri, against the Wabash company and others, praying the same relief prayed for in such cross-bill filed June 9, 1884. This suit was removed into the Circuit Court of the United States for the Eastern District of Missouri, and was consolidated, on March 19, 1885, with the suit, the bill in which was filed May 27, 1884.

A decree of foreclosure and sale was made in the consolidated cause on January 6, 1886, under which, on April 26, 1886, the railroads and property were sold to Joy, Hubbard, Welles, and Ashley, as purchasers. The sale was confirmed June 15, 1886, and deeds were ordered to be executed to the purchasers. Meantime, and before the deeds were executed, the bill of intervention was filed. The railroad property in question was all the time in the hands of Solon Humphreys and Thomas E. Tutt, as receivers appointed by the court on May 27, 1884.

The facts involved in the present appeal depend almost entirely upon documentary evidence, and as agreed upon by the parties in their respective briefs may be stated as follows:

This action was brought to compel the specific performance of a contract through which the Colorado company claimed to be entitled to a joint use, with the Wabash company, of that portion of the tracks of the latter company which extends eastwardly from a point on the northern line of Forest Park, through the park, and from thence to the Union Depot in the city of St. Louis, at Eighteenth Street. The facts out of which the controversy arose were, substantially, as follows:

(1) In August, 1871, a railway corporation known as the St. Louis County Railroad Company (hereinafter called the County

company) was organized under the general laws of Missouri, to construct a narrow gauge railroad, from the city of St. Louis, in a westerly direction, to a point in the county of St. Louis 16 miles from the city.

(2) On November 3, 1871, W. D. Griswold was the owner of a tract of land lying immediately west of the city of St. Louis, known as the Cabanne Dairy Farm, and on that date he sold and conveyed to the County company a right of way forty feet in width, through the tract owned by him.

(3) On March 25, 1874, the legislature of Missouri passed an act for the establishment of Forest Park, in the county of St. Louis, immediately west of the city. The act described the property which might be taken by condemnation for park purposes, and included the farm or tract owned by Griswold. The third section of the act contained the following proviso: "*Provided*, That nothing in this act contained shall prevent the St. Louis County Railroad Company from using and occupying a right of way of the width of not more than seventy feet through the northeastern portion of said Forest Park; the said railroad shall only enter the park through Duncan's subdivision on the east side of said park, and running westwardly on the northern side of the river des Peres, shall pass out of said park at a point on the northern line thereof, east of Union Avenue: *And provided further*, That no switch or siding shall be constructed by said railroad company in said park, nor shall more than one depot be established in said park, and that shall be for passengers only: *And provided further*, That the grade of said railroad, as far as the same runs through said Forest Park, shall be approved by said park commissioners." (Laws of Missouri, 1874, p. 371.)

(4) On August 11, 1875, the County company having located its line between the city and the park, and having acquired some detached portions of a right of way through a number of lots and blocks between the Union Depot and the park, and the St. Louis, Kansas City and Northern Railway Company (hereinafter called the Kansas City company) already having a line of railroad from St. Louis to Kansas City, which connected on the northern line of the park with the right of

way and line of the County company, those two companies entered into a written contract, in which the County company agreed to convey to the Kansas City company, for the sum of $125,000, a strip twenty-eight feet wide through each tract owned by it, between the eastern line of the park and the western limits of the city; and a strip thirty feet in width through each tract lying between the western limits of the city and the Union Depot at Eighteenth Street; and also an undivided one-half of all the right of way it then owned or might thereafter acquire through the park. The contract also provided, among other things, that inasmuch as the Kansas City company was to make a tunnel and cut just east of the park, it should let the trains of the County company pass through said tunnel and cut under such regulations and restrictions as were agreed upon with respect to trains in the park and elsewhere. It was then provided, that the use of the property in the park and through the tunnel and cut should be in common, but that the Kansas City company should have absolute control of the running and starting of its own trains and the making of its own time-tables, and that no train of the County company, or its assigns, should be started within eight minutes of the time fixed for starting the trains of the Kansas City company; that there should be twenty minutes' time between the starting and coming in of the trains of the County company; that only the County company should have a depot in the park; and that the Kansas City company should not have a depot or stop its trains in the park. The contract also provided, that at two specified places within the city limits where the right of way of the County company was narrowest, it (the County company) might lay and use one rail on the right of way of the Kansas City company; that where proceedings for condemnation, or negotiations, had been commenced by the County company the same should be prosecuted, or discontinued, as requested by the president of the Kansas City company; that, in consideration of the covenants therein contained, and of certain covenants and agreements on the part of the Commissioners of Forest Park contained in another agreement of even date therewith, the Kansas City company

should construct and maintain its railroad through the park, tunnel and cut, for the joint use of both of said railroad companies; and that the County company would within two years pay to the Kansas City company one-half of the actual cost of constructing said road through said park, and said tunnel and cut, or forever relinquish to the Kansas City company all claims to the road and property in said park, tunnel and cut. This contract was signed by said parties and delivered, but it was never acknowledged or recorded in the office of the county recorder.

(5) On the same day the foregoing contract was made, the County company, in pursuance of its agreement, conveyed to the Kansas City company a strip twenty-eight feet in width through each lot or tract owned by it between the eastern line of the park and the western limits of the city; a strip thirty feet wide through each lot or tract owned by it between the western limits of the city and Tayon Avenue in the city of St. Louis; and an undivided one-half of all its right, title and interest in or to the right of way and other privileges and franchises then owned or held by it, or which might thereafter be owned or held by it, through said park. The portions of the foregoing deed which were material to this controversy were as follows: "And also the said party of the first part" [the County company] "hath conveyed, assigned, and transferred, and by these presents doth convey, assign, and transfer unto the said party of the second part" [the Kansas City company] "the right of way over and upon the following described piece of land, situated between King's Highway and Union Avenue, a strip of land twenty-eight (28) feet in width off the southern portion, and for the whole length thereof, of that part of the right of way granted to said party of the first part by W. D. Griswold by deed dated November 3, 1871, and recorded in the office of the recorder of St. Louis County, aforesaid, in book 443, page 96, lying between the northern line of Forest Park and the eastern line of Union Avenue, all of which right of way conveyed by said deed is described as follows, to wit: A strip of land forty (40) feet in width, the centre line of which begins at King's

Highway, twenty (20) feet north of the southeast corner of the land of said Griswold, known as the Cabanne Dairy Farm, and running thence westerly along parallel to the south line thereof eight hundred and twenty-five (825) feet; thence by a curve eleven hundred and seventy (1170) feet long, bearing northwest with a radius of nineteen hundred and three (1903) feet; thence by a line bearing north 55° west, about ten hundred and ninety (1090) feet to a point on Union Avenue, not less than four hundred and eighty-seven (487) feet south of the northeast corner of Robert Forsyth's land. . . . And also the said party of the first part hath conveyed, assigned and transferred, and by these presents doth convey, assign and transfer unto the said party of the second part and to its successors and assigns, an undivided one-half of all the right, title or interest of the party of the first part of, in or to the right of way, and of, in or to any and all other rights, privileges and franchises, powers and immunities, owned by or vested in, or enjoyed by, or that may hereafter be acquired and owned by, vested in or enjoyed by, the party of the first part, in, through or upon Forest Park by any means or from any source whatever; all of which conveyances of the said rights of way in this deed mentioned are made subject to the terms and conditions upon which the same were granted to the party of the first part." The foregoing deed contained the ordinary covenants of warranty, and was duly acknowledged and recorded in the office of the recorder of said county, August 13, 1875. The several pieces of right of way owned by the County company and conveyed by it to the Kansas City company are indicated in blue on Chart A, in the printed record.

(6) On the same day (August 11, 1875) another agreement was entered into, known as the "tripartite agreement," the parties to it being the Commissioners of Forest Park, party of the first part, the County company, party of the second part, and the Kansas City company, party of the third part. This tripartite agreement began by reciting: "That said Forest Park Commissioners, in consideration of the relinquishments, agreements and stipulations hereinafter contained, on the part of the said party of the second part, do hereby accept and ap-

prove the line and grade of said railroad as laid down and described upon the accompanying plat and profile hereto attached and forming part of this agreement, and said line and grade, in case there is no forfeiture of this agreement, is hereby fixed as the sole and finally established right of way to which said party of the second part is entitled by statute or otherwise through said park, or any part thereof, and the width of said right of way, as established by statute, is hereby reduced from seventy (70) feet and fixed at forty-two (42) feet between its outer points." The County company then relinquished twenty-eight feet off the seventy feet of its right of way established by statute through the park, leaving its right of way through the park forty-two feet in width. The agreement then, in eight successive paragraphs, provided for the manner of constructing the road-bed through the park by the County company — that it should not be so constructed as to mar the landscape beauty of the park; and for the building of a depot in the park just outside of the right of way, but immediately adjoining it. The eighth and ninth paragraphs read as follows: "Eighth. The work of constructing said railroad through said park shall be commenced in good faith by the party, as hereinafter specified, within ninety (90) days from the delivery hereof, and shall be completed in one year thereafter under penalty of a forfeiture of this agreement, and upon completion thereof the railroads shall be operated through said park so as to prevent unnecessary noise or inconvenience to the public, as far as reasonably practicable, and the roads or their assigns shall comply with all reasonable rules or regulations of said Park Commissioners in that respect, and all of the aforesaid permanent improvements shall be kept and maintained in such condition as will not injuriously affect or mar the landscape beauty of the park, this provision referring to the aforesaid forty-two (42) feet right of way road-bed; and said party of the second part, or its assigns, shall also keep its police or guard, within the limits of the park, neatly uniformed. Ninth. Said party of the second part shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use

its right of way through the park and up to the terminus of its road in the city of St. Louis, upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by such companies." The tenth paragraph was an admission by the County company that its right of way was not exclusive, and that the agreement was not to be construed as limiting or impairing the right of the Park Commissioners to grant other rights of way to other railroad companies. The twelfth paragraph was as follows: "And whereas, for the purpose of enabling the party of the third part to reach the Union Depot of St. Louis, Missouri, an amicable arrangement and agreement for a right of way outside of and through said Forest Park has been made and entered into by and between the parties of the second and third parts, and in pursuance thereof the parties of the second and third parts are to enter upon and enjoy the right of way and all the rights, privileges, immunities, powers, improvements and property belonging to or vested in, or that may belong to or vest in, the party of the second part, in common, in, upon and through said park, under certain regulations, terms and conditions agreed upon by and between said parties therein; and whereas the party of the third part, in further pursuance of said last-named agreement, is about to construct, maintain and operate a railroad in, upon and through said park, at great expense, and to engage in other great outlays and to assume other heavy burthens and responsibilities to be of advantage to said third party through the continued enjoyment of said right of way and other rights, privileges, powers, franchises, immunities, improvements and property in, upon and through said park: Now, therefore, in view of the premises and as inducements to said party of the third part to proceed as intended, the party of the first part does hereby grant and convey unto, and license and permit, the said party of the third part, its successors and assigns, to have, hold, use and enjoy said right of way in, upon and through said park, in common with and to be held and enjoyed jointly with said party of the second part and its assigns, on the terms of the said contract between them, and under the same terms and

conditions as are hereby and hereinbefore imposed upon said party of the second part, and which are hereby assumed by said party of the third part as to improvements, except as to building a depot and switch in said park, which the party of the second part is to do itself; or in case said party of the second part, its successors or assigns, should forfeit its said rights, privileges and franchises in, upon and through said park, or from any cause cease to have, maintain or enjoy the same, then it is hereby agreed and convenanted that the party of the third part shall not also be excluded from said park but shall, with its successors and assigns, continue to have, maintain and enjoy all of said rights, privileges, immunities, franchises, improvements and property, on the terms hereinbefore set forth, continuously and forever." The thirteenth paragraph provided that the Kansas City company should have no depot in the park. The fourteenth paragraph, in so far as it is material, was as follows: "Now, therefore, in consideration thereof and of the agreement of the party of the third part herein, the party of the first part herein accepts the agreement and contract of the party of the third part herein to execute, perform and comply with all of the terms, provisions and things herein mentioned to be done, performed or complied with as to said improvements, except as aforesaid, by the party of the second part hereto, and in lieu and stead of said party of the second part hereto, so far as assumed as aforesaid, releasing it therefrom, and in consideration thereof the party of the third part hereto covenants and agrees with the other parties hereto that it will, in lieu and stead of the party of the second part hereto, do, perform and comply with all the terms and provisions, matters and things, herein expressed to be done, performed or complied with by said party of the second part as to said improvements, except as aforesaid, subject to the terms and conditions in said agreement of even date herewith contained; and it is hereby expressly covenanted and agreed that a compliance by the party of the third part, for itself, or for itself and the party of the second part jointly, in the construction of said railroad in, upon and through said park, tunnel and cut in accordance with the

terms of this agreement, shall be taken and accepted as performance of the conditions imposed upon said party of the second part; and it is further expressly covenanted and agreed that all and every part of the work, its kind, description and extent, to be performed by either of said parties of the second or third parts is hereinabove expressed, and neither of said parties shall be held or required to do or perform any other or further work and conditions than those hereby definitely set forth." The last clause of the contract provided that neither of said railroad companies should be required to supply any material, or do any of the work, necessary to construct or maintain either of the arched entrances into or exits from said park, but that all the work and material required in the construction of said arches should be paid for by the Park Commissioners. The foregoing contract was signed by the parties, but it was never acknowledged as a deed. It was afterwards, in 1879, recorded in the office of the county recorder.

(7) The evidence showed that, after the execution of the foregoing deed and contracts, the Kansas City company acquired from divers parties the necessary additional right of way between the park and the Union Depot, and proceeded to construct and put in operation its road through the park, tunnel and cut, and on down to the Union Depot in the city, the road through the park being on the line established by the tripartite agreement; that at the same time the Park Commissioners proceeded with the work referred to in the last clause of that agreement, and expended for material and work on the arched entrances or exits, rendered necessary by the presence of the railroad in the park, and in the erection of walls for the tunnel in the park, nearly $40,000; that the road through the park was completed in 1876 by the Kansas City company; and that, the County company having failed in the performance of all its covenants, and having failed to refund to the Kansas City company any portion of the cost of constructing the road through the park, it lost and abandoned all claim to the right of way and road-bed through the park, tunnel and cut, and the Kansas City company thereupon, under the terms of the agreement, took sole control of the

road through the park, tunnel and cut. Afterwards, in 1878, it acquired, by purchase from third parties, all the property and rights of way of the County company between the park and the Union Depot.

(8) In 1879, the Kansas City company was consolidated with the Wabash Railway company under the name of the "Wabash, St. Louis and Pacific Railway Company." The Wabash company assumed all the obligations of the Kansas City company, and in so far as this controversy is concerned the consolidation was only a change of name.

(9) In 1880, the Wabash company conveyed its property in trust to the Central Trust Company of New York and James Cheney, to secure a series of bonds, $18,000,000 of which were issued and sold. In 1884, the Wabash company became insolvent, and Solon Humphreys and Thomas E. Tutt were, by the Circuit Court of the United States for the Eastern District of Missouri, appointed receivers of its property, and afterwards bills were filed by the Central Trust Company and Cheney to foreclose said mortgage, as before mentioned.

(10) In 1886, while Humphreys and Tutt, receivers, were in possession of the Wabash property, the Colorado company having constructed a line of railroad connecting with the Wabash road at the north line of Forest Park, and of the same gauge, demanded of the receivers permission to run its cars over the Wabash tracks through the park and down to the Union Depot in the city, which Union Depot was, on August 11, 1875, and has since continued to be, the only general passenger depot reached by all railroads entering the city. The Colorado company contended that it was entitled to this right under the contracts aforesaid, and particularly under the provisions of the ninth and the subsequent paragraphs of the tripartite agreement. This claim was denied by the receivers, and thereupon the Colorado company and the city of St. Louis filed their said bill of intervention, setting forth the facts above stated, and praying the court to enjoin and restrain the Wabash company and the receivers from interfering with its use of said property. The city of St. Louis joined in the proceeding as the successor of the Park Com-

missioners, the park having, by appropriate legislation, been brought within the jurisdiction of the city. An amended bill of intervention was filed August 4, 1886. The prayer of the amended bill was as follows: "Your orators pray that a writ of injunction issue out of and under the seal of this honorable court enjoining and restraining the said Wabash, St. Louis and Pacific Railway Company, and the said Solon Humphreys and Thomas E. Tutt, as such receivers, and each of them and of their agents, servants, counsellors and employés, from in any manner refusing to permit your orator, the St. Louis, Kansas City and Colorado Railroad Company, under such reasonable regulations and terms as to this court may seem proper, from using the said right of way of said Wabash, St. Louis and Pacific Railway Company, commencing at the north line of said park, where the railway of said Wabash, St. Louis and Pacific Railway Company enters said park, thence over said right of way to said Eighteenth Street in said city of St. Louis, by running its engines and cars over and upon said right of way, including the tracks of said Wabash, St. Louis and Pacific Railway Company between the points at said Union Avenue and said Eighteenth Street." In their answer the Wabash company and the receivers admitted the execution of the agreements, but denied that under them, or either of them, the Colorado company had any right to use any portion of the Wabash tracks or right of way through the park or between the park and Eighteenth Street. The answer then stated the facts concerning the execution of the general mortgage by the Wabash company in 1880, to the Central Trust Company and Cheney; averred that the Wabash company had made default in the payment of interest on its bonds; that by the terms of said mortgage said trustees were entitled to possession of said property; that said receivers were in possession of said railroad under said mortgage for the benefit of the holders of said mortgage bonds, and that neither said bondholders, trustees or receivers were privy to or bound by any agreement or contract made by the County company with said Park Commissioners, with respect to the use of its railroad through said park or elsewhere, by other railroad companies. The answer

then denied that the intervenors were entitled to the relief prayed for, and set up the several defences stated and relied upon by the appellants.

(11) On the issues thus presented the case was referred to a special master, who reported in favor of the claim made by the intervenors. Considerable testimony was taken by the master, but it related almost entirely to matters affecting the compensation to be paid for the use of the tracks and property in question, and it is unnecessary to refer to it in detail. The following testimony of witnesses, on other points, was given: S. T. Emerson, chief engineer in charge of the construction of the Kansas City road from the Union Depot to the north line of the park, testified as follows: "Q. Now from that point [Forsyth Junction] to the Union Depot, what is the most, or the only, practical entrance to the depot from that point? A. The Wabash railroad." W. Emerson also testified as follows: "Q. How many tracks, if any, are on the right of way where the Wabash railway now enters the park from Eighteenth Street, the thirty feet from Eighteenth Street to the park and the forty-two feet through the park? A. There are occasional places where there is a side track. There could not be but one track besides the main track on the thirty feet." Andrew McKinley, president of the Board of Forest Park Commissioners at the time the tripartite agreement was made, testified as follows: "Q. What was the policy of the board with reference to railroads passing through the park, at the time of the execution of the tripartite agreement? A. There was a great deal of discussion and there was quite a controversy about where the road should run, under the provision which I have mentioned," (referring to the act of the legislature, requiring the County road to enter on the eastern side, through Duncan's subdivision). "Q. Please describe the park to the master, whether it has been improved, and, if so, how, in a general way? A. The provisions contained in the proviso that I have just spoken of were intended to protect the park against the invasions of all railroads, unquestionably. I put it there myself. Q. What effect would the invasion of the park by railroads have upon the park for the purpose for

which it was established? A. I think a very damaging effect upon the point of use and upon the point of landscaping. Q. For what purposes was the park intended to be used principally — as a driving park? A. It is shown in the act itself to be dedicated to the people of the city and county of St. Louis for their enjoyment forever — that is, a pleasure ground for the people of St. Louis. Q. Are there drives running through it? A. Yes, sir; nineteen and three-quarters miles of drives through the park. Q. What effect would the penetration of the park by railroads at different points have upon the park as a driving park? A. Up to this time it was apprehended that the road would produce some great danger to persons visiting Forest Park, and it was a long time before that public impression was relieved of the apprehension that horses would be frightened, and hence there is a provision that the road shall be covered over with a cover or protected by trees. During the time I was president of the park it was not thought to be necessary. Q. How much money has been expended in beautifying the park? A. $405,000 during my administration; since that time nothing. It remains as it was then. Q. What does it represent in money to-day? A. In cash paid $1,300,000, and, besides that, some contributions made by the city since. The interest on that sum, of course, is to be added. The bonds are thirty-year bonds." Cross-examination: "Q. Now, the expenditures by the Park Commissioners were in the erection of masonry composing these two arches and the principal viaduct through which the people enter the park. It was in the masonry composing those structures? A. Yes, sir; there would have been no necessity for them, except for the railroad. Q. They were made necessary by the railroad? A. Yes, sir. Q. They were for the convenience of persons passing in and out of the park? A. Yes, sir. Q. Without the railroad there would have been no necessity for the culverts; they were the entrances for carriage and footmen? A. Yes, sir." A. A. Talmage, general manager of the Wabash company, testified as follows: "Q. Would it be practicable for any other road subject to your rules and regulations to use the track from the north line of the park to the

depot — I mean the main track? A. It could be done under the rules and regulations of this company, but usually it is done by substituting the motive power and trainmen of our own road to handle the trains of foreign roads."

(12) The Wabash company and the receivers excepted to the reports of the master (of which there were two) on various grounds, which need not be given in detail.

(13) The exceptions were argued before the court held by Mr. Justice Brewer, then Circuit Judge, and Judge Treat, and it held, (29 Fed. Rep. 546,) that, under the contracts, the Colorado company had the right to use, on such terms and subject to such regulations as to the court seemed equitable, the Wabash tracks through the park, and from the park down to the connection with the Union Depot tracks at Eighteenth Street in the city; and on those points it overruled all the exceptions and confirmed the master's reports. It differed, however, with the master on the question of the compensation to be paid by the Colorado company, and sustained exception eleven on that point.

(14) The court then entered a decree, December 31, 1886, finding that the equities were with the intervenors, and that they were entitled to the relief prayed for, and fixing the compensation to be paid by the Colorado Company for the use of the right of way and tracks, side-tracks, switches, turn-outs, turn-tables and other terminal facilities of the Wabash company, between the north line of Forest Park and Eighteenth Street in the city of St. Louis, at $2500 per month. The decree then proceeded as follows: "And the court doth further find, adjudge and decree, that the expense per annum of maintaining the said right of way and other property pending such joint use thereof, including therein all taxes upon said property, shall be borne by the said Wabash, St. Louis and Pacific Railway Company and the said intervenor, the St. Louis, Kansas City and Colorado Railroad Company, in the proportion that the number of wheels each of said companies shall cause to be passed over the main track, or parts thereof, on said right of way, per annum, bears to the total number of wheels that both of said companies shall cause to be passed

over the same during each year pending the said period of such joint use, and that this expense shall be paid at the expiration of each year. The said right of way and tracks thereon and other terminal facilities shall be maintained and kept in good repair by the Wabash, St. Louis and Pacific Railway Company. And the court doth further order, adjudge and decree that the running of all trains, engines or cars of said intervenor, the said St. Louis, Kansas City and Colorado Railroad Company, over said right of way and tracks, and the use of said right of way, road, terminal facilities and other property specified as aforesaid, shall conform to the rules and regulations now in force, and such other reasonable rules and regulations as may hereafter be adopted by the said Wabash, St. Louis and Pacific Railway Company, or its said receivers, to enable said intervenor to fully enjoy the benefits of this decree, and that the trains of said railroad company, intervenor, shall be so regulated as that at least eight minutes shall, if deemed necessary, intervene between its trains and the trains of said Wabash, St. Louis and Pacific Railway Company, at any point between said north line of Forest Park and Eighteenth Street, and that the sole control and regulation of the running of the trains of the said companies shall be, under this decree, in the Wabash, St. Louis and Pacific Railway Company and its receivers, and subject to the further order of this court. And the court doth further order, adjudge and decree, that in all respects, subject to the terms of this decree, the said railroad company, intervenor, shall enjoy the equal use and benefit of said right of way, tracks, switches, side-tracks, turn-outs, turn-tables and other terminal facilities with said Wabash, St. Louis and Pacific Railway Company or its said receivers, and the said Wabash, St. Louis and Pacific Railway Company and Solon Humphreys and Thomas E. Tutt, as such receivers, and said Central Trust Company of New York and James Cheney, and all persons claiming by, through or under them and each of them respectively, and their agents, servants, counsellors and employés be, and the same are hereby, perpetually enjoined and restrained from in any manner refusing to permit the said intervenor, the said St. Louis, Kansas City

and Colorado Railroad Company, its successors or assigns, and its or their officers, agents or employés, from using with its or their engines, cars (loaded or empty), the said right of way, tracks, switches, side-tracks, turn-outs, turn-tables and other terminal facilities of said Wabash, St. Louis and Pacific Railway Company between the north line of said Forest Park and said Eighteenth Street, on the terms hereinabove set forth in this decree, in and for the transacting of its or their business, and in the operation of its or their road. And the said intervenor, the St. Louis, Kansas City and Colorado Railroad Company, by its officers, agents and employés and each of them, is hereby authorized and permitted, with its right of way, road, tracks and property, engines and cars, loaded or empty, to make connection with said Wabash, St. Louis and Pacific Railway Company at the north line of said Forest Park, and to use the said right of way, tracks, switches, side-tracks, turn-outs, turn-tables and other terminal facilities of said Wabash, St. Louis and Pacific Railway Company, or any one claiming by, through or under it, as to the same, between the north line of said park and Eighteenth Street, on the terms, in the manner, and subject to the regulations in this decree set forth in and for the transaction of the business, and in operation of the road, of said St. Louis, Kansas City and Colorado Railroad Company, its successors or assigns, and said Solon Humphreys and Thomas E. Tutt, receivers, and all agents, servants or persons by them engaged or acting with or for them, said Central Trust Company and James Cheney, said Wabash, St. Louis and Pacific Railway Company, and all persons claiming by, through or under said last-named company, are hereby restrained and enjoined from in anywise obstructing, preventing, interfering with or refusing to comply with, the permit and privilege hereby ordered, adjudged and decreed." The rules in force upon the Wabash road, and which were adopted by the decree, for the government of the parties in the use of the property, are found, as "Exhibit D," in the printed record.

(16) On the day the decree was entered, James F. Joy, Thomas H. Hubbard, Edgar T. Welles and O. D. Ashley filed their petition in the cause, reciting the execution of the

Argument for Appellants.

Wabash mortgage of June 1, 1880, to the Central Trust Company and Cheney, as trustees; stating that there had been a foreclosure of said mortgage and a sale of the mortgaged property on the 26th day of April, 1886, at which they had become the purchasers; that the sale to them had been duly confirmed by the court and proper deeds had been made conveying to them the right of way, railroad tracks, terminal facilities and other property, the use of which the intervenor was seeking to acquire in this proceeding; that said property was still in the possession of and being operated by said receivers; that, as such purchasers, they had an interest in the property and subject matter of the litigation, which they desired to protect by an appeal to the Supreme Court of the United States; and asking that they be made parties defendant, and be allowed an appeal to that court. The court thereupon entered an order, on said day, reciting the petition, and that it appeared to the court that said Joy, Hubbard, Welles and Ashley were the owners of the premises and right of way theretofore owned by the Wabash company, between the north line of Forest Park and across the park to Eighteenth Street in the city of St. Louis, over which the intervenor was seeking to obtain a right to run its engines and cars, and ordering that said purchasers be made parties defendant in the cause. An appeal to this court from the foregoing decree was afterwards duly perfected.

Mr. Wells H. Blodgett for appellants.

I. The court erred in holding that the covenants on the part of the County Railroad company to permit other railroads to use its right of way between the park and the terminus of its line in the city, was binding on the Kansas City company, and gave respondent the right to use the right of way and tracks afterwards acquired and constructed by the Kansas City company between the park and the city.

Our contention is, that the provision at the end of the twelfth paragraph of the tripartite agreement to the effect that "if the County company should forfeit its rights, privi-

leges and franchises upon and through the park, such forfeiture should not affect the rights of the Kansas City company, but that the Kansas City company should continue to have, maintain and enjoy all of said rights, privileges, immunities, franchises, improvements and property on the terms thereinbefore set forth, continuously and forever," — only relates to the right of way through the park, and that it has no reference to anything between the park and the city.

It is obvious that the other two parties to the agreement intended, by the last clause of the twelfth paragraph, to say to the Kansas City company, as an inducement for it to proceed with the work of constructing the line through the park, that in case it did make the expenditures contemplated, it should not afterwards be excluded from the park in consequence of any future forfeiture or failure on the part of the County company to fulfil its covenants. The idea was that if the Kansas City company constructed the line through the park, it was to continue in the park on the same terms imposed upon the County company. Therefore, no matter what view the court may take of the decree with respect to other matters, it was erroneous for the court to extend the decree over any portion of the track of the Kansas City company lying outside the park.

II. The court erred in holding and decreeing that the covenant of the County company — to the effect that "it would permit other railroads to use its right of way between the park and the terminus of its road in the city" — created an equitable easement in the road between the park and the city which affected that property in the hands of Joy and others, as purchasers from the Kansas City company.

An equitable easement is said to be a right without profit, which the owner of one tract of land has, to restrict or regulate, for the benefit of his own tract, the uses to be made of another contiguous tract. There must, of course, be two estates, a dominant and a servient estate, and in order to create an equitable easement, or an easement which only a court of equity can enforce, the burden or duty imposed on the servient estate, must be for the benefit of the dominant

estate. The covenants must "touch or concern" or "extend to the support of the dominant estate." They must be "for the benefit of the dominant estate." *Whitney* v. *Union Railway Co.*, 11 Gray, 359; *Jenks* v. *Williams*, 115 Mass. 217; *Jeffries* v. *Jeffries*, 117 Mass. 184; *Norcross* v. *James*, 140 Mass. 188.

These cases hold that when a party conveys a portion of his lands, and the grantor accepts a covenant back from his grantee, to the effect that neither he nor his assigns will use the land granted for a purpose prejudicial to the property retained, such covenants, although they cannot be strictly said to run with the land, nevertheless create in the grantor and his assigns equitable easements in the lands conveyed for the benefit of the lands not conveyed, and courts of equity have, therefore, enjoined the covenantor from violating the covenant to the prejudice of the covenantee and his assigns.

In the foregoing cases, as well as in all that are cited and relied upon by the appellees, it will be found upon examination that the covenants which were enforced were contained in deeds of grant, and that they concerned the use of property granted, in its relation to the property retained. The personal covenants of the grantees were, in those cases, regarded as creating easements in the lands granted which would be enforced in equity, although at law they were not covenants which run with the land.

Now, we concede that there are circumstances under which the covenant in question might be enforced if the bill had been filed against the County company (covenantor) and had only related to the right of way in the park. If the bill had only related to the right of way in the park, and it could be truthfully said that the County company acquired its right of way through the park under a grant from the Park Commissioners, and the court could furthermore see that to enforce the covenant would be beneficial to the park, then we think the case would come under the rule announced in the cases above cited.

But when it comes to the right of way outside the park our contention is, that the doctrine of equitable easement has no application, and that as to the property outside the park the

covenant of the County company, with respect to its use by other companies, was merely personal. *Des Moines & Fort Dodge Railroad* v. *Wabash, St. Louis &c. Railway*, 135 U. S. 576; *Norcross* v. *James*, 140 Mass. 188; *Keppell* v. *Bailey*, 2 Myl. & K. 517.

If covenants do not run with land, it is only when they are restrictive and relate to the lands granted that they will be enforced even in equity against assignees with notice. It is said in many cases, and the rule seems now firmly established, that courts of equity will not enforce against the grantee of the covenantor, who has himself entered into no covenant, any covenant of his grantor, which does not run with the land and which requires the expenditure of money. *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403; *London & Southwestern Railway* v. *Gomm*, 20 Ch. D. 562. Therefore, in so far as the decree gives to the Colorado company the use of the right of way outside the park, it should be reversed.

III. The court erred in holding and decreeing that a covenant on the part of the County company "to permit other railroads to use its right of way under such reasonable regulations and upon such terms and for such fair and equitable compensation to be paid therefor as might be agreed upon by such companies," constituted an agreement sufficiently definite to be specifically enforced in a court of equity.

A party who merely agrees to permit another at some future time to enter upon and use a given piece of property on such terms and for such compensation, as may, when the time arrives, be agreed upon, does not part with any interest in his estate or impair his dominion over it. The mere right in one party to use the property of another on such terms as may be agreed upon, gives the covenantee no interest in the property. One gets nothing by such a contract. He had the same privilege before the contract was made.

In this case, the regulations, compensation and terms on which the property was to be used, were all left by the contract to the future determination of the parties, and the question is, as to whether a court of equity ought to put itself in the place of the parties and supply not merely some subordi-

nate missing term, but make, in fact, the whole agreement. Or in other words, can a court of equity, under the guise of enforcing a contract, make the contract which it enforces, and in so doing, fix the terms on which one party may use the property of another, when the very contract in question leaves the matter of fixing the terms to the parties themselves? Can a court of equity do that? See *Colson* v. *Thompson*, 2 Wheat. 336; *Hennessy* v. *Woolworth*, 128 U. S. 438; *McKibbin* v. *Brown*, 1 McCarter (14 N. J. Eq.) 13; *Nichols* v. *Williams*, 7 C. E. Green (22 N. J. Eq.) 63; *Whitlock* v. *Duffield*, 1 Hoff. Ch. 110; *Huff* v. *Shepard*, 58 Missouri, 242; *Morgan* v. *Milman*, 3 De G. M. &. G. 24; *Cooth* v. *Jackson*, 6 Ves. 12, 33; *Milnes* v. *Gery*, 14 Ves. 400; *Kemble* v. *Kean*, 6 Sim. 333; *Taylor* v. *Portington*, 7 De G. M. & G. 328; *Wilson* v. *Northampton & Banbury Junction Railway*, L. R. 9 Ch. 279; *Brace* v. *Wehnert*, 25 Beav. 348; *Wilks* v. *Davis*, 3 Meriv. 507; *Blundell* v. *Brettargh*, 17 Ves. 231; *South Wales Railway* v. *Wythes*, 5 De G. M. & G. 880.

The fact must be kept in mind that Joy and his associates took the property as purchasers; that they have made no covenants; that they are assignees of the Kansas City company, and that courts of equity require contracts (where they are such as can be enforced against assignees) to be much more definite and certain in their terms when their enforcement is sought against assignees, than when the proceedings are against original parties. *Kendall* v. *Almy*, 2 Sumner 278; *Montgomery* v. *Norris*, 1 How. (Miss.) 499.

IV. The court erred in entering a decree compelling the specific performance, by the Wabash company, of a continuous duty requiring the exercise of skill and personal judgment, as well as the constant expenditure of money, and requiring the court to retain perpetual control over the cause in order to superintend the execution of the decree, and make, from time to time, such changes in the rules and regulations adopted as the circumstances of the parties and the shifting contingencies of business and trade should render necessary.

The question of whether a court of equity will specifically enforce a contract which requires the performance of continu-

ous duties, and the constant supervision, by the court, of a business involving skill, personal labor, cultivated judgment and the constant expenditure of money, and where, if performance is decreed, the case must remain indefinitely in court, has been so recently and so fully considered here, that to determine this case it seems only necessary to examine the decree and see whether it falls within the rule announced.

Under this decree the case must remain forever in court, and the court to the end of time may be called upon to determine the innumerable controversies that may arise between the parties under its provisions. Under it, constant payments and settlements are to be made, some monthly, others annually, and hence it is a constant and perpetual duty of the court to enforce those provisions. Under the decree it is made the duty of the Wabash company to perpetually maintain the tracks and all said terminal facilities in good repair, and the question of what is good repair is an issue on which the parties are entitled to be heard, and may call for as many separate trials as there are complaints.

And furthermore, to keep the property in good repair, calls for the constant expenditure of money and the exercise of judgment and professional skill, and to perform that duty the court must, if required, compel the Wabash company, or its assigns, to raise money and afterwards expend it with the judgment and skill necessary to keep the tracks, turn-tables and other terminals in good repair. A failure to comply with any one of the ninety-eight rules, or a dispute as to their meaning, furnishes a controversy that can only be determined by the court that entered the decree. Not only that, but new rules may be made and the question of whether they are reasonable, is reserved to the court, and, on application of the parties, must be determined by it. In short, the whole future management of the property is, by the decree, taken out of the hands of its owners and, for all time, subjected to the orders and control of the court.

In *Texas and Pacific Railway Co.* v. *Marshall*, 136 U. S. 393, it was recently held that it was error for a court of equity to enter a decree which required it to be making constant

inquiries as to whether its provisions were being obeyed perfectly and in good faith, or in an evasive manner, and which rendered the court liable to be perpetually called upon to make the same inquiries in the future and thus assume endless duties which are inappropriate to the functions of a court of equity. And it was said that the task of supervising and enforcing a contract for the building of a house or a railroad, was outside the proper functions of a court of equity and not within the powers of a specific performance. See also *Marble Company* v. *Ripley*, 10 Wall. 339; *Port Clinton Railroad* v. *Cleveland & Toledo Railroad*, 13 Ohio St. 544; *South Wales Railway Co.* v. *Wythes*, 5 De G. M. & G. 880; *Powel Duffryn Steam Coal Co.* v. *Taff Vale Railway Co.*, L. R. 9 Ch. 331; *Ross* v. *Union Pacific Railway*, 1 Woolworth, 26; *City of St. Thomas* v. *Credit Valley Railway*, 7 Ontario, 332; *Blanchard* v. *Detroit &c. Railroad*, 31 Michigan, 43; *Pollard* v. *Clayton*, 1 Kay & Johns. 462; *Booth* v. *Pollard*, 4 Younge & Coll. Ex. 61.

V. The court erred in entering a decree broader than the contract.

The contract only related to right of way; the prayer of the petition was for the use of right of way and tracks, and the decree not only gives them the use of the right of way and tracks, but it subjects to the use of respondent the switches, side-tracks, turn-outs, turn-tables and other terminal facilities, and even goes so far as to require the Wabash company to keep those additional properties in repair for respondent's use. Therefore, no matter what view may be taken of the case in other respects, the decree was erroneous in two particulars: First, because it is broader than the covenant; and second, because it is broader than the prayer of the bill. Both these objections are elementary.

VI. The court erred in holding that mutuality of equitable remedy existed between the parties to this suit.

The question of whether there is mutuality of equitable remedy between appellants and the Colorado company, is a matter that can only be determined by reference to the nature of the contract, the words employed and the relation of the

parties to each other. Of course these parties have no contract relations. The Colorado company has no contract relations with any one, and it is not pretended that Joy and his associates have entered into any covenants. The agreement on the part of the County company was, that it would, at some future time, make contracts permitting other railroads to use its right of way on such terms as might be agreed upon between it and the companies desiring to enter upon the use of its right of way.

The contract that was made between the Park Commissioners and the railroad companies, and under which certain work was done in the park, was one thing, and the contract to be made between the company owning the railroad and the company desiring to use it, was quite another.

By its decree, the court has clearly attempted to enforce the contract to be made, or in other words, it has put into its decree such provisions as, in its opinion, the parties ought to have put into an agreement of their own making.

VII. The court erred in holding that the contract of the County company to permit other railroads to use its right of way, was binding on Joy and his associates, they being purchasers in good faith and without notice, under the mortgage made by the Wabash company in 1880.

If the tripartite agreement was never acknowledged as a deed, then the filing of it in the office of the Recorder, imported no notice to Joy and his associates. That point was expressly ruled in *Bishop* v. *Schneider*, 46 Missouri, 472. But to avoid the effect of the rule laid down in that case, the court found that the recitation in the deed of August 11th, 1875, from the County company to the Kansas City company (which deed was duly recorded) to the effect "that the County company executed that deed in pursuance of the terms of a certain contract made between the same parties on the 11th day of August, 1875, and in full satisfaction of so much of said contract as related to the conveyance of certain pieces of land and rights of way to said party of the second part," was sufficient to put subsequent purchasers on inquiry as to the contents of the previous unrecorded contract between

the two companies; and that, having found and examined the contract between the two companies, a purchaser would discover in it a reference to the unacknowledged and improperly recorded tripartite agreement, and that upon reading the tripartite agreement he would find the clause on which the Colorado company bases its claim.

Now, we contend that the above finding was erroneous, and we say: (1) that a statement in a general warranty deed to the effect, "that it is made in pursuance of a previous personal contract between the parties and in full satisfaction of so much thereof as relates to the conveyance of the property," is not, and in reason cannot be, sufficient to put a subsequent grantee on inquiry for prior incumbrances; and (2) that when the document referred to is not a deed, but a mere collateral personal agreement, a reference to it in a deed, in which the grantor convenants that he is seized of an indefeasible estate in fee simple, does not even put a subsequent purchaser on inquiry.

But, again, the court found, that the further statement in the deed from the County company to the Kansas City company, to the effect, "that the County company conveyed said rights of way, subject to the terms and conditions upon which the same were granted to the County company," was sufficient to put subsequent purchasers on inquiry as to such conditions. We grant that proposition, but let us inquire what property the County company was conveying to the Kansas City company "subject to the terms and conditions upon which it had been conveyed to the County company."

As to the lots outside the park, there is nothing in all the record tending to show on what conditions one foot of that ground had been conveyed to the County company. And as to the right of way through the park, the County company held that property under its deed from Griswold, as well as under the third section of the Park Act, and there is nothing in either the deed or act, showing, or tending to show, that the County company held its right of way through the park subject to any conditions whatever. The County company claimed nothing in the park through any grant from the Park

Commissioners, and the Park Commissioners never attempted to grant anything to that company. The title to the lands in the park was vested in the people of the county, and the Legislature had absolute control over it for all purposes. *State* v. *St. Louis County Court*, 34 Missouri, 546; *Barnes* v. *Dist. of Columbia*, 91 U. S. 540. As to the property outside the park — that which was acquired from other parties by deed or by condemnation — there was certainly nothing in the deed from the County company to put Joy and his associates on inquiry concerning incumbrances on those portions of the line. The deed of the County company forms no link in the chain of title through which Joy and his associates held by far the major portion of the line between the park and the city, and we understand that purchasers are only bound to take notice of recitals contained in the deeds which form links in their chain of title. They are not bound to inquire into collateral contracts and circumstances. *Acer* v. *Westcott*, 46 N. Y. 384; *Burch* v. *Carter*, 44 Alabama, 115; *Attorney General* v. *Backhouse*, 17 Ves. 282; *Mueller* v. *Engeln*, 12 Bush, 441; *Penrose* v. *Griffith*, 4 Binney, 231.

Certainly, the recitals in the contracts or even in the deed from the County company to the Kansas City company, were no sort of notice to purchasers of any incumbrances upon, or easements in, all that portion of the right of way outside the park not conveyed by the County company to the Kansas City company. As to the property not purchased from the County company, the recitals in its deed to the Kansas City company lay outside the chain through which Joy and his associates derive title to all that portion of the property which never belonged to the County company. Therefore, as to all the property not purchased from the County company, the record shows no fact sufficient to put a purchaser on inquiry for incumbrances of any sort. This point was expressly ruled in *Tydings* v. *Pitcher*, 82 Missouri, 379.

Mr. John C. Orrick for appellees. *Mr. Leverett Bell* and *Mr. George R. Peck* were with him on the brief.

Opinion of the Court.

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

It is contended by the appellants that the Circuit Court erred (1) in holding that the covenant on the part of the County company, to permit other railroads to use its right of way between the park and the terminus of its line in the city, was binding on the Kansas City company, and gave to the Colorado company the right to use the right of way and the tracks afterwards acquired and constructed by the Kansas City company between the park and the city; (2) in decreeing that the covenant of the County company, to permit other railroads to use its right of way between the park and the terminus of its road in the city, created an equitable easement in the road between the park and the city, which affected such property in the hands of Joy and others, as purchasers; (3) in decreeing that such covenant on the part of the County company was an agreement sufficiently definite in terms to be specifically enforced by a court of equity; (4) in decreeing the specific performance by the Wabash company of a continuous duty, requiring the exercise of skill and personal judgment, as well as the expenditure of money, and requiring the court to retain perpetual control over the cause, in order to superintend the execution of the decree and make from time to time such changes in the rules and regulations adopted by the Wabash company as the circumstances of the parties and the shifting contingencies of business and trade should render necessary; (5) in making a decree broader than the contract, in that the County company only agreed, at most, to permit other companies to use its right of way, while the decree gives the right to use the right of way, and tracks, side-tracks, switches, turn-outs, turn-tables and other terminal facilities of the Wabash company; (6) in holding that there was mutuality of equitable remedy between the parties to the suit; and (7) in holding that the contract of the County company was binding on Joy and others, as purchasers in good faith and without notice, under the mortgage made by the Wabash company in 1880.

But we are of opinion that, under the two agreements of

August 11, 1875, and the deed of that date from the County company to the Kansas City company, the Wabash company, as successor of the latter company, is bound to permit the Colorado company to use the right of way from the north line of Forest Park, through the park, to the terminus of the Wabash company's road on Eighteenth Street, for a fair and equitable compensation.

Forest Park, containing 1379 acres of land, had been established as a park for the benefit of the people, and was intended principally as a driving park. The Board of Forest Park Commissioners had, under the act of March 25, 1874, the power to lay off, improve, adorn, govern, manage and control the use of the park and the avenues surrounding it. Before the execution of the tripartite agreement, neither the County company nor the Kansas City company had any railroad to the Union Depot. The County company had located its line east and west of the park, and had purchased the right of way at different points along its line from the Union Depot to the park; but it had built no railroad, and the location of its right of way through the park was undetermined at the time. The Kansas City company had its depot for freight and passengers in the northern part of the city, some distance from the Union Depot. As the Union Depot was at that time the only general passenger depot in the city, and was reached by most of the railroads which entered the city, the Kansas City company determined to build a branch of its road from Ferguson, about nine or ten miles from the city, to the Union Depot, and thus avail itself of better facilities for doing a passenger business, and to cross the bridge over the Mississippi River with its trains. It is stated in the agreement of August 11, 1875, between the County company and the Kansas City company, that the latter required the right of way in order to reach the Union Depot. Its branch line from Ferguson was located through the park. In its efforts to obtain the right of way through the park it encountered the County company. The Board of Park Commissioners was conferred with by the two companies, in regard to securing a definite right of way for both of them through the park. This is shown by the testi-

mony of Mr. McKinley, before referred to. The Park Commissioners were willing, at that time, to grant the use of one right of way through the park, on a certain line, with conditions as to the use of such right of way by other railroads, so as to protect the park, as far as possible, from invasion by other railroads, on separate and independent rights of way. In order to accomplish this result, the board expended $40,000 in aid of the construction of the railroad through the park. In view of the deep cut on the line of the Wabash road just east of the park, it would be difficult for any other railroad to enter the park, from the east, on an independent right of way, and at the same time use the right of way of the Kansas City company through the park. Hence, arose the provision that this right to use the right of way by other railroads should apply not only to the "right of way through the park," but also to the right of way "up to the terminus of its road in the city of St. Louis," that is, the right of way from the park to the Union Depot.

It was under these circumstances that the tripartite agreement came into existence; and the terms of paragraph 9 of it must be construed. That paragraph is here repeated: "Ninth. Said party of the second part shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the city of St. Louis, upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by such companies." It is to be construed in connection with paragraph 12 of the same agreement.

In regard to these two paragraphs, the opinion of the Circuit Court says: "It will be observed that by the ninth paragraph the County road agreed to permit the use of its right of way by other railroads. Whether a like obligation was assumed by the Kansas road depends upon the last sentence in the twelfth paragraph, which purports to grant to the Kansas road the right to occupy and enjoy the right of way through the park jointly with the County road 'on the terms of the said contract between them, and under the same terms and

conditions as are hereby and hereinbefore imposed upon said party of the second part, and which are hereby assumed by said party of the third part as to improvements, except as to building a depot and switch in said park, which the party of the second part is to do itself.' It must be conceded that the meaning of this language is not perfectly clear. It is claimed by the defendants that the words 'as to improvements, except as to building, etc.,' qualify not only the immediately preceding clause, commencing 'and which are hereby assumed,' but also the one prior, commencing 'and under the same terms and conditions,' and therefore that the terms and conditions as to improvements are those alone cast upon the Kansas road. This would make the two clauses but a single compound one, qualified by the following relative clause 'as to improvements,' etc. As against this it must be observed that, grammatically, a relative clause generally qualifies its immediate antecedent, and therefore, in this case, would refer simply to that clause which provides for the assumption by the Kansas road. This natural grammatical construction is strengthened by the punctuation — a comma after the words 'party of the second part' and none after the words 'party of the third part,' which seems to separate the entire first clause from the second and its qualifying terms. I know that the matter of punctuation is never relied upon to defeat the obvious intent; but, when the meaning is doubtful, the punctuation is certainly a matter tending to throw light upon it. Further, there are not simply two, but really three, antecedent clauses, the first one being 'the terms of the said contract between them,' that is, the two railroad companies. Very clearly this qualifying clause does not refer to that, and therefore it should not be held to qualify the second, unless the obvious intent compels such construction. It is objected that the clause commencing 'and which are hereby assumed' is, under this construction, superfluous. I think not. These improvements called for the expenditure of money, and the idea seemed to be that the Kansas road should not only hold its rights upon certain conditions but, that, as to those involving expenditure of money, it should expressly assume the performance. There is a manifest differ-

ence between a conveyance subject to a mortgage and a conveyance in which the grantee assumes the payment of the mortgage. This distinction evidently dictated the form of expression used."

It appears, from paragraph 12, that the Kansas City company had in view the failure of the County company to comply with the provisions of paragraphs 1 to 8 inclusive of the tripartite agreement relating to the construction of the road, among which was the provision which required the completion of the road within one year, under the penalty of the forfeiture of all rights under the agreement. The Kansas City company guarded against such contingency by the provision, in paragraph 12, that, in case the County company, its successors or assigns, should forfeit its rights, privileges and franchises in, upon and through the park, or from any cause should cease to have, maintain or enjoy the same, then the Kansas City company should not also be excluded from the park, but, with its successors and assigns, should continue to have, maintain and enjoy all of said rights, privileges, immunities, franchises, improvements and property, on the terms thereinbefore set forth, continuously and forever. Thereby, in case of the forfeiture of its rights by the County company, the Kansas City company became possessed of the entire right of way, subject to the terms of the agreement of August 11, 1875, between the two companies, and to those of the tripartite agreement of the same date; and that which, prior to the forfeiture, was held and enjoyed jointly by the two companies, became the sole property of the Kansas City company, its successors and assigns, on the terms of the said contract between the two companies, and under the same terms and conditions which were imposed upon the Kansas City company. Among the conditions so imposed were those of paragraph 9 of the tripartite agreement. Further, those terms as to improvements, except as to building a depot and switch in the park, were assumed by the Kansas City company. The depot and switch were to be built by the County company. The word "improvements" related to the building of the road and the erection of what was to be erected, except the depot and switch. The

reason why the Kansas City company did not assume the building of the depot and switch appears from a clause in the agreement of August 11, 1875, between the two companies, to the effect that the County company should have and maintain the passenger depot in the park, so far as the two companies were concerned, and that the Kansas City company should not have the power of stopping any of its trains in the park. As, however, the latter company would use the right of way through the park, and what were called the "improvements," except the depot and switch, the Park Commissioners required it to assume the obligations of the County company in that regard.

This was the view of the contract taken by the Circuit Court, and we think it was correct. It is evidently in accordance with the intention of the parties to the tripartite agreement. The object of the Park Commissioners was to protect the park from the invasion of more than one railroad track; and, to accomplish that result, it was necessary to give to other railroad companies the right to use the one right of way, and to impose on the Kansas City company, as well as the County company, the obligation to permit other companies to use such right of way. *Hayes* v. *Michigan Central Railroad*, 111 U. S. 228.

We are also of opinion that the covenants in paragraph 9 of the tripartite agreement, as to the use of the right of way by other railroad companies, are binding upon subsequent purchasers, with notice, from the Kansas City company. *Tulk* v. *Moxhay*, 2 Phillips, 774; *Luker* v. *Dennis*, 7 Ch. D. 227; *Bronson* v. *Coffin*, 108 Mass. 175; *Whitney* v. *Union Railway Co.*, 11 Gray, 359, 364; *Parker* v. *Nightingale*, 6 Allen, 341, 344; *Vandoren* v. *Robinson*, 16 N. J. Eq. 256; *Kirkpatrick* v. *Peshine*, 24 N. J. Eq. 206; *Western* v. *Macdermott*, L. R. 2 Ch. 72; *Watertown* v. *White*, 4 Paige, 510; *Randall* v. *Latham*, 36 Connecticut, 48, 53; *City of Cincinnati* v. *Lessees of White*, 6 Pet. 431; *Brew* v. *Van Deman*, 6 Heiskell, 433; *Winfield* v. *Henning*, 21 N. J. Eq. 188; *Verplanck* v. *Wright*, 23 Wend. 506; *Stockett* v. *Howard*, 34 Maryland, 121; *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y. 35.

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In the present case, the tripartite agreement is a link in the chain of title of the mortgagees and of the purchasing committee. The right of way through the park, granted by Griswold to the County company, November 3, 1871, was lost by non-user. The right of way granted by the Park Commissioners to the County company under the first park act, of March 25, 1872, failed because that act was declared unconstitutional, in *Chouteau* v. *Leffingwell*, 54 Missouri, 458. The third line, that established by the tripartite agreement, was not identical with either of the two prior lines. The Park Commissioners, therefore, granted to the two companies, under the tripartite agreement, all the right of way which they acquired in the park. The right of the mortgagees and of the purchasing committee to use such right of way is based solely upon that agreement; and, holding under it, they must hold subject to its terms and conditions, irrespectively of the question of notice. *Whitney* v. *Union Railway*, 11 Gray, 359; *Vandoren* v. *Robinson*, 16 N. J. Eq. 256; *Tulk* v. *Moxhay*, 2 Phillips, 774; *Luker* v. *Dennis*, 7 Ch. D. 227; *Western* v. *Macdermott*, L. R. 2 Ch. 72. Therefore, the Wabash company, the mortgagees, and the purchasing committee must be held to have had notice of the covenants and conditions of the tripartite agreement prior to the execution of the mortgage, and are bound by them, whether the covenants be or be not strictly such as run with the land.

Nor is the failure to acknowledge the tripartite agreement as a deed of any importance. There was sufficient to put the purchasers on inquiry, and to charge them with notice of all the facts which such an inquiry would have made known. The Wabash company came into existence in August, 1879, through the consolidation of the Kansas City company with the Wabash Railway company. This consolidation took place under statutes by virtue of which the consolidated company took all the property, rights and franchises and assumed all the liabilities of the Kansas City company. The Wabash company, therefore, was not strictly a purchaser from the Kansas City company. The consolidation was merely a change of name. If the Kansas City company was bound by

the tripartite agreement to grant the use of the right of way to other railroads, on certain terms, the Wabash company, as consolidated, was equally bound to do so. The mortgage was executed in 1880, and the committee purchased in 1886. The tripartite agreement was recorded in the recorder's office of the city of St. Louis, September 5, 1879, prior to the execution of the mortgage and prior to the purchase under it made by the committee. *Bishop* v. *Schneider*, 46 Missouri, 472; *Stevens* v. *Hampton*, 46 Missouri, 404; *Digman* v. *McCollum*, 47 Missouri, 425.

The tripartite agreement, and that between the County company and the Kansas City company, and the deed from the County company to the Kansas City company, all of them bear date August 11, 1875. The deed was duly acknowledged, and was recorded August 13, 1875. It is a link in the chain of title of the mortgagees and the purchasing committee. It recites that it is made in pursuance of the terms of a certain contract made and executed between the County company and the Kansas City company, and dated August 11, 1875, and is in full satisfaction of so much of such contract as relates to the conveyance of certain pieces of land and right of way to the Kansas City company. It also contains the following provision: "And also the said party of the first part hath conveyed, assigned and transferred, and by these presents doth convey, assign and transfer, unto the said party of the second part, and to its successors and assigns, an undivided one-half of all the right, title or interest of the party of the first part of, in or to the right of way, and of, in or to any and all other rights, privileges and franchises, powers and immunities owned by, or vested in or enjoyed by, or that may hereafter be acquired and owned by, vested in or enjoyed by, the party of the first part, in, through or upon Forest Park, by any means or from any source whatever; all of which conveyances of the said rights of way in this deed mentioned are made subject to the terms and conditions upon which the same were granted to the party of the first part, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise apper-

taining." Thus this deed refers to the contract of August 11, 1875, between the County company and the Kansas City company, and to the terms thereof; and the Kansas City company took its title subject to the terms and conditions imposed upon the County company by the tripartite agreement. This reference to the terms and conditions on which the right of way mentioned in the deed was granted to the Kansas City company put all the parties to the deed, and their assigns, on inquiry as to the terms of the contract by which such rights of way were granted, and led up to the provision in the agreement of August 11, 1875, between the two companies, which referred to the tripartite agreement in the following language: "And whereas, under this agreement and a certain agreement between the parties hereto and the Commissioners of Forest Park of even date herewith, the party of the second part is about to, and hereby, in consideration of the covenants and agreements of the party of the first part, hereinafter particularly set forth, and of the covenants and agreements of said Commissioners of Forest Park in said agreement with them contained, does covenant and agree to construct and maintain a railroad bed and road in, upon and through said Forest Park and the tunnel and cut hereinbefore specified, according to certain plans and specifications agreed upon, and according to the terms and conditions of said agreement with said commissioners, for the joint use of both the parties (of the first part and of the second part) hereto, their several successors and assigns." Being thus chargeable with notice of the contents of the contract of August 11, 1875, between the County company and the Kansas City company, the mortgagees and the purchasing committee were chargeable also with notice of the tripartite agreement, to which it referred; and they purchased subject to the terms on which the right of way was granted. *Kirkpatrick* v. *Peshine*, 24 N. J. Eq. 206; *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y. 35; *Bishop* v. *Schneider*, 46 Missouri, 472; *Stevens* v. *Hampton*, 46 Missouri, 404; *Maupin* v. *Emmons*, 47 Missouri, 304; *McCamant* v. *Patterson*, 39 Missouri, 100, 110; *Mense* v. *McLean*, 13 Missouri, 298; *Meier* v. *Blume*, 80 Missouri, 179, 184.

The covenant in paragraph 9 of the tripartite agreement created an easement in the property of the County company and the Kansas City company for the benefit of the public, which might be availed of, with the consent of the public authorities, properly expressed, by other railroad companies which might wish to use not only the right of way through the park but also that between the park and the Union Depot. *Whitney* v. *Union Railway*, 11 Gray, 359, 364; *Parker* v. *Nightingale*, 6 Allen, 341, 344; *Wilkinson* v. *Clements*, L. R. 8 Ch. 96; *Perkins* v. *Hadsell*, 50 Illinois, 216; *Stansbury* v. *Fringer*, 11 Gill & J. 149; *Cooper* v. *Pena*, 21 California, 403; *Union Pacific Railway* v. *McAlpine*, 129 U. S. 305, 314; *McMurray* v. *Moran*, 134 U. S. 150.

The two agreements of August 11, 1875, and the deed of that date from the County company to the Kansas City company constituted a single transaction, relating to the same subject matter, and should be construed together in such a way as to carry into effect the intention of the parties, in view of their situation at the time and of the subject matter of the instruments. Contracts of such a character are to be construed liberally in favor of the public when the subject matter concerns the interests of the public. *Parker* v. *Great Western Railway*, 7 Scott N. R. 835, 870; *Colman* v. *Eastern Counties Railway*, 10 Beav. 1, 14; *Canal Co.* v. *Wheeley*, 2 B. & Ad. 792; *Blakemore* v. *Canal Co.*, 1 Myl. & K. 154, 165; *Lee* v. *Milner*, 2 Younge & Coll. Ex. 611, 618; *Ware* v. *Canal Co.*, 28 L. J. Ch. N. S. pt. 1, 153, 157; *Gray* v. *Railway Co.*, 4 Railway Cases, 240.

The Kansas City company, under the agreements, completed its road through the park to the Union Depot in 1876. The agreement between the County company and the Kansas City company provided that the County company should pay to the Kansas City company one-half of the cost of the construction and maintenance of the road-bed through the park and the tunnel and the cut, within two years from August 11, 1875, and that, if the County company should fail or refuse to make payment for sixty days after demand, after it should become due, all the rights, privileges, franchises, powers, immunities, improvements and property of the County company,

in, through or upon Forest Park, and in, into, through, over or upon the tunnel and cut, should become, by virtue of such failure and refusal, without further process or proceedings, forfeited to the Kansas City company, its successors and assigns; that, in case of such forfeiture, no further payments should be made by the County company, but the Kansas City company might enter upon the sole and absolute possession and enjoyment of all such rights, privileges, franchises, powers, immunities, improvements and property, to the exclusion of the County company; and that the latter company should, in such case, convey by deed to the Kansas City company, its successors and assigns, all of such rights, privileges, franchises, powers, immunities, improvements and property. The two years expired in 1877. The County company, having paid nothing, forfeited to the Kansas City company all its interest in the right of way through the park and through the tunnel and the cut east of the park.

By the two agreements and the deed, the Kansas City company obtained from the County company an undivided one-half of the right of way through the park, and the other rights of way, then owned by the County company, between the park and the Union Depot, and, by virtue of the two agreements and the forfeiture, without further action by either the County company or the Park Commissioners, the Kansas City company became vested with the title to the whole right of way through the park, the tunnel and the cut, and became substituted for the County company under the agreements. All the obligations and conditions imposed upon the County company became those of the Kansas City company, except as to building the depot and the switch in the park; and the latter company became subject to the conditions which were imposed on the County company by the tripartite agreement. That agreement created the easement before referred to, which covered the tracks through the park and the tracks east of the park to the Union Depot. *Whitney* v. *Union Railway Co.*, 11 Gray, 359, 364; *Parker* v. *Nightingale*, 6 Allen, 341, 344.

The permission to other railroad companies to use such tracks was a concession to the Park Commissioners, and was

one of the conditions of the grant of the right of way through the park to the County company; and the Kansas City company obtained the title to, and the exclusive possession of, such right of way, under the agreement providing for such permission. It would be inequitable to permit the Kansas City company, or its successor, to continue to use the right of way through the park and at the same time to deprive the Park Commissioners, or their successor, the city of St. Louis, as trustees of the public, of the benefit of the use by other railroad companies of the right of way between the park and the Union Depot. The park was dedicated to the use of the people of the city and county of St. Louis, and it was the duty of their trustees to preserve that use to them, for park purposes. In the view of those trustees, it was necessary, for the protection of the park, that other railroad companies should be permitted to use not only the right of way through the park but also that between the park and the Union Depot. In order to obtain the right of way through the park, the Kansas City company subjected itself to the condition imposed by paragraph 9 of the tripartite agreement, and it is right that that company and its successor should be held to a strict compliance with its covenant. The appellants, although enjoying the benefit of the $40,000 expended by the Park Commissioners and of the right of way through the park, deny their liability under the agreement, without offering to return to the grantors the property obtained by virtue of the agreement. Under such circumstances, these parties cannot be heard to allege that the agreement was against the policy of the law. *Wiggins Ferry Co.* v. *Chicago & Alton Railroad*, 73 Missouri, 413.

In respect to the point that paragraph 9 of the tripartite agreement covers the use by other railroad companies, not only of the right of way through the park, but also of the right of way to the terminus of the County company's road in the city of St. Louis, the Circuit Court very rightly said, in its opinion: "It is argued with great force, however, by counsel for the respondents, that even if the purchasers were charged with notice of these terms and conditions as attaching to the lands described in the deed, inasmuch as the Kansas

road obtained a large portion of its right of way between Forest Park and the Union Depot from other sources, it took these latter portions free from any burden cast upon the lands specifically conveyed by the County road. 'Can it be,' he says, 'that a condition in a deed of a few feet of the right of way, in a long line of three hundred miles, casts a burden on the entire line, to be assumed by every succeeding purchaser?' I might answer this extreme case by a reverse question: Can it be possible that a condition attached to substantially the entire right of way of this long line of road can be defeated by the fact that some few feet have been acquired by a deed free from such condition? But these extreme cases do not constitute the practical matter before us. Here the County road had an incomplete right of way through the park and to the Union Depot. A share of this incomplete right of way it conveyed to the Kansas road subject to certain conditions. Can it be that the completion by the Kansas road of this right of way, by the purchase of intervening and isolated tracts, destroys the entire value of the conditions? Looking at this matter in a practical way, and from a reasonable standpoint, I think the answer to this question must be in the negative."

In *Bronson* v. *Coffin*, 108 Mass. 175, 180, it was said, the court speaking by Gray, J.: "An interest in the nature of an easement in the land which the covenant purports to bind, whether already existing, or created by the very deed which contains the covenant, constitutes a sufficient privity of estate to make the burden of a covenant to do certain acts upon that land, for the support and protection of that interest and the beneficial use and enjoyment of the land granted, run with the land charged. And an obligation, duly expressed, that the structures upon one parcel of land shall forever be of a certain character for the benefit of an adjoining parcel is equally a charge upon the first parcel, whether the obligation is affirmative or merely restrictive, and whether the affirmative acts necessary to carry the obligation into effect are to be done by the owner of the one or the owner of the other." And it was held by the court, where there was a covenant to make and

maintain a fence on a railroad, contained in a deed granting to the road a strip for the right of way, that this covenant was an incumbrance on all the remaining land of the grantor, and ran with that land, because the covenant gave the grantee an interest in the nature of an easement in the adjoining land of the grantor. See also *Western* v. *Macdermott*, L. R. 2 Ch. 72; *Whitney* v. *Union Railway*, 11 Gray, 359, 364; *Parker* v. *Nightingale*, 6 Allen, 341; *Union Pacific Railway* v. *McAlpine*, 129 U. S. 305, 314; *McMurray* v. *Moran*, 134 U. S. 150.

There can be no doubt of the power of the County company and the Kansas City company, under the statutes of Missouri, to make the agreement in question. Gen. Stats. of Missouri of 1866, c. 63, sec. 32, p. 341.

The only right of way through the park and to the Union depot claimed by the appellants is that established by the tripartite agreement. Every other right of way through the park was surrendered, by that agreement, to the Park Commissioners, because that agreement says that the line and grade established by it was thereby fixed "as the sole and finally established right of way to which" the County company was "entitled by statute or otherwise through said park, or any part thereof." Such line and grade were laid down and described on the plat and profile which were attached to the tripartite agreement and formed part thereof. The Park Commissioners expended about $40,000 in complying with their engagements under that agreement. At its date, as testified to by Mr. McKinley, it was feared that the invasion of the park by railroads would not only affect unfavorably the landscape beauty of the park, but would also produce great danger to persons visiting it; and it was a long time before the apprehension was relieved that horses would be frightened. The consideration for the expenditure of the $40,000 was the provision of the tripartite agreement which protected the park and prevented its being defaced and injured by the construction of other railroads through it. The confining of such railroads to the use of the single right of way established was a reasonable precaution. *Hayes* v. *Michigan Cent. Railroad*, 111 U. S. 228; *Mayor of New York* v. *Williams*, 15 N. Y.

502. Such provision was in the interest of the public safety, and the Park Commissioners had the right to exact it.

In case the County company should forfeit its rights in the park, the Kansas City company was to continue to enjoy the right of way on the terms imposed on the County company by paragraph 9 of the tripartite agreement. Such construction of the contract is the only one consistent with fair dealing and the manifest intention of the parties. The tripartite agreement is the only muniment of title under which the appellants now enjoy the right of way. The grant of the right to other railroads to use such right of way through the park and to the Union Depot was a grant to the Park Commissioners, as trustees for the public, and is to be construed liberally. Paragraph 9 is imperative. It provides that the County company "shall permit" other railroads to use its right of way. This is to be done "under such reasonable regulations and terms as may be agreed upon," and "upon such terms and for such fair and equitable compensation to be paid" to the County company "therefor as may be agreed upon by such companies." Not only are the regulations and terms to be reasonable, but the compensation is to be fair and equitable. Although the statement is that the compensation is to be such "as may be agreed upon by such companies," yet the statement that it is to be "fair and equitable" plainly brings in the element of its determination by a court of equity. If the parties agree upon it, very well; but if they do not, still the right of way is to be enjoyed upon making compensation, and the only way to ascertain what is a "fair and equitable" compensation therefor is to determine it by a court of equity. Such is, in substance, the agreement of the parties. The provision cannot be construed as meaning that, if the parties do not agree, there is to be no compensation, and that, because there can in that event be no compensation, there is to be no enjoyment of the right of way. In this view, it cannot be said that the court is making an agreement for the parties which they did not make themselves. *Emery* v. *Wase*, 8 Ves. 505; *Milnes* v. *Gery*, 14 Ves. 399; *Gregory* v. *Mighall*, 18 Ves. 328; *City of Providence* v. *St. John's Lodge*, 2 R. I. 46; *Dike* v. *Greene*, 4 R. I. 285.

On the question whether paragraph 9 of the tripartite agreement covers not merely the right of way through the park and up to the terminus of the road in the city of St. Louis, but also the tracks for that extent, the opinion of the Circuit Court very properly says: "The language of the ninth paragraph, under which, as before noticed, intervenors must claim, is that the party of the second part shall permit other railroads to use its 'right of way.' Now, the term 'right of way' has a twofold signification. It sometimes is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their road-bed. Obviously, in this paragraph, it is used in the latter sense. Through both of these contracts the terms 'right of way,' 'track,' and 'road-bed' frequently appear, and in all cases the term 'right of way' is used as descriptive of the strip above referred to. Notably, in the fifth paragraph, is the distinction between the 'right of way' and the 'track' disclosed, in which it is provided that the depot shall be wholly outside of the right of way, but immediately adjoining the track. Now, the right of way through the park, as given by the Griswold deed, was 40 feet; as fixed by the contract with the Forest Park Commissioners was 70 feet; and by this present contract, 42 feet. So the County road conveyed to the Kansas road, outside of the park, a strip either 30 or 28 feet in width for its right of way. My thought, at first, was that the intervenors could only claim a right to use so much of this right of way as was not, in fact, occupied by the track of the Wabash, and that all that was intended by this ninth paragraph was to permit other railroad companies to occupy and use so much of the Kansas road's right of way as it did not itself occupy and use; but, after reflection on the arguments of counsel, I have been led to the conviction that this was too narrow a construction, and was not the real intent of the parties. The master, in his report, shows that the entire right of way is occupied by tracks and sidings, so that there is no room for another and independent track; and as there is nothing to show that this occupation has not been made in good faith, and to supply

the needs of the Wabash company, if my first interpretation had been correct, the intervenors would plainly be without any rights. I think, however, the true construction is this: that the Kansas company was to have the first right — a right not limited to its necessities, but as broad as its convenience. Subject, and only subject, to such prior right, other companies were to have the use of the right of way, and if the respondent's business compelled the occupation by its tracks or sidings of the entire right of way, but the convenience of its business would permit the use of those tracks and sidings by another road, then such other road would be entitled to the use of both the right of way and the tracks and sidings. This construction is, I think, in accordance with the obvious intent of the parties, who were contracting for general rights, and not fixing the specific details."

The evidence shows that the entire right of way is occupied with tracks and sidings, so that there is no room for another and independent track, and that the entrance into the Union Depot over the tracks of the Wabash company is the only practical route for the road of the Colorado company to that depot. As the Kansas City company had the right to cover its right of way with main and side-tracks, so that there should be no room on such right of way for the tracks of another railroad, it would be in its power to defeat the intent of the agreement, if the right of way should be held not to include the tracks. Moreover, as the County company and the Kansas City company were tenants in common of the right of way through the park and to the east end of the cut, each company had the right to use the whole of the right of way, subject to the right of the other company to use the whole of it. Hence, the grant to other roads of the privilege of using the right of way applied to the whole of such right of way through the park, and not to a particular part of it. The track cannot be separated from the right of way, the right of way being the principal thing and the track merely an incident. A right of way is of no practical use to a railroad without a superstructure and rails. The track is a necessary incident to the enjoyment of the right of way. The record shows that the railroad

of the Colorado company is of the same gauge as that of the Wabash company, and that it is entirely practicable for the Colorado company to use the tracks of the Wabash company from the north line of the park to the Union Depot, subject to the reasonable rules and regulations of the Wabash company.

The appellants having denied all right of the Colorado company under the tripartite agreement, it became necessary for the intervenors to come into a court of equity; and the court, having taken cognizance rightfully of the subject matter in controversy, has the power to settle not only the right but also the amount of compensation. The action of the Circuit Court was, in effect, to enforce the specific performance of the agreement. The offer by the Colorado company, in its bill, to pay a fair and equitable compensation, with its prayer to have such compensation determined by the court, brought the matter within the cognizance of the court, the other party having substantially agreed, by paragraph 9 of the tripartite agreement, that the compensation should be determined by a court of equity. The prayer for an injunction to restrain the Wabash company and its receiver from refusing to permit the Colorado company to use the right of way of the Wabash company from the north line of the park to Eighteenth Street, is a prayer for all that is necessary to secure practically the specific performance of the agreement. *Dinham* v. *Bradford*, L. R. 5 Ch. 519; *Tillett* v. *Charing Cross Bridge Co.*, 26 Beav. 419; *Raphael* v. *Thames Valley Railway*, L. R. 2 Eq. 37; *Tscheider* v. *Biddle*, 4 Dillon, 55; *Biddle* v. *Ramsey*, 52 Missouri, 153; *Arnot* v. *Alexander*, 44 Missouri, 27; *Hug* v. *Van Burklee*, 58 Missouri, 202; *Gregory* v. *Mighell*, 18 Ves. 328.

The right to use the right of way is a continuing right. If the remedy were to be at law, repeated actions for damages would be necessary. The remedy at law would be wholly inadequate. It would not secure directly the enforcement of the provision of paragraph 9 of the tripartite agreement, or the use of the right of way by the Colorado company. It would be neither plain or complete, nor would it be a reasonable substitute for the remedy in equity, by the injunction asked for.

Opinion of the Court.

The appellants rely largely upon cases of the character of that of *Marble Co.* v. *Ripley*, 10 Wall. 339, where this court refused to enforce the specific performance of a personal contract to deliver from a quarry marble of certain kinds and in blocks of a specified kind, holding that, as the duties required of the owners of the marble quarry were continuous, and the agreement was one for a perpetual supply of marble, the court could make no decree which would end the controversy, and the case would have to remain in the court forever, with the liability on the part of the court to be called upon, to the end of time, to determine, not only whether the prescribed quantity of marble had been delivered, but whether every block was from the right place, and was sound, and of suitable size or shape or proportion; and it was held that it was impracticable for the court to superintend the execution of such a decree.

In the present case, it is urged that the court will be called upon to determine from time to time what are reasonable regulations to be made by the Wabash company for the running of trains upon its tracks by the Colorado company. But this is no more than a court of equity is called upon to do whenever it takes charge of the running of a railroad by means of a receiver. Irrespectively of this, the decree is complete in itself and disposes of the controversy; and it is not unusual for a court of equity to take supplemental proceedings to carry out its decree and make it effective under altered circumstances.

Considerations of the interests of the public are held to be controlling upon a court of equity, when a public means of transportation, such as a railroad, comes into the possession and under the dominion of the court. These considerations have been recognized and applied by this court in several cases. *Barton* v. *Barbour*, 104 U. S. 126; *Miltenberger* v. *Logansport Railway*, 106 U. S. 286, 311, 312; *Union Trust Co.* v. *Illinois Midland Railway*, 117 U. S. 434, 458.

The Circuit Court having adopted the rate of compensation insisted upon by the appellants, and the Colorado company not having taken an appeal, the question of the rate of com-

pensation is concluded between the parties. So also is the question that the rules and regulations for the running of the trains of the Colorado company are to be those prescribed by the Wabash company and its successors.

In view of the testimony as to the use, by agreement, of the tracks of one railroad company by the engines and cars of another, the practical difficulties insisted upon of carrying out the regulations laid down in the decree of the Circuit Court amount to very little, if anything. That these regulations are practical is shown by the agreement of August 11, 1875, between the County company and the Kansas City company, in that provision thereof, which is as follows, and which was adopted to a certain extent by the Circuit Court in its decree: "It is agreed and covenanted that to accommodate the running arrangements of the party of the second part said party of the second part shall have the absolute and sole control of the running, starting and regulating of the time-tables of and for its own trains; and it is further agreed and covenanted that no train, locomotive, car or other conveyance of the party of the first part, its successors or assigns, shall be allowed or attempted to be started or run within eight (8) minutes of the time fixed or stated for the starting, coming in or running of the train or trains of the party of the second part, its successors or assigns; and there shall be twenty minutes' time between the starting and coming in of the trains of the party of the second part, and this matter as to said specified times shall be under the sole control and regulation of the party of the second part." It is to be noted, however, that the agreement referred to gave to the Kansas City company the control only of its own trains, while the decree gives to the Wabash company the control of all the trains to be run over its tracks, with the proviso that the trains of the Colorado company shall not be started or run within eight minutes of the time fixed for the starting, coming in or running of the trains of the Wabash company. The latter company is required only to make reasonable rules and regulations for the running of the trains of the Colorado company. The Wabash company is to fix the time-tables, and the trains of the Colorado company

are to be operated on the tracks of the Wabash company, subject to the rules and regulations of the latter company so long as a train of the former company occupies the tracks of the latter company.

It is objected that the details of the manner of the use of the right of way are not set forth in paragraph 9 of the tripartite agreement, and that, therefore, a court of equity will not decree a specific performance. But, viewing the two agreements of August 11, 1875, as a single contract, the details as to the manner of use of the right of way are sufficiently furnished by agreement of the parties, for it is provided by the agreement of August 11, 1875, between the County company and the Kansas City company, not only that the latter company shall have the absolute and sole control of the starting, running and regulating of the time-tables of and for its own trains, but also, that the matter of the relative times of the starting, coming in and running of the trains of the County company and of those of the Kansas City company shall be under the sole control and regulation of the latter company, its successors and assigns.

The case of *Texas & Pacific Railway Co.* v. *Marshall*, 136 U. S. 393, is much relied upon by the appellants; but the principle of that case does not apply to the present one. There, the court held that, if the railroad company was under a contract with the city of Marshall to keep there its principal office of business and its main machine shops and car works, it was much more consonant to justice that the injury suffered by the city should be compensated by a single judgment in an action at law; that there was no substantial difficulty in ascertaining such compensation; and that, therefore, the city had a complete remedy at law. But in the present case, the remedy in damages by an action at law would be entirely inadequate, and nothing short of the interposition of a court of equity would provide for the exigencies of the situation. See, also, *Wilson* v. *Northampton &c. Railway Co.*, L. R. 9 Ch. 279.

The decree of the Circuit Court is so framed as to execute itself. It finds that the rules and regulations now in force for the running of trains over the right of way and tracks of the

Wabash company, and which are set forth in the record, are reasonable rules and regulations. So long as they are undisturbed, there is no occasion for the action or interposition of the court.

The fact that the railroads which are to be allowed, under paragraph 9 of the tripartite agreement, to use the right of way through the park and up to the terminus in the city of St. Louis, are not named in that paragraph, is of no importance. *Wolverhampton Railway Co.* v. *London and Northwestern Railway*, L. R. 16 Eq. 433; *Express Cases*, 117 U. S. 1; *Railway Co.* v. *Alling*, 99 U. S. 463.

Railroads are common carriers and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation. The present case is a striking illustration. Here is a great public park, one of the lungs of an important city, which, in order to maintain its usefulness as a park, must be as free as possible from being serrated by railroads; and yet the interests of the public demand that it shall be crossed by a railroad. But the evil consequences of such crossing are to be reduced to a minimum by having a single right of way, and a single set of tracks, to be used by all the railroads which desire to cross the park. These two antagonisms must be reconciled, and that can be done only by the interposition of a court of equity, which thus will be exercising one of its most beneficent functions.

As to the objection that there is no mutuality in the contract, and therefore it cannot be enforced, the Circuit Court says in its opinion: "As to the objection on the ground of the want of mutuality in the contract, I think it of little force. The respondent has been paid for the privilege that is now claimed. The consideration, as I have heretofore shown, was ample; and, when a party has received payment for a privilege, I do not think it can resist the enforcement of that privi-

lege on the mere ground that it cannot compel the other party to continue in its enjoyment." We concur in this view. Under the tripartite agreement, the right of way through the park was obtained by the Kansas City company, and, in consideration of the covenants contained in paragraph 9 and other paragraphs of that agreement, $40,000 were expended by the Park Commissioners in aid of the construction of the railroad through the park, upon the right of way granted. Things were to be done by each party for valuable considerations to be paid by one to the other. The Park Commissioners complied in all respects with the agreement. Although the one easement was granted in consideration of the other, the appellants refused to permit the enjoyment of the easement which they granted. The want of mutuality is urged when the appellants are called upon to comply with the covenant which is valuable to the city of St. Louis and the public whom that city represents. Such want of mutuality is alleged to consist in the inability of the appellants to prevent other railroads which may use the right of way from discontinuing such use, and in the fact that the contract did not specify the period during which the other railroads should be required to use the right of way. But we think that there is no such want of mutuality as should interfere with the enforcement of the contract.

It is insisted that the County company had no power to bind itself to grant the use of its right of way east of the park. But the appellants do not occupy a position to insist upon that objection, so long as they themselves use the right of way which was granted, and enjoy the benefit of the money which the Park Commissioners expended.

The city of St. Louis is, in the present case, not merely a nominal party, but is charged with the duty of protecting the park, and of preserving and fostering the commerce of the city. Both of those objects are clearly set forth in the tripartite agreement executed by the Park Commissioners, of whom the city of St. Louis is the successor; and the considerations thus arising are legitimate ones in a court of equity, the case being founded upon the tripartite agreement.

Decree affirmed

Statement of the Case.

BUTLER *v.* GAGE.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 1342. Submitted January 5, 1891.—Decided January 19, 1891.

It is to be presumed that when a writ of error is filed here from Colorado, signed (the Chief Justice being absent) by a judge who styles himself "Presiding judge of the Supreme Court" of that State, that he acts in that capacity in the absence of the Chief Justice, and in accordance with the provisions of the Constitution of the State, and that the writ was properly allowed.

The petition for a writ of error is not part of the record on which this court acts.

When a case is presented for the determination of the highest court of a State without a suggestion that a Federal question is involved, and after decision a petition for a rehearing, containing no such suggestion, is presented and denied, a denial of a motion for further oral argument in which such a claim is for the first time set up does not necessarily involve the decision of a Federal question.

THIS was an action brought in the name of William P. Linn and Lewis C. Rockwell against Hugh Butler and Charles W. Wright, in the District Court in and for the county of Lake and State of Colorado, upon a contract between Linn and Butler and Wright, subsequently assigned by Linn to Burrell, and by Burrell to Rockwell, as collateral security for money loaned by him to Linn. Linn subsequently died and his executors were substituted.

The defences raised no Federal question. Upon trial had, a verdict was rendered in favor of the plaintiffs and their damages were assessed at the sum of $9008.33, and a motion for new trial having been overruled, judgment was rendered thereon January 17, 1888, whereupon the case was taken by appeal to the Supreme Court of the State of Colorado. Appellants assigned forty-three errors, but these involved no Federal question. September 13, 1889, the Supreme Court entered an order reciting that "it appearing that this cause comes within the provisions of Rule 51 of this court, it is ordered by the court that this cause be, and is hereby, advanced for hearing, and that the same is hereby assigned to the Supreme Court Commission for consideration and report and for oral argument at such time as said commission shall

order." September 27, 1889, it was stipulated and agreed by and between the parties that the cause might be set down for oral argument on Wednesday, the 16th day of October, 1889. The cause was accordingly heard by the Supreme Court Commission, which arrived at a decision and opinion and reported the same to the Supreme Court. On the 24th of December, 1889, the Supreme Court entered the following order:

"At this day this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said District Court in and for the county of Lake as also upon the matters assigned for error herein, and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is no error in the proceedings and judgment aforesaid of said District Court, it is therefore considered and adjudged by the court that the judgment aforesaid of said District Court be, and the same is hereby affirmed and stand in full force and effect, and that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said appeal.

"It is further considered and adjudged by the court that said appellees do have and recover of and from said appellants their costs in this behalf expended, to be taxed, and that they have execution therefor. And let the opinion of the court filed herein be recorded."

And the opinion of the commission was then given upon the record, with these words attached: "*Per curiam:* For the reasons stated in the foregoing opinion the judgment is affirmed."

On the 7th of January, 1890, appellants filed their petition for a rehearing in the cause, assigning various reasons, but suggesting no Federal question, and taking no exception, so far as appears, to the fact that the case had been heard by the commission, which on the 28th of March, the Supreme Court, upon consideration thereof, denied.

May 16, appellants filed their motion in words and figures as follows: "And now come the said appellants and move the

court to grant an oral argument on the merits of this cause and appeal in and before this court, and that in the meantime no mandate, remittitur or process issue herein to affirm or enforce in any way the judgment of the said District Court of Lake County complained of and appealed from," which motion was overruled May 23d. Thereupon appellants presented their petition for a writ of error from this court, addressed to "Hon. J. C. Helm, Chief Justice of the Supreme Court of the State of Colorado." In this paper it was claimed, after a recital of various steps taken in the case, that the motion and request of appellants that the Supreme Court should grant an oral argument on the merits of the appeal and of the cause, and the refusal of the court to grant the same and to hear an oral argument, "drew in question the constitutionality of the statutes of the State of Colorado, entitled 'An act to regulate the practice in the Supreme Court; appointing commissioners therefor, fixing their salary, and defining their duties,' approved March 7, 1887; and a certain other act entitled 'An act providing for a Supreme Court Commission,' approved April 1, 1889; in that by the said statutes and the construction placed thereon and the practice adopted thereunder by said Supreme Court, litigants and suitors in said Supreme Court were deprived of their right to have their appeals and writs of error and other judicial controversies to be tried before, heard and decided by said Supreme Court, and because the same are repugnant to and inconsistent with and forbidden by the Fourteenth Amendment to the Constitution of the United States, which provides that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;' and that said decision in this cause in effect sustains the validity of said statutes so drawn in question."

The writ of error was allowed as follows:

"State of Colorado:

"Desiring to give petitioners an opportunity to test in the

Supreme Court of the United States the question presented in the foregoing petition, it is ordered that a writ of error be allowed to said court, and that the same be made a supersedeas, the bond, in the penal sum of sixteen thousand dollars, herewith presented, being approved.

"In testimony whereof witness my hand this 27th day of May, A.D. 1890, the chief justice being absent.

"CHAS. D. HAYT,

"*Presiding Judge of the Supreme Court of the State of Colorado.*"

The writ of error having issued and citation having been duly served, signed by and attested in the name of Judge Hayt, and the transcript having been filed in this court, the defendants in error moved to dismiss or affirm.

Mr. L. C. Rockwell for the motion.

Mr. Hugh Butler opposing.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

The motion to dismiss is predicated upon two grounds: First. Because the writ of error was not allowed, nor the citation signed, by the Chief Justice of the Supreme Court of the State of Colorado. Second. Because no Federal question was involved in the case, or appeared or was raised upon the record.

It is essential to the exercise by this court of revisory jurisdiction over the final judgments or decrees of the courts of the States that the writ of error should be allowed either by a justice of this court, or by the proper judge of the State court, after ascertaining by an examination of the record that a question cognizable here was made and decided in the State court, and that such allowance was justified. *Gleason* v. *Florida*, 9 Wall. 779. Section 999 of the Revised Statutes provides that the citation shall be signed by the chief justice, judge or chancellor of the court rendering the judgment or

passing the decree complained of, or by a justice of this court; and it was held in *Bartemeyer* v. *Iowa*, 14 Wall. 26, that when the Supreme Court of a State is composed of a chief justice and several associates, and the judgment complained of was rendered by such court, the writ could only be allowed by the chief justice of that court or by a justice of this court.

Section 5 of article VI of the constitution of the State of Colorado is as follows: "The Supreme Court shall consist of three judges, a majority of whom shall be necessary to form a quorum or pronounce a decision." And by section 8 of that article it is provided that: "The judge having the shortest term to serve, not holding his office by appointment or election to fill a vacancy, shall be the chief justice, and shall preside at all terms of the Supreme Court, and, in case of his absence, the judge having in like manner the next shortest term to serve shall preside in his stead." (Gen. Stats. Colorado, 1883, p. 49.)

It appears from the record that the chief justice was absent when this writ was allowed, and it is stated by counsel that Judge Hayt, who allowed it, had the next shortest term to serve, as the other associate justice was elected to fill a vacancy. It is certainly to be presumed that Judge Hayt was, as he asserted himself to be, the presiding judge of the court in the absence of the chief justice. The first ground urged for the dismissal of the writ of error is therefore untenable.

This brings us to consider whether the record before us so presents a Federal question as to justify the maintenance of the writ. And it may be remarked in the outset, that the petition for a writ of error forms no part of the record upon which action here is taken. *Manning* v. *French*, 133 U. S. 186; *Clark* v. *Pennsylvania*, 128 U. S. 395; *Warfield* v. *Chaffe*, 91 U. S. 690.

Sections 1 and 2 of article VI of the constitution of the State of Colorado read thus:

"Section 1. The judicial power of the State as to matters of law and equity, except as in the constitution otherwise provided, shall be vested in a Supreme Court, District Courts, County Courts, justices of the peace, and such other courts as may be provided by law.

"SEC. 2. The Supreme Court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, and shall have a general superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law." (Gen. Stats. Colorado, 1883, p. 48; Sess. Laws Colorado, 1887, p. 483.)

In 1887 the legislature of the State of Colorado passed a statute authorizing the appointment of three Supreme Court Commissioners for the period of two years, unless sooner relieved or discharged, and upon April 1, 1889, enacted a similar statute authorizing the appointment of like commissioners for the period of four years. Sections 2 and 3 of the latter act are as follows:

"SEC. 2. Said commissioners shall be subject to such rules and orders as the Supreme Court shall from time to time adopt for their government, and for procedure before them; they shall examine and consider together and report upon such cases as shall be referred to them by the court for that purpose, and perform such other services as the court shall require. Their reports shall be in writing and signed by one of their number, and shall show which concur therein and which, if any, dissent; and a dissenting commissioner may likewise make a report. Every report shall contain a concise but comprehensive statement of the facts in the case, the opinion of the commissioner or commissioners submitting the report, and a citation of the authorities relied on in support of the opinion. The court may provide by rule for a hearing of an oral argument by counsel before said commission: *Provided*, That no cause shall be referred to said commissioners in which they, or any of them, are or have been interested as counsel or otherwise.

"SEC. 3. Every opinion shall be promptly delivered to the chief justice, who shall lay the same before the court. The court may approve, or modify or reject any such opinion. Whenever it shall approve and adopt an opinion as submitted, or as modified, the same as approved and adopted shall be promulgated as the opinion of the court, and shall be filed and

reported, and judgment shall be rendered in the same manner and with the same effect and subject to the same orders, motions and petitions for rehearing as in the case of other opinions and judgments of the court; and every such opinion shall show which commissioner prepared the opinion and which concurred, and the approval and adoption, and by the concurrence of which judges; and whenever the court shall reject the opinion of the commissioners in any cause, the opinion of the court shall be prepared and a like proceeding had in all respects as in other causes submitted to the court." Sess. Laws Colorado, 1889, 444, 445.

Three commissioners were appointed under this act and are now acting as such commissioners, and it was to them that the consideration of this case on appeal was assigned by the State Supreme Court. In the argument for plaintiffs in error it is asserted that the record involves the inquiry: "Did the Supreme Court of the State of Colorado in this instance, by reason of the State statute of 1889, deny to the plaintiffs in error any right or privilege secured and protected by the Fourteenth Amendment?" and that "the right denied in this case was a review by a court, created and existing under the law of the land, and created for the purpose of determining such controversies." And it is contended that, considering the nature of the right, the statute and the course pursued under it deprived plaintiffs in error of due process of law and the equal protection of the laws.

The record discloses that after the cause was assigned to the commission "for consideration and report and for oral argument at such time as said commission shall order," it was stipulated and agreed by the parties that the cause should be set down for oral argument on a certain day. And it is nowhere shown that any objection was made by plaintiffs in error to the commissioners' acting, but the cause proceeded to argument, report, and judgment, without question as to the jurisdiction.

An application was then made to the Supreme Court for a rehearing, and a brief filed in support thereof, and the authority of the commission, or of the Supreme Court in its action upon the commission's report, was not even then impugned.

Counsel frankly admits that "up to this time, no attack had been made against the authority of the commission or against the right of the court to accept and adopt the work of the commission;" but, he continues, that after the petition for rehearing in this case was denied, the objection was made in another case that the commission "had no right or power to decide judicial controversies, and that the Supreme Court had no right or power to base its final judgment on the report or recommendation of the commission." This other case was entitled *Bullock* v. *McGerr*, and will be found reported in 23 Pacific Reporter, 980. The question came up on a petition for a rehearing, which among other grounds contained the following: "The counsel for appellants desire to argue the validity of an opinion of the Supreme Court in the form of an indorsement or ratification of the commission based on an oral argument heard before the commission." The rulings are embodied in the syllabus prepared by the court, as follows:

"1. The constitutionality of the legislative act providing for a Supreme Court Commission is not necessarily involved upon the petition for a rehearing of a cause which had been referred to the commission in pursuance of said act.

"2. Courts ordinarily decline to determine the constitutionality of legislative enactments in a case where the record presents some other and clear ground upon which the judgment may rest.

"3. The Supreme Court alone can promulgate opinions and render judgments, and its duty is not discharged by the adoption *pro forma* of the conclusions of the Supreme Court Commission.

"4. The privilege of being heard orally before the Supreme Court prior to final judgment is a right which, though subject to reasonable regulation, cannot, under our practice, be denied to any party litigant making seasonable application therefor."

Each of the three judges of the court delivered an opinion and the general subject was largely discussed, and reference made to *The State ex rel. Hovey* v. *Noble et al.*, 118 Indiana, 350, where, upon an application for a writ of prohibition, the act of

the legislature of Indiana creating such a commission was held unconstitutional; and to *People ex rel. Morgan* v. *Hayne et al.*, 83 California, 111, where, upon *quo warranto*, the Supreme Court of California sustained the validity of the commission; and, in addition to these cases of a direct proceeding against the commissioners as respondents, to *Chicago Railroad Co.* v. *Abiline*, 21 Pacific Reporter, 1112, in which the Supreme Court of Kansas, upon a petition for rehearing, refused to consider the question of the constitutionality of a similar act and denied the rehearing upon the merits. The opinions in *Bullock* v. *McGerr* appear to have been announced May 16, 1890, and on the same day appellants made their motion that the Supreme Court grant an oral argument on the merits of the cause and that the remittitur be stayed in the meantime, which motion was denied.

We are not informed of the ground upon which this denial was based, but we presume, in the light of *Bullock* v. *McGerr*, that the Supreme Court considered the application to be heard orally as coming too late; and it is quite clear that the constitutionality of the act providing for the Supreme Court Commission was not considered to be necessarily involved and was not passed upon. Yet we are asked to retain this cause for the purpose of deciding that question, notwithstanding plaintiffs in error acquiesced in the hearing of the case by the commission, and stipulated as to the time when the argument should take place before that body; participated in that argument; petitioned the Supreme Court for a rehearing; and did not moot the point now raised until after the final judgment of the Supreme Court had been pronounced and the petition for rehearing had been overruled. The validity of a statute of, or an authority exercised under, the State of Colorado, on the ground of such statute or authority being repugnant to the Constitution, treaties or laws of the United States, was not drawn in question in the Supreme Court of Colorado, and that court did not decide in favor of its validity. No title, right, privilege or immunity under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, was specially set up or claimed under such

Constitution, treaty, statute, commission or authority, and no decision was rendered against such title, right, privilege or immunity. The Supreme Court of the State confessedly went to judgment without any suggestion that a Federal question was presented for its determination, and not even in the petition for rehearing was any such question brought to the attention of the court. And the disposition of the motion that oral argument be permitted after the petition for rehearing was denied, did not, in itself, necessarily involve the decision of a Federal question.

We cannot, under such circumstances, reëxamine the judgment and orders of that court, and the writ of error must be

Dismissed.

UNITED STATES *v.* CONNOR.

APPEAL FROM THE COURT OF CLAIMS.

No. 113. Argued January 9, 1891. — Decided January 19, 1891.

Any right which an informer might have had to a share in a fine, penalty, or forfeiture under the provisions of the act of July 13, 1866, 14 Stat. 145, was taken away by the act of June 6, 1872, 17 Stat. 256, c. 315, § 9, unless the amount of the fine, penalty or forfeiture was fixed and settled by judgment or compromise, and by payment, before the passage of the latter act.

Without resting this case on the point, the court is of opinion that the claimant's claim was presented to the Secretary of the Treasury, and was finally passed upon and adjudicated by him twelve years before the commencement of this action, and that consequently it is barred by the statute of limitations. Rev. Stat. § 1069.

This case being reached in its order on the docket on the 17th of December, 1890, argument was begun. The court, however, ordered the case to be passed, to be heard before a full bench. On the 9th of January, 1891, it was again called, and was argued. The case, as stated by the court, was as follows:

In December, 1871, the appellee gave the first information,

to the proper officers of the United States, of a violation of the internal revenue laws by one William Stout. Proceedings were thereupon instituted by the government for collection of the penalty therefor. At the time this information was given, section 179 of the act of June 30, 1864, as amended by the act of July 13, 1866, (14 Stat. 145, c. 184,) was in force. This, after casting upon the collectors the duty of instituting prosecutions for all fines, penalties and forfeitures due the government, under the revenue acts, contained these provisions as to informers: "And where not otherwise provided for, such share as the Secretary of the Treasury shall, by general regulations, provide, not exceeding one moiety nor more than five thousand dollars in any one case, shall be to the use of the person, to be ascertained by the court which shall have imposed or decreed any such fine, penalty or forfeiture, who shall first inform of the cause, matter or thing whereby such fine, penalty or forfeiture shall have been incurred; and when any sum is paid without suit, or before judgment, in lieu of fine, *penlly* [penalty] or forfeiture, and a share of the same is claimed by any person as informer, the Secretary of the Treasury, under general regulations to be by him prescribed, shall determine whether any claimant is entitled to such share as above limited, and to whom the same shall be paid, and shall make payment accordingly. It is hereby declared to be the true intent and meaning of the present and all previous provisions of internal revenue acts granting shares to informers, that no right accrues to or is vested in any informer in any case until the fine, penalty or forfeiture in such case is fixed by judgment or compromise, and the amount or proceeds shall have been paid, when the informer shall become entitled to his legal share of the sum adjudged or agreed upon and received: *Provided*, That nothing herein contained shall be construed to limit or affect the power of remitting the whole or any portion of a fine, penalty or forfeiture conferred on the Secretary of the Treasury by existing laws."

In 1872 the statute was changed by section 39 of the act of June 6 of that year, (17 Stat. 256, c. 315,) which reads: "That so much of section one hundred and seventy-nine of the act of

Statement of the Case.

July thirteenth, eighteen hundred and sixty-six, as provides for moieties to informers be, and the same is hereby, repealed; and the commissioner of internal revenue, with the approval of the Secretary of the Treasury, is hereby authorized to pay such sums, not exceeding in the aggregate the amount appropriated therefor, as may, in his judgment, be deemed necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law; and for this purpose there is hereby appropriated one hundred thousand dollars, or so much thereof as may be necessary, out of any money in the treasury not otherwise appropriated." By section 46 of the same act (p. 258) it was provided as follows: "That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed: *Provided*, That all the provisions of said act shall be in force for levying and collecting all taxes properly assessed, or liable to be assessed, or accruing under the provisions of former acts, the right to which has *has* already accrued, or which may hereafter accrue, under said acts, and for maintaining, continuing and enforcing liens, fines, penalties and forfeitures incurred under and by virtue thereof. And this act shall not be construed to affect any act done, right accrued or penalty incurred under former acts, but every such right is hereby saved; and all suits and prosecutions for acts already done in violation of any former act or acts of Congress relating to the subjects embraced in this act may be commenced or proceeded with in like manner as if this act had not been passed."

The suit against Stout was not tried. On May 13, 1873, a settlement was made with him; and he paid the United States, in lieu of and as a penalty, the sum of eight hundred dollars. On March 22, 1875, the appellee presented an application to the Treasury Department for his informer's share, which was endorsed "too late," and nothing was done thereunder. Twelve years thereafter, and on February 24, 1887, by his attorney, he made a second application. To such application the following answer was returned:

Statement of the Case.

"TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,

"WASHINGTON, D.C., *February* 24, 1887.

"GEORGE A. KING, Esq.,

"*Attorney-at-Law, Washington, D.C.*

"SIR: In your letter to the Secretary, dated the 20th of January, 1887, you request that your client, Mr. Frederick D. Connor, of New Albany, Indiana, be declared to have been the first informer in a case in which he claimed that a penalty of $800 has been recovered by reason of information which had been given by him, and you make this request so that in case the Secretary should decline to order payment of the proper share of said penalty to the informer, he may then be in a position to apply to the Court of Claims for relief.

"In reply, I have to say that the case is not one in which payment of the informer's share can be properly made at the present time, because the penalty was fixed by compromise, and the amount paid after August 1, 1872, when the act of June 6, 1872, (17 Stat. 256,) took effect, repealing section 179 of the act of June 30, 1864, as amended by the act of July 13, 1866, (14 Stat. 145,) under which the share of the informer is claimed in this case, and because the question as to the effect of such repeal was involved in the Ramsay case, in which the judgment of the Court of Claims, on being appealed to the Supreme Court of the United States, was recently affirmed by a divided court, thus rendering the decision of no effect as a precedent.

"I see no objection, however, to stating that the proof filed in the office of the Secretary of the Treasury shows that said Frederick D. Connor gave the first information upon which a penalty of $800 was recovered by compromise from William Stout, a distiller of fruit; the compromise having been approved by the Secretary of the Treasury on the 13th day of May, 1873, and the penalty having been paid on the 29th of April, 1874.

"I add that under the schedule of shares prescribed by the Secretary of the Treasury, August 14, 1866, pursuant to the authority conferred by said section 179, the share of the penalty that would be payable to an informer in this case would be three hundred and seventy dollars ($370.00).

"It is presumed that on this declaration you can take the case to the Court of Claims and obtain an adjudication.

"C. S. FAIRCHILD, *Acting Secretary.*"

Thereafter this suit was brought, claiming under the act of 1866, and the alleged decision by the Secretary of the Treasury as evidenced by the letter quoted. The judgment of the Court of Claims was in favor of the claimant, and the government has brought this appeal.

Mr. Assistant Attorney General Cotton for appellants.

Mr. George A. King for appellee.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

The right of claimant, as informer, depends on the act of 1866. Before final adjustment of the claim made against Stout, the act of 1866 was repealed. Unless, therefore, prior to this repeal some right was vested, the claimant has no standing in court. But the act of 1866 explicitly declared, that no right accrued to an informer until the fine, penalty or forfeiture became fixed by judgment or compromise, and the amount thereof was paid. While there is in the repealing act a reservation, it is only of rights which have accrued. As under the act of 1866, no right accrued until judgment or compromise, the repeal by the act of 1872 left nothing to the claimant. It is familiar law, that an offer of reward conveys no right beyond the specific terms of the offer; that it may be withdrawn at any time; and that unless prior to the withdrawal something has been done to complete a contract or settle and establish a right under the offer, a claimant takes nothing by reason thereof. It is urged that the claimant had done all that he was called upon to do under the act of 1866; that the government had the full benefit of his information; and that it would be unseemly for it to appropriate such benefit and repudiate any liability therefor. It is claimed that a reasonable construction of the act of 1866 is, that the lia-

bility to the informer arose the moment the information was given, while the amount to be paid was not settled until judgment or compromise and payment; and the opinion of the Court of Claims, in the case of *Ramsay* v. *United States*, 21 C. Cl. 443, is cited in support of this view.

But the language of the act of 1866 is clear. It is emphatic that no right accrues. No clearer language could be used; and we may not, under the pretence of an equity, enlarge the scope of an offer beyond its express words. Is the claim so meritorious as to justify a strained construction of the language of the statute? What did the claimant do? So far as it appears, he simply informed the officers of the government of a violation of one of the laws of his country. Is there no obligation resting upon a citizen to disclose such a fact? Does such an act of disclosure make him a special object of public gratitude; or has he simply discharged a duty, resting in common upon all citizens? Is it not clear that an offer of reward therefor is not the recognition of an equitable duty of the government to the informer, but a mere act of public policy, the giving or withholding of which, and whose terms, are wholly within the discretion of the government. Whoever claims under such an offer must bring himself within its terms. Failing to do that, his compensation is the consolation which comes to every citizen from the discharge of a public duty, which is the common obligation of all. We conclude, therefore, that the claimant acquired no right before the repeal of the act of 1866, and, therefore, has no claim against the government for compensation for the information he gave.

If the facts were otherwise, and a stronger claim for compensation was made out, can the letter of the Secretary of the Treasury be considered as an adjudication of the claim? It is conceded that such an adjudication is prerequisite to this action. The tenor of the Secretary's letter is not to the effect that he is adjudicating upon the claim. On the contrary, the findings show that twelve years before, the claim had been presented and practically determined against the claimant. The statute of limitation would bar a suit commenced as this was, twelve years after such adjudication. Rev. Stat. § 1069; *Finn* v.

Statement of the Case.

United States, 123 U. S. 227. Obviously, from the language of the letter, the Secretary did not intend a reopening of the case and a new adjudication, but simply to furnish to the claimant such information as the records of his department disclosed.

Without resting the case, however, on this last point we hold, for the reasons first stated, that the judgment of the Court of Claims was erroneous; and it must be

Reversed, and the case remanded with instructions for further proceedings in accordance with the views herein expressed.

PLEASANT TOWNSHIP *v.* ÆTNA LIFE INSURANCE COMPANY.

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

No. 1214. Submitted December 18, 1890. — Decided January 19, 1891.

The act of the legislature of Ohio of April 9, 1880, authorizing townships having a population of 3683 under the census of 1870, "to build railroads and to lease or operate the same," and "to borrow money" "as a fund for that purpose," and "to issue bonds therefor in the name of said township," is repugnant to the provision in article 8, section 6 of the constitution of that State, which provides that "the general assembly shall never authorize any county, city, town or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or loan its credit to or in aid of any such company, corporation or association"; and bonds of such a township, issued under the supposed authority of said act, are void.

It appearing that a decision of the highest court of the State of Ohio, made prior to the issue of the bonds in controversy in this action, as to the validity of such municipal bonds, was, argumentatively at least, in conflict with decisions of the same court made after the issue of such bonds, this court, following the rule laid down in *Douglass* v. *Pike County*, 101 U. S. 677, and *Burgess* v. *Seligman*, 107 U. S. 20, in the exercise of its independent judgment, finds the issue here in controversy to be invalid.

THIS was an action at law, to recover upon bonds issued by the plaintiff in error to aid in the construction of a railway,

under the act of the legislature of Ohio of April 9, 1880. Demurrer to the petition, judgment for the plaintiff on the demurrer, to review which the defendant sued out this writ of error. The case is stated in the opinion.

Mr. Isaiah Pillars, *Mr. John H. Doyle* and *Mr. I. N. Alexander* for plaintiff in error.

Mr. John C. Lee for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

This is an action on bonds issued by the plaintiff in error under the authority of an act of the legislature of Ohio, of April 9, 1880. (77 Ohio Laws, pages 157 and following.[1]) The single question for consideration is the constitutionality of that statute. For if the act is unconstitutional, the bonds

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[1] "An act to authorize certain townships to build railroads, and to lease or operate the same.

"[PLEASANT TOWNSHIP, VAN WERT COUNTY.]

"Section 1. *Be it enacted by the General Assembly of the State of Ohio*, That whenever in any township, which by the federal census of 1870 had, and which by any subsequent federal census may have, a population of thirty-six hundred and eighty-three, the township trustees thereof shall, on the petition of not less than one hundred resident tax-payers of such township, pass a resolution declaring it to be essential to the interest of such township that a line of railway shall be constructed on the line to be designated in said petition, and said railway shall be named in said resolution, and the termini thereof shall be designated therein, and not to exceed seven miles in length. That it shall be lawful for a board of trustees appointed as herein provided, and they are hereby authorized to borrow as a fund for the purpose, not to exceed the sum of forty thousand dollars, and to issue bonds therefor in the name of said township, bearing interest at a rate not to exceed six per centum per annum, payable semi-annually. Said bonds to be payable at such time and places, and in such sums as shall be deemed best by said board. Said bonds shall be signed and sealed by the president of said board, and attested by the clerk of such township, who shall keep a register of the same, and they shall be secured by pledge of the faith of such township, and a tax which it shall be the duty of the trustees thereof annually to levy (which tax shall not exceed three mills on the dollar in any one year), to pay the interest and provide a sinking fund for final redemption of said bonds. . . ."

were issued without authority, and are not binding upon the township; while, on the other hand, if it is constitutional and valid, no question is made as to the regularity of the proceedings which ended in the issue of the bonds.

To obtain a clear understanding of this question a reference must be had to the constitution, legislation and judicial decisions of the State, in respect to railroad bonds. The constitution of Ohio, adopted in 1851, contained in article 8, section 6, this prohibition: "The general assembly shall never authorize any county, city, town or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation or association whatever; or to raise money for, or loan its credit to or in aid of, any such company, corporation or association." This provision was inserted in the constitution, and adopted by the people, in view of the fact then and since well known in the history of all States, particularly in the West, that municipal bonds to aid railroads were freely voted in expectation of large resulting benefits — an expectation frequently disappointed. It was a declaration of the deliberate judgment of the people of Ohio that public aid to such *quasi* public enterprises was unwise, and should be stopped. The first effect of this constitutional provision was the full withholding of all public aid to railroad enterprises. Nothing broke this clear record of exemption from taxation for railroad enterprises until 1869, when, on the 4th day of May of that year, the legislature passed an act which, though general in its terms, as applicable only to cities having exceeding one hundred and fifty thousand inhabitants, was, by the existing condition of municipalities, one in fact having reference solely to the city of Cincinnati. This act authorized such city to issue bonds, and out of the proceeds thereof construct a railway, one of the termini of which should be the city. The validity of this act was sustained by the Supreme Court of the State, at its December, 1871, term, in the case of *Walker* v. *The City of Cincinnati*, 21 Ohio St. 14.

On April 22, 1872, the legislature passed an act to authorize counties, townships and municipalities to build railroads. (69 Ohio Laws, 84.) This act was general in its terms, and gave

power to any county, township or municipality to issue bonds and build railroads, under certain restrictions. At the December, 1872, term, this act was adjudged unconstitutional and void, as in conflict with article 8, section 6, heretofore quoted. *Taylor* v. *Ross County*, 23 Ohio St. 22.

In 1880 several acts were passed by the legislature, authorizing certain townships to build railroads. These acts were general in form, but special in fact. The one under which these bonds were issued (77 Ohio Laws, 157) commences with these words: "Be it enacted by the general assembly of the State of the Ohio, That whenever in any township, which by the federal census of 1870 had, and which by any subsequent federal census may have, a population of thirty-six hundred and eighty-three." The other acts passed contemporaneously with this, by similar language, necessarily applied immediately to townships north or south, and so situated as to include only those on the continuous line of a railroad already projected and surveyed. One of these acts, precisely like that under which the bonds in controversy were issued, was brought before the Supreme Court of Ohio at the January term, 1881, and adjudged void, as in conflict with the section heretofore referred to. *Wyscaver* v. *Atkinson*, 37 Ohio St. 80. And a like ruling was made in *Counterman* v. *Dublin Township*, 38 Ohio St. 515. While the particular act under which these bonds were issued does not appear to have been presented to that court, yet, as appears above, acts identical, save in the language describing the township, and passed at the same session, and obviously part of a single scheme, have been presented to that court, and by it declared void. In the judgment, therefore, of her highest tribunal, this act of the legislature of the State of Ohio is unconstitutional, and the bonds issued under it are without authority of law and invalid.

It is true that the defendant in error became the purchaser and holder of these bonds before these last adjudications of the state court. It did not, therefore, buy with judicial declaration that the series of acts, under one of which it claims, was in conflict with the constitution; and yet, it purchased without any such declaration that it was valid. It is claimed

that this act of 1880 was modelled on the statute of 1869 — the Cincinnati act heretofore referred to; and that, therefore, though not in terms, yet in fact, there had been a previous judicial affirmation of the highest court in the State in favor of such legislation. The rule laid down in *Douglass* v. *County of Pike*, 101 U. S. 677, is invoked; and it is urged, that whatever decision may have been made by the Supreme Court of Ohio since the purchase of these bonds by defendant in error, its prior rulings were in favor of the constitutionality of such legislation and the validity of the bonds; and that, therefore, such judicial determination entered into and established the contract of the township, and forever settled the validity of those bonds. Such was the view of the learned circuit judge who decided this case. We would not weaken in the least the authority of the case of *Douglass* v. *County of Pike*, *supra*. There comes, incidentally, into this case that which is abundant justification of the rule there announced. The city of Cincinnati, under the authority of the act of 1869, issued many millions of bonds. These bonds are current in the market, endorsed by the legislative act authorizing the city to issue them, by the vote of the people of the city in favor of their issue, and by the judicial declaration of the highest court of the State that the act of the legislature was constitutional and valid. With such triple authentication, and relying upon the case of *Douglass* v. *County of Pike*, *supra*, well may the bondholders expect of this court a judgment against the city, even if there should be a subsequent decision of the Supreme Court of Ohio, against the constitutionality of such act, and although the personal opinions of the members of this court should be in harmony with that adjudication. In other words, whatever may be thought of the constitutionality of a statute, if it were a new question, there may, by concurrence of legislative, judicial and popular action, become impressed upon bonds issued thereunder an unimpeachable validity. But this is not such a case. While in the matter of structure there is between the act of 1869 and that of 1880 a striking resemblance, there are also marked differences. Even if in form they were absolutely alike, yet, as they are acts respecting dif-

ferent classes of corporations, the validity of the one would not necessarily determine the validity of the other. A statute empowering a county to issue bonds and build a jail might be unquestionably valid; while a statute, in precisely the same language, attempting to give the same power to a school district, might be as plainly unconstitutional and void. Here, the act of 1869 was a grant of power to a city, a "municipal corporation proper," as Judge Dillon calls it in his work on Municipal Corporations (volume 1, section 23); while the act of 1880 was a grant to a township — a "*quasi* corporation," as the same author calls it — a distinction recognized in the State of Ohio long before the passage of even the act of 1869. *Hamilton County* v. *Mighels*, 7 Ohio St. 109. The differences between these two classes of corporations it is unnecessary to point out in detail. It is enough to say that one has, far more than the other, the powers, capacities and duties of a private corporation; so that a delegation of power to the one, if adjudged valid, does not justify the inference that a delegation of a like power to the other must also be valid. So far, therefore, as judicial determinations are concerned, the purchaser of these bonds had no express warrant from the Supreme Court of the State to rely upon. So far as any mere implications and inferences from such judicial decisions are concerned, they were stronger against than in favor of the validity of these bonds. The statute of 1872, empowering counties and townships to issue bonds to build railroads, had been declared void; and the statute of 1869 had been sustained, as is evident from the opinion of the Supreme Court, because, as believed, it was a special exception from the inhibition of the constitution. The purchaser of these bonds cannot, therefore, plead judicial guaranty. It took the chances, and purchased at its own peril. Was the act of 1880 in conflict with the constitution of Ohio? The Supreme Court of the State has said that it was. 37 Ohio St. *supra*. We are not concluded by that determination. In matters of contract, especially, the right of citizens of different States to litigate in the Federal courts of the various States, is a right to demand the independent judgments of those courts. The settled law in that respect is

well stated in the case of *Burgess* v. *Seligman*, 107 U. S. 20, 33: "Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

In this case our judgment accords fully with that of the Supreme Court of the State in 37 and 38 Ohio St. *supra.*

Notice the constitutional provision. The significance of its inhibition is read in the evil which it was intended to remedy. Common was the practice, theretofore, of issuing municipal bonds to aid in the construction of railroads. The practice was felt to be evil, stimulating unnecessary railroad enterprises, and injuriously affecting the interests of the taxpayer. The universal method of railroad enterprises was through private corporations. The possibility of other methods was unknown, or not seriously contemplated. So, when the people by their constitution prohibited public aid to private corporations, obviously the thought was that all public assistance to the building of railroads was prohibited. The ingenuity of the lawyer and the legislator, by means of which the letter of this prohibition was avoided, and a city enabled to construct a railroad running from itself to other parts of the country, as a great highway of approach and distribution of its business, was obviously not expected or foreseen. We are not criticising the decision in *Walker* v. *Cincinnati*, 21 Ohio St. *supra*, as an erroneous construction of the constitutional provision. We simply note the fact that the statute therein construed was a skilful avoidance of its generally understood scope. This exceptional character was no nullification of the provision. On the contrary, the Supreme Court, in its opinion in that case, clearly recognized and stated the force of such prohibition; and, noticing the exceptional character of this legislation, by that very fact indicated that otherwise its force and scope were absolute and wide reaching. It is one thing for a large city, with its concentration of business interests, to build, equip, and own a great railroad highway running from such centre outward into other districts, rapid and easy communication with which advances its business interests; and it is a very different thing for a *quasi* municipal corporation, like a township, with its sparse population, and its lack of concentration of business interests, to construct a few miles of railroad through its territory. Business may demand the one — convenience alone supports the other. The justification of the one is in the private and business element which enters into a municipal corporation proper; the absence of which element in a *quasi*

corporation, like a township, forbids its investment in railroad enterprises. A railroad is a highway, but its character and mode of use make a large distinction between it and other highways. A few miles of track, unequipped with rolling stock and disconnected from other lines of track, are absolutely worthless. An ordinary highway through a township, although disconnected at either end with other highways, is of practical benefit and substantial use to the people of the township; but it is not so with a railroad track. Only in a lengthened line, with rolling-stock equipment, does a railroad become a thing of value. The act of 1869 contemplated for the city of Cincinnati a lengthened line, with rolling-stock equipment, and made ample provisions therefor. It meant no investment of public funds in a short track to be utilized thereafter by conjunction with other railroads, and made valuable by the infusion of private capital in the ultimate enterprise. It contemplated no mingling of public and private funds in the completed road. This matter was noticed by the Supreme Court of Ohio in its opinion in the Cincinnati case, when, after quoting the constitutional provision, it said: "The mischief which this section interdicts is a business partnership between a municipality or subdivision of the State and individuals or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever. In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders nor furnish money or credit for the benefit of the parties interested therein. Though joint stock companies, corporations and associations only are named, we do not doubt that the reason of the prohibition would render it applicable to the case of a single individual. The evil would be the same, whether the public suffered from the cupidity of a single person, or from that of several persons associated together." 21 Ohio St. 54.

In determining the constitutionality of any statute, its scope and effect are as proper for consideration as its language; the

eyes of the court are never limited to the mere letter; and, so construing the act of 1869, the court held that such act contemplated and provided for a completed and continuous line of railroad, which, fully equipped, remained the property of the city, and was a great highway which opened from itself outward into territory whose business would advance the commercial interests of the city. In like manner, when the court came to consider the subsequent legislation with respect to counties and townships, including therein both the legislation of 1872 and that of 1880, it properly considered what must be the effect and operation of the statutes; and it ruled, that obviously under them all that was contemplated was a limited distance of track, whose value could only be secured by mingling the funds of the township with other capital. By the averments in this case, which, under the demurrer must be accepted as true, a private corporation had projected and surveyed a line of road running through several townships; and the significance of these acts, was the securing of the right of way and the grading of the road-bed through these several townships, with the view of thereafter placing this, thus created, continuous line in the possession of some corporation which would equip and operate it. And this combination of statutes, with their several grants of township aid, clearly discloses that there was no thought or possibility of either of the townships building, equipping and owning an independent railroad. Each separate act meant for its township not a railroad, but a road-bed. The practical value, the only real, resulting benefit, was in the incorporation of this road-bed into the railroad projected by, and to be practically operated and made effective only through, private capital. This is not a mere matter of speculation. The descriptions in these various acts of 1880 identify the townships. They are, as alleged in the answer, along in the line of a projected and surveyed railroad. This concurrence of separate township aid, by legislative sanction, establishes an intent to further the projected line through public aid. But this act, with the others, in its particular operation, means not the building and ownership of a railroad, but aid to a projected and lengthy line of railroad.

Such was the conclusion of the Supreme Court of Ohio. We quote its language from 37 Ohio St.: "When viewed in the abstract, it is difficult to see in what manner, within the contemplation of the legislature, the proposed road could become of such public utility as to justify resort to taxation; but when applied to the subject matter, under the existing circumstances the legislative intent becomes quite apparent. Beaver Township, Noble County, the only township to which the provisions of the act were intended to apply, is a sparsely settled agricultural district, with a population of 1684, without railroad facilities either within or bordering upon it. Without railroad connections, it is quite certain that the proposed improvement would be utterly useless; hence, in view of this fact, the trustees of the township designated the location of the proposed road as follows: 'Running through said township from the point that the Somerset railway intersects the east line of said township and terminating where the Belair, Beaver Valley and Shawnee Railway intersects the west line of said township.' Neither of the connecting railways here mentioned is in existence, but only in contemplation, — the former having been authorized to be built by Somerset Township, Belmont County, by an act of the legislature, similar to the one now under consideration, passed on the 18th of March, 1880. So that it is quite evident that the legislative intent, as well as that of the trustees of Beaver Township, was to make the proposed road a link in a more extended route or line of railway. The same intent is manifested in the fact that no provision was made for the operating of the proposed road by the township; but power only was given to lease the same on completion, to any person or persons or company which would conform to the terms and conditions which the trustees should prescribe." 37 Ohio St. 94, 95.

The conclusion of that court was, we think, imperative from the facts as developed. Beyond that, if we ignore all surrounding circumstances, the fact is that the amount of the aid to be voted was insufficient for the construction and equipment of a road of even short length; and, turning to the mere letter of the statute, we notice this significant fact. While

the act of 1869, by its language, contemplated and required a railroad, and thus a highway from Cincinnati outward into territory subservient to its business interests, the act in question before us locates neither the road nor its termini. If the letter of the statute alone be regarded, power is given by this statute to construct a railroad in Alaska. Neither location nor termini are prescribed, and the general power is given to construct a railroad not exceeding seven miles in length. Can an act containing such indefinite provisions, with an appropriation of township aid so limited as to foreclose the idea of a constructed and equipped railroad, and whose thought of mingling public aid with private capital is so evidenced, be one which can be sustained, in the face of the inhibition of the constitution of the State of Ohio? We think not.

The judgment of the Circuit Court must be reversed, and the case remanded with instructions to overrule the demurrer to the answer.

BRIMMER *v.* REBMAN.

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

No. 1154. Submitted January 5, 1891. — Decided January 19, 1891.

A statute of Virginia, entitled "An act to prevent the selling of unwholesome meat," approved February 18, 1890, (Laws of Virginia 1889–1890, 63 c. 80) declares it to be unlawful to offer for sale, within the limits of that State, any beef, veal or mutton, from animals slaughtered one hundred miles or more from the place at which it is offered for sale, unless it has been previously inspected and approved by local inspectors appointed under that act. It provides that the inspector shall receive as his compensation one cent per pound to be paid by the owner of the meats. The act does not require the inspection of fresh meats from animals slaughtered within one hundred miles from the place in Virginia at which such meats are offered for sale. *Held*, that the act is void, as being in restraint of commerce among the states, and as imposing a discriminating tax upon the products and industries of some States in favor of the products and industries of Virginia.

The owner of meats from animals slaughtered one hundred miles or over

from Virginia has the right to compete in the markets of that State upon terms of equality with the owner of meats from animals slaughtered in that State or elsewhere, within one hundred miles from the place at which they are offered for sale.

The principle reaffirmed that, independently of any question of intent, a State enactment is void, if, by its necessary operation, it destroys rights granted or secured by the Constitution of the United States.

THE case is stated in the opinion.

Mr. R. Taylor Scott and *Mr. Robert M. Hughes* for appellant.

Mr. William J. Campbell, *Mr. W. C. Goudy* and *Mr. A. H. Veeder* for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

William Rebman was tried and convicted before a justice of the peace in Norfolk, Virginia, "a city of fifteen thousand inhabitants or more," of the offence of having wrongfully, unlawfully, and knowingly sold and offered for sale "eighteen pounds of fresh meat, to wit, fresh, uncured beef, the same being the property of Armour & Co., citizens of the State of Illinois, and a part of an animal that had been slaughtered in the county of Cook and State of Illinois, a distance of one hundred miles and over from the said city of Norfolk in the State of Virginia, without having first applied to and had the said fresh meat inspected by the fresh meat inspectors of the said city of Norfolk, he, the said Rebman, then and there well knowing that the said fresh meat was required to be inspected under the laws of Virginia, and that the same had not been so inspected and approved as required by the act of the General Assembly of Virginia, entitled 'An act to prevent the selling of unwholesome meat,' approved February 18, 1890." He was adjudged to pay a fine of $50 for the use of the Commonwealth of Virginia, and $3.75 costs; and, failing to pay these sums, he was, by order of the justice, committed to jail, there to be safely kept until the fine and costs were paid, or until he was otherwise discharged by due course of law.

He sued out a writ of *habeas corpus* from the Circuit Court of the United States for the Eastern District of Virginia upon the ground that he was restrained of his liberty in violation of the Constitution of the United States. Upon the hearing of the petition for the writ he was discharged, upon grounds set forth in an elaborate opinion by Judge Hughes, holding the Circuit Court. *In re Rebman*, 41 Fed. Rep. 867. The case is here upon appeal by the officer having the prisoner in custody.

The sole question to be determined is whether the statute under which Rebman was arrested and tried is repugnant to the Constitution of the United States. The statute is as follows:

"Whereas it is believed that unwholesome meats are being offered for sale in this Commonwealth; therefore,

"1. Be it enacted by the General Assembly of Virginia, That it shall not be lawful to offer for sale, within the limits of this State, any fresh meats (beef, veal, or mutton) which shall have been slaughtered one hundred miles or over from the place at which it is offered for sale, until and except it has been inspected and approved as hereinafter provided.

"2. The county court of each county and the corporation court of each city of this State shall, in their respective counties and cities, appoint one or more inspectors of fresh meats on the petition of not less than twenty citizens; and it shall be the duty of said inspectors to inspect and approve or condemn all fresh meat offered for sale in this State which has been transported one hundred miles or more from the place at which it was slaughtered.

"3. And for all fresh meat so inspected said inspector shall receive as his compensation one cent per pound, to be paid by the owner of the meat.

"4. It shall be the duty of any and all persons, firms or corporations, before offering for sale in this State, fresh meats, which under the provisions of this act are required to be inspected, to apply to the fresh meat inspector of the county or city where the same is proposed to be sold and have said meat inspected; and for a failure so to do, or for offering to sell any fresh meats condemned by said inspector, the person, firm,

or corporation so selling or offering to sell shall be fined not less than fifty nor more than one hundred dollars for each offence, to be recovered before any justice of the peace of the county or city where the violation occurs; provided that, in cities of fifteen thousand inhabitants or more one-half of the fees of inspectors shall be paid into the State treasury; and provided, further, that nothing in this act shall apply to the counties of Accomac and Northampton.

"5. The said inspectors, before discharging the duties herein imposed, shall take and subscribe an oath before the court appointing them to faithfully discharge said duties, and the several courts are respectively empowered to remove, for cause, any inspector and to appoint another or others instead.

"6. This act shall be in force from and after the first day of March, eighteen hundred and ninety." Acts of Virginia 1889–90, p. 63, c. 80.

The recital in the preamble that unwholesome meats were being offered for sale in Virginia cannot conclude the question of the conformity of the act to the Constitution. "There may be no purpose," this court has said, "upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution;" in which case, "the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void." *Minnesota* v. *Barber*, 136 U. S. 313, 319, and authorities there cited. Is the statute now before us liable to the objection that, by its necessary operation, it interferes with the enjoyment of rights granted or secured by the Constitution? This question admits of but one answer. The statute is, in effect, a prohibition upon the sale in Virginia of beef, veal or mutton, although entirely wholesome, if from animals slaughtered one hundred miles or over from the place of sale. We say prohibition, because the owner of such meats cannot sell them in Virginia until they are inspected there; and being required to pay the heavy charge of one cent per pound to the inspector, as his compensation, he cannot compete, upon equal terms, in the markets of that Com-

monwealth, with those in the same business whose meats, of like kind, from animals slaughtered within less than one hundred miles from the place of sale, are not subjected to inspection, at all. Whether there shall be inspection or not, and whether the seller shall compensate the inspector or not, is thus made to depend entirely upon the place where the animals from which the beef, veal, or mutton is taken, were slaughtered. Undoubtedly, a State may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States. The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right, under the Constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation which, in terms or by its necessary operation, denies this equality in the markets of a State is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and, therefore, void. *Welton* v. *Missouri*, 91 U. S. 275, 281; *Railroad Co.* v. *Husen*, 95 U. S. 465; *Minnesota* v. *Barber*, above cited. The fees exacted, under the Virginia statute, for the inspection of beef, veal and mutton, the product of animals slaughtered one hundred miles or more from the place of sale, are, in reality, a tax; and, "a discriminating tax imposed by a State, operating to the disadvantage of the products of other States when introduced into the first-mentioned State, is, in effect, a regulation in restraint of commerce among the States, and, as such, is a usurpation of the powers conferred by the Constitution upon the Congress of the United States." *Walling* v. *Michigan*, 116 U. S. 446, 455. Nor can this statute be brought into harmony with the Con-

stitution by the circumstance that it purports to apply alike to the citizens of all the States, including Virginia; for, "a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute." *Minnesota* v. *Barber*, above cited; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497. If the object of Virginia had been to obstruct the bringing into that State, for use as human food, of all beef, veal and mutton, however wholesome, from animals slaughtered in distant States, that object will be accomplished if the statute before us be enforced.

It is suggested that this statute can be sustained by presuming — as, it is said, we should do when considering the validity of a legislative enactment — that beef, veal or mutton will or may become unwholesome, "if transported one hundred miles or more from the place at which it was slaughtered," before being offered for sale. If that presumption could be indulged, consistently with facts of such general notoriety as to be within common knowledge, and of which, therefore, the courts may take judicial notice, it ought not to control this case, because the statute, by reason of the onerous nature of the tax imposed in the name of compensation to the inspector, goes far beyond the purposes of legitimate inspection to determine quality and condition, and, by its necessary operation, obstructs the freedom of commerce among the States. It is, for all practical ends, a statute to prevent the citizens of distant States, having for sale fresh meats (beef, veal or mutton), from coming into competition, upon terms of equality, with local dealers in Virginia. As such, its repugnancy to the Constitution is manifest. The case, in principle, is not distinguishable from *Minnesota* v. *Barber*, where an inspection statute of Minnesota, relating to fresh beef, veal, mutton, lamb and pork, offered for sale in that State, was held to be a regulation of interstate commerce and void, because, by its necessary operation, it excluded from the markets of that State, practically, all such meats — in whatever form, and although entirely sound and fit for human food — from animals slaughtered in other States.

Without considering other grounds urged in opposition to the statute and in support of the judgment below, we are of opinion that the statute of Virginia, although avowedly enacted to protect its people against the sale of unwholesome meats, has no real or substantial relation to such an object, but, by its necessary operation, is a regulation of commerce, beyond the power of the State to establish.

Judgment affirmed.

UNITED STATES *v.* CENTRAL PACIFIC RAILROAD COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 758. Argued November 21, 22, 1890. — Decided January 26, 1891.

Since the passage of the act of May 7, 1878, 20 Stat. 58, c. 96, § 1, the sums expended by the Central Pacific Railroad for betterments and improvements on its road, its buildings and equipments, whereby the capital of the Company invested in its works is increased in permanent value, are not to be regarded as part of its current expenses to be deducted from its gross receipts in reaching and determining the amount of the net earnings upon which a percentage is to be paid to the United States.

The case of *Union Pacific Railroad Co.* v. *United States*, 99 U. S. 402, distinguished from this case.

THE case is stated in the opinion.

Mr. Attorney General for the United States.

Mr. Joseph E. McDonald and *Mr. Joseph K. McCammon* for the Central Pacific Railway Company.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is an appeal from the Court of Claims. The claimant, the Central Pacific Railroad Company, filed a petition October 31, 1887, to recover from the United States the sum of $804,094.31, alleged to be due for services rendered to the War,

Post Office, and other departments, and the sum of $321,-157.72, alleged to have been exacted by the Treasury Department, and paid by the claimant, in excess of the amount actually due from the claimant to the government for the 25 per cent net earnings required to be paid by the fourth section of the act known as the Thurman act, passed May 7, 1878. The Court of Claims rendered a decree in favor of the claimant for the first of the above-mentioned sums, and for a portion of the second claim, amounting to $198,422.83, the other part of the sum demanded having been barred by the statute of limitations. Both parties appealed from the decree, but the claimants have dismissed their appeal and the government has consented that the decree shall be affirmed as to the said sum of $804,094.31 due to the claimants for services rendered to the departments, so that the only matter of controversy remaining on the record is the decree for the said sum of $198,422.83 the alleged amount of over-payments exacted for 25 per cent of net earnings during the years 1881, 1882, 1883 and 1884. The ground of appeal on the part of the government as to this sum is that in arriving at the net earnings of the railroad company for the years before mentioned, the company claimed and the court allowed certain expenses which, as contended by the government, were not for current expenses and repairs, but were for betterments and improvements on the road, its buildings and equipments, whereby the capital of the company invested in its works was increased in permanent value. These expenses, the government contends, ought not to have been allowed under the provisions of the Thurman act. They are of the same class, as appears by a supplemental return made by the Court of Claims, which were allowed by this court as fairly chargeable under the head of expenses under the act of 1862, in the case of *Union Pacific Railroad Co.* v. *United States*, 99 U. S. 402. But the accounts in question in that case arose before the Thurman act was passed, and the phraselogy of this act was probably adopted in view of the construction of the act of 1862 claimed by the railroad companies in that case. As the law stood prior to 1878, under which 5 per cent of the net earnings of the companies was to

be paid into the Treasury towards the liquidation of the bonds loaned to them by the government, we held that in arriving at such net earnings it was admissible for the companies to charge, as they had done, a reasonable amount for betterments and improvements, rendered necessary by the gradual increase of traffic, the better discharge of business, and the public accommodation; not including, however, the cost of any important improvement, such as additional track, or any other matter involving a large outlay of money. This view was based upon the practice and usage of conservative and well managed railroad companies, which tended to the suppression of extravagant dividends that might be the result of a showing of large net earnings. But Congress, in the Thurman act, *ex industria* used language with regard to the character of the expenses to be allowed in ascertaining the amount of net earnings, which seems to preclude any charges for improvements or betterments, or increase of permanent value of the works in any manner whatever. The language referred to is as follows: "That the net earnings mentioned in said act of eighteen hundred and sixty-two, of said railroad companies respectively, shall be ascertained by deducting from the gross amount of their earnings respectively the necessary expenses actually paid within the year in operating the same and keeping the same in a state of repair, and also the sum paid by them respectively within the year in discharge of interest on their first mortgage bonds, whose lien has priority over the lien of the United States, and excluding from consideration all sums owing or paid by said companies respectively for interest upon any other portion of their indebtedness; and the foregoing provision shall be deemed and taken as an amendment of said act of eighteen hundred and sixty-four, as well as of said act of eighteen hundred and sixty-two." 20 Stat. c. 96, § 1, p. 58.

Considering the time and the circumstances under which this act was passed, and the express declaration that the clause in question was to be deemed and taken as an amendment of the acts of 1864 and 1862, we think its meaning cannot be mistaken as intending to exclude from the category of expenses to be taken from gross receipts in order to ascertain the

"net earnings," all such expenditures as have the effect of permanently improving the value of the company's property and works; and, taken prospectively, it is to be regarded as valid under the decision in *The Sinking Fund Cases*, 99 U. S. 700. As the expenses in question are of the category referred to, and the allowance of them by the Court of Claims reduced the 25 per cent of net earnings by the said amount of $198,422.83, it follows that the judgment, as to that sum, must be reversed, and be affirmed as to the said sum of $804,094.31; and the cause

Remanded with instructions to enter judgment in conformity with this opinion.

UNITED STATES *v.* KINGSLEY.

APPEAL FROM THE COURT OF CLAIMS.

No. 778. Argued January 16, 1891 — Decided January 26, 1891.

A private in the Marine Corps of the United States, discharged from the service as a person of bad character and unfit for service by order of the Secretary of the Navy through the Commandant of the Corps, without court martial or other competent military proceeding, forfeits thereby his retained pay under the provisions of Rev. Stat. § 1281; but he may claim and recover his transportation and subsistence from the place of his discharge to the place of his enlistment, enrollment, or original muster into the service, under the provisions contained in Rev. Stat. § 1290.

This was an appeal by the United States from a judgment of the Court of Claims, 24 C. Cl. 219, awarding to the petitioner, Joseph F. Kingsley, $73.30 for "retained pay," and for transportation and subsistence from the place of his discharge to that of his enlistment. The finding of the Court of Claims was as follows:

"*Findings of fact.*

"This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows;

Statement of the Case.

"1. August 12, 1882, the claimant enlisted as a private in the Marine Corps of the United States at Brooklyn, N. Y.

"October 3, 1884, he was promoted to a corporal.

"September 4, 1885, he was reduced to a private.

"June 4, 1887, he was discharged from the Marine Corps at the Marine Barracks, Navy-yard, Washington, D. C.

"2. The cause of discharge appears in the following correspondence and order:

"MARINE BARRACKS, NAVY-YARD,
"WASHINGTON, D. C., *May* 28, 1887.

"SIR: I have to respectfully request that private Joseph F. Kingsley, of this command, may be discharged from the service, as he is utterly worthless and his character is bad; he is also a very disturbing element in the garrison. I inclose herewith his staff returns, also a list of his offences.

"Very respectfully, your obedient servant,
"P. C. POPE.

"*Captain U. S. Marine Corps, Commanding Marines.*

"C. G. McCauley, Colonel Commandant.

"*List of offences.*

"October 11, 1886. Twenty-four hours over leave.

"October 21, 1886. Creating disturbance in quarters.

"December 3, 1886. Drunk in garrison.

"December 24, 1886. Insubordination and disrespect to sergeant of the guard, tried by summary court martial, sentenced thirty days D. I., solitary confinement.

"February 23, 1887. Over leave.

"April 5, 1887. Improper conduct at target practice.

"May 20, 1887. Absent without leave.

"May 26, 1887. Insubordinate and disrespect to the officer of the day.

"These reports were forwarded through the official channels to the Secretary of the Navy, and thereafter the following order was issued:

Statement of the Case.

"HEADQUARTERS U. S. MARINE CORPS,
"WASHINGTON, D. C., *May* 31, 1887.

"SIR: Be pleased to discharge 'by order of the Secretary of the Navy, as unfit for service, character bad,' . . . private Joseph F. Kingsley, at the Marine Barracks, Navy-yard, Washington, D. C., (upon the report of his commanding officer, dated the 28th instant).

"Very respectfully, C. G. MCCAULEY,
"*Colonel Commandant, U. S. Marine Corps.*

"The Adjutant and Inspector, U. S. Marine Corps Headquarters.

"June 4, 1887, in pursuance of this order the claimant was discharged.

"3. It does not appear that he demanded to be tried by court martial or protested against his discharge.

"4. He has not received any 'retained pay' under section 1281 of the Revised Statutes, nor transportation and subsistence from the place of discharge to the place of enlistment under section 1290. He has, however, received all other pay and allowances.

"The distance from Washington Navy-yard to Brooklyn is 228 miles.

"5. Under the practice of the accounting officers of the Treasury Department enlisted men of the Marine Corps have been held to be entitled to all the benefits of sections 1281 and 1290 of the Revised Statutes.

"*Conclusion of law.*

"Upon the foregoing findings of facts the court decides, as conclusions of law, that the claimant is entitled to recover for 'retained pay' under section 1281 of the Revised Statutes $65.20, and for transportation and subsistence, under section 1290, $8.10."

From the judgment entered upon this finding the defendant appealed to this court.

Mr. Assistant Attorney General Maury for appellants.

No appearance for appellee.

Mr. Justice Brown delivered the opinion of the court.

(1) Claimant's right to retained pay depends upon Rev. Stat. § 1281, which reads as follows: "To the rates of pay stated in the preceding section one dollar per month shall be added for the third year of enlistment, one dollar more per month for the fourth year, and one dollar more per month for the fifth year, making in all three dollars increase per month for the last year of the first enlistment of each enlisted man named in said section. But this increase shall be considered as retained pay, and shall not be paid to the soldier until his discharge from the service, and shall be *forfeited* unless he serves honestly and faithfully to the date of discharge."

To entitle the soldier to this retained pay it is therefore necessary to show, first, his discharge from the service; second, an honest and faithful service to the date of discharge. It was held by the Court of Claims, however, that to deny his right to retained pay, a *forfeiture* must have been considered and declared by a court martial or other military authority having jurisdiction in the premises, and that the question of honest and faithful service, required by the section, was not one that could be tried in a collateral proceeding. We are unable to concur in this opinion. By his enlistment the soldier contracts for honest and faithful service, and the rendition of such service is a condition precedent to his right to recover his retained pay. The fact that he has not rendered such service may be shown as well by his military record as by the judgment of a court martial. It is true the word "forfeited" is used in the statute, but we think it is not used in the technical sense of a punishment after judgment, but rather in the sense of a disability incurred by the non-performance of a contract. A similar meaning is attached to the word when used in connection with the claim of a mariner for his wages. By his contract of shipment the seaman also bargains for honest and faithful service, and obedience to the lawful commands

of the master and other officers of his vessel, and in case of desertion or gross misconduct, it is the constant practice of courts of admiralty to forfeit the whole or a part of his wages, irrespective of the actual damage suffered by the owner or master of the vessel. *The Balize*, Brown's Adm. 424. In an action at common law, however, such wages are not subject to forfeiture, but a deduction is made therefrom commensurate with the damages actually sustained. The statute under consideration imposes a like forfeiture for a breach of the soldier's contract of enlistment, irrespective of any actual damages occasioned by his misconduct, and such forfeiture may be declared by the court in which he brings his action, as well as by the judgment of a court martial. Indeed, the word in this connection means nothing more than an incapacity to recover, by reason of misconduct, irrespective of any actual damages, or, as defined by Worcester, "to lose by some breach of condition; to lose by some offence."

We are confirmed in this view by an examination of *United States* v. *Landers*, 92 U. S. 77, 79, which was an action for bounty and pay, wherein Mr. Justice Field, speaking for the court, says: "Forfeiture of pay and allowances up to the time of desertion follows from the conditions of the contract of enlistment, which is for faithful service. The contract is an entirety; and, if service for any portion of the time is criminally omitted, the pay and allowances for faithful service are not earned. And, for the purpose of determining the rights of the soldier to receive pay and allowances for past services, the fact of desertion need not be established by the findings of a court martial; it is sufficient to justify a withholding of the moneys that the fact appears upon the muster-rolls of his company. If the entry of desertion has been improperly made, its cancellation can be obtained by application to the War Department. But forfeiture of pay and allowances for future services, as a condition of restoration to duty, can only be imposed by a court martial."

That the accounting officers of the Treasury were justified in withholding the pay of the claimant in this case, is manifest by the numerous offences of which he appears, from the report

of his commanding officer, to have been guilty. This record shows a clear case of failure to furnish the honest and faithful service demanded by the statute.

(2) Different considerations apply to his claim for transportation and subsistence from the place of discharge to the place of enlistment. The right to this depends upon section 1290:

"When a soldier is discharged from the service, except *by way of punishment for an offence*, he shall be allowed transportation and subsistence from the place of his discharge to the place of his enlistment, enrollment or original muster into the service. The government may furnish the same in kind, but in case it shall not do so he shall be allowed travel-pay and commutation of subsistence for such time as may be sufficient for him to travel from the place of discharge to the place of his enlistment, enrollment or original muster into the service, computed at the rate of one day for every twenty miles."

We think this statute contemplates a discharge as a punishment inflicted by the judgment of a court martial or other military authority, for a specific offence, and not such a discharge as was issued in this case, for unfitness for service and general bad character. While this may justify the proper authorities in ordering the discharge of the soldier as a worthless member of the service, we cannot consider such a discharge as "a punishment for an offence" within the meaning of the statute. The question whether such punishment must necessarily be awarded by the judgment of a court martial, is not presented by the record, and we express no opinion upon the point.

The judgment of the Court of Claims must, therefore, be

Reversed and the case remanded with directions to set aside the judgment already rendered, and to enter a new judgment in favor of the claimant for $8.10, for his transportation and subsistence.

SUPERIOR CITY *v.* RIPLEY.

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

No. 1322. Submitted January 6, 1891. — Decided January 26, 1891.

An acceptance by a municipal corporation of a draft, directing it to pay to the order of the payee a sum of money due to the drawer for work and labor done and materials furnished under a contract, constitutes a new contract between the acceptor and the payee which the latter may enforce in the courts of the United States, if he be a citizen of a different State from the acceptor, and if the amount be sufficient to give jurisdiction, notwithstanding the drawer and the acceptor are both citizens of the same State, and notwithstanding the provisions in the act of August 13, 1888, 25 Stat. 433, c. 866, § 1.

If a contract with a municipal corporation calls for payment for work and labor and materials furnished under it in city warrants, and the municipality accepts a draft for a sum in money from the contractor in favor of the payee or order, without specifying that it is payable in such warrants, it is not necessary to allege, in an action on the acceptance, that demand was made payable in such warrants and was refused.

This was a writ of error to reverse a judgment of the Circuit Court for the District of Nebraska in favor of the defendants in error, upon certain orders accepted by the city of Superior. The case was practically decided in overruling a demurrer to the petition, which set forth, in substance, the following facts:

1. That the plaintiffs, Ripley and Bronson, were citizens of the State of Missouri, and the defendant, the city of Superior, a municipal corporation of the State of Nebraska.

2. That under an ordinance, regularly adopted and confirmed by a popular vote, the city entered into a contract with S. K. Felton & Co. for the construction of a system of water-works for the sum of $25,000. That, in pursuance of such contract, Felton & Co. built and completed the water-works, which were accepted by the city on the 29th day of April, 1889; and that upon the contract price there was paid $5000, October 13, 1888, and $3681, December 14, 1888.

3. That S. K. Felton & Co. became indebted to the plain-

tiffs for water-pipe, hydrants and other material sold and delivered to them by the plaintiffs, and used in said water-works, in the sum of $5750, for which Felton & Co. executed the following order:

"SUPERIOR, NEB., *Dec. 24th*, 1888.

"Upon final completion and acceptance of water-works by the city of Superior, Neb., pay to the order of Ripley and Bronson five thousand seven hundred and fifty dollars, and charge same to contract price and on contract for erection of said water-works.

"(Signed) S. K. FELTON & Co.

"(Addressed:) To the mayor and city council,

"City of Superior, Superior, Neb."

4. That said order was presented at a meeting duly called of the city council, and accepted by a vote of said meeting, and in pursuance thereof the mayor and city clerk, under the seal of the city, endorsed and accepted the said order as follows:

"The city of Superior, Neb., hereby accepts the within written order, provided the water-works are fully completed according to plans and specifications and are duly accepted by the city, and then in that event the city of Superior will withhold from the final payment of contract price that may be due S. K. Felton & Co. the amount of this acceptance, or such part thereof as may actually be due said S. K. Felton & Co. thereon, and will pay over such amount in city warrants to Ripley and Bronson in lieu of S. K. Felton & Co., such amount to be credited upon said contract price for said water-works as if the same was paid to S. K. Felton & Co.

"Dated Superior, Neb., Dec. 24th, 1888.

"By order of the city council. C. E. ADAMS, *Mayor*.

"(City of Superior Corporate Seal.) C. E. DAVIS, *City Clerk*."

And thereupon said S. K. Felton & Co. endorsed upon said order as follows:

"We accept and agree to above conditions the day and date hereof, and that this may be embraced in our contract with the city of Superior and be part thereof.

"S. K. Felton & Co.

"Witness: Chas. E. Davis."

5. That the water-works were completed by S. K. Felton & Co., and accepted by the city on the 29th of April, 1889; and that the city paid to S. K. Felton & Co. a large amount of money, subsequent to the acceptance of this order, in disregard of plaintiff's rights, and that there has accrued and become payable to them since said acceptance over $18,000, whereby the city became liable to the plaintiffs for the amount of their order.

To this petition the defendant city interposed a demurrer upon the grounds:

1. That it did not appear from said petition that the Circuit Court had jurisdiction of the subject matter of the suit.

2. That the said petition did not state facts sufficient to constitute a cause of action.

The court overruled the demurrer, (41 Fed. Rep. 113,) and, the defendant not desiring to plead further, rendered judgment for the plaintiffs, in the sum of $6061.87.

Mr. John M. Ragan, *Mr. J. B. Cessna*, and *Mr. W. F. Buck* for plaintiff in error.

Mr. Clinton Rowell for defendant in error.

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

(1.) In support of its demurrer founded upon the alleged want of jurisdiction in the Circuit Court, the plaintiff in error insists that the plaintiffs below obtained their right to bring suit upon this order by assignment from S. K. Felton & Co., who are not alleged to be citizens of any other State than Nebraska, and hence that the plaintiffs are disqualified to sue, under the act of August 13, 1888, 25 Stat. 433, c. 866, § 1,

the first section of which provides 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."

The action in this case is brought upon an order drawn by S. K. Felton & Co., in which they direct the city to pay to the plaintiffs below, a certain sum of money upon the completion and acceptance of certain work undertaken by them for the city, and charge the same to their contract price. This order was presented to the corporation and formally accepted, "provided the water-works are fully completed, according to plans and specifications, and are duly accepted by the city," and the city promised to pay the same *in city warrants.* This acceptance was a contract directly between the city and the plaintiffs below, upon which the city was immediately chargeable as a promissor to the plaintiffs. Nothing is better settled in the law of commercial paper than that the acceptance of a draft or order in favor of a certain payee, constitutes a new contract between the acceptor and such payee, and that the latter may bring suit upon it without tracing title from the drawer. From the moment of acceptance, the acceptor becomes the primary debtor, and the drawer is only contingently liable, in case of non-payment by the acceptor. Daniel on Negotiable Instruments, § 532; *Fentum* v. *Pocock*, 5 Taunton, 192; *Wallace* v. *McConnell*, 13 Pet. 136. Ever since the case of *Young* v. *Bryan*, 6 Wheat. 146, it has been the settled law of this court that the Circuit Court has jurisdiction of a suit, brought by the endorsee of a promissory note against his immediate endorser, whether a suit would lie against the maker or not, upon the ground as stated by Chief Justice Marshall, "that the endorsee does not claim through an assignment. It is a new contract entered into by the endorser and endorsee." p. 151. This case was approved in *Mullen* v. *Torrance*, 9 Wheat. 537; *Evans* v. *Gee*, 11 Pet. 80;

and *Coffee* v. *The Planters' Bank of Tennessee*, 13 How. 183. It needs no argument to show that the same rule would apply as between the acceptor and the payee; and if the latter be a non-resident of the State, he may bring suit directly against the acceptor, notwithstanding the drawer of the paper is a resident of the same State as the acceptor, for the same reason that the acceptance creates a new contract, to which the drawer is not a party. *Thompson* v. *Perrine*, 106 U. S. 589.

The same principle is illustrated in the case of *De Sobry* v. *Nicholson*, 3 Wall. 420, in which it was held that if the requisite citizenship exist between the immediate parties to a contract, the jurisdiction of the Circuit Court cannot be defeated by the fact that another and prior contract, to which the plaintiff is not a party, is set out as an inducement to the making of the contract in suit.

So, in *Manufacturing Co.* v. *Bradley*, 105 U. S. 175, a corporation agreed to pay on a certain date to A, a sum of money, at a specified rate of interest; and, by an endorsement on the paper after it matured, further agreed, in consideration of forbearance to a date named, to pay at a higher rate of interest, to *bearer*. It was held that the endorsement was a new contract, upon sufficient consideration, and negotiable within the meaning of the law merchant, and that B, the legal holder of the paper, was not precluded from suing thereon in the Circuit Court, by the fact that A was a citizen of the same State as the corporation. In delivering the opinion of the court Mr. Justice Matthews observed: "It is true that the bond, as originally executed, was payable to Gayer, receiver, simply, and was not negotiable; but the subsequent endorsement was a new and complete contract, upon a distinct and sufficient consideration, and, being payable to bearer, is negotiable by delivery merely." p. 180.

(2.) In support of its second ground of demurrer, the defendant city further insists that inasmuch as the acceptance of the city was a promise to pay in *city warrants*, the petition should allege that the plaintiffs demanded payment in warrants, and that the city refused to give them warrants for the order. The order, however, was to pay a certain sum in dollars and

cents, and the promise was to pay the amount of the acceptance, and if payment had been made or tendered, either in current money or in city warrants, it was matter of defence, and the burden of proof was upon the defendant. No allegation in the petition that payment in city warrants was demanded and refused, was necessary to constitute a complete cause of action, and it is only after a failure to make out a *prima facie* case in the petition, that a general demurrer will lie. *Wallace* v. *McConnell*, 13 Pet. 136; *Brabston* v. *Gibson*, 9 How. 263, 279. As the warrants were a mere method of payment in money, for the convenience of the city in carrying on its financial business, it may be treated as a promise to pay in money. *Babcock* v. *Goodrich*, 47 California, 488. If the promise were to pay in bank notes or other representatives of money, it would scarcely be claimed that it was not a promise to pay in money, or that any special demand of bank notes was necessary to be averred. There is an allegation in the petition, that, though often requested, the said city of Superior has not paid to plaintiffs the amount of said order and acceptance, or any part thereof, and that there is now due and unpaid upon the same, the entire amount thereof. We think this is a sufficient allegation of non-payment and refusal to pay to render the city chargeable in this form of action.

The judgment of the Circuit Court must be

Affirmed.

SIOUX CITY STREET RAILWAY COMPANY *v.* SIOUX CITY.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 1228. Submitted January 8, 1891. — Decided January 26, 1891.

On December 12, 1883, the city of Sioux City, in Iowa, by ordinance, conferred on a street railway company, incorporated December 6, 1883, under the general laws of Iowa, the right of operating a street railway, with the requirement that it should pave the street between the rails. Subsequently, under an act of 1884, the city, by ordinance, required the com-

Statement of the Case.

pany also to pave the street for one foot outside of the rails, and assessed a special tax against it for the cost of the paving outside of the rails: *Held*, that there was no contract between the company and the State or the city, the obligation of which was impaired by the laying of the tax.

Under section 1090 of the Code of Iowa, which was in force when the company was incorporated, its franchise was subject to such conditions as the legislature should thereafter impose as necessary for the public good.

THE Sioux City Street Railway Company became a corporation on December 6, 1883, under the general incorporation laws of the State of Iowa. On the 12th of December, 1883, the city of Sioux City, by an ordinance of the city council, conferred upon the company the right to locate, operate, construct and maintain street railways upon and along certain streets in the city, on the terms and conditions specified in such ordinance. Section 11 of the ordinance was as follows: "Sec. 11. Whenever, by resolution of common council, any street or part of street on which said track shall be laid and operated shall be ordered paved or macadamized, either at the expense of the city or owners of abutting property, then the said proprietors of said street railway shall pave or macadamize in the time and manner directed the space between the rails, and shall thereafter keep the same between the rails in good repair, and shall keep in good condition and repair the space between the tracks on all bridges that they cross." On the 18th of December, 1883, the company accepted the ordinance. Prior to March 18, 1884, the company had expended over $10,000 in constructing tracks on certain streets and for other purposes, and had contracted for material and supplies for constructing other tracks, and had its street railway in operation on certain streets, in accordance with the terms of the ordinance.

On March 15, 1884, the legislature of Iowa passed an act entitled "An act granting additional powers to certain cities of the first class, with reference to the improvement of streets, highways, avenues, or alleys and to provide a system for payment therefor." The 6th section of that act provided as follows: "All railway companies and street railway companies in cities of the first class, as provided in section one of this act,

shall be required to pave, or repave between rails and one foot outside of their rails, at their own expense and cost. Whenever any street, highway, avenue or alley shall be ordered paved or repaved by the council of any such city, such paving or repaving between and outside of the rails, shall be done at the same time and shall be of the same material and character as the paving or repaving of the street, highway, avenue or alley upon which said railway track is located, or of such other material as said council may order, and when said paving or repaving is done said companies shall lay in the best approved manner the strap or flat rail. Such railway companies shall keep that portion of the streets, highways, avenues or alleys between and one foot outside of their rails up to grade and in good repair, using for such purpose the same material with which the street, highway, avenue or alley is paved upon which the track is laid, or such other material as said council may order." Laws of 1884, p. 22.

On January 15, 1886, the city of Sioux City became a city of the first class, under the statutes of Iowa, and has continued to be such.

On the 11th of May, 1886, the city council passed an ordinance entitled "An ordinance providing for the paving of the streets between the rails of railways and street railways located thereon, and defining the manner of making special assessments to defray the cost and expenses thereof and the manner of enforcing and collecting the same," the first section of which provided as follows: "Sec. 1. That whenever the city council, etc., shall cause to be paved any street, avenue or alley whereon any railway has or shall be located and laid down, they shall also order and provide by resolution that the company or persons owning said railway or street railway, pave said street, avenue or alley between the rails of said railway or street railway, and one foot each side the rails thereof, at their own expense and cost: *Provided*, That the provisions of this section shall not in any manner be construed to affect any rights accrued or existing in favor of said railway companies or street railway company under any franchise or license heretofore granted under any ordinance heretofore

adopted by said city council." Under this ordinance, and a subsequent one passed May 25, 1886, and a resolution passed August 31, 1886, the city council ordered certain streets to be paved, including those parts as to which the assessments involved in this suit were imposed, and provided for assessing to the street railway company the cost of paving the space between the rails and one foot outside thereof.

The assessment of a special tax against the company for the cost of paving the space outside of the tracks was made December 27, 1886. Prior to that time, the company had paid for so much of the paving as lay between the rails of its tracks. In proper time, after the resolution of August 31, 1886, was served upon the company, it filed its written objections thereto, as follows: "The Sioux City Street Railway Company objects to the resolution ordering the assessment of a special tax against said company for the cost of paving one foot outside of its railway tracks in improvement districts 2 and 3. It objects to having the cost of paving one foot outside of the railway track charged to it, or to have same in any manner assessed against it or against its property, and to having any resolution or ordinance passed charging the cost of said paving to it, or making any assessment against it or against its property, or seeking in any manner to collect said cost from it, or making same a lien upon the title to any of the property, by any ordinance, resolution or confirmation purporting to charge such cost against the said company or its property; that, by the terms of the charter granting the company the right to locate, construct, and maintain its said railway, it was expressly provided, that the company should only be required to pave so much of the street wherein the track was constructed as should lie between the rails of said track, that the city of Sioux City thereby expressly contracted and agreed that this company should have the right to locate, construct, operate and maintain its said track in said streets, and should only be required to pave or keep in repair that portion thereof lying within the rails of its said tracks; that the said company, relying upon the charter and the ordinance granting it the right to locate and construct the tracks on the said

streets herein named and the provisions and conditions thereof, located, constructed, and has since operated its track and railway on the said streets, and has in all respects complied with all the conditions and requirements imposed upon it by said city by the said ordinance, and that said assessment of costs of paving one foot outside the rails of said railway tracks is a violation of the grant and contract of said city to and with this company, and is illegal and void." Notwithstanding this, the city council, on the 15th of March, 1887, overruled the objections of the company and confirmed the assessment.

Under this state of facts, the company, on the 30th of May, 1887, filed in the district court of the county of Woodbury, in the State of Iowa, its petition against the city of Sioux City and the city council of Sioux City, setting forth the foregoing facts and averring as follows: "That, by the terms of the charter granting to the plaintiff the right to locate, construct and maintain said street railway, it was expressly provided, that plaintiff should only be required to pave so much of the street whereon it constructed and operated its street railway as should lie between the rails of its said track, and the city thereby expressly contracted and agreed with plaintiff, that in consideration of its constructing and operating the said street railway over said streets, it should have the right so to do, and only be required to pave and keep in repair so much of the street as lies between its rails; and said company, relying on the ordinance and contract of said city, located and constructed at great expense said track, and has ever since operated and maintained the same, and the said ordinance and resolution requiring plaintiff to pay the cost of paving one foot outside of the track of the railway is a violation of said contract granting it the right to locate and construct the said railway. The said city council erred in passing said ordinance and resolution requiring plaintiff to pay the cost of paving one foot outside of their tracks, and erred in overruling their objections to the special charges and assessments made against said company for said cost of such paving, and in determining that the said cost of such paving should be charged to said plaintiff and against the property, and erred

in confirming said special assessments." The petition prayed for the issuing of an order for a writ of *certiorari* to the city council and for a reversal of its action.

On the 11th of February, 1889, the petition was amended by averring that section 6 of the act of March 15, 1884, in so far as it sought to impose upon the company the paving of one foot outside of its track, or to impose upon it the cost thereof, was a violation of subdivision 1 of section 10 of article 1 of the Constitution of the United States, as impairing the obligation of a contract, and that the ordinances of May 11, 1886, and May 25, 1886, and the resolutions of August 9, 1886, and December 27, 1886, were a violation of the same subdivision.

The defendants filed a demurrer to the petition and amendment, as follows: "That the facts stated herein do not entitle the plaintiff to the relief demanded, for that: 1. The said ground for relief, as stated in said petition and amendment thereto, is that the action of said city and its city council, in assessing the cost of paving of one foot outside the rail of the tracks of plaintiff's railway, impairs the obligation of the contract made between said city and plaintiff, while said petition and amendment thereto disclose that such is not the effect of said action of the city. 2. That said petition and amendment thereto show that, in making said assessment, the city of Sioux City, by its common council, only complied with the provisions of the law of the State of Iowa authorizing said assessment, and then in force. 3. That the said plaintiff took its charter as a corporation from the State subject to the reserved power of the State to abridge or modify said charter, and to regulate, withhold or impose any other conditions upon any franchise obtained by said corporation, and the said plaintiff took said franchise and ordinance from said city subject to the rights of said city to make any charge or assessment against its property which the legislature might provide by statute."

The District Court sustained the demurrer, dismissed the petition, and confirmed the assessments. The plaintiff appealed to the Supreme Court of Iowa, which affirmed the judgment, its opinion being reported in 78 Iowa, 367.

Argument for Plaintiff in Error.

Section 1090 of the Code of Iowa, which was in force when the railway company became incorporated, provided as follows: "Sec. 1090. The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall, at all times, be subject to legislative control, and may be, at any time, altered, abridged or set aside by law, and every franchise obtained, used or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good."

Mr. J. H. Swan for plaintiff in error.

The ordinance granting the company the right to lay down and operate their railway constituted a contract between the city and the street railway company, and was governed by the terms and conditions set forth in it. *DesMoines* v. *Chicago, Rock Island &c. Railway*, 41 Iowa, 569; *Burlington* v. *Burlington Street Railway Co.*, 49 Iowa, 144, 147; *DesMoines Street Railway* v. *DesMoines Broad Gauge Railway*, 73 Iowa, 513; *State* v. *Corrigan Street Railway*, 85 Missouri, 263; *Coast Line Railway* v. *Savannah*, 30 Fed. Rep. 646; *Chicago* v. *Sheldon*, 9 Wall. 50.

It is claimed that the right reserved in section 1090, of the Code of Iowa of 1873, reserved to the State the right to make this change, and to inject into and make a part of this contract the additional conditions here imposed.

This ordinance or contract between the city and the street railway company is neither part of the articles of incorporation, by-laws, rules or regulations of the corporation, nor is it a franchise coming within the meaning of section 1090 of the Code of Iowa.

The city, by law, is the owner and controls the streets which the railway company desires to obtain the use of to lay the tracks, and has power to grant this use on such terms and conditions as may be agreed upon. The manufacturer or dealer

owns the iron and ties which he will grant upon such terms as may be agreed upon. The contract with the city is made for the use of certain streets upon which to lay and operate its road, and the terms and conditions are agreed upon. This is a right acquired by contract which has become vested under the charter in the legitimate exercise of lawful power, and stands upon a different footing from the rights obtained from the State by the incorporation. The State only asserts its power to modify, withhold or change its own contract with the corporators. It does not contend for a power to revoke the contracts of the corporation with other parties, or impair the vested rights acquired thereby. Such is the language of this court in *Tomlinson* v. *Jessup*, 15 Wall. 454, 459. See also *New Jersey* v. *Yard*, 95 U. S. 104; *Miller* v. *State*, 15 Wall. 478, 498; *Railroad Co.* v. *Maine*, 96 U. S. 499, 510; *Sinking Fund Cases*, 99 U. S. 700, 720; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347; *Railway Co.* v. *Philadelphia*, 101 U. S. 528; *Chicago* v. *Sheldon*, 9 Wall. 50, 55; *DesMoines* v. *Chicago, Rock Island &c. Railway*, 41 Iowa, 569; *New York City* v. *Second Avenue Railroad*, 32 N. Y. 261; *Burlington* v. *Burlington Street Railway*, 49 Iowa, 144, 147; *State* v. *Corrigan St. Railway*, 85 Missouri, 263; *Quincy* v. *Bull*, 106 Illinois, 337; *Atlantic City Water Works* v. *Atlantic City*, 39 N. J. Eq. 367.

Mr. J. L. Kennedy, *Mr. C. L. Wright*, *Mr. E. H. Hubbard* and *Mr. D. B. Henderson* for defendant in error.

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

The Supreme Court of Iowa, in view of section 1090, held, that the city of Sioux City, by granting the authority to construct and operate the railway on the condition of paving between the rails, did not limit its authority to make and enforce other regulations and requirements, as authorized by section 1090; that, although, by the contract, the company bound itself to pave between the rails, the city did not bind itself not

to exercise the authority conferred upon it by section 1090, to impose other conditions upon the exercise of the franchise of the company, which, in the judgment of the city, might be required for the public good; and that the city was authorized to impose on the company the burden of the additional paving outside of the rails.

No question is raised as to the regularity or legality of the proceedings for assessment for the cost of paving outside of the track, except the question of the power of the city to impose the assessment, in view of the franchise granted to the company. The only contention is that, in view of the provision of section 11 of the ordinance of December 12, 1883, there was no power in the city to require the company to pave anywhere except between the rails. On the other hand, the defendants contend that section 11, while requiring the company to pave between the rails, does not provide that it shall be required to pave only between the rails. Reference is also made by the defendants to section 8 of the ordinance of December 12, 1883, which provides for the payment by the company into the city treasury of an annual license fee of $25 on each car used by it, "in addition to the other taxes lawfully assessed and collected;" and it is contended that, as the legislature subsequently passed a general law requiring all street railway companies to pay for the cost of paving one foot outside of the rails, this tax or assessment was charged lawfully against the company. It is also contended that, no matter what the provisions of the ordinance were, it was within the power of the legislature to enact laws imposing an additional tax upon the company, and within the power of the city, acting under such a law, to make the charge upon the property of the company; and that, under section 6 of the act of March 15, 1884, the assessment and tax in question were made against the property of the company, and the city merely carried out the direction of the statute and did not impose the additional burden by its own voluntary act.

The company took its franchise subject to such legislation as the State might enact. This is plain from the provision of section 1090 of the Code. The company took its charter sub-

ject to the provisions of that section. The general assembly deemed it necessary for the public good to require street railways to pay for the paving of one foot outside of the tracks, probably upon the view that it was right that they should be required to pave that part of the street which they used almost exclusively. It was not in the power of the city, by any contract with the company, to deprive the legislature of the power of taxing the company. *Railway Co.* v. *Philadelphia*, 101 U. S. 528; *Spring Valley Water-Works* v. *Schottler*, 110 U. S. 347; 2 Morawetz on Private Corporations, §§ 1061, 1062, 1066, 1085, 1095, 1097.

Under section 1090 of the Iowa Code, the legislature had the power not only to repeal and amend the articles of incorporation of the company, but to impose any conditions upon the enjoyment of its franchise which the general assembly might deem necessary for the public good. The reservation of this power was a condition of the grant. The city council could make no arrangement with the company which would not be subject, under that section, to the superior power of the general assembly.

The cases referred to by the plaintiff in error, of *DesMoines* v. *Chicago &c. Railway Co.*, 41 Iowa, 569, and *Burlington* v. *Burlington Street Railway Co.*, 49 Iowa, 144, are not applicable to the present case, because in them there was not involved any question of the power of the State to impose additional burdens or conditions on the enjoyment of the franchise; and section 1090 of the Code was not in any manner involved or referred to in them. The questions raised in the present case relate solely to the subject of taxation, which is a matter under the authority of the State.

Moreover, the city derived from the State alone its power to grant a license to the company. The right to operate the railway in the streets is a franchise obtained through power given to the city by the State, but the State reserved the power to regulate such franchise and impose conditions upon it. It reserved the power to determine the question of the exemption of the company from taxation and to prescribe what burdens should be imposed upon it for the public good in the enjoy-

ment of its franchise. Manifestly, such power of the State would exist if the right to occupy the streets with tracks was granted to the company directly by an act of the legislature of the State; and the case is not changed by the fact that the franchise was granted by the city. There is nothing in the ordinance of the city council which takes away the power of the State and the city to impose additional taxes on the property of the company, or which indicates an intent that no further or different tax should be subsequently imposed on its property. *Delaware Railroad Tax*, 18 Wall. 206, 227; *Railway Co.* v. *Philadelphia*, 101 U. S. 528, 536; *Commonwealth* v. *Easton Bank*, 10 Penn. St. 451.

No question can arise as to the impairment of the obligation of a contract, when the company accepted all of its corporate powers subject to the reserved power of the State to modify its charter and to impose additional burdens upon the enjoyment of its franchise. Under the act of March 15, 1884, it was made a condition of the enjoyment of its franchise by the company, that, when the city should determine that the streets should be paved, the company should bear a certain portion of the cost thereof; and any prior contract between the company and the city in regard to paving was subject to the provisions of section 1090 of the Code. There was nothing in the ordinance of December 12, 1883, which bound or could bind the city not to exercise its statutory authority to impose other conditions upon the exercise of the rights of the company.

Our conclusion, therefore, is that there was no contract between the company and the State or the city, the obligation of which was impaired by the laying of the tax in question.

Judgment affirmed.

REAGAN *v.* AIKEN.

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

No. 468. Submitted January 12, 1891. — Decided January 26, 1891.

A debtor in Texas mortgaged to a creditor real estate there to secure the payment of debts to various creditors, and on the same day by a separate instrument to the same mortgagee personal property for the same object. Other creditors commenced suit in the Circuit Court of the United States against the debtor and caused the property covered by the chattel mortgage to be seized under writs of attachment, and to be sold and the proceeds applied towards payment of their claims in suit. The grantees in the chattel mortgage sued the marshal and his official sureties at law in the state court to recover the value of the goods seized and sold. This action was removed into the Circuit Court, where the creditors then filed a bill in equity to restrain the further prosecution of the action at law. A temporary injunction was issued. The mortgaged real estate was then sold, and the proceeds applied to the payment of the debts secured thereby, leaving a balance still due. After dismissing the injunction suit, the action at law came on for trial. A motion by the defendant to transfer it to the equity docket was refused. The defendant contended that the chattel mortgage was, under the laws of Texas, an assignment for the benefit of creditors and not a chattel mortgage. The court instructed the jury that the validity of the instrument as a mortgage depended upon whether when it was made the maker was solvent or insolvent. One of the counsel for the plaintiffs, who was also a creditor, testified that he was present at the execution of the chattel mortgage, at which were also present the mortgagor and certain other creditors for whose security the mortgage was executed, and stated what took place then. His evidence was not objected to by the creditors whose counsel he was. There was a verdict against the marshal and his sureties. *Held*,

(1) There was no error in refusing to transfer the action at law to the equity docket;

(2) That the instrument in question was not, under the local law of Texas, an assignment for the benefit of creditors, but a chattel mortgage;

(3) That the verdict of the jury determined the solvency of the grantor and the validity of the instrument;

(4) That it was no error to permit the counsel to testify, as his clients did not object.

Statement of the Case.

It is too late on a motion for a new trial to tender exceptions to the charge: and when the record does not contain the full charge, and no exceptions to such part as it does contain, the court must be assumed to have stated the law correctly.

On December 23, 1885, J. M. Anderson and T. W. Anderson, Jr., executed a mortgage on certain real estate in Texas to one W. J. McDonald, to secure the payment of certain debts of the mortgagors. On the same day, J. M. Anderson mortgaged to said McDonald and W. B. Aiken and L. C. Stiles certain personal property, as security for the payment of the same debts. On December 27, Carter Bros. & Co., of Louisville, Kentucky, H. T. Simon, Gregory & Co., and J. H. Wear, Boogher & Co., of St. Louis, commenced in the Circuit Court of the United States for the Eastern District of Texas certain actions against J. M. Anderson, and caused writs of attachment to be issued and levied upon the personal property covered by the chattel mortgage above mentioned. The goods thus attached were sold by the marshal, and the proceeds applied in satisfaction of the claims in suit. On the 29th of March, 1886, the grantees in the chattel mortgage commenced a suit in the state court against the United States marshal and the sureties on his official bond, alleging the seizure and sale under the writs, and seeking to recover the value of the goods thus seized and sold. This action, commenced in the state court, was removed by appropriate proceedings to the United States Circuit Court for the Eastern District of Texas. On February 3, 1887, the attaching creditors filed their bill in the same Circuit Court for an injunction to restrain the further prosecution of the action at law, the one commenced in the state and removed to the federal court. This bill was based on the proposition that the creditors of Anderson were secured by both the real estate and chattel mortgage, while the attaching creditors had only recourse on the property covered by the chattel mortgage; and that, therefore, the creditors thus doubly secured by the real estate and chattel mortgage should exhaust the security given by the former before making any claim to the property secured by the latter. The temporary injunction was issued as prayed for. The property secured by

the real estate mortgage was sold, and the proceeds applied as directed therein; but such appropriation of proceeds did not pay the debts in full, and left a balance due the creditors therein named, secured only by the chattel mortgage. Thereafter, on September 26, 1887, by stipulation of counsel, the injunction bill was dismissed, and the action at law transferred from the state to the federal court was continued to the next term, with a proviso as to the use of the testimony already taken in the injunction suit; and also that the dismissal should be without prejudice to the right of the defendants in the law action to move for its transfer from the law to the equity docket. At the February term, 1888, the law action came on for trial; an application was made to transfer it to the equity docket, which was denied, and the case went to trial, and resulted in a verdict and judgment against the marshal and his sureties for an amount equal to the sums due to the various creditors secured by the real estate and chattel mortgages, and unsatisfied by the proceeds of the sale of the real estate. To reverse such judgment a writ of error has been brought to this court.

Mr. John Paul Jones for plaintiffs in error.

Mr. J. S. Hogg, *Mr. H. D. McDonald* and *Mr. C. A. Culberson* for defendants in error.

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

Many assignments of error and many questions are presented by the counsel for plaintiffs in error. We notice those which seem to be substantial. It is alleged, first, that there was error in refusing to transfer the law action to the equity docket. This was an action at law, brought by certain mortgagees to recover the value of goods mortgaged to them, which had been seized, sold and appropriated by the defendant, the United States marshal, to other purposes. Nothing is plainer than that such an action is one at law. It is urged

that the debts secured by the chattel mortgage were also secured by a real estate mortgage; that the real estate thus conveyed had been sold, and the proceeds applied in reduction of the debts; that, therefore, an accounting was necessary to show the amount still due to the various creditors; and that such an accounting could only be had in an equitable action. The ruling of the Circuit Court was unquestionably correct. The recovery of the plaintiffs, the chattel mortgagees, was limited to the amount of the debts secured by the chattel mortgage. If any portion of the debts thus secured had been paid subsequently to the mortgage, by the voluntary act of the debtor or the appropriation of the proceeds of other securities, this was matter of defence which could be pleaded and proved in an action at law as fully and satisfactorily as in a suit in equity. It was simply a question as to the partial payment of indebtedness. How it was made was immaterial; the fact and amount were the substantial matters; and these were matters provable and determinable in an action at law. There was no error, therefore, in refusing to transfer the case from the law to the equity docket.

A second proposition is, that the chattel mortgage so called was not, in fact, a chattel mortgage, but an assignment for the benefit of creditors; and, therefore, void under the statute of Texas, as giving preferences and not being for the equal benefit of all creditors. But the instrument is, in form, and expressed intent and scope, a mortgage. It recites that the grantor is indebted to sundry parties, naming them and giving the amounts of the debts; that he is desirous of securing such creditors; and in consideration of the premises conveys to three of the creditors named the property, with instructions to take possession and sell, and after paying expenses, to apply the proceeds to the payment, ratably, of the debts, and the balance, if any, to return to the grantor. It then reads: "This instrument is intended as a chattel mortgage to secure the debts herein mentioned;" and states that it is made to the three creditors mentioned, in behalf of themselves and the other creditors named, because, on account of the great number of the latter, it would be inconvenient for them all to act

in its execution. It is true that there is no expressed condition of defeasance; but that attaches to every conveyance made simply for security, and it is unnecessary to state that which the law implies. That it contained a direction for the mortgagees to sell, is not material; for, in the absence of such a direction, a mortgagee, on taking possession, should sell and apply the proceeds to the satisfaction of his debt. Instruments similar in form have been repeatedly presented to the consideration of the Supreme Court of Texas, and adjudged to be chattel mortgages, and not within the scope of the act of March 24, 1879, providing for assignments for the benefit of creditors, or in conflict with the 18th section of that act, which forbids preferences in assignments. *La Belle Wagon Works* v. *Tidball*, 59 Texas, 291; *Stiles* v. *Hill*, 62 Texas, 429; *National Bank* v. *Lovenberg*, 63 Texas, 506; *Jackson* v. *Harby*, 65 Texas, 710; *Calder* v. *Ramsey*, 66 Texas, 218; *Watterman* v. *Silberberg*, 67 Texas, 100; *Scott* v. *McDaniel*, 67 Texas, 315, 317. Nor can any advantage be taken by the plaintiffs in error of the opinion expressed by the trial court, when the instrument was offered in evidence, that its validity depended entirely on the fact as to whether, when it was made, the grantor was insolvent or contemplated insolvency, and this, irrespective of whether that opinion was correct or not; for the verdict of the jury, in favor of the plaintiffs, negatives the existence of such conditions, if their existence avoided the instrument.

That the law was fully given by the court to the jury we are bound to presume, in the absence from the record of the entire charge; and that it was correctly stated, from the fact that plaintiffs in error took no exceptions to it. True, the record contains four special instructions given by the court, and two asked by the defendants and refused. It also shows that two days after the verdict, and in their motion for a new trial, the defendants protested and excepted to such giving and refusal; but nowhere is it stated that these four instructions were all that were given, and in the federal courts a motion for a new trial is a mere application to the discretion of the trial court, and it is too late then to tender for the first

time exceptions to rulings made at the trial. *Pacific Express Co.* v. *Malin*, 132 U. S. 531, 538. So, although one of the instructions asked by the defendants, and refused, relates to the effect on the instrument of the insolvency of the grantor therein, it may have been refused because already fully given in the general charge. For these reasons there is nothing in respect to the instructions, either those given or refused, which can now be considered.

Another error alleged is, that the court permitted H. D. McDonald, one of the counsel for plaintiffs, to testify that he was present at the time of the execution of the chattel mortgage, and to state what transpired at that time. The parties present at that interview were the mortgagor and certain of the creditors, and the interview was held with a view of obtaining from the mortgagor the security which was in fact given. McDonald was present both as a creditor and as attorney for the creditors. It is objected that communications to an attorney are confidential, and that he can neither be compelled nor permitted to disclose them as a witness; but the creditors whose counsel he was did not object to his testimony, and, as stated, he was present both as party and counsel. Under these circumstances, we see no error in the admission of his testimony.

These are the substantial matters presented for our consideration, and in them we find no error. The judgment, therefore, will be

Affirmed.

BENT *v.* THOMPSON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 1282. Submitted January 7, 1891. — Decided January 26, 1891.

Under the laws of the Territory of New Mexico, a judgment of a probate court, in 1867, admitting a will to probate, cannot be annulled by the same court, in a proceeding instituted by an heir more than twenty years

after the judgment was rendered and more than four years after the heir became of age.

Under the "laws of Velarde," which, under the provisions of the Kearny Code, remained in force in that Territory until modified by statute, the practice and procedure of the probate courts were matters of statutory regulation, the probate judge had jurisdiction to admit wills to probate by receiving the evidence of witnesses, and his judgment was valid, and, although reviewable on appeal, was conclusive unless appealed from and reversed.

THE case is stated in the opinion.

Mr. E. T. Wells, *Mr. R. T. McNeal*, *Mr. Caldwell Yeaman*, *Mr. Benjamin F. Butler* and *Mr. O. D. Barrett* for appellant.

Mr. Frank Springer for appellees.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

THIS is an appeal from a judgment of the Supreme Court of the Territory of New Mexico. The opinion of that court is reported as *Bent* v. *Thompson*, 23 Pac. Rep. 234. In connection therewith, that court made and filed a statement of facts in substance as follows:

Alfred Bent died on the 9th of December, 1865, leaving as his only heirs at law his widow, Guadalupe Bent, and three sons, namely, Charles Bent, William Bent, (the appellant,) also sometimes called Julian Bent, and Alberto Silas Bent. Charles Bent arrived at his majority on the 26th of April, 1881; William Bent on the 31st of May, 1883; and Alberto Silas Bent on the 20th of October, 1885. The widow was the mother of the above-named three children. She presented to the probate judge of Taos County, in the Territory of New Mexico, a last will and testament which she claimed to be, and which purported to be, the last will and testament of said Alfred Bent, executed December 6, 1865, the terms of which are not material. On the 6th of March, 1867, this will was proved, approved and ordered to be recorded, by the said probate judge, as the last will and testament of the said Alfred Bent, the record of the probate court on that day being in

these words, the judge of probate, the clerk, and a deputy sheriff being named as present: "The administrators of the estate of Alfred Bent, deceased, presented the will of said deceased for approval; the court examined said will and the witnesses in it mentioned, and finding it correct according to law approved it and ordered that it be recorded in this office." The said Guadalupe, has since intermarried with one George W. Thompson. No appeal or other proceedings in regard to the will or its probate were had, so far as the record discloses, until August 12, 1887, when the appellant filed his petition in the probate court of Taos County, for the re-probate of the will and the setting aside of the record of its former probate. At the time such petition was filed, more than twenty years had elapsed since the will was probated and recorded, and the petitioner had arrived at his majority more than four years prior to the filing of said petition, which was the commencement of this proceeding. The record does not disclose whether or not Charles Bent, William Bent and Alberto Silas Bent were summoned to be present at the time the will was probated in 1867, but does show that Guadalupe Bent, widow of the decedent and mother of the children, was a party to the proceeding.

Guadalupe Thompson, Alberto Silas Bent, Charles Bent, the Maxwell Land Grant Company and the Maxwell Land Grant and Railway Company appeared in the proceeding as respondents, and, on the 7th of September, 1887, the probate court made a decree declaring null and void the probate of March 6, 1867, and declaring further that the paper writing so proposed by said Guadalupe Thompson as the last will of Alfred Bent was not such last will, and ordering that it be rejected and the record thereof annulled.

Among the grounds of objection filed in the probate court by the Maxwell Land Grant Company, and the Maxwell Land Grant and Railway Company, to its action in reopening the matter of the probate, were the following, called "third" and "fourth:" "Because said petitioner has not made his application, if he had the right to do so, within a reasonable time after the former probate of said will. Because this court and

judge thereof has no right or authority to disprove the acts of his predecessor done in his official capacity more than twenty years since or at any other time, the record thereof having during all that time remained in full force and effect and other parties having acquired rights thereon on the faith of the same."

The two companies took an appeal to the District Court sitting within and for the county of Taos, from the judgment of the probate court, assigning, among other reasons of appeal, the following: "6th. Because neither the probate court nor the probate judge had jurisdiction to entertain the said petition or grant the prayers thereof. 7th. Because neither said probate court nor said probate judge could inquire into the validity of the acts of the probate court or probate judge done at a regular term of the probate court more than twenty years prior to the filing of said petition of William Bent." The District Court sustained the grounds of appeal above specified, and declared null and void, and vacated, set aside, and held for naught the proceedings of the probate court of September 7, 1887. From this judgment William Bent appealed to the Supreme Court of the Territory. That court affirmed the judgment of the District Court, and entered a judgment dismissing the petition, and declaring null and void, vacating, setting aside, and holding for naught the proceedings of the probate court of Taos County had in September, 1887. William Bent has appealed to this court.

In its opinion, the Supreme Court discusses the question of probating a will in common form and in solemn form, in view of the fact that the petitioner demanded a re-probate of the will in solemn form, and that the opposing parties contended that the probate of a will was a purely statutory proceeding in New Mexico, and that its laws did not recognize the double form of probating wills nor require notice to heirs or legatees. The complaint of the petition was, that neither the petitioner, nor Charles Bent, nor Alberto Silas Bent, had any notice of the intention to present the will for probate, and were not present or heard. The Supreme Court held that the civil law was in force in New Mexico, and it examined the provisions

thereof in regard to proving a will, and arrived at the conclusion that any person interested could have a will probated, without notice to the heirs or other interested parties, it being required only that witnesses should be summoned, and only one form of probate being prescribed; that, by the Kearny Code of 1846, the prior "laws of Velarde," in relation to the execution and proving of wills and the administration of the estates of deceased persons, dating back to 1790, were continued in force; that, by section 17 of the act of January 12, 1852, (Laws of 1851–2, p. 356; Compiled Laws of New Mexico of 1884, sec. 1393,) authority was given to probate judges, in their respective counties, to "qualify" or probate wills, "by receiving the evidence of the witnesses who were present at the time of making the same, and all other acts in relation to the investigation of the validity thereof;" that, by the act of January 26, 1861, (Laws of 1860–1, p. 62; Compiled Laws, secs. 1446–1449,) it was provided as follows: "No judge of probate shall have the power to declare any will, codicil, or any other testamentary disposition, to be null and void under the pretext of the want of the solemnities prescribed by the laws of this Territory by the testator making such disposition;" that the second section of the same act provided, in substance, that, when a will was presented for probate, if the probate judge should doubt whether it ought to be approved or not, he should return the will immediately to the person who presented it for probate, noting on the foot of it his reasons for refusing approval; that the third section of the same act provided that it should be the duty of the person to whom the will was returned to present the same at the next regular term of the District Court of the county, whose duty it was made to examine into the matter and declare by its decision whether the will was valid or void, and then return it to the party; and that there was a proviso to the fourth section of the act, reading as follows: "That any proceedings had by said judges of probate not in conformity with the provisions of this act shall be declared null and of no effect by the District Court, and all at the cost of the said probate judges."

The Supreme Court declares that such was the state of the

law of the Territory at the time the will was executed and probated and at the time Alfred Bent died; that, in *Browning* v. *Browning*, 9 Pac. Rep. 677, it had held that the common law was not introduced into the Territory by the organic act, except in a very limited degree; that even in 1876, when the common law was formally adopted as the basis of the jurisprudence of the Territory, it was the common law "as recognized in the United States" that was adopted, that is, "the common law, or *lex non scripta*, and such British statutes of a general nature, not local to that kingdom, nor in conflict with the Constitution or laws of the United States nor of this Territory, which are applicable to our condition and circumstances, and which were in force at the time of our separation from the mother country;" that it was not intended, by the adoption of the common law in 1876, to repeal the statute laws of the Territory, but only such portions of the common law were adopted as did not conflict with such statute laws; that the statute laws governing probate courts and defining the manner in which wills should be probated in the Territory remained in force until modified by the act of 1889, and were the basis of the jurisdiction and authority of the probate courts; that the probate of a will in the manner prescribed by the statute was conclusive, and must be recognized and admitted in all courts as valid, so long as such probate stands; and that, as it appeared by the record that the will was probated as required by law, by the mother of the petitioner, who was an interested party, more than twenty years prior to the filing of his petition in the probate court, and that the petitioner delayed filing his petition for more than four years after he attained his majority, and as the record stated that the probate court examined the will and the witnesses mentioned in it, and found it correct according to law, approved it and ordered it to be recorded in the probate office, and as, by the statute of New Mexico, (Compiled Laws of 1884, secs. 1869, 1881,) an infant was allowed one year after the removal of his disabilities to assert his rights, except as to real estate, in which case the period was extended to three years, the petitioner had no rights in the premises and no standing in court at the time he instituted the proceeding.

The only question presented for consideration is whether, under the laws of the Territory of New Mexico, a judgment of a probate court in that Territory admitting a will to probate can be annulled by the same court in a proceeding instituted by an heir more than twenty years after the original judgment was rendered and more than four years after the heir became of age.

The provisions of the laws of New Mexico applicable to proceedings such as those involved in the present case, which were in force at the date of the probate in 1867, were as follows, as contained in the Compiled Laws of 1884:

"§ 562. The several probate judges shall have exclusive original jurisdiction in all cases relative to the probate of last wills and testaments: The granting letters testamentary and of administration, and the repealing the same; . . . to hear and determine all controversies respecting wills, the right of executorship, administration, or guardianship; . . ." Kearny Code, 1846.

"§ 563. Appeals from the judgment of the probate court shall be allowed to the District Court in the same manner, and subject to the same restriction as in case of appeals from the District to the Supreme Court." Kearny Code, 1846.

"§ 1393. Probate judges, in their respective counties, are authorized to qualify wills, by receiving the evidence of the witnesses who were present at the time of making the same, and all other acts in relation to the investigation of the validity thereof." Act of January 12, 1852.

"§ 1365. The laws heretofore in force concerning descents, distributions, wills, and testaments, as contained in the treatises on these subjects written by Pedro Murillo de Lorde, [Velarde] shall remain in force so far as they are in conformity with the Constitution of the United States, and the statute laws in force for the time being." Kearny Code, 1846.

The following four sections were enacted January 26, 1861:

"§ 1446. No judge of probate shall have the power to declare any will, codicil, or any other testamentary disposition to be null and void under the pretext of the want of the solem-

nities prescribed by the laws of this Territory by the testator making such disposition.

"§ 1447. When any probate judge shall doubt whether any testamentary disposition as those mentioned in section 1446, ought to be approved on account of the want of any solemnity as aforesaid, in case that such should be the opinion of any judge of probate, he shall immediately return to the person who may have applied for the approval of such document, the testament, codicil, or any other testamentary disposition, which may have been placed in his hands for the approval thereof, noting at the foot of said document the positive reasons on which he founds his opinion for refusing his approval.

"§ 1448. It shall be the duty of any person to whom may have been returned a document, such as are mentioned in this act, to present the same to the District Court of their respective county at the first regular term of said court; and it shall be legal for said court to examine such documents, together with the observations submitted by the probate judge who may have refused his approval; and it shall be the duty of the said District Court, at the same term, to declare the validity or nullity of such documents, and to return the same, after making its decision, to the party interested.

"§ 1449. If, in the judgment of any probate judge of this Territory, any will, codicil, or any other testamentary disposition does not merit his approval, he shall return the same to the party interested, as required in section 1447; but in this case the probate judge shall grant letters of administration to the person or persons appointed as testamentary executor in said documents in preference to any other person who may also solicit them: *Provided*, That any proceedings had by said judges of probate not in conformity with the provisions of this act shall be declared null and of no effect by the District Court, and all at the cost of the said probate judges."

No further change in the probate laws was made until 1889.

In addition to the foregoing, may be mentioned the following, by which all laws in force in New Mexico touching wills, if any, additional to those contained in Velarde's treatise, were continued in force until supplanted by legislation:

"All laws heretofore in force in this Territory, which are not repugnant to, or inconsistent with, the Constitution of the United States, and the laws thereof, or the statute laws in force for the time being, shall be the rule of action and decision in this Territory." Kearny Code, 1846, Tit. Laws, sec. 1; found in Compiled Laws of 1884, p. 114.

This section was substantially reënacted by the act of July 14, 1851, and again in the Compiled Laws of 1865, p. 512 (Chaper LXXII, sec. 6), but was omitted by the compilers from the Compiled Laws of 1884, on the ground that in their opinion it was "obsolete and out of date." Compiled Laws, 1884, p. 1402, par. 72. The volume of 1884 is, however, only a compilation of existing law and neither reënacts nor repeals anything.

The common law was not adopted in New Mexico until 1876, when the following act was passed (Act of January 7, 1876, c. 2, § 2; Compiled Laws, § 1823): "In all the courts of this Territory, the common law as recognized in the United States of America shall be the rule of practice and decision."

Upon this act the Supreme Court of New Mexico has held as follows: "We are therefore of opinion that the legislature intended, by the language used in that section, to adopt the common law, or *lex non scripta*, and such British statutes of a general nature, not local to that kingdom, or in conflict with the Constitution or laws of the United States, nor of this Territory, which are applicable to our condition and circumstances, and which were in force at the time of our separation from the mother country." *Browning* v. *Browning*, 9 Pac. Rep. 677, 684.

In regard to the argument made, that by the provision in the organic act of New Mexico, declaring that the jurisdiction of the Probate Courts should be "as limited by law" (Act of Sept. 9, 1850, § 10, 9 Stat. 449), the practice and procedure of the common law touching matters of probate came into force in New Mexico, regardless of any statutory provisions of the Territory, which view is sought to be supported by a reference to *Ferris* v. *Higley*, 20 Wall. 375, it may be said, that that case relates only to the jurisdiction and not to the practice of

those courts; and that, in *Hornbuckle* v. *Toombs*, 18 Wall. 648, 656, this court, speaking by Mr. Justice Bradley, said: "From a review of the entire past legislation of Congress on the subject under consideration, our conclusion is, that the practice, pleadings, and forms and modes of proceeding of the Territorial courts, as well as their respective jurisdictions, subject, as before said, to a few express or implied conditions in the organic act itself, were intended to be left to the legislative action of the Territorial assemblies, and to the regulations which might be adopted by the courts themselves. Of course, in case of any difficulties arising out of this state of things, Congress has it in its power at any time to establish such regulations on this, as well as on any other subject of legislation, as it shall deem expedient and proper."

From an examination of the provisions of the "laws of Velarde," which under the provisions of the Kearny Code, remained in force until modified by statute, we are of opinion that the practice and procedure of the Probate Courts were matters of statutory regulation; that the probate judge had jurisdiction to admit wills to probate by receiving the evidence of the witnesses; and that his judgment was valid and, although reviewable on appeal, was conclusive unless appealed from and reversed.

It is to be remarked that, in the findings of fact made by the Supreme Court of the Territory, it is not stated that William Bent was not present at the probate and was not cited to appear, but it is stated only that the record does not disclose whether or not he was summoned to be present.

Sections 1860, 1863, and 1869 of the Compiled Laws of New Mexico of 1884 are as follows:

"§ 1860. The following suits or actions may be brought within the time hereinafter limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially provided."

"§ 1863. Those founded upon accounts and unwritten contracts, those brought for injuries to property, or for the conversion of personal property, or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified, within four years."

"§ 1869. The times limited for the bringing of actions herein shall, in favor of minors and persons insane or under any legal disability, be extended so that they shall have one year from and after the termination of such disability within which to commence said actions."

It was held by the Supreme Court of New Mexico, in *Browning* v. *Browning*, 9 Pac. Rep. 677, 684, 685, that the limitations of the statute of January 23, 1880, of New Mexico, of which those three sections are a part, applied to proceedings in the Probate Court. We think this construction was correct, and that the present suit is an action to annul a former judgment of the Probate Court. Such is the character of the judgment declaring the former probate to be null and void.

Moreover, by sections 1446–1449 of the Compiled Laws, before quoted, the course of procedure of the probate judge was distinctly defined, and he had no power to declare the will void. On the contrary, his proceeding, not being in conformity with the provisions of the act of January 26, 1861, was, as declared by that act, null and of no effect.

Judgment affirmed.

CONSOLIDATED ROLLER MILL COMPANY *v.* WALKER.

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

No. 1485. Submitted January 9, 1891. — Decided January 26, 1891.

Claim 1 of letters patent No. 228,525, granted June 8, 1880, to William D. Gray, for an improvement in roller grinding-mills, namely, "1. In a roller grinding-mill, the combination of the counter-shaft provided with pulleys at both ends and having said ends mounted in vertically and independently adjustable bearings, the rolls C E having pulleys connected by belts with one end of the counter-shaft, and the rolls D F independently connected by belts with the other end of the counter-shaft, as shown," is invalid, because, in view of the state of the art, it does not embody a patentable invention.

The combination set forth in that claim evinces only the exercise of ordinary mechanical or engineering skill.

That claim is not infringed by the use of a roller mill made in accordance with letters patent No. 334,460, granted January 19, 1886, to John T. Obenchain.

In equity. Decree dismissing the bill. Plaintiff appealed. The case is stated in the opinion.

Mr. R. Mason for appellant.

Mr. Robert H. Parkinson and *Mr. Joseph G. Parkinson* for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Western District of Pennsylvania, by the Consolidated Roller Mill Company against R. R. Walker, for the infringement of claim 1 of letters patent No. 228,525, granted June 8, 1880, on an application filed May 2, 1879, to William D. Gray, for an improvement in roller-grinding mills. The Circuit Court, held by Judges McKennan and Acheson, entered a decree dismissing the bill, with costs. The case was heard on pleadings and proofs. The answer denied the validity of the patent, charged want of novelty and of patentability, and denied infringement. The opinion of the court (43 Fed. Rep. 575) was written by Judge Acheson.

The specification and claims of the patent are as follows: "My invention relates to that class of mills in which horizontal grinding-rolls arranged in pairs are employed; and the invention consists in the improved arrangement of belts and pulleys for communicating motion to the rolls, and in other minor details hereinafter described in detail. In the accompanying drawings, Figure 1 represents a side elevation of the same; Fig. 2, a top-plan view of the rolls and their operating-belts; and Fig. 3, an end elevation of the same, partly in section. It has been found by experience that when the rolls are driven by gearing a great deal of noise and a jarring of the parts of the apparatus and trembling of the mill-floor result, and this

jarring and trembling in turn cause an unevenness of operation or grinding and a rapid and uneven wear of the rolls. To obviate these difficulties and produce an even, steady motion, I discard the gearing hitherto employed, and substitute therefor a system of belting arranged in a peculiar manner, to give the proper direction and speed to the rolls. In the drawings, A represents the frame or body of the machine, in the upper part of which are mounted, in pairs, a series of grinding or crushing rolls, C D E F. Above the grinding-rolls is arranged a hopper provided with feeding-rolls G H, arranged to deliver the grain to each pair of rolls. B represents a counter-shaft, which is represented in the drawings as extending transversely through the base of the frame or body A, parallel with the grinding-rolls, but which may, if desired, be located entirely without the machine. As represented in Figs. 1 and 2, the grinding-rolls are furnished alternately at opposite ends each with a belt-wheel or pulley, while the counter-shaft B is furnished at one end with one wheel or pulley and at its opposite end with two. N represents the main driving-belt, which passes to and around the pulley *c* of the roll C, thence downward and around pulley *b* of the counter-shaft B, thence upward and around pulley *e* of the roll E, and back to the source of power, imparting to the rolls C and E a motion in one direction, and to the counter-shaft a motion in the reverse direction. From the pulleys *b'* *b''* on the rear end of the counter-shaft B, belts P and R pass upward and around pulleys *d* and *f* of the rolls D F, as shown in Fig. 2, imparting to said rolls a motion the reverse of that of the rolls C E. In this way the two rolls of each set are caused to revolve toward each other while being all driven from a common source primarily.

"The use of belting obviates all the noise incident to gearing and produces a much more even and steady motion, each roller being driven from the counter-shaft, instead of one from another, as heretofore. Another advantage incident to the arrangement of belting above described is, that by simply removing the pulley of any shaft and replacing it with another of proper size, any desired difference in the speed of the rolls

may be obtained, whereas in the case of gearing this cannot be accomplished except through the use of a very complicated arrangement of intermediate wheels. In order to adapt the counter-shaft B to perform the double purpose of reversing the motion of certain of the rolls and of acting as a belt-tightener, it is mounted, at opposite sides of the frame or body A, in boxes swivelled or hung in yokes L, sliding vertically in guides or boxes K, and adjusted up and down therein by screw rods or stems S, the swivel-boxes permitting a slightly greater movement of the shaft B at the one end than at the other, without interfering with its free rotation, and thereby permitting the tightening of the belt or belts at one side of the machine, without disturbing those at the other. In order to adjust and maintain the rolls C D and E F in proper relation to each other, the two outer rolls, C and F, are carried in sliding-boxes, which are formed each with a T rib or standard, *m*, moving in a groove or way of corresponding shape, the rolls being held up to their operative position by springs U, which, in turn, are regulated in pressure by screws T. Clamping-screws may be arranged to secure the sliding-boxes Q in any desired position. By the above arrangement of the sliding-boxes they are prevented from being advanced or retracted unequally, and thereby giving the rolls a 'winding' position. It is desirable that, when the rolls are not employed in grinding, they should be held apart, as otherwise they would be liable to injury by direct contact, and also subjected to unnecessary wear. To accomplish their ready separation I place just in front of each sliding-box Q a rotating cam or eccentric, Y, which, when turned in one direction, permits the box to be advanced, but when given a partial revolution about its axis, forces and holds back the same.

"The meal, after being crushed by the rollers, sometimes packs or cakes together; and, for the purpose of regranulating the same, it is passed through a disintegrator. The disintegrator-cylinder may be mounted on and driven by the counter-shaft B, as shown in Fig. 3, in which case the usual surrounding shell or casing (shown in the drawings) will need to be adjustable vertically.

"The peculiar manner of or means for adjusting the shell forms no part of the present invention, and need not, therefore, be described in detail herein. Many arrangements — such as the use of bolts and slots, or adjusting-screws, for example — will suggest themselves to the skilled mechanic.

"Machines of this class are found to be impaired in their operation through the heating of the roller-journals. To overcome this defect I form on the shafts of the rollers, and also on the counter-shaft, near each end, a collar, *x*, which serves both to prevent end play of the shaft, and to carry upward continually a supply of oil from the chamber or supply *z* to the upper side of the shaft and box, whence it spreads out over the entire surface of the bearing and journal. The boxes are each formed with an annular oil-chamber, *v*, at each end, communicating by inclined passages *w* with the supply chamber or sink *z*. In this way a perfect lubrication of the bearings is constantly maintained and heating is obviated. The feed-rolls G H are furnished at their ends with pulleys *g h*, which are driven by belts from the grinding-rolls D E, which, being stationary, cannot interfere with the tension of the belts, as would the adjustable rolls C F.

"I am aware that various devices have hitherto been employed to regulate the distance between the rolls, in order to govern the fineness of the material delivered from them, and I am also aware that shafts have been made movable in such manner as to tighten belts passing over pulleys on other shafts, and I lay no claim thereto; but I believe myself the first to construct and organize a grinding-mill in the peculiar manner herein shown and described, whereby the single belt is caused to operate the various parts in the required directions and the disintegrating-cylinder caused to keep the belt tight.

"Having thus described my invention, what I claim is —

"1. In a roller grinding-mill, the combination of the counter-shaft provided with pulleys at both ends and having said ends mounted in vertically and independently adjustable bearings, the rolls C E having pulleys connected by belts with one end of the counter-shaft, and the rolls D F independently connected by belts with the other end of the counter-shaft, as shown.

"2. In a roller grinding-mill, a disintegrating-cylinder connected at its two ends by belts with the rolls, in combination with independently and vertically adjustable supports connected by transverse pivots with the boxes sustaining the ends of the cylinder, in the manner described and shown.

"3. In a roller-mill, the combination of the frame, the cylinder, the pivoted bearings K, the forked arms L, having the bearings therein, and the screw S, as shown."

The opinion of the Circuit Court, after quoting from the specification, says: "Gray's specification, as our quotations therefrom indicate, suggests the idea that he was the first to apply belt-drives to roller grinding-mills. But the fact is otherwise, as the proofs abundantly show. Nor was he the first to discard from such mills cog-gearing and friction gears altogether and substitute therefor belt-driving." The opinion then refers to Mechwart's Austrian patent, granted August 3, 1875, extracts from which, as found in the record, are as follows: "The arrangement invented by me has for its object an advance in the former method of driving the coöperating rollers of any particular roller mill. This end has heretofore been obtained exclusively either by the intermeshing of both rollers through the means of spur gear, or else through the naked driving of the one roller from the driven roller by means of friction produced through any pressure whatever between the rollers. . . . The substance of the invention, which I consider new and desirable for patent, consists in the use of belts for the driving of each single roller of a pair in roller mills for the begetting of mill products in any desired relation of the two coöperating rolls to each other. Heretofore, in roller mills, one roll of a pair has been driven from the other by means of spur gearing or by means of friction caused by the pressure between the rollers. The transmission of movement through spur gearing has, however, the disadvantage that, through the unavoidable inequality of the intermeshing, an unequal movement of the rollers ensues, which results, according to experience, in the rapid loss of 'true' and in unequal wearing away of the rollers; besides this, the disagreeable rattling of spur gearing and the rapid

wearing away of the gears themselves is a disadvantage. The driving of the second roller by means of friction of the two rollers pressed together is only practical when the chop passes the rollers in very thin strata and not in coarse particles. In case of the latter the friction will be relieved and the driven roller be stopped ; besides this, only an equal peripheral speed of the rollers is permitted by this construction, and therefore it is not applicable when an unequal speed is desired, as for example, in the grinding of the middlings into flour. These disadvantages the inventor has removed by his application of belt-drive to every single roller of a roller pair of a roller mill, which, according to his best knowledge and conscience, has never been employed in similar machines and is entirely new, so that, by means of such transmission of movement, an equal revolution is obtained, which is impossible with spur gearing. In the accompanying three drawings are six different arrangements, shown for different groupings of the rollers, although I do not thereby intend to exclude every other possible arrangement."

The opinion then proceeds: "We find therein distinctly set forth the disadvantages resulting from the use of spur gearing in roller grinding-mills, viz., the disagreeable rattling, the rapid wearing away of the gears, and the unequal movement and unequal wearing away of the rollers, and also the inefficiency of driving by means of frictional contact between the rolls, which latter, it is set forth, is only practical when the chop passes the rollers in very thin layers and not in coarse particles, and is not applicable when an unequal peripheral speed of the rolls is required. All these disadvantages, it is declared, are avoided by Mechwart's invention, which consists in driving both coöperating rolls by means of belts, whereby, also, can be obtained an equal and also an unequal peripheral speed, while the diameter of the rolls, as well as the diameter of the belt pulleys, can be varied relatively to each other for different objects. Mechwart's drawings show, as examples, six different arrangements of belting, which, he states, are intended to illustrate 'only some of the different arrangements of the belt-drive for roller mills, without exhausting the possible varia-

tions in its application.' Figure 3, sheet A, shows a machine having two pairs of grinding rolls, the pairs being vertical and arranged side by side. A shaft, mounted in the machine frame in fixed bearings, carries two pulleys, one at each side of the machine. A belt from one of these pulleys passes around a tightening pulley at the upper right-hand corner of the machine, thence around a pulley on the upper left-hand roll shaft, thence around a pulley on the lower right-hand roll shaft, and thence back to the driving pulley; and by this belt one roll of each pair is driven. From the other pulley, on the other side of the machine, a belt is arranged in a similar manner, so as to drive the other two rolls of the pair. Without further description of the Mechwart system, it is enough to say that his patent disclosed roller grinding-mills, single and double, with both vertical and horizontal pairs of rolls arranged side by side, driven by means of belts exclusively, his machine being equipped with adjusting or tightening pulleys, and having a shaft journalled directly into the machine frame and receiving its motion from the prime mover of the mill, either directly or by belt."

It then says: "But turning now to machinery employed in the arts generally, it is certain that the use of belt-gearing interchangeably with or as a substitute for cog-gearing was very old and common before Gray's alleged invention. It was, too, an old and familiar expedient to keep the belt adjusted to a proper degree of tightness by means of tightening pulleys, the shafts of which, in revolving, sometimes did other work about the machine; and shafts had been made movable in such manner as to tighten belts passing over pulleys on other shafts. It was also old, and very common in machine shops and factories of various kinds, to provide an individual machine with a counter-shaft mounted directly in the machine frame, the counter-shaft being driven by a belt from the line-shaft, and the machine by a belt from the counter-shaft. Furthermore, it was no new thing to provide the journal boxes or hangers in which counter-shafts are mounted with means for independently adjusting the ends of the shaft." It then adds that, in view of the things referred to, the court is unable to

discover any patentable subject matter in claim 1 of Gray's patent; and that it falls directly within the established principle, that the application of an old process, machine or device to a like or analogous purpose, with no change in the mode of application and no result substantially different in its nature, will not sustain a patent, even if the new form of result has not before been contemplated; citing *Pennsylvania Railroad Co.* v. *Locomotive Truck Co.*, 110 U. S. 490, and *Blake* v. *San Francisco*, 113 U. S. 679.

It then says that it is quite clear, moreover, that the application of belting to drive roller grinding-mills, to obviate the difficulties incident to the use of cog-gearing and to secure the advantages set forth in Gray's specification, did not originate with him; and that, therefore, even were it conceded that his peculiar arrangement is attended with better results than had been attained previously, still this would not sustain the patent, for, the mere carrying forward of an original conception, resulting in an improvement, in degree simply, is not invention; citing *Burt* v. *Evory*, 133 U. S. 349, and that the conclusion is unavoidable, that the combination set forth in Gray's first claim evinces only the exercise of ordinary mechanical or engineering skill; citing *Hollister* v. *Benedict Mfg. Co.*, 113 U. S. 59; *Thompson* v. *Boisselier*, 114 U. S. 1; *Aron* v. *Manhattan Railway Co.*, 132 U. S. 84; *Hill* v. *Wooster*, 132 U. S. 693, 701; and *Howe Machine Co.* v. *National Needle Co.*, 134 U. S. 388. We fully concur in these views and conclusions, and regard them as entirely sufficient to justify the decree.

The Circuit Court further says: "It seems to be proper for us to add that our judgment is with the defendant upon the defence of non-infringement also. To understand the nature of the invention intended to be covered by the first claim, resort must be had to the specification, and we there find that the 'swivel boxes' are essential to the contemplated greater movement at one end of the shaft than at the other, whereby is effected 'the tightening of the belt or belts at one side of the machine, without disturbing those at the other.' This is apparent on the face of the paragraph hereinbefore quoted at

length; and the expert testimony is direct and convincing, that, to the practical working of the described device as a belt-tightener, this swivelling feature is indispensable. Without the swivelled boxes Gray would not have 'independently adjustable bearings.' True, those boxes are not expressly mentioned in the claim, but we think they are to be regarded as entering therein by necessary implication, for the reason just stated, as well as by force of the words 'as shown.' Moreover, the prior state of the art would limit the claim to the specific organization shown and described. *Phœnix Caster Co.* v. *Spiegel*, 133 U. S. 360, 369. But that organization the defendant does not use. His alleged infringement consists in the use of a roller mill manufactured under and in accordance with letters patent No. 334,460, granted on January 19, 1886, to John T. Obenchain. In the defendant's machine the journal boxes are rigidly supported so as to be always horizontal, and incapable of any tilting or swivelling motion; and this is essential to the working of the apparatus. A continuous counter-shaft is not employed, but three coupled base-shafts, the outer shafts or sections being each journalled at the outer end in a vertically adjustable non-swivelling box, and the inner end of each being forked and carrying a loosely pivoted ring. These two rings are connected by a tumbling rod forked at each end and pivoted to the rings, thus forming a universal coupling, and thereby, through the central shaft or tumbling rod, rotary motion is transmitted from one of the end shafts or sections to the other, no matter how much they may differ in vertical position. Now, for the reasons already given, we are of opinion that such a construction of Gray's first claim as would embrace the Obenchain device is inadmissible." We see no reason to doubt the correctness of these views.

Decree affirmed.

Syllabus.

TUBBS *v.* WILHOIT.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 450. Submitted January 5, 1891. — Decided January 26, 1891.

The swamp land grant of September 28, 1850, to the several States was *in præsenti*, and upon identification of the lands thereunder in lawful mode, title thereto related back to the date of the grant.

The identification originally prescribed by the action of the Secretary of the Interior was changed as to such lands in California by the act of July 23, 1866, 14 Stat. 219, section four thereof prescribing new and additional modes of identification.

That act provided, among other things, that (1) all lands represented as swamp and overflowed on township plats, the surveys and plats of which townships had been made under the authority of the United States and approved, were to be certified to the State by the commissioner of the general land office within prescribed periods; and (2) existing State segregation maps and surveys of such lands found by the United States Surveyor General to conform to the existing system of the United States were directed to be made the basis of township plats, to be thereafter constructed and approved by that officer, and forwarded to the commissioner of the general land office for approval.

In 1864, United States subdivisional survey of the township embracing the land in controversy in this suit was made and approved by the United States surveyor general, and a copy of the plat thereof, also approved by him, was filed in the proper local land office. On such approved plat certain parts were colored green, and marked "swamp and overflowed land," and excluded from the estimated aggregate area of public lands shown thereon, and were included in the estimated area of swamp and overflowed land in that township. In August and September, 1864, under authority of state law, one Kile applied to purchase the land in controversy from the State under the swamp land grant, secured the requisite survey and the approval thereof by the State surveyor general; and in August, 1865, having made full payment to the State received the State's patent therefor. *Held*, that the title of the State was confirmed by the act of 1866, by the return of the land as swamp and overflowed on the survey of the United States and the township plat, approved by the United States surveyor general and filed in the local land office in 1864.

Prior to executive instructions of April 17, 1879, the commissioner's approval of the public surveys and plats was not required before filing thereof in the local offices of sale by the United States surveyor general, and on such filing the land became subject to sale, selection and disposal. Power to correct fraud or error therein existed in the commissioner, but where the survey and plat were correct they became final and effective when approved and filed in the local land office by the surveyor general.

Opinion of the Court.

Temporary withdrawal of the township plat prior to the passage of the act of 1866, did not defeat confirmation prescribed by that act in the present case, a certified copy of such plat having been substituted in its place and the survey thereof never having been disapproved nor changed otherwise than by the erasure of the words "swamp and overflowed" as to this and other tracts and the substitution on the plat of the words "public lands," under direction of the commissioner of the general land office given after his control over the matter had ceased. Official acceptance of the survey by the commissioner may be inferred from its adoption in making sales and issuing patents, if such approval be in fact necessary.

The homestead entry of plaintiff in error made subsequent to the making of the survey and filing of such township plat thereof in the local office, and subsequent to the state segregation survey, sale and patent of the land to Kile, and subsequent to the confirmatory act of 1866, was ineffectual against the right acquired by the State and its patentee.

Alleged inadvertence of the state court in entering judgment below for defendant for rents and profits cannot be reviewed here. Any inadvertence of the kind is only matter for consideration by the court below.

This was an action for the possession of land. The federal questions are stated in the opinion.

Mr. Henry Beard for plaintiff in error.

Mr. A. T. Britton and *Mr. A. B. Browne* for defendants in error.

Mr. Justice Field delivered the opinion of the court.

This is an action for the possession of a parcel of land of about eighty acres in the county of San Joaquin, California, being substantially the south half of the southeast quarter of section 11, in township 4, of that county.

The plaintiff in the court below, and in error here, asserted title to the premises under a patent of the United States issued to him in due form on the first of October, 1879, upon a homestead entry made by him in May, 1873, and commuted to a cash entry in November following.

The original defendant below, Joseph Kile, now deceased, and in whose place his executors Wilhoit and Thompson have been substituted, claimed the premises under a patent of Cali-

fornia, bearing date the 5th of August, 1865, conveying to him the premises as swamp and overflowed lands, and as part of the land granted to the State by the act of Congress of September 28, 1850. 9 Stat. 519, c. 84.

The action was brought in the Superior Court of the county of San Joaquin, where the issue was tried without the intervention of a jury, by stipulation of the parties. Special findings of fact were filed, upon which judgment for the plaintiff was rendered. On appeal to the Supreme Court of the State the judgment was reversed, and judgment ordered in favor of the defendants for the lands, and for the rents and profits thereof. To review this judgment the case is brought here on a writ of error. The question presented is the validity of this title under the patent of California. If the claim thereto was abandoned or overthrown, the right of the plaintiff to recover under the patent of the United States would be conceded.

To determine this question, a consideration must be had of the various proceedings taken to obtain the patent of the State, and the law bearing upon them. The act of Congress of September 28, 1850, granted to the several States of the Union all the swamp and overflowed lands within their limits, which, on the passage of the act, remained unsold, to enable them to construct the necessary levees and drains for the reclamation of such lands; and made it the duty of the Secretary of the Interior, as soon as practicable, to make out an accurate list and plats of the lands described, and transmit the same to the governors of the States, and upon their request to cause patents to be issued to the States therefor.

Soon after the passage of the act the question arose in each State as to the time the grant took effect — whether at the date of the act, or on the issue of the patent to the State upon the request of its governor after the list and plats of the lands had been made out by the Secretary of the Interior and transmitted to him. After much consideration by the officers of the department of the government under whose supervision the act was to be carried out, and by the courts of the several States in which such lands existed, it was held that the words

"are hereby granted" in the act imported a present grant, and not a promise of one in the future ; and that the title to the lands, therefore, passed to the State at once, their identification to be made by the action of the Secretary of the Interior, but when identified the title to relate back to the date of the act.

In the recent case of *Wright* v. *Roseberry*, 121 U. S. 488, the rulings of the officers of the Land Department, and of the courts of the States in which swamp and overflowed lands existed, by which the conclusion mentioned was reached, are stated with much fulness, and it is unnecessary to repeat what is there said. It is sufficient to observe that the construction thus given to the act is now the accepted law of the country.

But the enjoyment of the grant was greatly impeded by the delay of the Interior Department to make out and certify the lists required. This delay arose from many causes, some of which the secretary could not control, such as the insufficiency of the force under his command to make the required surveys and the necessary identification of the lands. The decision of this court in *Railroad Co.* v. *Smith*, 9 Wall. 95, tended in some degree to lessen the evil effects of the delay, in holding that when that officer had neglected or failed to make the identification, it was competent for the grantees of the State, in order to prevent their rights from being defeated, to identify the lands in any other appropriate mode which would effect that object. And in *Wright* v. *Roseberry* it was suggested that such mode of identification by the State was also permissible where the secretary declared his inability to certify the lands from any other cause than a consideration of their character — a suggestion followed in the decision of that case.

In consequence of the delays in certifying the lists and the inconveniences which followed, the legislatures of several States, in which such lands existed, undertook to identify the lands and dispose of them, and for that purpose passed various acts for their survey and sale and the issue of patents to purchasers. The conflicts which thus arose between parties

claiming under the State and parties claiming directly from the United States led to various acts of Congress for the relief of purchasers and locators of swamp and overflowed lands. Act of March 2, 1855, 10 Stat. 634, c. 147; Act of March 3, 1857, 11 Stat. 251, c. 117.

The inconvenience and conflicts mentioned were especially annoying and injurious to the State of California, for the great emigration to that State in 1850, and the years immediately following, created a call for lands of this description, not only because they were easily reclaimed, but because of their extraordinary fertility after reclamation. Accordingly, as early as 1855 its legislature, asserting her ownership of such lands, provided for their survey and sale, and for the issue of patents. Legislation was also had on that subject in 1857, 1858 and 1859. As great confusion had, from the causes mentioned, arisen in the title to such lands, and also to other lands in California claimed under grants of the United States, Congress, on July 23, 1866, passed an act, entitled "An Act to quiet Land Titles in California," 14 Stat. 218, c. 219, by which, among other things, the provisions of the original act of 1850 for the identification of swamp and overflowed lands in that State were changed. Their identification was no longer left to the Secretary of the Interior, but was made subject to the joint action of the state and the federal authorities. The fourth section, which related to those lands, provided as follows:

"That in all cases where township surveys have been, or shall hereafter be made under authority of the United States, and the plats thereof approved, it shall be the duty of the commissioner of the general land office to certify over to the State of California, as swamp and overflowed, all the lands represented as such, upon such approved plats, within one year from the passage of this act, or within one year from the return and approval of such township plats. The commissioner shall direct the United States surveyor general for the State of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said State; and where he shall find them to conform to the system of sur-

veys adopted by the United States, he shall construct and approve township plats accordingly, and forward to the general land office for approval: *Provided*, That in segregating large bodies of land, notoriously and obviously swamp and overflowed, it shall not be necessary to subdivide the same, but to run the exterior lines of such body of land. In case such State surveys are found not to be in accordance with the system of United States surveys, and in such other townships as no survey has been made by the United States, the commissioner shall direct the surveyor general to make segregation surveys, upon application to said surveyor general by the governor of said State, within one year of such application, of all the swamp and overflowed land in such townships, and to report the same to the general land office, representing and describing what land was swamp and overflowed under the grant, according to the best evidence he can obtain. If the authorities of said State shall claim as swamp and overflowed any land not represented as such upon the map or in the returns of the surveyors, the character of such land at the date of the grant, September twenty-eight, eighteen hundred and fifty, and the right to the same, shall be determined by testimony, to be taken before the surveyor general, who shall decide the same, subject to the approval of the commissioner of the general land office." 14 Stat. 219, c. 219, sec. 4.

By this section, rules or methods were established for the identification of swamp and overflowed lands in California which superseded all previous rules or methods for that purpose. It first enacted, that, in all cases where township surveys had been or should thereafter be made under the authority of the United States, and the plats thereof be approved, it should be the duty of the commissioner of the general land office to certify over to the State, as swamp and overflowed, all the lands represented as such upon the approved plats, within one year from the passage of the act, or within one year from the return and approval of such township plats.

The section then provided for the construction of township plats where none previously existed. It required the com-

missioner of the general land office to direct the United States surveyor general for California to examine the segregation maps and surveys of the swamp and overflowed lands made by the State, and directed that when he should find them to be in conformity with the system of surveys adopted by the United States he should construct and approve township plats accordingly and forward them to the general land office for approval. But in case such surveys should be found not in accordance with the system of United States surveys, and in other townships where no survey had been made by the United States, the commissioner was required to direct the surveyor general to make segregation surveys, upon application of the governor of the State, within one year, of all the swamp and overflowed lands in the township, and report the same to the general land office, representing and describing what land was swamp and overflowed according to the best evidence he could obtain. The section further provided that if the State should claim as swamp and overflowed any land not so represented upon such map or in the returns of the surveyors, then the character of such land at the date of the grant, and the right of the State thereto, were to be determined by testimony to be taken before the surveyor general, subject to the approval of the commissioner of the general land office.

With this brief review of the act of September 28, 1850, and of the fourth section of the act of July 23, 1866, we proceed to state what was done by the original defendant, Joseph Kile, to secure the title of the State. In April, 1864, the United States subdivisional survey of township 4 north, of range 5 east, of Mt. Diablo meridian, in the county of San Joaquin, was made, and the field and descriptive notes, together with the map or plat of the survey, were examined and approved, and the approval certified by the United States surveyor general for California. On the first of July following (1864) a copy of this examined and approved map or plat was filed in the United States district land office at Stockton, California, which district included the lands of that township, and a copy was returned to the general land office of the United States at Washington. The certificate of approval by the United States

surveyor of the plat of the survey, written upon its margin, was as follows:

"The above map of township No. 4 north, range No. 5 east, Mount Diablo meridian, is strictly conformable to the field-notes of the survey thereof on file in this office, which have been examined and approved. Surveyor General's Office, San Francisco, California, June 30, 1864.

"L. UPSON, *Surv. Gen. Cal.*"

Upon this approved map or plat the greater part of the lands of the township, including all of section 11, was colored green, and upon the face of the part thus colored the words "swamp and overflowed land" were written. The lands thus colored and marked were excluded from the estimated aggregate area of public lands and included in the estimated aggregate area of swamp and overflowed land.

In August, 1864, Kile made application in accordance with the provisions of the acts of the legislature of California to purchase from the State the southeast quarter of section eleven, as being part of the swamp and overflowed lands granted by the act of Congress; and, on the 18th of that month, the county surveyor of the county of San Joaquin made a survey and recorded in his office a plat and field-notes thereof, and certified and reported the same to the state surveyor general, in whose office they were filed and recorded on the 30th of September following. On that day, and after the state surveyor general had approved the survey, plat and field-notes, the State of California issued and delivered to Kile a certificate of purchase of the southeast quarter of section eleven, founded upon his application and the approved survey. The certificate set forth that Kile had made part payment of the purchase-price and was the purchaser of the land, and that on making full payment and surrendering the certificate he should receive a patent from the State.

On the 5th of August, 1865, Kile, having paid the residue of the purchase-money and surrendered the certificate, received from the State a patent for the land. The patent recites that

all the requirements of the act of Congress, as well as of the acts of the legislature of the State in relation to swamp and overflowed lands, had been complied with, and that the governor, by virtue of the authority vested in him, thereby bargained, sold, and conveyed to Kile the lands with the appurtenances.

These proceedings having been taken, and the patent issued, the first clause of section four of the act of Congress of July 23, 1866, operated to confirm the title of the patentee. That clause, as already stated, provided that in all cases where township surveys had been made, or should afterwards be made, under the authority of the United States and the plats thereof approved, it should be the duty of the commissioner of the general land office to certify over to the State, as swamp and overflowed, all the lands represented as such upon the approved plats, within one year from the passage of the act, or within one year from the return and approval of such township plats. The only objection urged against the operation of this provision is that the township plat was not in terms approved by the commissioner of the general land office. The clause mentioned requires no such approval of township plats which had then been made and approved by the surveyor general of the United States for California. The township surveys were made under the authority of the United States, and the plat thereof was approved by that authority, when they were made and approved by that officer. Only such township plats were to be submitted to the approval of the commissioner as should be subsequently made by that officer from the segregation maps and surveys of swamp and overflowed lands of the State after he had found the surveys to be in conformity with the system of surveys adopted by the United States; and such township plats as should be made by him when the segregation maps and surveys of the State were not in accordance with the United States system of surveys, or were of townships where no surveys at all had been made. Until April 17, 1879, it had not been the practice of the Land Department to require any specific approval by the commissioner, either of surveys of the public lands or of plats of townships in accordance therewith, made by the surveyor general of the

State, before they were deemed so far final as to sanction sales or selections of the lands surveyed and platted. It is true that wherever fraud or error existed in the action of the United States surveyor general for the State, the power of correction was vested in the commissioner, but where the survey was itself correct, and the township plat conformed thereto, they became final and effective when filed in the local land office by that officer.

In speaking of the laws and of the practice of the department on this subject, the late Secretary of the Interior, Mr. Schurz, in a communication to the commissioner of the general land office, under date of August 7, 1877, said:

"By the act of Congress, approved May 1, 1796, (1 Stat. 464,) 'providing for the sale of the lands of the United States in the territory northwest of the river Ohio and above the mouth of the Kentucky River,' the surveyor general was authorized to prepare plats of the townships surveyed, to keep one copy of the same in his office for public information, and to send other copies to the 'places of sale,' and to the Secretary of the Treasury. The present local land offices are equivalent to the 'places of sale' mentioned in the act of 1796, and, as a matter of practice, from that date to the present time the township plats prepared by the surveyor general have been filed by him with the local officers, who thereupon proceeded to dispose of the public lands according to the laws of the United States. There is nothing in the act of 1796, or in the subsequent acts, which requires the approval of the commissioner of the general land office before said survey becomes final and the plats authoritative. Such a theory is not only contrary to the letter and spirit of the various acts providing for the survey of the public lands, but is contrary to the uniform practice of this department. There can be no doubt but that under the act of July 4, 1836, reorganizing the general land office, the commissioner has general supervision over all surveys, and that authority is exercised whenever error or fraud is alleged on the part of the surveyor general. But when the survey is correct, it becomes final and effective when the plat is filed in the local office by that officer."

This view of the secretary was referred to and held to be correct in *Frasher* v. *O'Connor*, 115 U. S. 102, 114. This practice was changed by the Land Department in April, 1879, and communicated in its instructions to surveyors general on the 17th of that month. It was not until after such instructions that the duplicate plats filed in the local land offices were required to be previously approved by the commissioner of the general land office.

There is no finding, nor even any allegation, that the survey and plat of township four, in the county of San Joaquin, were not correct, or that they were disapproved by the Land Department. The only change made upon that plat consisted in an erasure of the designation that some of the lands were swamp and overflowed, and the substitution of a designation of them as public lands, the department having come to a different conclusion from that returned by the surveyor general years before, such conclusion being reached upon an inquiry made long after the department had ceased to have any control over the matter. The notes of the survey and the plat of the township remained precisely as they were when filed in the local land office on the 1st of July, 1864. But if an approval of the township plat by the commissioner of the general land office was necessary, it is to be found in the recognition of its correctness by the subsequent action of the commissioner. In *Wright* v. *Roseberry* there was no approval of the township plat in terms, but it was held to be an approved plat by the fact that it was officially used as such. 121 U. S. 516, 517.

In this case the original and official township plat was prepared by the surveyor general in triplicate; one of which was returned to the general land office of the United States, where it always remained, and one was filed in the local land office at Stockton. It is true that the latter one was afterwards, in 1865, withdrawn by the surveyor general from the local land office by order of the commissioner, and was not returned and filed in that office; but a copy of the plat which had been returned to the general land office, certified by the commissioner, and also by the surveyor general of California, as a

correct copy of the plat on file in that office, was subsequently filed in the local land office at Stockton. It does not appear in terms by whose order this subsequent filing was had, but it must be presumed to have been by direction of the commissioner of the general land office. It is not to be presumed that the parties in charge of the local land office would have allowed a copy of the township plat, which had been taken from its files by order of the commissioner, to be refiled without the authority of that officer. Besides, to that plat thus returned the commissioner referred when he directed the register of the land office at Stockton to make a change of the words "swamp or overflowed lands" written upon it to the words "public lands." And subsequently when a patent of the United States for the land was issued to the plaintiff Tubbs the land was described as embracing eighty acres "according to the official plat of the survey of the same lands returned to the general land office by the surveyor general." The one thus returned was a duplicate of the one originally filed in the local land office.

It is, therefore, conclusively established that such township plat was recognized by the Land Department at Washington as a correct plat, and used as such, which was the only approval of a similar plat in *Wright* v. *Roseberry*. This conclusion is strengthened by the fact that when subsequently the State authorities applied to the commissioner of the general land office to certify over to the State the lands represented upon the plat as swamp and overflowed the application was refused, not on the ground of any supposed error in such plat, but solely for the reason that the Land Department had already divested itself of authority by the issue of a patent to the plaintiff. If there had been any error in the plat which would have justified the action of the department, it would undoubtedly have been stated. When the plaintiff was allowed to make a homestead entry all control over the land had passed from the Land Department, and the title by virtue of proceedings under the state law had been confirmed by the act of Congress of July 23, 1866, and become vested in the defendant. That entry was not made until the 8th of May,

1873, several years after the official map of the township had been filed in the local land office at Stockton and in the general land office at Washington, and the issue of a patent by the State of California to the defendant Kile, and the passage of the act of Congress. Whether the township plat be considered as approved by the action of the surveyor general or by the subsequent recognition of its correctness by the commissioner of the general land office, when approved, the duty of the commissioner to certify over to the State the lands represented thereon as swamp and overflowed was purely ministerial. He could not defeat the title of the State by withholding such certificate, nor could he add to the title by giving it. Its only effect would have been to facilitate the proof of the vesting of the title in the State by its additional recognition of the land as that covered by the congressional grant of 1850. It would not have added to the completeness of the title. A strange thing it would be if the refusal of an officer of the government to discharge a ministerial duty could defeat a title granted by an act of Congress, and enable him to transfer it to parties not within the contemplation of the government. The judgment of the court below must, therefore, be affirmed.

As to the alleged inadvertence in the entry of judgment in favor of the defendant for rents and profits, we have only to say that if there be any such inadvertence, it is not a matter for revision by this court, but only for consideration by the court below. *Judgment affirmed.*

WHITEHEAD *v.* SHATTUCK.

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

No. 128. Argued and submitted January 6, 1891. — Decided January 26, 1891.

The bill alleged that the plaintiff was the owner in fee of the premises, but held the title as trustee; that notwithstanding his ownership of the property and his right to its immediate possession and enjoyment, the

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defendants claimed title to it and were in its possession, holding the same openly and adversely to him; that their claim of title was without foundation in law or equity; and that it was made in fraud of the rights of the plaintiff. To this bill the defendants demurred, on the ground, among others, that it appeared from it that the plaintiff had a plain, speedy and adequate remedy at law, by ejectment, to recover the real property described, and that it showed no ground for equitable relief. The demurrer was sustained. *Held*, that the ruling of the court below was right.

When the right set up by the plaintiff is a title to real estate, and the remedy sought is its possession and enjoyment, that remedy should be sought at law, where both parties have a constitutional right to call for a jury.

The provision in the Code of Iowa that "an action to determine and quiet the title to real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession," although construed by the courts of that State as authorizing a suit in equity to recover possession of real estate from the occupant in possession of it, does not enlarge the equity jurisdiction of federal courts in that State, so as to give them jurisdiction over a suit in equity in a case where a plain, adequate and complete remedy may be had at law.

Holland v. *Challen*, 110 U. S. 15, explained and distinguished from this case.

This was a suit in equity to quiet the title of the plaintiff, as trustee of the Des Moines and Fort Dodge Railroad Company, a corporation of Iowa, to certain real property in the county of Humboldt in that State, of the value of five thousand dollars.

The bill alleged that the plaintiff was the owner in fee of the premises, but held the title as trustee aforesaid; that notwithstanding his ownership of the property and his right to its immediate possession and enjoyment, the defendants claimed title to it and were in its possession, holding the same openly and adversely to him; that their claim of title and right of possession was founded upon a preëmption and homestead claim, and entry thereunder, made in the United States land office, a certificate of such entry given by that office, and a patent issued by the Land Department of the United States of the land as subject to entry; and also upon a subsequent deed of the Iowa Homestead Company, the grantee of the Dubuque and Sioux City Railroad Company, which latter company claimed title under the act of Congress of May, 1856,

making a grant of land to Iowa to aid in the construction of certain railroads in that State, and a certificate of the proper officer of the Land Department of the United States setting apart the lands to that company as a portion of the grant.

The bill charged that the claim and pretended title of the defendants were without foundation in law or equity; that they were made in fraud of the rights of the plaintiff; that the preëmption and homestead claim, and entry thereunder, and the certificate of entry of the land office, and the patent of the United States, were fraudulently made, giving as a reason therefor that the land thus entered and patented was not at the time subject to entry and patent, and that the deed of the Iowa Homestead Company conveyed no title, for the reason alleged that the land was no part of the grant to the State; and that these evidences of title were procured without legal right and in violation of law, but were clouds upon the plaintiff's title, and interfered with and prevented the sale of his property. He therefore prayed that the certificate of entry, and the patent of the land, and the certificate of the Land Department that the land was a part of the grant to the State of Iowa, and the deed of the Homestead Company, might be annulled and cancelled, and the cloud upon his title caused thereby removed, and the title to the premises be established and quieted in him.

To the bill the defendants demurred, on the ground, among others, that it appeared from it that the plaintiff had a plain, speedy and adequate remedy at law, by ejectment, to recover the real property described, and that it showed no ground for equitable relief. The demurrer was sustained by the court below, and a decree entered dismissing the bill. From this decree the plaintiff appealed to this court.

Mr. J. F. Duncombe for appellant.

The Iowa statute under which this suit is brought, gives the right to bring an action "to determine and quiet the title of real property," "whether in or out of possession," to "any one having or claiming an interest" in real property.

Argument for Appellant.

The case of *Lewis* v. *Soule*, 52 Iowa, 11, holds that an action to quiet title to real property may be brought against a person in the possession thereof, under this statute, "in all cases where the defendant makes some claim adverse to the estate of plaintiff." The defendants claimed to be the *owners*, and that the court held to be sufficient. The same doctrine is held in *Lees* v. *Wetmore*, 58 Iowa, 170; and in *Wyland* v. *Mendell*, 78 Iowa, 739. This is our case precisely, passed upon by the Iowa courts.

In the case of *Holland* v. *Challen*, 110 U. S. 15, the court construed the statute of the State of Nebraska, which reads as follows: "That an action may be brought and prosecuted to final decree or order, by any person or persons, *whether in actual possession or not*, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest and quieting the title to such real estate." The wording of this statute and that of sec. 3273, Code of Iowa, is somewhat different, but the substance and meaning of the two statutes are the same.

In *Holland* v. *Challen* this court, as we understand it, held that where there is a statute creating or enlarging an equitable right, a United States Court of Equity has jurisdiction to enforce that right precisely the same as a court of equity would have jurisdiction to enforce any other equitable right, and that such "equitable rights may be administered by the Circuit Courts of the United States as well as by the courts of the State."

Now does our Iowa statute enlarge the equitable right to have one's title quieted in an action in chancery so as to include a case where the complainant is not in possession and the defendant is in possession, claiming title adverse to complainant? Fortunately the Supreme Court of the United States has answered that question in *Reynolds* v. *Crawfordsville First National Bank*, 112 U. S. 405. That was a bill in equity to quiet title and restrain waste filed by the bank against the appellant, Reynolds. The prayer of the bill was for a decree quieting the title of the bank in the property and

enjoining waste by Reynolds. A decree was entered quieting complainant's title and declaring the deed to Reynolds void — this being the deed complained of in the bill of complaint under which he claimed title. Reynolds appealed. The Supreme Court affirmed the decree.

These cases certainly hold that the United States courts will enforce these same equitable rights given by a state statute, when, by the decisions of the state court construing such a statute, complainant avers sufficient in his bill to give him the right in the state courts, to maintain an equitable action; which has been done in this case.

Mr. Charles A. Clark for appellees.

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

The facts set forth in the bill of the plaintiff clearly show that he has a plain, adequate and complete remedy at law for the injuries of which he complains. He alleges that he is the owner in fee, as trustee, of certain described lands in Iowa, and his injuries consist in this: that the defendants are in the possession and enjoyment of the property, claiming title under certain documents purporting to transfer the same, which are fraudulent and void. If the owner in fee of the premises, he can establish that fact in an action at law; and if the evidences of the defendants' asserted title are fraudulent and void, that fact he can also show. There is no occasion for resort to a court of equity, either to establish his right to the land or to put him in possession thereof.

The sixteenth section of the Judiciary Act of 1789, 1 Stat. 82, c. 20, declared "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law," and this provision has been carried into the Revised Statutes, in section 723. The provision is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedies, but only expressive of the law which has governed proceedings in equity ever since their adoption in the

courts of England. The term "speedy" as used in the demurrer is embraced by the term "complete" in the statute.

The Seventh Amendment of the Constitution of the United States declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." That provision would be defeated if an action at law could be tried by a court of equity, as in the latter court a jury can only be summoned at its discretion, to ascertain special facts for its enlightenment. *Lewis* v. *Cocks*, 23 Wall. 466, 470; *Killian* v. *Ebbinghaus*, 110 U. S. 568, 573; *Buzard* v. *Houston*, 119 U. S. 347, 351. And so it has been held by this court "that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." *Hipp* v. *Babin*, 19 How. 271, 278.

It would be difficult, and perhaps impossible, to state any general rule which would determine, in all cases, what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that, where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class. The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury.

What we have thus said will be sufficient to dispose of this case; but some consideration is due to the arguments of counsel founded upon the statutes of Iowa, and the principle supposed to have been established by this court in the decision of the case of *Holland* v. *Challen*, 110 U. S. 15, upon which the plaintiff relies.

The Code of Iowa enacts that "an action to determine and quiet the title to real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession," implying that the action may be brought against one in possession of the property. And such has been the construction of the provision by the courts of that State. *Lewis* v. *Soule*, 52 Iowa, 11; *Lees* v. *Wetmore*, 58 Iowa, 170. If that be its meaning, an action like the present can be maintained in the courts of that State, where equitable and legal remedies are enforced by the same system of procedure, and by the same tribunals. It thus enlarges the powers of a court of equity, as exercised in the state courts; but the law of that State cannot control the proceedings in the federal courts, so as to do away with the force of the law of Congress declaring that "suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law," or the constitutional right of parties in actions at law to a trial by a jury.

The State, it is true, may create new rights and prescribe the remedies for enforcing them, and, if those remedies are substantially consistent with the ordinary modes of proceeding in equity, there is no reason why they should not be enforced in the courts of the United States, and such we understand to be the effect of the decision in *Clark* v. *Smith*, 13 Pet. 195, and *In re Broderick's Will*, 21 Wall. 503.

In *Holland* v. *Challen*, 110 U. S. 15, a bill was filed to quiet title under a statute of Nebraska, which provided that an action might be brought by any person, in possession or not, claiming title to real estate, against any person who claimed an adverse estate or interest therein, for the purpose of determining such estate or interest and quieting the title. The bill alleged that the plaintiff was the owner in fee simple, and entitled to the possession of the real property described. It then set forth the origin of his title, and alleged that the defendant claimed an adverse estate or interest in the premises, and that this claim so affected his title as to render a sale or

other disposition of the property impossible, and disturbed him in his right of possession. He therefore prayed that the defendant might be required to show the nature of her adverse estate or interest; that the title of the plaintiff might be adjudged valid and quieted as against her and parties claiming under her, and his right of possession assured; and that the defendant might be decreed to have no estate in the premises and be enjoined from in any manner injuring or hindering the plaintiff in his title and possession. The defendant demurred to the bill, on the ground that the plaintiff had not made or stated such a case as entitled him to the discovery or relief prayed. The court below sustained the demurrer, dismissed the bill, and the case was brought to this court, where the decree was reversed and the bill sustained.

It was urged that the title of the plaintiff to the property had not been by prior proceedings judicially adjudged to be valid, and that he was not in possession of the property, the contention of the defendant being that, when either of these conditions existed, a court of equity would not interpose its authority to remove a cloud upon the title of the plaintiff and determine his right to the possession of the property. The court replied that "the statute of Nebraska enlarges the class of cases in which relief was formerly afforded by a court of equity in quieting the title to real property. It authorizes the institution of legal proceedings not merely in cases where a bill of peace would lie, that is, to establish the title of the plaintiff against numerous parties insisting upon the same right, or to obtain repose against repeated litigation of an unsuccessful claim by the same party; but also to prevent future litigation respecting the property by removing existing causes of controversy as to its title, and so embraces cases where a bill *quia timet* to remove a cloud upon the title would lie." p. 18.

The court then explained that a bill of peace would lie only where the plaintiff was in possession and his right had been successfully maintained, and that the equity of the plaintiff in such cases arose from the protracted litigation for the possession of the property which the action of ejectment at common

law permitted; and that to entitle the plaintiff to relief in such cases there must be a concurrence of three particulars — the possession of the property by the plaintiff, the disturbance of his possession by repeated actions at law, and the establishment of his right by successive judgments in his favor. Upon these facts appearing, the court would interpose and grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. It was also observed, that a change in the form of the action for the recovery of real property had taken place from that which formerly existed, and that the judgment rendered in such cases in some states became a bar to future litigation upon the subjects determined; and that in such cases there could be no necessity of repeated adjudications at law upon the right of the plaintiff, as a preliminary to his invoking the jurisdiction of a court of equity to quiet his possession against an asserted claim to the property. The court also explained when a bill *quia timet* would lie, and in what respect such a bill differed from a bill of peace. It was brought, it said, not so much to put an end to vexatious litigation respecting the property, as to prevent future litigation, by removing existing causes of controversy as to its title. It was designed to meet anticipated wrongs or mischiefs, the jurisdiction of the court being invoked because the party feared future injury to his rights and interests. To maintain a suit of this character, it was said, it was also generally necessary that the plaintiff should be in possession of the property, and, except where the defendants were numerous, that his title should have been established at law, or be founded on undisputed evidence or long-continued possession.

The statute of Nebraska authorized a suit in either of these classes of cases, without any reference to any previous judicial determination of the validity of the plaintiff's right, and without any reference to his possession; and the court pointed out the many advantages which would arise by allowing courts to determine controversies as to the title to property, even when neither party was in possession, referring particularly to what is a matter of every-day observation, that many lots of land in our cities remain unimproved because of conflicting claims to

them, the rightful owner hesitating to place valuable improvements upon them, and others being unwilling to purchase them, much less to erect buildings upon them, with the certainty of litigation and possible loss of the whole; and observing that what is true of lots in cities, the ownership of which is in dispute, is equally true of large tracts of land in the country which are unoccupied and uncultivated, because of the unwillingness of persons to take possession of such land, and improve it in the face of a disputed claim to its ownership. An action for ejectment, said the court, would not lie where there is no occupant; and if no relief can be had in equity because the party claiming ownership is not in possession, the land must continue in its unimproved condition. It was, therefore, manifestly for the interest of the community that conflicting claims to property thus situated should be settled, so that it might be subjected to use and improvement. It was, said the court, to meet cases of this character, that statutes, like the one of Nebraska, had been passed by several States, and there was no good reason why the right to relief against an admitted obstruction to the cultivation, use and improvement of lands thus situated in the States should not be enforced by the federal courts when the controversy to which it might give rise was between citizens of different States. All that was thus said was applied simply to the case presented where neither party was in possession of the property. No word was expressed, intimating that suits of the kind could be maintained in the courts of the United States where the plaintiff had a plain, adequate and complete remedy at law; and such inference was specially guarded against. Said the court, "No adequate relief to the owners of real property against the adverse claims of parties not in possession can be given by a court of law. If the holders of such claims do not seek to enforce them, the party in possession, or entitled to possession — the actual owner of the fee — is helpless in the matter, unless he can resort to a court of equity. It does not follow that by allowing, in the federal courts, a suit for relief under the statute of Nebraska, controversies properly cognizable in a court of law will be drawn into a court of equity. There can be no

controversy at law respecting the title to or right of possession of real property, when neither of the parties is in possession. An action at law, whether in the ancient form of ejectment, or in the form now commonly used, will lie only against a party in possession. Should suit be brought in the federal court, under the Nebraska statute, against a party in possession, there would be force in the objection that a legal controversy was withdrawn from a court of law; but that is not this case, nor is it of such cases we are speaking." It is thus seen that the very case that is now before us is excepted from the operation of the ruling in *Holland* v. *Challen*, or at least was designedly left open for consideration whenever similar relief was sought where the defendant was in possession of the property.

Nor can the case of *Reynolds* v. *National Bank*, 112 U. S. 405, be deemed to sustain the plaintiff's contention. It was there only held that the legislation of the State may be looked to in order to ascertain what constitutes a cloud upon a title, and that such cloud could be removed by a court of the United States sitting in equity in a suit between proper parties. The question did not arise as to whether the plaintiff had a plain, adequate and complete remedy at law, but whether a suit to remove the cloud mentioned would lie in a federal court. Nothing was intended at variance with the law of Congress excluding the jurisdiction of a court of equity where there is such a full remedy at law, or in conflict with the constitutional guaranty of the right of either party to a trial by jury in such cases. In *Frost* v. *Spitley*, 121 U. S. 552, 557, subsequently decided, the court referred to *Holland* v. *Challen* as authorizing a bill in equity to quiet title in the Circuit Court of the United States for the District of Nebraska by a person not in possession, "if the controversy is one in which a court of equity alone can afford the relief prayed for," recognizing that the decision in that case went only to that extent.

Judgment affirmed.

COOK v. UNITED STATES.

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

No. 1311. Argued December 11, 12, 1890. — Decided January 26, 1891.

By the act of March 1, 1889, 25 Stat. 783, c. 333, "to establish a United States court in the Indian Territory, and for other purposes," the strip of public land lying south of Kansas and Colorado, and between the one hundredth and the one hundred and third meridians, and known as No Man's Land, was brought within the jurisdiction of the court for the Indian Territory so established, and was attached for limited judicial purposes to the Eastern District of Texas.

The history of and the legislation concerning the Indian Territory considered and reviewed.

By the act of March 1, 1889, 25 Stat. 783, c. 333, the intention of Congress to confer upon the Circuit Court of the United States in the Eastern District of Texas power to try defendants for the offence of murder, committed before its passage, where no prosecution had been commenced, was so clearly expressed as to take it out of the well settled rule that a statute should not be interpreted to have a retroactive operation where vested rights are injuriously affected by it; and it must be construed as operating retroactively.

The provision in Article 3 of the Constitution of the United States as to crimes "not committed within any State" that "the trial shall be at such place or places as the Congress may by law have directed" imposes no restriction as to the place of trial, except that the trial cannot occur until Congress designates the place, and may occur at any place which shall have been designated by Congress previous to the trial; and it is not infringed by the provision in the act of March 1, 1889, 25 Stat. 783, c. 333, conferring jurisdiction upon the Circuit Court in the Eastern District of Texas to try defendants for the offence of murder committed before its passage.

The Sixth Amendment to the Constitution, providing for the trial in criminal prosecutions by a jury "of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," has reference only to offences against the United States committed within a State, and is not infringed by the act of March 1, 1889, 25 Stat. 783, c. 333.

The act of March 1, 1889, 25 Stat. 783, c. 333, although it subjects persons charged with murder committed in a place under the exclusive jurisdiction of the United States, but not within any State, to trial in a judicial district different from the one in which they might have been tried at

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the time the offence was committed, is not repugnant to Art. I, Sec. 9 of the Constitution of the United States as an *ex post facto* law; since an *ex post facto* law does not involve, in any of its definitions, a change of the place of trial of an alleged offence, after its commission.

The Circuit Court of the United States for the Eastern District of Texas, held at Paris, in that District, at the October Term, in 1889, had jurisdiction of an indictment for murder, charged to have been committed in the country known as "No Man's Land" July 25, 1888.

The Attorney General having, by his brief, confessed, as it was his duty to do, that there was error in an important ruling in the court below, entitling the defendants to a reversal, this court reverses the judgment of that court, and remands the case for a new trial.

THERE was, in July, 1888, a parallelogram of unorganized public land extending from the 100th meridian on the east to the 103d on the west, and from latitude 36° 30′ to latitude 37°. It was called "Public Land" upon the maps, but was commonly known as "No Man's Land." It was originally a part of the Republic of Texas; but, in the annexation, the parallel of 36° 30′ was made the northerly line of the State, presumably in order to apply the rule of the Missouri Compromise. Kansas and Colorado were subsequently organized, in part out of this acquired territory north of 36° 30′, with their southern boundaries on the 37th parallel; the west line of the Indian Territory was fixed at the 100th meridian; and the eastern boundary of New Mexico was fixed on the 103d meridian, thus leaving this small strip of land not included in any organized State or Territory.

By the act of March 1, 1889, 25 Stat. 783, c. 333, it was provided that "a United States court is hereby established whose jurisdiction shall extend over the Indian Territory bounded as follows, to wit: north by the State of Kansas, east by the States of Missouri and Arkansas, south by the State of Texas, and west by the State of Texas and the Territory of New Mexico." It will be seen that the Indian Territory as thus defined on the west stretches to the border of New Mexico. To do this its northern line must run upon a portion of the southern line of Colorado. But Colorado is not mentioned in the act; only Kansas.

Under the provisions of the 17th section of that act it was

provided that this part of the Indian Territory should "from and after the passage of this act be annexed to and constitute a part of the Eastern Judicial District of the State of Texas for judicial purposes." p. 786.

By the act of May 2, 1890, 26 Stat. 81, c. 102, this parallelogram was made a part of the Territory of Oklahoma; but by section 9 of that act it was provided that crimes committed therein "prior to the passage of this act shall be tried and prosecuted and proceeded with, until finally disposed of, in the courts now having jurisdiction thereof, as if this act had not been passed." 26 Stat. 86.

The plaintiffs in error were, at October term, 1889, of the Circuit Court of the United States for the Eastern District of Texas, sitting at Paris in that State indicted for murder committed in No Man's Land. The allegations in the indictment were as follows:

"Eastern District of Texas, ss.: The grand jurors of the United States of America, duly elected, impanelled, tried, sworn and charged to inquire into and due presentment make of offences against the laws of the United States of America in and for the district and circuit aforesaid, on their oath in said court present: That heretofore, to wit, on the twenty-fifth day of July in the year of our Lord one thousand eight hundred and eighty-eight, in that section of the country lying between Kansas and Texas, bounded on the west by New Mexico, and extending east to the hundredth meridian of longitude, commonly called the Neutral Strip or 'No Man's Land,' in the Indian Territory, the same being attached to and constituting part of the Eastern District of Texas for judicial purposes, and within the jurisdiction of this court," etc. — (then charging the homicide).

The trial, at which various exceptions to the ruling of the court were duly taken, resulted in conviction and sentence, to review which this writ of error was brought. Several assignments of error were made, but the only ones considered by this court were those which related to the jurisdiction of the court below, and the following:

"*Tenth.* The court erred in permitting the counsel for the

government to read from the report of Attorney General Bradford in the hearing of the jury certain statements, then to ask the witness Bradford if he did not make the statements so read in said report, and in overruling the objections of plaintiffs in error thereto. And the court erred in admitting in evidence, over the objections of plaintiffs in error, certain parts of said report, as shown of record, because said witness Bradford was placed upon the witness stand by the government as a rebutting witness after counsel for government knew what he would testify to, and said witness had testified as such rebutting witness to the exact facts that the government's counsel had expected him to testify to; and because said witness had stated that plaintiff in error, C. E. Cook, did not state to him in language or in substance the statement contained in said report; because what witness stated in said report was not a report required of him in his official capacity as Attorney General of the State of Kansas. Neither said report nor any part thereof was relevant or competent, and is hearsay, and ought not to have been admitted in evidence."

Mr. George R. Peck and *Mr. John F. Dillon*, (with whom were *Mr. William R. Day*, *Mr. Joseph Frease* and *Mr. W. H. Rossington*, on the brief,) for plaintiffs in error, made the following points upon the question of jurisdiction:

The Circuit Court of the United States for the Eastern District of Texas had no jurisdiction of the offence charged in the indictment for the following distinct reasons:

(1) The Neutral Strip or "No Man's Land" at the date of the homicide alleged in the indictment (July 25, 1888) was outside of the jurisdiction of any particular state or federal district; and no court of the United States had jurisdiction to prosecute criminally the alleged homicide; or, if any court had jurisdiction, it was not the Circuit Court for the Eastern District of Texas, but was the district where the defendants were found or arrested.

(2) The allegation in the indictment on which the court below assumed jurisdiction, viz., that on the 25th day of July,

1888, the Neutral Strip or "No Man's Land" was "in the Indian Territory, the same being attached to and constituting part of the Eastern District of Texas for judicial purposes, and within the jurisdiction of this court," is untrue in point of fact and of law.

(3) If "No Man's Land" was, at the date of the commission of the alleged homicide (July 25, 1888), within or attached to any judicial district of the United States, it was the *Northern* District of Texas and not the Eastern District of Texas.

(4) The Circuit Court of the United States for the Eastern District of Texas assumed jurisdiction by virtue of sec. 18 of the act of March 1, 1889, 25 Stat. 786. If this act operated to extend the jurisdiction of that court to offences committed in No Man's Land, it did so only as to offences committed after the approval of that act. It could not, under the Constitution, make a past offence triable in the district created by that act instead of the district which existed when the offence was committed; nor could the act be made retrospective, so as to embrace an offence committed before its passage.

The legislation bearing upon these propositions is as follows:

Indian Territory. 4 Stat. 729, c. 161; 5 Stat. 680, c. 103; 16 Stat. 362, c. 296, § 12; 18 Stat. 51, c. 205; 18 Stat. 420, c. 132; 19 Stat. 176, c. 289; 19 Stat. 254, c. 72; 19 Stat. 272, c. 101; 19 Stat. 323, c. 103; 19 Stat. 338, c. 103; 19 Stat. 356, c. 105; 22 Stat. 405, c. 13; 25 Stat. 783, c. 333.

No Man's Land. 5 Stat. 797, Resolution No. 8; 9 Stat. 446, c. 49; 4 Stat. 729, c. 161; 5 Stat. 680, c. 103; 19 Stat. 230, c. 41; 22 Stat. 400, c. 13; 20 Stat. 318, c. 97; 25 Stat. 783, c. 333.

On this legislation we submit that it is entirely clear that the allegations in the indictment that the Neutral Strip or "No Man's Land" was, on July 25, 1888 (the date of the homicide), in the "Indian Territory," and that the same was attached to and constituted part of the *Eastern* Judicial District of Texas, are, and each of those allegations is, wholly without foundation. On the contrary, it appears from the foregoing legislation that on the 25th of July, 1888, "No

Man's Land" was no part of the Indian Territory, and was not at that time situate in or annexed to any judicial district of the United States. It was not part of the Indian Territory, or part of the Indian Country, as it stood annexed by the acts of 1834 and 1844, noticed above, to the District of Arkansas, and it was no part of the "Indian Territory," as it was by the act of January 31, 1877, annexed by the then well known name, "Indian Territory," to the Western District of Arkansas; it was not part of the "Indian Territory" within the meaning of the act of January 6, 1883, which divided the jurisdiction over the Indian Territory between Kansas and the *Northern* District of Texas. The result is, that it was not, on July 25, 1888, the date of the alleged homicide, part of any judicial district. If this be so, the conclusion necessarily follows that the Circuit Court for the Eastern District of Texas had no jurisdiction.

But we contend further that no federal court has jurisdiction.

The Constitution of the United States provides (Sec. 2, Art. III,) that when crimes are not committed within any State "the trial shall be at such place or places as the Congress may by law have directed." This means that the place or places of trial must have been directed by Congress by statute prior to the commission of the offence.

Section 730 of the Revised Statutes provides that the trial of all offences committed on 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. It has been held that this refers only to maritime offences, and not to offences committed on land. *United States* v. *Alberty*, Hemp. 444. And in *Ex parte Bollman*, 4 Cranch, 75, it was held that if an offence be committed on land, the offender must be tried by the court having jurisdiction over the territory where the offence was committed.

We therefore submit that "No Man's Land" was on July 25, 1888, the date of the alleged homicide, no part of any judicial district, and that Congress had not previously to that time prescribed any place for the trial of offences committed

within that region; and that, under the Constitution, Congress could not, if it had undertaken to do so (which it did not), afterwards prescribe a place of trial. Such act would not only be in conflict with Sec. 2, Art. III, of the Constitution, above referred to, but would also be *ex post facto* within the meaning of the Constitution, as is shown by the decision and reasoning in *Kring* v. *Missouri*, 107 U. S. 221.

But if we are mistaken in this, and if section 730 of the Revised Statutes does apply to offences committed on land, outside of any particular State or district, then the distinct provision is that the trial "shall be in the district where the offender is found, or into which he is first brought;" and that fact ought to be alleged in the indictment; certainly in some proper mode to appear of record. Such allegation in the indictment would seem to be necessary in order to show that the crime is within the limited jurisdiction of the particular federal court. In point of fact the defendants were residents of and were arrested in, Kansas, and applied to Mr. Justice Brewer to be released on habeas corpus. *In re Jackson*, 40 Fed. Rep. 372.

We have thus far considered the question on the hypothesis that at the time the homicide was committed, No Man's Land was within no judicial district. But if we are mistaken in this position, then it belonged, if to any, to the *Northern* District of Texas by virtue of the act of January 6, 1883, 22 Stat. 400, c. 13. The result would be that the *Eastern* District of Texas would have no jurisdiction; and, confessedly, it has none, except it is conferred by the eighteenth section of the act of March 1, 1889, 25 Stat. 783, which was passed after the date of the alleged homicide.

Nothing seems to us to be plainer than that the act of 1889 does not undertake to give any jurisdiction to the Circuit Court for the Eastern District of Texas as to past offences. The only language relating to jurisdiction is the following: "And the United States Courts herein provided to be held at Paris shall have exclusive original jurisdiction of all offences against the laws of the United States within the limits of that portion of the Indian Territory attached to the Eastern Judi-

cial District of the State of Texas by the provisions of this act," et cet.

There is no reason to suppose that Congress in the use of the words that the "Court herein provided to be held at Paris shall have exclusive original jurisdiction of all offences against the laws of the United States," meant to refer to past offences. There is not the slightest evidence or indication of any such intention to be found in the act. The ordinary principles of construction apply, namely, that a statute shall have a prospective operation only, unless in clear terms it is given a retrospective operation.

It is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively. *Chew Heong* v. *United States*, 112 U. S. 536; *United States* v. *Starr*, Hemp. 469.

But if the act of March 1, 1889, 25 Stat. 783, shall be construed to be retrospective, and to have been intended to apply to offences committed in "No Man's Land" prior to the passage of that act, the said act is void because in conflict with Sec. 2, Art. III, of the Constitution, for the reason that Congress had no power to fix or change the district in which the trial should be had after the commission of the offence.

This section provides that in the States crimes shall be prosecuted within the States where committed, and when the crime is committed without the States the trial shall be at such place or places as the Congress may by law have directed. When introduced the last clause read as follows: "As the legislature may direct." It was changed so as to read "as the Congress may by law have directed."

The object of this provision is plain. It was intended to secure to the accused a trial by jury in the place where the crime was committed. If Congress might fix the place of trial after the commission of an offence it could provide for trial in a district remote from the residence of the accused, at such a distance from the witnesses as to deprive him of their presence and testimony. All such attempts are rendered void

by the constitutional provisions above quoted. *United States* v. *Maxon*, 5 Blatchford, 360; *Gut* v. *The State*, 9 Wall. 35, 37; *Ex parte Devoe M'f'g Co.*, 108 U. S. 401, 417.

Mr. Attorney General and *Mr. Solicitor General* for defendants in error. Their brief contained the following paragraphs, entitled "Confession of error."

The admission of the report of the Attorney General of Kansas upon the murder, and the charge of the court to the jury with respect to the effect thereof, were error prejudicial to the defendants below. . . .

It will be seen from the foregoing that the government was permitted to contradict its own witness by introducing a written statement signed by him, made at another time, and that this was done without any professional statement to the court by counsel for the government that they were surprised and misled into calling him. Such a course is contrary to all the rules of evidence. . . . It is not necessary to discuss the question whether the charge was erroneous. It was grossly so, and must have been very prejudicial. It was the admission of the purest hearsay evidence upon the crucial point in the case.

Mr. Justice Harlan delivered the opinion of the court.

The plaintiffs in error, with others, were indicted in the court below at its October term, 1889, and were convicted and sentenced to suffer death, for the crime of murder alleged to have been committed on the 25th day of July, 1888, in that part of the United States designated in numerous public documents as the Public Land Strip, but commonly called No Man's Land. It is 167 miles in length, 34½ miles in width, lies between the 100th meridian of longitude and the Territory of New Mexico, and is bounded on the south by that part of Texas known as the Panhandle, and by Kansas and Colorado on the north.

The prosecution was based upon section 5339 of the Revised Statutes, providing that "every person who commits murder

within any fort, arsenal, dock-yard, magazine or in any other place or district of country under the exclusive jurisdiction of the United States, . . . shall suffer death;" and upon the act of Congress of March 1, 1889, establishing a court of the United States for the Indian Territory and for other purposes, and attaching a part of that Territory, for limited judicial purposes, to the Eastern District of Texas. 25 Stat. 783, c. 333.

The principal assignment of error is based upon these general propositions: That at the date of the alleged homicide the Public Land Strip was not within the jurisdiction of any particular state or federal district, and that no court of the United States had jurisdiction to try the alleged offence, or if any court had jurisdiction it was not the court below, but the Circuit Court of the United States for the Northern District of Texas, or that of the District of Kansas in which the defendants were found and arrested; and that if the above act of March 1, 1889 — under which alone this prosecution was conducted — placed the Public Land Strip within the limits of the Eastern District of Texas, it did not, and consistently with the Constitution of the United States could not, give the Circuit Court for that district jurisdiction of offences committed prior to its enactment.

Did Congress intend to attach the Public Land Strip to the Eastern District of Texas for any purpose? That necessarily is the question to be first considered. And it must be determined without reference to the act of May 2, 1890, providing a temporary government for Oklahoma; for that act, while including this strip within the Territory of Oklahoma, declares that all "crimes committed in said Territory" prior to its passage "shall be tried and prosecuted, and proceeded with until finally disposed of, in the courts now [then] having jurisdiction thereof," as if that act had not been passed. 26 Stat. 81, 86, c. 182, §§ 1, 9. We shall be aided in the solution of the question of jurisdiction by recalling the history of the Public Land Strip, and various acts of Congress, preceding that of 1889, which are supposed to have some bearing upon this case.

The Public Land Strip was once a part of the possessions of

Mexico. This appears from the treaty of January 12, 1828, between the United States of America and the United Mexican States, confirming the previous treaty of February 22, 1819, with the Monarchy of Spain. 8 Stat. 372, 374. When Texas achieved its independence this strip was within its limits. Indeed, the Republic of Texas originally embraced the present territory of the State of Texas, as well as parts of what now constitutes New Mexico, Arizona, Colorado and Kansas. On the day of its admission into the Union, by the Joint Resolution of December 29, 1845, the judicial District of Texas was established, embracing the entire State. 9 Stat. 1, 108.

Congress, by an act of September 9, 1850, 9 Stat. 446, c. 49, made certain propositions to Texas, one of which was that its boundary on the north should commence at the point where the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and run from that point due west to the meridian of one hundred and three degrees; thence due south to the thirty-second degree of north latitude; thence on the latter parallel to the Rio Bravo del Norte; and thence with the channel of that river to the Gulf of Mexico. This proposition was accepted by Texas. Oldham and White's Digest Laws of Texas, p. 55. By the same act, § 2, the eastern boundary of New Mexico was established on the one hundred and third meridian. The remaining territory of Texas, as it was when admitted into the Union, passed by that act under the jurisdiction of the United States. The Territory of Kansas was organized by the act of May 30, 1854, c. 59, § 19, 10 Stat. 277, 283, its southern line being fixed on the 37th parallel of north latitude. The Territory of Colorado was organized by an act approved February 28, 1861, 12 Stat. 172, c. 59, its eastern boundary being on the 102d meridian, and its southern boundary being on the 37th parallel of north latitude. Ib. § 1. The result of all these enactments was that the body of public lands, known as the Public Land Strip, was left outside of Texas as well as of the Territories of New Mexico, Kansas and Colorado.

By the act of February 21, 1857, the State of Texas was divided into two judicial districts, the Western and the Eastern. 11 Stat. 164, c. 57. The Northern District was established by an act passed February 24, 1879, with courts at Waco, Dallas County, and Graham, Young County, embracing one hundred and ten counties by name, including Sherman, Hansford, Ochiltree and Lipscomb in the panhandle, immediately south of the Public Land Strip, and Hemphill, Wheeler, Collingsworth and Childress immediately west of the 100th meridian, and Hardeman, Wilbarger, Wichita, Clay, Montague, Cooke, Grayson, Fannin and Lamar immediately south of the Indian Territory, in the central and eastern parts of Texas, but excluding the counties of Red River and Bowie in the latter State near the Arkansas line. The same act enlarges the Eastern District of Texas, and designates all the counties that should thereafter compose the Eastern and Western Districts, respectively. Under this act the Eastern District embraced, among others, the counties next to Louisiana and Arkansas, including Red River and Bowie. 20 Stat. 318, c. 97.

An act of Congress was passed January 6, 1883, for the holding at Wichita of a term of the District Court of the United States for the District of Kansas and for other purposes, 22 Stat. 400. c. 13. By that act (§ 2) "all that portion of the Indian Territory lying north of the Canadian River and east of Texas and the one hundredth meridian not set apart and occupied by the Cherokee, Creek and Seminole Indian tribes," was annexed to the District of Kansas; and the United States District Courts at Wichita and Fort Scott in that district were given "exclusive original jurisdiction of all offences committed within the limits of the territory hereby annexed to said District of Kansas against any of the laws of the United States now or that may hereafter be operative therein." It was further provided: "§ 3. That all that portion of the Indian Territory not annexed to the District of Kansas by this act, and not set apart and occupied by the Cherokee, Creek, Choctaw, Chicasaw and Seminole Indian tribes, shall, from and after the passage of this act, be annexed to and con-

stitute a part of the United States judicial district known as the Northern District of Texas; and the United States District Court at Graham, in said Northern District of Texas, shall have exclusive original jurisdiction of all offences committed within the limits of the territory hereby annexed to said Northern District of Texas against any of the laws of the United States now or that may hereafter be operative therein. § 4. That nothing contained in this act shall be construed to affect in any manner any action or proceeding now pending in the Circuit or District Court for the Western District of Arkansas, nor the execution of any process relating thereto; nor shall anything in this act be construed to give to said District Courts of Kansas and Texas, respectively, any greater jurisdiction in that part of said Indian Territory so as aforesaid annexed, respectively, to said District of Kansas and said Northern District of Texas, than might heretofore have been lawfully exercised therein by the Western District of Arkansas; nor shall anything in this act contained be construed to violate or impair, in any respect, any treaty provision whatever." It is insisted, on behalf of the United States, that this act attached the Public Land Strip to the Northern District of Texas; that the words, "Indian Territory," were used to include that strip; and that such a construction is sustained both by executive recognition and by the legislation of Congress.

Then comes the act of March 1, 1889, c. 333, above referred to, 25 Stat. 783, which, it is contended, transferred the Public Land Strip from the Northern District to the Eastern District of Texas. By its first section a United States Court, to be held at Muscogee, is established, "whose jurisdiction shall extend over the Indian Territory, bounded as follows, to wit: North by the State of Kansas, east by the States of Missouri and Arkansas, south by the State of Texas, and west by the State of Texas and the Territory of New Mexico." It is given (§ 5) "exclusive original jurisdiction over all offences against the laws of the United States committed within the Indian Territory as in this act defined, not punishable by death or by imprisonment at hard labor." That court was

also given (§ 6) "jurisdiction in all civil cases between citizens of the United States who are residents of the Indian Territory, or between citizens of the United States, or of any State or Territory therein, and any citizen of or person or persons residing or found in the Indian Territory, and when the value of the thing in controversy, or damages or money claimed shall amount to one hundred dollars or more: *Provided*, That nothing herein contained shall be so construed as to give the court jurisdiction over controversies between persons of Indian blood only."

The seventeenth, eighteenth and twenty-eighth sections of that act are as follows:

"SEC. 17. That the Chickasaw Nation and the portion of the Choctaw Nation within the following boundaries, to wit: Beginning on Red River at the southeast corner of the Choctaw Nation; thence north with the boundary line between the said Choctaw Nation and the State of Arkansas, to a point where Big Creek, a tributary of the Black Fork of the Kimishi River, crosses the said boundary line; thence westerly with Big Creek and the said Black Fork to the junction of the said Black Fork with Buffalo Creek; thence northwesterly with said Buffalo Creek to a point where the same is crossed by the old military road from Fort Smith, Arkansas, to Boggy Depot, in the Choctaw Nation; thence southwesterly with the said road to where the same crosses Perryville Creek; thence northwesterly up said creek to where the same is crossed by the Missouri, Kansas and Texas Railway track; thence northerly up the centre of the main track of the said road to the South Canadian River; thence up the centre of the main channel of the said river to the western boundary line of the Chickasaw Nation, the same being the northwest corner of the said nation; thence south on the boundary line between the said nation and the reservation of the Wichita Indians; thence continuing south with the boundary line between the said Chickasaw Nation and the reservations of the Kiowa, Comanche and Apache Indians to Red River; thence down said river to the place of beginning; and all that portion of the Indian Territory not annexed to the District of

Kansas by the act approved January sixth, eighteen hundred and eighty-three, and not set apart and occupied by the five civilized tribes, shall, from and after the passage of this act, be annexed to and constitute a part of the Eastern Judicial District of the State of Texas, for judicial purposes.

"SEC. 18. That the counties of Lamar, Fannin, Red River and Delta of the State of Texas, and all that part of the Indian Territory attached to the said Eastern Judicial District of the State of Texas by the provisions of this act, shall constitute a division of the Eastern Judicial District of Texas; and terms of the Circuit and District Courts of the United States for the said Eastern District of the State of Texas shall be held twice in each year at the city of Paris, on the third Mondays in April and the second Mondays in October; and the United States courts herein provided to be held at Paris shall have exclusive, original jurisdiction of all offences committed against the laws of the United States within the limits of that portion of the Indian Territory attached to the Eastern Judicial District of the State of Texas by the provisions of this act, of which jurisdiction is not given by this act to the court herein established in the Indian Territory; and all civil process, issued against persons resident in the said counties of Lamar, Fannin, Red River and Delta, cognizable before the United States courts, shall be made returnable to the courts, respectively, to be held in the city of Paris, Texas. And all prosecutions for offences committed in either of said last-mentioned counties shall be tried in the division of said eastern district of which said counties form a part: *Provided*, That no process issued or prosecution commenced or suit instituted before the passage of this act shall be in any way affected by the provisions thereof."

"SEC. 28. That all laws and parts of laws inconsistent with the provisions of this act be, and the same are hereby, repealed."

Other sections prescribe the modes of procedure in the court established by that act and the punishment for numerous offences.

From this history of the Public Land Strip it appears:

1. That by the act of 1883 all of the "Indian Territory" north of the Canadian River and east of Texas and the 100th meridian, not set apart and occupied by the Cherokee, Creek and Seminole Indian tribes, was attached to the District of Kansas, while the portion not so annexed and not set apart and occupied by the Cherokee, Creek, Choctaw, Chickasaw and Seminole Indian tribes, was annexed to the Northern District of Texas, saving actions or proceedings pending in the Circuit or District Court for the Western District of Arkansas. 2. That, by the act of 1889, the court established for the Indian Territory was given exclusive original jurisdiction over all offences against the laws of the United States committed within the Indian Territory as defined by that act, not punishable by death or by imprisonment at hard labor. 3. That exclusive original jurisdiction was given by the act of 1889 to the courts of the United States, sitting at Paris, Texas, of all such offences, committed within the portion of the Indian Territory annexed to the Eastern District of that State, of which jurisdiction was not given to the court established in and for the Indian Territory.

Much of the discussion by counsel was directed to the inquiry whether the act of 1883 attached the Public Land Strip to the Northern District of Texas. In view of the relations which certain Indian tribes once held to that strip, under treaties with the United States — which treaties will be referred to in another connection — there are some reasons for holding, in accordance with the contention of the government, that it was so attached to that district. But it is not necessary to decide that point; for, however it might be determined, the question would remain whether the Public Land Strip was not within that portion of the Indian Territory, defined in the act of 1889, which was assigned, by that act, for certain judicial purposes, to the Eastern District of Texas. If it was, the court below had jurisdiction of the offence charged in the indictment, unless the latter act is construed as having no application to offences committed prior to its passage. The act of 1883 is chiefly important in the present inquiry as it may serve to explain the provisions of the act of 1889.

It is certain that after, as well as before, the passage of the act of 1883, various public officers and committees in Congress described the "Indian Territory" as lying east of the 100th meridian, and represented the Public Land Strip as being unattached to any judicial district.[1] The most significant, perhaps, of all the official documents of this class are the letter of the Attorney General of the United States to the President under date of November 15, 1887, and that of the Secretary of the Treasury to the Speaker of the House of Representatives, under date of May 1, 1888. The former describes the Public Land Strip as "bounded on the north by the States of Kansas and Colorado, on the east by the Indian Territory, on the south by Texas, and on the west by New Mexico," and says that it was not then "embraced in any district established by law of the United States." The latter, speaking of the urgent need of legislation to enforce the revenue laws of the United States in the Public Land Strip, says that "the land referred to is not embraced in any judicial district, and not being within the jurisdiction of any United States court the laws of the United States are inoperative, or, at least, cannot be enforced therein."

The public documents to which reference has been made undoubtedly show that, in the opinion of many gentlemen in the legislative and executive branches of the government, the "Indian Territory" did not extend further west than the one hundredth meridian, and that, even after the passage of the act of 1883 it remained unattached to any judicial district. So that, if Congress intended by the act of 1883 to annex the Public Land Strip to the Northern District of Texas, it was informed by these documents that that act was not so con-

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[1] Report of Commissioner of Indian Affairs, 1872, p. 33; Letter of Commissioner of General Land Office to Durant, September 17, 1873, Rec. Com. Gen. Land Office, vol. 27, p. 304; Report of Land Commission, p. 462; Report Com. Land Office, 1884; House Judiciary Committee, Rep. No. 2030, July 2, 1864; *id.* Report, Doc. No. 389, February 11, 1886, embodying letter of Com'r Land Office of January 29, 1886; House Com. on Territories, 1887, Report No. 1684; *id.* 1888, Rep. No. 2857; *id.* February 7, 1888, Rep. 263.

strued by certain officers of the government. But it was further informed that the public interests absolutely demanded that that portion of the public domain should no longer remain in the condition in which it had been left for many years, namely, without being clearly included in some judicial district, whereby the rights of the general government, as well as of individuals, could be enforced against criminals and wrongdoers of every class. No possible reason can be suggested why, at the time of the passage of the act of 1889, the Public Land Strip should not have been brought within some judicial district.

Upon a careful scrutiny of the act of 1889, giving full effect to all of its clauses, according to the reasonable meaning of the words used, yet interpreting it in the light of the previous history of the Public Land Strip, and of the information communicated to Congress by public officers, we do not doubt that Congress intended to bring that strip within the jurisdiction of the court established for the Indian Territory, and to attach it, for limited judicial purposes, to the Eastern District of Texas; thus enabling the general government to protect its own interests, as well as the rights of individuals. That act was so interpreted by Mr. Justice Brewer before his accession to this Bench. *In re Jackson*, 40 Fed. Rep. 372. Observe, that the country over which the court established by that act was to exercise jurisdiction was not described as being east of the 100th meridian and south of Kansas, nor simply as the Indian Territory, but, *ex industria*, as the Indian Territory bounded "north by the State of Kansas, [the southern line of that State constituting about two-thirds of the northern boundary of the Public Land Strip,] east by the States of Missouri and Arkansas, south by the State of Texas, and west by the State of Texas *and* the *Territory of New Mexico*." If the act had bounded it on the north by Kansas *and Colorado*, the description, beyond all question, would have included the Public Land Strip. But the description, as it is, necessarily includes that strip, because the "Indian Territory," for which the new court, to sit at Muscogee, was established, being bounded on the north by Kansas, *and* west, in part, by "the Territory of

New Mexico" — the eastern boundary of which is on the 103d meridian — must include within its limits the Public Land Strip, lying between New Mexico and the 100th meridian. This fact is of greater significance than the careless omission to state, in the act, that the Indian Territory, described in it, was bounded on the north by Colorado as well as by Kansas. The court at Muscogee was given exclusive original jurisdiction over all offences against the United States, not punishable by death or by imprisonment at hard labor, committed, not simply within the Indian Territory, but within the Indian Territory, "as in this [that] act defined," while the court at Paris was given exclusive original jurisdiction of all offences against the laws of the United States within the limits of that portion of the Indian Territory attached to the Eastern District of Texas "by the provisions of this [that] act," of which jurisdiction was not given to the court at Muscogee. If Congress did not intend to bring the Public Land Strip within the jurisdiction of the court established for the Indian Territory, and, for certain judicial purposes, within the jurisdiction of the courts held at Paris, in the Eastern District of Texas, why did it declare that the Indian Territory, for which it legislated in the act of 1889, was bounded on the west "by the State of Texas *and* the Territory of New Mexico?" We cannot hold the words, "and the Territory of New Mexico," to be meaningless, simply because the northern boundary of that strip was not described with precision and fulness; especially as every consideration of policy demanded that that part of the public domain should not longer be left without courts for the protection of the government and the people.

It is contended that this interpretation of the words "Indian Territory" in the act of 1889 is wholly unauthorized by anything in the history of the Public Land Strip; for, it is said, that there are no facts whatever that make those words at all appropriate as embracing that strip. This broad statement is scarcely justified by the facts. By the treaty of July 27, 1853, made and concluded at Fort Atkinson, in the Indian Territory, 10 Stat. 1013, between the United States and the

Camanche, Kiowa and Apache tribes or nations, "inhabiting the said territory south of the Arkansas River," it was provided that the annuities stipulated to be given by the United States should be delivered yearly in July to those tribes, collectively, at or in the vicinity of Beaver Creek, a large part of which is within the Public Land Strip. By another treaty with those tribes, October 18, 1865, 14 Stat. 717–721, the United States agreed that a certain district of country, or such parts as the President should from time to time designate, should be and was set apart for their "absolute and undisturbed use and occupation," and that of "such other friendly tribes" as had theretofore "resided within said limits, or as they may from time to time agree to admit among them, and that no white person, except officers, agents and employés of the government, shall go upon or settle within the country embraced within said limits, unless formally admitted and incorporated into some one of the tribes lawfully residing there, according to its laws and usages." The boundaries of said district were: "Commencing at the northeast corner of New Mexico; thence south to the southeast corner of the same; thence northeastwardly to a point on main Red River, opposite the mouth of the north fork of said river; thence down said river to the 98th degree of west longitude; thence due north on said meridian to the Cimarone River; thence up said river to a point where the same crosses the southern boundary of the State of Kansas; thence along said southern boundary of Kansas to the southwest corner of said State; thence west to the place of beginning." These boundaries, it is true, included a part of the State of Texas, and the treaty was, in that respect, ineffectual. Nevertheless, the cession included the Public Land Strip, then a part of the public domain of the United States. By a subsequent treaty with two of the same tribes, concluded October 21, 1867, 15 Stat. 581, 584, they were restricted in territory to the southwest corner of the Indian Territory, but they reserved the right "to hunt on any lands south of the Arkansas River, so long as the buffalo may range thereon in such numbers as to justify the chase." These treaties are referred to as showing that as late as 1867 the Public Land Strip, in the mode of its

use, had some connection with Indians west of the Mississippi, and especially with some of those now occupying permanent reservations in the Indian Territory. That strip, we are informed, has not been occupied by Indians since 1867, but it was not opened to settlement, and could have been used for any of the purposes that the government had in view for Indians.

There are other circumstances that are not without significance as indicating why Congress in the act of 1889 used the words "Indian Territory," as describing not only lands east of the 100th meridian, south of Kansas, but lands north of Texas and between that meridian and New Mexico. Among them the following may be named: 1. To a report of the commissioner of the general land office, made in 1864, was annexed a map, "constructed from the Public Surveys and other official sources in the general land office," in which the Public Land Strip is included within the boundaries of the Indian Territory; and a similar map, "constructed from the plats and official sources of the general land office," under the direction of Commissioner Wilson, was issued in 1867. 2. By an act of March 2, 1887, Congress granted a right of way through the "Indian Territory" to a railroad company, beginning at a point on the northern line of said Territory at or near the south line of Kansas, crossed by the 101st meridian; thence in a southwesterly direction to El Paso, New Mexico. It could not commence at the point designated and reach El Paso by a southwesterly line without passing through the Public Land Strip. Unless that strip was, for the purposes of that act, regarded as a part of the Indian Territory, then the route to El Paso would not pass through the Indian Territory at all. 3. By the treaty of May 6, 1828, with the Cherokee Indians the United States, besides setting apart for the use of that tribe 7,000,000 acres within the limits of the Indian Territory, guaranteed to that nation "a perpetual outlet west, and free and unmolested use of all the country lying west of the western boundary" of the limits given, "and as far west as the sovereignty of the United States and their right of soil extend." In an official communication from the commissioner of the land

office to the Secretary of the Interior, under date of January 29, 1886, embodied in a report made on the 11th of February, 1886, by the Judiciary Committee of the House of Representatives, upon a proposed bill extending the laws of the United States over certain "unorganized territory south of Kansas," it was said: "It appears that the Cherokees claimed the public Land Strip, now so called, as the outlet above mentioned, and the official maps down to 1869, or later, designated said strip as *part of the Indian Territory.* I have not found in the records of this office any expressed reason why this strip was so designated on the maps, nor why that designation was changed upon the maps published after 1869." The commissioner recommended the passage of the proposed bill, because it would take this "unorganized territory out of its anomalous condition to a certain extent and open the lands to entry."

These circumstances are referred to not as conclusive, nor, as in themselves, persuasive, but only to show that the Public Land Strip was regarded, at different times, by public officers to be part of the Indian Territory, as commonly designated, or as having such connection with the lands east of the 100th meridian, where various tribes of Indians had been located by the United States, as made it natural that it should be placed, together with the lands between that meridian and the States of Missouri and Arkansas, not occupied by the civilized Indian tribes, under the jurisdiction of the court established by the act of 1889, or of some other court of the United States. Congress, it must be presumed, was not unaware of the fact that the words "Indian Territory" had been used by some to exclude, and by others to include, the Public Land Strip, and, to avoid misapprehension as to whether that strip was annexed to some judicial district, and, perhaps, for the purpose of meeting the recommendation of the Secretary of the Treasury in his letter of May 1, 1888, it speaks, in the act of 1889, of the Indian Territory, not generally, but *as therein defined.* That description, we have seen, necessarily included the Public Land Strip, because it was the only part of the public domain in that part of the United States that was bounded on

the north by Kansas, as well as on the west by the Territory of New Mexico, and which immediately adjoined the Indian Territory lying east of the 100th meridian.

Much was said at the bar about the unreasonableness of the supposition that Congress intended to subject the people in the Public Land Strip to the jurisdiction of a court sitting at so great a distance as Paris, Texas, rather than to one at Graham, in the Northern District of Texas, or one at Wichita, in Kansas. Judging by the map, the distance from the Public Land Strip to Paris is not much greater than to Graham. Indeed, the facilities for reaching Paris may be quite as good as those for reaching Graham. While the court of the United States nearest to the Public Land Strip, other than the one at Muscogee, seems to be the District Court of Kansas, this fact cannot control, as against the natural meaning of the words of the act.

Nor do we think that the interpretation of the act of 1889 can or ought to be affected by that of 1890, providing a temporary government for the Territory of Oklahoma, and enlarging the jurisdiction of the United States court in the Indian Territory. Oklahoma, by that act, is made to include "all that portion of the United States *now known as the Indian Territory*, except . . . and except the unoccupied part of the Cherokee outlet, together with that portion of the United States known as the Public Land Strip." The boundary of the country "now known as the Indian Territory" and included in said Territory of Oklahoma is given, and the Public Land Strip is, separately, bounded "east by the 100th meridian, south by Texas, west by New Mexico, and north by Colorado and Kansas." This may be regarded at most as simply a declaration by Congress that the country then "known as the Indian Territory" did not include the Public Land Strip, and, therefore, that each should be separately described by its boundaries. But that does not prove that Congress did not intend, in 1889, to include the Public Land Strip in the "Indian Territory," *as defined by the act of that year*. On the contrary, the Oklahoma act, when it bounds that Strip on the "west by New Mexico," tends to show that substantially similar words used in describing the

Indian Territory mentioned in the act of 1889, had reference to the Public Land Strip.

Looking at this question in every light in which it may be considered, we repeat the expression of our opinion that the Public Land Strip, west of the 100th meridian, bounded on the south by Texas, on the west by New Mexico, and on the north by Colorado and Kansas, was annexed by the act of 1889 to the Eastern District of Texas for such judicial purposes as by that act appertained to the court held at Paris in that District.

Was it competent for the court below to try the defendants for the offence of murder committed prior to the passage of the act of 1889? We do not doubt that Congress intended to confer upon that court jurisdiction to try such cases. By the express words of the act, the courts to be held at Paris, Texas, were given exclusive original jurisdiction of "all offences committed against the laws of the United States" within that part of the Indian Territory attached to the Eastern Judicial District of Texas, of which jurisdiction was not given, by the same act, to the court established for that Territory. The only exception made is in the proviso to the eighteenth section, declaring, among other things, that no prosecution commenced before the passage of the act should be in any way affected by its provisions. This, in connection with the previous part of the same section, defining the jurisdiction of the court below, necessarily imports that where no prosecution had been commenced, it should have authority to try all offences, punishable by death or imprisonment at hard labor, committed, no matter when, within the new territory over which its jurisdiction was extended. No other interpretation can be reasonably given to the act. If the Public Land Strip was placed by the act of 1883 in the Northern District of Texas, or if the defendants, having been apprehended in Kansas, were amenable, prior to the act of 1889, to the District Court in that State, the jurisdiction of the United States court of neither of those districts had attached, by the commencement of a prosecution, before that strip was annexed to the Eastern District of Texas. In so interpreting the act of Congress we do not

infringe the settled rule that courts uniformly refuse to give to statutes a retrospective operation, where rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature. *United States* v. *Heth*, 3 Cranch, 399, 413; *Chew Heong* v. *United States*, 112 U. S. 536, 559. The saving of only pending prosecutions shows that Congress did not except any offence against the United States of which the court below was given jurisdiction.

It is contended that the act, so construed, is in violation of section two, article three, of the Constitution, supplemented by the Sixth Amendment. The former provides that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." The latter provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." In respect to that clause of the Sixth Amendment declaring that the "district shall have been previously ascertained by law," it need only be said that if those words import immunity from prosecution where the district is not ascertained by law before the commission of the offence, or that the accused can only be tried in the district in which the offence was committed, (such district having been established before the offence was committed,) that amendment has reference only to offences against the United States committed within a State. *United States* v. *Dawson*, 15 How. 467, 487, 488; *Jones* v. *United States*, 137 U. S. 202, 211, 212. The second section of article three had provided, in respect to crimes committed in the States, that the trial by jury should be had within the State where the crime was committed. The Sixth Amendment added the further guaranty, in respect to the place of trial, that the district should have been previously ascertained by law, leaving the trial of offences not committed within any

State, to be controlled by the second section of article three. The requirement in the latter section is that the trial "shall be at such place or places as the Congress may by law have directed." "As crimes," said Mr. Justice Story, commenting upon this section, "may be committed on the high seas and elsewhere, out of the territorial jurisdiction of a State, it was indispensable that in such cases Congress should be enabled to provide the place of trial." 2 Story's Const. § 1781. It was consequently provided in the act of April 30, 1790, 1 Stat. 114, c. 9, § 8, that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may first be brought." And such was the law when the crime with which the defendants are charged was committed. Rev. Stat. §§ 730, 5339. But for the passage of the act of 1889, and if the Public Land Strip was not attached by the act of 1883 to the Northern District of Texas, the defendants could have been indicted and tried in the District of Kansas, where they were apprehended. *Jones* v. *United States*, above cited. So that the contention of the defendants is, in effect, that in respect to crimes committed outside of the States, in some place within the exclusive jurisdiction of the United States, Congress is forbidden by the second section of article three of the Constitution from providing a place of trial different from the one in which the accused might have been tried at the time the offence was committed. We do not so interpret that section. The words, "the trial shall be at such place or places as the Congress may by law have directed," impose no restriction as to the place of trial, except that the trial cannot occur until Congress designates the place, and may occur at any place which shall have been designated by Congress previous to the trial. This was evidently the construction placed upon this section in *United States* v. *Dawson*, above cited, where the court, speaking by Mr. Justice Nelson, said: "A crime, therefore, committed against the laws of the United States, out of the limits of a State, is not local, but may be tried at such place as Congress shall designate by law. This furnishes an answer to the argu-

ment against the jurisdiction of the court, as it respects venue, trial in the county, and jury from the vicinage, as well as in respect to the necessity of particular or fixed districts before the offence." p. 488. So, in *United States* v. *Jackalow*, 1 Black, 484, 486: "Crimes committed against the laws of the United States, out of the limits of a State, are not local, but may be tried at such place as Congress shall designate by law; but are local if committed within the State. They must then be tried in the district in which the offence was committed." If Congress — as it did in the act of 1790, which may be regarded as a contemporaneous construction of the Constitution — may provide for the trial of offences committed outside of the States, in whatever district the accused is apprehended, or into which he may first be brought, it is difficult to perceive why, such crimes not being local, it may not provide a place of trial where none was provided when the offence was committed, or change the place of trial after the commission of the offence.

It is said that the construction we place upon the second section of article three makes it obnoxious to the *ex post facto* clause of the Constitution. In support of this position reference is made to *Kring* v. *Missouri*, 107 U. S. 221, where it was declared that any statute passed after the commission of an offence which, "in relation to that offence or its consequences, alters the situation of a party to his disadvantage," is an *ex post facto* law. This principle has no application to the present case. The act of 1889 does not touch the offence nor change the punishment therefor. It only includes the place of the commission of the alleged offence within a particular judicial district, and subjects the accused to trial in that district rather than in the court of some other judicial district established by the government against whose laws the offence was committed. This does not alter the situation of the defendants in respect to their offence or its consequences. "An *ex post facto* law," this court said in *Gut* v. *The State*, 9 Wall. 35, 38, "does not involve, in *any* of its definitions, a change of the place of trial of an alleged offence after its commission."

Another contention of the defendants is that the indictment is fatally defective, in that it fails to sufficiently show when Cross — the person alleged to have been murdered — died, or that he died within a year and a day from the infliction upon him of the alleged mortal wounds, or from the effect of such wounds, or within the territory in the jurisdiction of the court in which they were tried. As the Attorney General and the Solicitor General submit this question without argument, and without any suggestion in support of the indictment, and as the judgment must, for reasons to be presently stated, be reversed, leaving the government at liberty to find a new indictment, if its officers shall be so advised, we will not extend this opinion by an examination of the authorities cited by the defendants to show the present indictment to be defective.

At the trial below, one of the defendants' counsel, who had been attorney general of Kansas, and who, in that capacity, made to the governor of that State a report touching the death of Cross immediately after it occurred, was called, in rebuttal, as a witness for the prosecution. That report contained various statements purporting to have been made by the defendants, and which connected them with the killing of Cross. Although the witness stated that the report was based upon hearsay evidence merely, was thrown together hastily by a stenographer, and was incorrect, and that the defendants had not made the statements therein attributed to them, certain parts of it were admitted in evidence to the jury, against the objection of the defendants. The record shows that this report was read in evidence to show that the witness had made different statements at another time and place. And the court, in its charge, said to the jury: "The instructions given above are limited, so far as the evidence is concerned, by the following instructions: The portions of Attorney General Bradford's report were admitted in evidence to be considered by you as to whether or not the statements therein contained were made by the parties to said Bradford, said Bradford now being attorney for the defendants, and denying the truth of the statements therein contained; and as to whether or not

these statements were ever made to said Bradford, is a question of fact to be considered by you from all the evidence upon that subject; and if you believe the statements were not so made to said Bradford, you are to disregard the same. But if you believe from the evidence that they were so made to said Bradford, then you are instructed to consider them as evidence, but only as to such parties by whom they were made."

The jury were thus informed that this report, although merely hearsay, was substantive evidence upon the issue as to whether the defendants were present at, and participated in, the killing. The representatives of the government, in this court, frankly concede, as it was their duty to do, that this action of the court below was so erroneous as to entitle the defendants to a reversal. Numerous other errors are said to have been committed at the trial to the prejudice of the defendants, but as such alleged errors may not be committed at the next trial, it is not necessary now to consider them.

For the error above mentioned the judgment is reversed, and the cause remanded with directions to grant a new trial.

CHICAGO, SANTA FÉ AND CALIFORNIA RAILROAD COMPANY *v.* PRICE.

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

No. 1456. Submitted January 8, 1891. — Decided January 26, 1891.

Where a contract with a railway company for construction work provided for monthly payments to the contractor, "on the certificate of the engineer," and that the determination of the chief engineer should be conclusive on the parties as to quantities and amounts, and where, in executing the contract each monthly account as made up by the division engineer was sent to the chief engineer, and the monthly payments were made on the certificate of the latter officer; his action in making such certificate was *held* to be a "determination" under the contract, conclusive upon the parties in an action at law, in the absence of fraud, or of such gross error as to imply bad faith.

Statement of the Case.

THIS action was brought by Price, McGavock & Co., for the use of Jones, Forrest & Bodkin, to recover from the Chicago, Santa Fé and California Railroad Company the balance alleged to be due them under a written contract, made March 21, 1887, for the clearing, grubbing and masonry necessary to complete the road-bed of that company from a point on the Mississippi River to Galesburg, Illinois, a distance of about fifty miles. The parties in writing waived a jury and tried the case before the court, which made a special finding of facts.[1] There was a judgment against the railroad company. 38 Fed. Rep. 304.

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[1] The court, from the testimony in the case, finds the following facts, to wit:

That on the 21st day of March, A. D. 1887, the plaintiffs and the defendant entered into a contract in writing, as set forth in the foregoing bill of exceptions, by which the plaintiffs agreed to do all the clearing, grubbing and masonry necessary to complete the road-bed of the defendant from the bank of the Mississippi River to Galesburg, a distance of about fifty miles; that on the 21st day of March, A. D. 1887, the plaintiffs entered into a contract with Jones, Forrest & Bodkin, which is in terms as set forth in the foregoing bill of exceptions, and that the parties have stipulated in writing as set forth in the bill of exceptions, and that the defendant was at all times aware that the plaintiffs had made the said agreement with Jones, Forrest & Bodkin and never objected thereto.

The court further finds that the work covered by the contract was, for the purpose of construction, divided by the defendant into four divisions, and that the work of each division was by the defendant put in charge of an assistant or division engineer, who was employed by the defendant and acted under the general direction of the chief engineer of the defendant.

The court further finds that the plaintiffs, through Jones, Forrest & Bodkin and their sub-contractors, performed the said work according to the terms of the said contract, and that the same has been accepted and taken possession of by the said defendant.

The court further finds that shortly after the entering into of said contract between Jones, Forrest & Bodkin and the plaintiffs the said Jones, Forrest & Bodkin sub-let all of the work on division 9 except a portion of section 119 (respecting which section there is no controversy between the parties in this suit), and that according to the said contract of sub-letting the said sub-contractors were to receive from Jones, Forrest & Bodkin 90 per cent of what was coming to Jones, Forrest & Bodkin according to their contract with the plaintiffs.

The court further finds that the said sub-contractors performed their work under the charge of the division engineers; that upon the first of each

Statement of the Case.

The contract contained, among other provisions, the following:

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month each division engineer made up and forwarded to the assistant chief engineer a paper showing his estimate of the work done on each section of his division, both according to its quantities and classifications, upon which were computed and extended in the office of the said assistant chief engineer the aggregate amounts coming to said plaintiffs, under the terms of the said contract, to the beginning of said month; that said papers were headed "monthly estimate" and bore the attestation of the division engineers, and were approved by the assistant chief engineer and chief engineer; that said certificates were all in form identical with the one set forth in the preceding bill of exceptions; that from month to month tissue copies of said certificates were delivered to the plaintiffs and payment made for the amount thereby shown to be coming to them, less 10 per cent reserved under the contract and less previous payments made; that each month the defendant sent to the division engineers in the field tissue copies of said certificates; that the plaintiffs sent their said tissue copies of said certificates to Jones, Forrest & Bodkin, together with their check for the amount coming due to them under the contract; that thereupon Jones, Forrest & Bodkin from time to time paid to their sub-contractors the amounts coming due to them according to the quantities and classifications of said certificates, and that the defendant had knowledge that the plaintiffs were paying Jones, Forrest & Bodkin, and that said Jones, Forrest & Bodkin were from time to time paying to their sub-contractors in accordance with said certificates.

The court finds that Dressler, the division engineer of division 9, sent in his last month's paper on November 1st, and that his successor, Baker, sent in a monthly paper on division 9 on December 1, which was the last month's paper on that division and which paper adopted Dressler's figures as shown in his last monthly paper and added something thereto for work done subsequently.

The court further finds that the work under said contract was substantially completed, with the exception of a small amount of grading, before the last of said monthly papers was so made up and sent to the plaintiffs, and that said plaintiffs paid what was coming to Jones, Forrest & Bodkin according to the showing of said last monthly certificate, and Jones, Forrest & Bodkin, in reliance upon the correctness of said certificate, paid to their sub-contractors on division 9 (that being the only division here in dispute) what was coming to them in accordance with the showing of said last monthly certificate, except in the case of one of their sub-contractors who was paid $880.00 less and another sub-contractor who was paid about $500.00 less than said certificate shows to have been coming, a portion of which was for work on division 9 and a portion for work on division 10, respecting which division 10 there is no dispute, but there is no evidence showing what exact portion of said $880.00 and $500.00 belonged to division

"The aforesaid party of the first part, [Price, McGavock & Co.,] in consideration of the prices hereinafter agreed to be

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9, and what portion to division 10; that such payments by Jones, Forrest & Bodkin to their sub-contractors were made at various times down to January 12, 1888, but were all made before Jones, Forrest & Bodkin had any knowledge of Baker's remeasurements, hereinafter mentioned, or of any claim on the part of the defendant that Dressler's estimates were erroneous.

The court further finds that some time after the last of these monthly certificates was delivered to the plaintiffs one George T. Baker, who had had charge of division 7, made certain remeasurements and reclassifications of the work done in divisions 8 and 9; that the work on these two divisions prior to November 26th had not been done under the supervision of said Baker, but was done under the supervision of one F. F. Ames and R. Dressler respectively, and that said Baker embodied the results of his remeasurements and reclassifications in the estimate called the final estimate; which said estimate was approved by the assistant engineer-in-chief and the engineer-in-chief, and delivered to the plaintiffs in March, 1888.

The court further finds that the said reëstimate and reclassification so made largely changed the quantities aud classifications of the work done on division 9 from the showing of quantities and classifications of said division made in the several monthly certificates, including the one made after the substantial completion of the work as aforesaid; that said reclassification and remeasurement of said Baker were made without the coöperation or knowledge of the plaintiffs or their sub-contractors, and that the plaintiffs had paid to Jones, Forrest & Bodkin, and Jones, Forrest & Bodkin had made payments to their sub-contractors under their said contracts, as above set forth, and according to the quantities and classifications shown by the monthly certificates before either of them had knowledge of said Baker's remeasurements and reclassifications.

The court further finds that the said last monthly certificate of the work on division 9 could, with reasonable care upon the part of the division engineer, have been made nearly accurate, and that upon the assumption of the correctness of said Baker's so-called final estimate the discrepancy between it and the said certificate could be the result only of negligence or incompetency upon the part of the division engineer in charge of said division unless the said division engineer was purposely dishonest; but the court finds that there was no proof of dishonesty in which the plaintiffs or their sub-contractors took any part or of which they had any knowledge.

The court further finds that the effect of the said monthly certificates of quantities and classifications of work done on division 9 was to cause the plaintiffs to pay to Jones, Forrest & Bodkin more on account of each of said certificates than they would have paid if said certificates had been made according to the remeasurement and reclassification of said Baker, and Jones, Forrest & Bodkin in turn to pay more to their sub-contractors than they would have paid if the said monthly certificates had been made accord-

paid to them by the party of the second part, [the railroad company,] hereby agree and bind themselves to construct and in every respect to complete the grubbing and clearing, grading and masonry, including the furnishing of materials and all other things requisite and necessary to complete the roadbed and prepare the same ready for receiving the superstructure, upon that portion of the railroad of the party of the second part known and designated as section —, number —, the first fifty (50) miles eastward from station thirty (30), east bank of Mississippi River, of the Chicago, Sante Fé and California Railway, in such a manner as will conform in every respect to the annexed specifications and to the following conditions, viz.:

"1st. That the work shall be commenced within ten (10) days after the execution of these presents, or as soon after as the railway company shall have acquired a title to the lands, and shall be completed on or before the first day of August, one thousand eight hundred and eighty-seven.

"2d. The work shall be executed under the direction and supervision of the chief engineer of said railway company and his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work performed under this contract shall be determined and whose determination shall be conclusive upon the parties, and who shall have full power to reject or condemn all work or materials which in his or their opinion do not fully conform to the spirit of

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ing to Baker's remeasurement and reclassification; so that if the plaintiffs are to be paid for the entire work according to the revision made by Baker they will be the losers to the extent of the errors said to have been corrected on division 9.

The court further finds that according to the said estimate of Baker, upon the divisions other than division 9, there is a balance due to the plaintiffs from the defendant of $17,351.68, and that on the basis of the last monthly certificate of Dressler on division 9, viz., the certificate of November 1st, as above set forth, there is a balance due on that division of $11,586.48, in which amount is included so much of the sums of $880.00 and $500.00 as is applicable to division 9, as above referred to.

The court therefore finds in favor of the plaintiffs for the amount of $28,938.16.

this agreement; and said chief engineer shall decide every question which can or may arise between the parties relative to the execution thereof, and his decision shall be binding and final upon both parties; and whereas the classification of excavation provided for in the annexed specifications is of a character that makes it necessary that special attention should be called to it, it is expressly agreed by the parties to this contract that the determination, by the measurements and calculations of the said engineer, of the respective quantities of such excavation shall be final and conclusive."

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"5th. If any damage shall be done by the party of the first part (or persons in their employ) to the owners or occupants of lands or other property adjoining or in the vicinity of the work herein contracted to be done the engineer of said company shall have the right to estimate the amount of said damage and to pay the same to said owner or occupant, and the amount so paid for such damage shall be deducted from the value of work done under this contract."

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"The aforesaid party of the second part hereby agrees that whenever this contract shall be completely performed on the part of the said party of the first part, and the engineer has certified the same in writing, the said party of the second part shall, within ten days thereafter, pay to said party of the first part any remaining sums due for said work, according to this contract, as follows, to wit: [Here follow the prices agreed upon for different kinds of work to be done.]"

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"It is further agreed between the parties that monthly payments shall be made by the party of the second part, on the certificate of the engineer, for work done, deducting ten per cent from the value of work done, as agreed compensation for damages, to be forever retained by the party of the second part in case the whole amount of work herein named shall not be done in accordance with this agreement.

"For the purpose of avoiding all causes of difference or dispute between the parties to this contract relative to its true

intent or meaning, and for the purpose of adjusting in an amicable manner any difference that may or can arise relative thereto, it is hereby mutually understood and agreed by the parties as follows, to wit:

"1. No extra charges will be claimed or allowed on account of changes, either in the line or grade of the road, the prices herein mentioned being considered as full compensation for the various kinds of work herein agreed to be performed.

"2. Whenever work is required to be done which is not now contemplated or covered by the prices herein mentioned the engineer shall fix such prices for the work as he shall consider just and equitable, and the said parties shall abide by such prices, provided the party of the first part enter upon and commence such work with full knowledge of the prices so fixed by the engineer; but if the party of the first part decline executing said work at the price fixed by the engineer, then the party of the second part may enter into contract with any person or persons for its execution, the same as if this contract had never existed; and if extra work, or work not provided for in this contract, is performed by the contractors, without protest or notice in writing to the engineer and to the party of the second part before prices shall have been fixed to such work, then the engineer shall estimate the same at such prices as he shall deem just and reasonable, and his decision shall be final, and the party of the first part shall accept of said prices in full satisfaction of all demands against the party of the second part for said extra work; but nothing shall be deemed extra work that can be measured or estimated under the provisions of this contract."

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"5. It is expressly agreed by the party of the first part that the party of the second part may at any time pay so much of the money due the party of the first part on the running or final estimates above mentioned to the laborers employed by the party of the first part as may be due said laborers and charge the same to the party of the first part.

"6. In case any or all work embraced in this contract shall be permanently suspended by and on account of the party of

the second part, which it is hereby agreed the party of the second part may do, for other causes than heretofore provided in this contract, then in that case all further operations under this contract shall be suspended within three days after receiving written notice from the party of the second part requiring the further progress of the work to be suspended, and the party of the first part shall have their choice either to consider such suspension temporary and resume work on the same within ten days after receiving notice to resume work, or may consider the same at an end, and shall receive full pay for all work by them performed under this contract, and at the prices herein stipulated, upon the estimate of the engineer, which shall be final and conclusive between the parties to this contract; which estimates shall not include any anticipated profits that might have accrued from the completion of the said work, it being understood that no claim for damages shall be made by the party of the first part on account of any profits that might accrue from the completion of the same."

Mr. Norman Williams and *Mr. Charles S. Holt* for plaintiff in error.

The final estimate of the chief engineer, if properly made, is the measure of the plaintiff's rights, and is conclusive. *Herrick* v. *Belknap*, 27 Vermont, 673; *Martinsburg & Potomac Railroad* v. *March*, 114 U. S. 549; *Snell* v. *Brown*, 71 Illinois, 133; *Monongahela Navigation Co.* v. *Fenlon*, 4 W. & S. 205; *Sweet* v. *Morrison*, 116 N. Y. 19.

The court having refused to consider the final estimate, not because it was incorrect, but on the ground that the company had no right to make any final estimate at all, the judgment should be reversed.

Mr. P. S. Grosscup for defendants in error.

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

The written contract between the parties in this case does not materially differ from the one before this court in *Martinsburg & Potomac Railroad Co.* v. *March*, 114 U. S. 549, 553.

In that case the contractor did not allege in his declaration that the engineer ever certified in writing the complete performance of the contract, together with an estimate of the work done and the amount of compensation due him according to the prices established by the parties; which certificate and estimate was made by the agreement a condition of the liability of the company to pay the contractor the balance, if any, due him. Nor did the declaration allege any facts which, in the absence of such a certificate by the engineer whose determination was made final and conclusive, entitled the contractor to sue the company on the contract. It was held, in accordance with the principles announced in *Kihlberg* v. *United States*, 97 U. S. 398, and *Sweeney* v. *United States*, 109 U. S. 618, that the declaration was fatally defective in that it contained "no averment that the engineer had been guilty of fraud, or had made such gross mistake in his estimates as necessarily implied bad faith, or had failed to exercise an honest judgment in discharging the duty imposed upon him." Some observations in that case are pertinent in the present one. It was said: "We are to presume from the terms of the contract that both parties considered the possibility of disputes arising between them in reference to the execution of the contract. And it is to be presumed that in their minds was the possibility that the engineer might err in his determination of such matters. Consequently, to the end that the interests of neither party should be put in peril by disputes as to any of the matters covered by their agreement, or in reference to the quantity of the work to be done under it, or the compensation which the plaintiff might be entitled to demand, it was expressly stipulated that the engineer's determination should be final and conclusive. Neither party reserved the right to revise that determination for mere errors or mistakes upon his part. They chose to risk his estimates, and to rely upon their right, which the law presumes they did not intend to waive, to demand that the engineer should, at all times, and in respect to every matter submitted to his determination, exercise an honest judgment, and commit no such mistakes as, under all the circumstances, would imply bad faith."

The only difference between that case and the present one is that the alleged mistakes of the engineer in the former were favorable to the railroad company, while in this case they are favorable to the contractors. But that difference cannot affect the interpretation of the contract. In the present case the agreement was that the work should be executed under the direction and supervision of the chief engineer of the railroad company and his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work should be determined, and "whose determination shall be conclusive upon the parties." Any decision of the chief engineer relating to the execution of the contract was to be "binding and final upon both parties." His measurements and calculations as to excavations were made "final and conclusive."

What are the substantial facts found by the court below? The work was in four divisions, each division being in charge of an assistant or division engineer, who acted under the general direction of the chief engineer. The agreement provided for monthly payments to the contractor, on the certificate of the engineer, "for work done;" ten per cent from the value thereof to be retained by the company until the whole work was completed in accordance with the contract. The work was under the immediate supervision of the division engineer. On the first day of each month he made up and forwarded to the assistant chief engineer an estimate of work done on each section of his division, according to quantities and classifications. Upon such estimates the assistant chief engineer ascertained the amount due the contractor to the beginning of the month. These monthly estimates were approved by both the assistant chief engineer and chief engineer. This course was pursued until the work was substantially completed, and was accepted and taken possession of by the company. Subsequently, without the knowledge or coöperation of the contractors, Baker, a subordinate engineer of the railroad company, who had not supervised the work of the plaintiffs, reëstimated and reclassified it, and upon such reëstimate and reclassification, which were approved by the chief engineer,

the company claimed that the monthly estimates upon which the plaintiffs had been paid from time to time were much too large.

We are of opinion that the ultimate facts, as found by the court, do not authorize the railroad company to go behind the estimates from time to time by its division engineer, which were approved and certified by the assistant chief engineer and chief engineer. Within a reasonable interpretation of the contract, the last monthly estimate of work done on division nine, (that being the only division here in dispute,) followed by the acceptance by the company of the whole work, was a certificate of complete performance entitling the plaintiff to be paid in full according to the terms of the contract. While there was evidence tending to show that the estimates by the division engineer, upon which the last monthly certificate was based, were not made up from actual measurements on the ground, but from reports by subcontractors, there was, also, evidence tending to show that the remeasurements and reclassifications which the company caused to be made after the completion and acceptance of the work, and which it calls the "final estimate," were inaccurate. But there is no fact distinctly found indicating fraud upon the part of the company's engineers, or such gross mistakes by them as imply bad faith. It is found only that the monthly estimates might, with reasonable care, have been made nearly accurate, and that, *if* the remeasurements and reclassifications were correct, the discrepancy between them and the monthly estimates, upon which the plaintiffs were paid from time to time, could be explained only upon the ground of negligence, incompetency or dishonesty upon the part of the division engineer. But the court did not find that the monthly estimates were inaccurate, or that the chief or division engineer was dishonest, or that the subsequent remeasurement and reclassification were correct. The mere incompetency or mere negligence of the division or chief engineer does not meet the requirements of the case, unless their mistakes were so gross as to imply bad faith.

We are of opinion that the judgment is supported by the finding of facts, and it is *Affirmed.*

COBURN *v.* CEDAR VALLEY LAND AND CATTLE COMPANY (Limited).

SAME *v.* SAME.

SAME *v.* SAME.

SAME *v.* SAME.

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

Nos. 139, 140, 141, 142. Argued and submitted January 9, 1891.—Decided January 26, 1891.

A litigation existed between the appellants and the appellee, which was embodied in two bills, two cross-bills, their respective answers, and the other proceedings therein. A correspondence ensued which resulted in a proposition for compromise and settlement on the one side, which was accepted by the other. Subsequently it appeared that the appellee intended and considered the agreement of settlement to embrace a complete relinquishment and discharge of all claims of either party against the other, while the appellants claimed that they were to retain their disputed claims against the appellee. The appellee thereupon filed a petition in each of the causes, disclosing to the court the correspondence and agreement of settlement and praying for a decree that all matters in controversy "had been settled and compromised by the parties and are decreed and adjudged to be finally settled, and ordering that all the cases be dismissed." The court below, after hearing the parties, found that there had been a full compromise and settlement by agreement of the parties, and ordered each of the bills to be dismissed. A motion to vacate these decrees, and grant a rehearing was overruled. *Held*,

(1) That the parties intended to make a full compromise and settlement of all claims and demands on either side, and that the decree of the court below was right, and should be affirmed;

(2) That no objection having been raised, until after decision rendered, to the proceeding by petition instead of by supplemental or cross-bill, the decree should not be vacated or disturbed on that account; especially as the appellants had appeared in answer and opposition to the petitions, and had introduced affidavits to support their contentions.

THESE cases, as stated in substance by counsel, may be described as follows:

Statement of the Case.

(1) On October 10, 1885, the Cedar Valley Land and Cattle Company, Limited, an English corporation, filed its bill against William N. Ewing and James M. Coburn in the Circuit Court of the United States for the Western District of Missouri, alleging that Stewart and others, having ascertained that the defendants were willing, in conjunction with them, to subscribe to the capital stock of the corporation when formed, agreed among themselves to become the promoters of a corporation for the purpose of purchasing a ranch with the cattle and horses thereon, then the property of one Munson, and situated in the State of Texas; that the name of the corporation was to be the Cedar Valley Land and Cattle Company, Limited, and that plaintiff is the identical corporation in contemplation; that the corporation was formed January 7, 1885, and in the preceding December, Stewart, Burnett, Campbell and Fisher, styling themselves plaintiff's directors and acting as plaintiff's promoters, believing that defendants were willing to undertake and assume the trust in behalf of the proposed corporation, directed and requested defendants to buy the ranch, land and cattle from Munson for plaintiff at the very lowest terms, and defendants accepted the trust; that on December 31, 1884, defendants, in the name of Ewing, in pursuance thereof, concluded negotiations with Munson for the ranch, and purchased it for plaintiff, and Ewing entered into a written contract with Munson, which is set out at length in the bill; that this contract was made for and in behalf of plaintiff, in contemplation of corporate existence, as was the employment of Ewing by the promoters and the contract of purchase, and with the intention that the contract should be adopted by the corporation when formed and enure to its benefit; that said contract was so adopted and the corporation proceeded to carry the same out, and complied with all the terms and conditions of the contract, including the payment of the sums of money therein provided, being $100,000 remitted December 31, 1884, $140,000, May 5, 1885, and $180,000 June 18, 1885, which moneys were entrusted to the defendants to make such payments; and that Ewing, on the 31st of December, 1884, made a declaration of trust that the $100,000 to be

paid on that day was the property of the plaintiff. Plaintiff further averred that in August, 1885, it learned that Coburn and Ewing had secretly agreed with Munson for a commission for selling said property, and had received about $40,000 from him on that account, which was retained out of the moneys remitted, and that defendants agreed to pay Munson for some of his cattle about $18,000 more than he had at first been willing to sell for; and further, that defendants, out of the cash sent them by the company with which to pay Munson, had retained the sum of $60,000, and, in lieu thereof, had conveyed to him a lot and building in Kansas City, belonging to them, worth not more than $45,000. The bill prayed for a decree for such amount as defendants might be found to have received, upon an accounting, etc.

The defendants answered denying that they were promoters of said corporation, and alleging that all their agreements and arrangements as to the character in which they should act in the purchase of said ranch property were made with Burnett, one of the persons named as a promoter and director in the bill, and that Burnett knew that the defendants would be paid a commission by Munson, and that the defendants were openly engaged in the business of selling such property for a compensation; and that the services rendered by defendants involved much labor and were reasonably worth a larger amount than was received. The answer also alleged that plaintiff acquired said ranch for $100,000 less than its actual market value; and that the only connection which defendants had with said corporation was that after it had been organized, Ewing subscribed to its capital stock, pursuant to a contract by which he was appointed its manager for the term of five years.

Exceptions were filed to the sufficiency of this answer, which were referred to a special master for examination and report. This report was made and the exceptions set for hearing. The appeal in this case is No. 139.

(2) On December 8, 1885, Coburn and Ewing filed a cross-bill against the Cattle company, by leave, which alleged that they for a number of years had been partners in the business

of selling property as brokers and for a commission, and that at all the times mentioned in the plaintiff's bill, they had the ranch in their charge for the purpose of selling the same under an agreement for a reasonable compensation to be paid them by Munson; that Burnett, knowing this fact, made an agreement with them to procure a purchaser for said property if they would share their commission with him; that afterwards they were directed by Burnett to buy the property upon terms and conditions and at specified prices known to him; that they entered into the contract with Munson pursuant to directions from Burnett, and expended a large amount of time and labor in the transaction, a reasonable compensation for which was alleged to be $50,000; and that some months afterwards, the corporation, having been organized in the meantime, entered into an agreement with Coburn and Ewing, that, if they would subscribe $100,000 to its capital stock, it would appoint Ewing its manager for the period of five years at a stipulated salary, which proposition was accepted, the sum of $50,000 paid on account of such subscription, and the appointment accordingly made. The cross-bill further alleged that said corporation had attempted to annul the contract so made with Ewing, and, without offering to cancel said subscription or to return any part of the money paid on account thereof, or tendering or offering to pay the reasonable and expected profit arising from said contract, had sought to sequester said stock and had refused to permit its transfer on its books; and that the market value of said stock was $125,000, and the reasonable and expected profit arising out of said contract was $20,000.

The cross-bill prayed for an answer to certain separate interrogatories directed to matters peculiarly within the knowledge of the corporation, and that upon its appearing to the court that Coburn and Ewing were entitled to be paid a reasonable compensation, and that it was the duty of the corporation to pay the same, the court might decree it to Coburn and Ewing, and that the corporation might be required to pay them the value of their stock, less any sum that might be unpaid thereon, and to pay to Ewing the sum of $20,000 on

account of his contemplated profit out of the contract appointing him manager of the corporation, and also for general relief. To this cross-bill the Cattle company filed a demurrer. The appeal in this case is No. 142.

(3) On October 6, 1885, Coburn and Ewing filed their bill against the Cattle company and George D. Fisher in the Circuit Court of Jackson County, Missouri, which alleged that, in March, 1885, Ewing proposed to the defendant company, on behalf and in the name of Coburn and Ewing, to subscribe for two thousand shares of its capital stock, of the par value of $50 each, upon the condition that Ewing should be appointed manager of the company for the period of five years; that this proposition was accepted and Ewing appointed accordingly by the directors of the corporation, and thereupon Coburn and Ewing subscribed for the two thousand shares and paid $50,000 in full of all assessments or calls which had been made on said stock, and certificates had been issued to them accordingly; that Ewing entered upon the duty of manager and had been continuously employed therein ever since; and that on September 7, 1887, the corporation attempted to cancel and terminate the appointment of Ewing as such manager by written communication, setting forth that "in consequence of the facts which have come to the knowledge of the board of directors connected with your purchase from Mr. Munson," they had decided to annul his appointment, and that Fisher was authorized to take charge of the company's property, and requested the delivery of the same to him accordingly. The bill also alleged that there were peculiar reasons of fitness, etc., for the employment of Ewing, and that Coburn and Ewing would not have subscribed or taken any shares in the capital stock but for the contract to appoint Ewing manager; that Ewing had faithfully performed all his duties and had at no time given the company any just cause for terminating his appointment; and that the contract was of great value to Ewing, and would yield him a sum aggregating $20,500 for the unexpired portion thereof. And the bill further alleged that Fisher was undertaking to prevent Ewing from performing his functions as manager, and to take out of his possession

all property in his hands as such, without offering to pay or refund the value of the stock to Coburn and Ewing, or the reasonable damages accruing to Ewing by reason of the refusal of the company to further perform its contract with him, and without releasing or indemnifying him for certain liabilities he had incurred, and for which he was personally liable, on account of the company, to all of which compensation, reimbursement and indemnity, Coburn and Ewing alleged themselves entitled before Ewing could be discharged from said appointment; and an injunction was prayed accordingly.

This cause was removed to the United States Circuit Court for the Western District of Missouri, and the corporation answered alleging that no such contract was made for the appointment of Ewing, but that the subscription of Coburn and Ewing to the capital stock was unconditional; and that Ewing was appointed as manager, but as an entirely separate and distinct transaction. It was admitted that said appointment was cancelled and terminated by the notice mentioned in the bill, and the grounds for such action were set forth as resting practically on the same facts alleged in the bill of the company in No. 139. The appeal in this case is No. 140.

(4) On November 23, 1885, the Cattle company filed a cross-bill setting forth the alleged employment of Coburn and Ewing on behalf of the intended corporation; the making of the contract with Munson; that Coburn and Ewing had received a commission from Munson secretly; the transactions as to the property in Kansas City, and the alleged overpayment in the purchase of cattle; the cancellation of Ewing's appointment by reason of the premises; and alleging that Ewing had done acts in hostility to the interests of the corporation, which would be imperilled if he were allowed to manage the same. An injunction was prayed restraining Ewing from acting as such manager and in anywise interfering with the property of said corporation.

Coburn and Ewing answered averring substantially the same facts disclosed in their answer in No. 139, their cross-bill in No. 142, and their original bill in No. 140. The application of Coburn and Ewing and of the Cattle company for temporary

injunctions came on for hearing in December, 1885, and the Circuit Court made an order granting the temporary injunction prayed for in the cross-bill of the Cattle company. The appeal in this case is No. 141.

The record in No. 141 discloses that upon the cross-bill there was filed an affidavit with exhibits, which showed that a suit had been commenced by Coburn and Ewing against the Cattle company in a State court of Texas and an injunction obtained, which, upon the removal of the cause to the Circuit Court of the United States for the Northern District of Texas, was dissolved by Judge McCormick, upon the ground that where it appeared that plaintiffs had been employed to purchase a ranch and cattle, and had secretly received from the seller a commission, and where one of them had afterwards obtained employment from the company as manager of the ranch and herd, without disclosing the facts, the company had good cause for removing him from a position obtained under such circumstances. The opinion is reported in 25 Fed. Rep. 791.

June 19, 1886, the Cattle company filed in each of said causes the following "petition for a decree:"

"Now comes The Cedar Valley Land and Cattle Company, Limited, a party to the above-mentioned suits, and petitions the court to enter an order or decree in each of said cases showing that the matters in controversy therein have all been settled and compromised by the parties and are decreed and adjudged to be finally settled, and ordering that all the said cases be dismissed, the plaintiff in each to pay costs therein, and that the sureties on the injunction bond given by this petitioner be discharged.

"And in support of this application, the petitioner files herewith true copies of the written correspondence between the parties, embodying their agreement of compromise, and on the hearing of this petition will produce the originals thereof; also affidavit of George Dixon Fisher."

The correspondence was as set forth in the margin.[1]

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[1] "Received November 12, 1885.

"Karnes and Waters will recommend any one of the following compromises:

Statement of the Case.

The affidavits of Messrs. Fisher, McCrary and Field were also filed on behalf of appellees.

"1. C. & E. to be paid back the money for their stock, say $50,000.

"C. & E. to pay back the sum of $40,000.

"The company to enter its appearance in a suit to be brought by C. &. E. to determine the value of their services and commission in purchase of property, leaving out all transactions between C. & E. and W. B. M.

"2. The company to allow C. & E. $25,000 as their commissions for the purchase of the ranch, C. & E. to pay balance of $40,000, company to pay back amount of stock, each party to pay costs made by themselves.

"3. Arbitrate by three persons, one selected by each, they to choose a third, what their services shall be, and the company then to pay the amount set, C. & E. to pay $40,000 & company to pay amount of stock.

"Either proposition to be finality as to all the matters embraced in the bill filed by the Company *vs.* C. & E."

Response to the proposition of Waters and Karnes, Attorneys for Coburn & Ewing.

"Adams and Field and Geo. W. McCrary will recommend to their client, the Cedar Valley Land and Cattle Company, a settlement with Coburn and Ewing as follows:

"1. C. &. E. to be allowed for their stock what they have paid on it.

"2. C. & E. to pay back to the company the sum of $40,000.

"3. Ewing to surrender management.

"4. This settlement to be a full and final adjustment of all the controversies between the parties and of all claims of either party against the other.

"5. No delay of legal proceedings in consequence of these negotiations, unless by an agreement the controversies are ended.

"This proposition involves the surrender of the company's claim for the profit on the sale of the Delaware-street property, to which we think it entitled, and which will, we suppose, amount to about the sum of $15,000, as well as other claims set forth in its bill.

"And it involves also the allowance for the stock of C. & E. of about $10,000 more than its present value.

"These are, therefore, the most favorable terms we can recommend, and under no circumstances can we advise the payment of commissions to C. & E., or any waiver of the company's right to defend against any claim that they may make on this account."

From appellants' to appellees' counsel, December 28, 1885.

"In the matter of controversy between the Cedar Valley Land and Cattle Company and Mess. Coburn & Ewing, it must have been observed that I have not seemed quite in accord with those associated with me. I have always felt inclined to some amicable adjustment, and regretted when I was

Fisher stated that about the 29th of April, 1886, he called upon Coburn and submitted to him the form of a bond to be

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directed to terminate rather summarily the negotiations to that end undertaken a few weeks ago. I have now taken the liberty of addressing you this note entirely upon my own responsibility, and I am induced to do so by a statement made to me by Mr. Gage, a mutual friend of both parties, to the effect that he understood Mr. Fisher that the terms proposed by you in our former negotiation were still open for acceptance. If such be the case I say frankly to you that in my judgment the terms then proposed contain substantially the correct basis of settlement, and I would like again to move in the direction of ending all this interminable litigation. I do not wish to trespass on your valuable time, and hence I have not called to present these views in person, but if this letter receives a favorable response I will see my clients and at some time, when agreeable to you, will call at your office to canvass the matter more in detail. If it is thought best by you not to negotiate further I would be glad that no mention be made of this letter."

From appellees' to appellants' counsel, December 28, 1885.

"Yours of this date received. Mr. Fisher is out of town and will not return until the last of the week. I think, however, he is still disposed to settle, and if you can bring your clients to agree to the terms proposed by us let me know, and as soon as he returns I will see him and advise you.

"P. S. — I will not mention the matter to any one until I hear from you further."

From appellants' to appellees' counsel, December 28, 1885.

"Upon the receipt of your communication of to-day I at once sought an interview with my clients. Maj. Ewing is out of the city, and I only saw Mr. Coburn, who thinks Maj. Ewing will agree to any arrangement that he may make. He has much to say of the company's injustice to them in seeking to appropriate without compensation the result of their labor and skill in the purchase of this property. He contends that Munson was taken at a time when for several reasons he was very anxious to sell, and that they drove an unusually good bargain with him. Of course, I have sought to impress upon him that the case must be tried squarely upon the law. I have brought myself to believe that there is not much probability of your recovering on account of the house and the bulls, but as to the commission of $40,000 I have frankly said that I believed the chances were against my clients. This amount represents the whole sum your company has lost, while it has received the benefit of valuable services at no expense whatever. Any settlement made must involve an entire withdrawal of the interests of Coburn and Ewing. They insist that their stock is worth a premium, while, on the other hand, Mr. Fisher claims that it has depreciated. I am aware that you have the impression that Burnett was not connected with this sale, but in this it is more than probable that you are in error, and

given by Coburn and Ewing in pursuance of the terms of the compromise, to bind said firm not to buy up or otherwise

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Coburn and Ewing have in their possession the proportional part realized coming to Burnett, amounting to $16,800. All these phases of the case I have gone over carefully with Mr. Coburn, and he has become willing to settle in a way approximately as follows:

"(1.) That the stock of Coburn and Ewing be taken at $50,000.

"(2.) That Coburn and Ewing pay back to the company the $40,000 received from Munson.

"(3.) That the company, with American securities, indemnify C. & E. against any claim of the representatives of Burnett as to the $16,800.

"(4.) That all suits be dismissed, each party paying his own costs, all claims for damages or compensation be waived, and full receipts passed.

"(5.) That the salary of Ewing up to the time of his discharge be paid to him, amounting to about one month's pay, and that there be paid a few small items of expenses, amounting in all to a very small sum. As I understand, this is substantially your proposition to us. In a conversation with you I think you stated that you would favor the indemnity for the $16,800. I believe there is a controversy between Mr. Ewing and Mr. Fisher as to whether the company owes Ewing about a month's balance on salary. This, however, of course, can be settled by the books. If I have not made my proposition clear I will be glad to state it more fully, and upon Mr. Fisher's return I much hope a satisfactory adjustment can be made."

From appellees' to appellants' counsel, January 5, 1886.

"We were advised by the counsel of the Cedar Valley Land and Cattle Company in London that the company has no right either to purchase or provide for the cancellation of the stock now held by Coburn and Ewing. In view of this advice Mr. Fisher does not feel at liberty to conclude the settlement upon the basis of taking back the stock. If we could agree upon any settlement which would leave the stock in the hands of Coburn and Ewing, or which would not require the company to take it, Mr. Fisher would feel at liberty to act in the matter; but, as I assume that this cannot be accomplished, I have advised Mr. Fisher, who leaves for London in a few days, to lay the whole matter before the board and give us instructions which will, I hope, enable us to agree with you upon some disposition of the stock and upon a final satisfactory adjustment of the matters between the parties."

From appellants' to appellees' counsel, January 8, 1886.

"Your note of the 5th instant was duly received, stating that no further action could be taken in the matter of settling the dispute between the C. V. L. & C. Co. and Mess. Coburn and Ewing until Mr. Fisher had additional instructions from his company. I have delayed answering until I could confer with Mess. C. & E., which I now have done. They greatly regret

molest any of the range privileges of the company. The form of the bond had been changed by striking out the words "as

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the delay that will be necessarily occasioned, as they hoped for a speedy termination of the controversy. I have urged upon them that they allow me to continue my efforts for an adjustment. This they have done, with the understanding that I request you to ask Mr. Fisher to report by cable at the earliest possible moment whether the proposition will be accepted. This is a matter involving so large an amount and requiring the taking of testimony at so many and such remote points that I assume that we are agreed as to the importance of determining this negotiation one way or another as soon as the same can be reasonably done.

"Awaiting your further advice, I am, very truly."

From appellees' to appellants' counsel, January 11, 1886.

"I have arranged with Mr. Fisher to cable me instructions from London as to compromise of the controversy between Coburn and Ewing and the C. V. L. & C. Company. I will advise you promptly when instructions are received."

From appellants' to appellees' counsel, January 26, 1886.

"Mess. Coburn & Ewing have 2000 shares in the C. V. L. & C. Co., £5 each paid, amounting to about $48,800. They will settle the controversy with the company —

"1. By returning the $40,000 commission and the company's taking their stock at the actual amount paid by them; or,

"2. They will turn over to the company 1600 shares and retain 400.

"3. In any event C. & E. are to be protected against any claim by Burnett's estate, either by a release or indemnity.

"4. Mess. C. & E. agree not to buy up or otherwise molest any of the ranch privileges now enjoyed by the company.

"5. This settlement in no way to affect the arrangements heretofore made concerning the W. & L. cattle, but the same to be carried out by both parties in good faith as agreed upon, but not to enter into this arrangement in any way whatever. In other words, the W. & L. cattle are in no way taken into consideration in this settlement.

"6. The balance of salary as compensation to be paid to Mr. Ewing."

From appellees' to appellants' counsel, February 2, 1886.

"I enclose herewith a letter just received from Mr. Fisher from New York, which explains itself. Mr. F. carries with him to London the several propositions of settlement which have been under discussion. Will you kindly advise me what response Coburn & Ewing have to make to the terms suggested in this letter? If possible I should like to be advised in time to write Mr. Fisher to-morrow, as requested.

"Please return Mr. Fisher's letter."

part and parcel of the" in the second line, and inserting in place thereof "in accordance with the terms of our letter of

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From Fisher to appellees' counsel, 29th January, 1886.

"As I wired you yesterday, I am unfortunately here till to-morrow at 2 p. m., in consequence of the steamer I intended sailing with yesterday being disabled. I am sorry at this, as I am anxious to get to London to consult with my co-directors. I have been thinking a good deal over the best way to arrange a compromise with C. & E., but in every shape I take it it is always saddled with the difficulty of dealing with their stock.

"No one, of course, would be fool enough to take their shares at par when it is so generally known, and by none better than C. & E. themselves, that the values of all cattle shares are not within 20 per cent of what they were, and as the company itself can neither buy nor cancel it is most perplexing. The following is a proposition that has occurred to me that C. & E. might submit to the board: C. & E. agree to pay Co. the $5000 [$40,000] commission, with interest thereon at the rate of 8 per cent per annum for the time they have had it; C. & E. to retain their stock in company by the directors getting for them an advance on it for $40,000, at the rate of interest of ten per cent per annum, said advance to go to liquidate the debt to the company, C. & E., besides, paying the company's expense in connection with this litigation.

"This arrangement would enable C. & E. to hold their stock, which they appear to value so highly, until such time as they could sell it at par, or possibly, in two years, at a premium, and at the same time refund the $40,000. The company would in this case not commence proceedings for damages caused by turning back the cattle. If you think well of this project you can see Karnes about it, and, if C. & E. are disposed to make the above proposition, cable the word 'consent' on 8th February, the day I expect to get to London. Frankly, I must say this is a more favorable settlement than I would give them, as I am satisfied there is more in the real estate than $15,000, but under the circumstances [it] might be accepted by the board.

"Of course, if there is no cablegram, I will understand they will not make this proposition; in any case, write not later than Wednesday."

From appellants' to appellees' counsel, February 2, 1886.

"I am just in receipt of your letter of to-day, including a letter from Mr. Fisher from N. Y., which I herewith return to you. You have heretofore seen fit to express your appreciation of what I had done and was doing to get this controversy settled, and hence I need not restate my endeavors in the matter. I am only sorry to see Mr. Fisher taking the position indicated by his letter. I am now convinced that Mr. Gage was correct in his opinion that he, F., was unfavorable to any settlement. The terms proposed in his letter I have not submitted nor will I submit to my clients. I have been satisfied from the beginning and am still satisfied, and have so stated to Mess. C. & E., that they are liable in law for the return of the $40,000,

date February 27, 1886, accepting terms of compromise," and Coburn added the following words: "of all pending litiga-

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but I don't believe they are liable any further. This they ought to repay. On the other hand, this company had received the benefits of their labor without any expense. There ought to be some recognition of the equities of the case. On such a basis I have tried to have an adjustment made; but if it is the determination of Mr. Fisher to drive these men to the wall, then there is no alternative left but to fight. I shall still hope, however, that through the coöperation of yourself and Mr. Gage a fair and just settlement may be made, and that the damage to the interests of all concerned, to which Mr. Fisher's rashness will lead, may be avoided. As Mr. Fisher mentioned my name in his letter, I would be glad to have him furnished a copy of this."

Cablegram.

"From London. Kansas City.

"Ewing's proposals declined. Letter posted to-day, enclosing complete answer to cross-bill and conveying the only terms which will be accepted. Inform Ewing."

From appellees' to appellants' counsel, February 24, 1886.

"I enclose copy of letter, just received from the secretary of the Cedar Valley Land and Cattle Company, submitting the only terms upon which the company will settle with Coburn and Ewing. The sum demanded is nominally larger than that offered by you, but as it is proposed to receive payment in cattle and the stock of the company now held by C. & E., at par, I am in hopes your clients will consider it better to accept than to continue the litigation.

"If this proposition is accepted please advise me before March 4th."

From Coburn and Ewing to appellees' counsel, February 27, 1886.

"On February 24th, 1886, you handed to J. V. C. Karnes, Esq., one of our counsel, a copy of a letter which you had just received from the secretary of the Cedar Valley Land and Cattle Company, which is as follows:

"'THE CEDAR VALLEY LAND AND CATTLE COMPANY, LIMITED,
"'MOORGATE STREET CHAMBERS, LONDON, E. C., *Feb.* 11, 1886.

"'DEAR SIR: The board have had under their very careful consideration Mess. Karnes & Waters's letter, dated the 26th of January, 1886, containing two alternative offers by Mess. Coburn and Ewing for the settlement of the claims made by the Cedar Valley Land and Cattle Company upon them.

"'I am instructed to inform you that neither of these propositions is acceptable, and that the action against Mess. Coburn and Ewing must proceed. With that view the answer to Mess. Coburn and Ewing's cross-bill has been forwarded to Mess. Adams and Field along with a letter from the solicitors of the company.

tion." The first sentence of the proposed bond was therefore amended so as to read as follows: "That for a good and valu-

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"'The company being liable in a large sum of costs, which will not be recovered from Mess. Coburn and Ewing, the only terms upon which the board can agree to compromise the claim of the company are as follows:

"'1. That the amount payable to the company by Mess. Coburn and Ewing be £10,000, the amount paid by them for the 2000 shares now standing in their names.

"'2. That this amount, £4000, shall be paid in cash, or in lieu thereof that the cattle of the L. & W. herd now upon the Cedar Valley ranch shall be accepted as cash, when counted over this spring, upon a valuation to be made by two valuers — one chosen by Coburn and Ewing and one by the company — the valuers appointing a referee.

"'3. That the balance then remaining due to the company will be discharged by the transfer to such person or persons as may be named by the board of a sufficient number of Mess. Coburn & Ewing's shares on the basis of a par value, the shares then remaining in the hands of Coburn & Ewing to be held by them for a period of not less than two years.

"'4. Mess. Coburn & Ewing to give security that they will not buy up or otherwise molest any of the range privileges now enjoyed by the company.

"'5. That the company agree to protect Coburn & Ewing against any claim from the executors of the partner of the late Geo. Burnett.

"'When the board consider (1) that the issue has practically been decided against Mess. Coburn & Ewing by the same judge before whom the case will ultimately be tried; (2) that Mess. Coburn & Ewing have received from Mr. Munson the sum of $75,000 for a property which, in the written estimate of six of the eminent valuers in Kansas City, is worth from $45,000 to $50,000; (3) the almost insuperable difficulty which the board will have in placing any of the shares transferred by Mess. Coburn & Ewing, in consequence of the non-payment of a dividend, resulting from Mr. Ewing's vindictive or ill-judged action in ordering the beeves back to the ranch; and (4) the interest upon the amount of commission obtained in various ways from Mr. Munson from the period of its receipt up to the present date, which, we are advised, would be recoverable from them by an action at law, the board is of the opinion that the foregoing offer is more favorable to Mess. Coburn & Ewing than the latter had any right to expect. The board, however, is induced to offer these easier terms with the object of settling the matter before the general meeting of the 4th of March. It is therefore to be distinctly understood that this proposal only remains open until the 3d of March, and that failing the receipt on or before that date of a telegram announcing that Mess. Coburn & Ewing have signed an agreement embodying the above terms, the offer now made by the board is withdrawn on that day. It will suit the company infinitely better to receive the amount of their claim in cash, as would be the case when a judgment has been recovered in their favor, than to have to deal with any large num-

able consideration and in accordance with the terms of our letter of date February 27, 1886, accepting terms of compromise

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ber of shares transferred by Mess. Coburn & Ewing. It is to be understood that the offer is to be made without prejudice to any claim for damages which the board may have against the executors of the partner of the late George Burnett.

"'The directors desire me to add that in the event of the foregoing offer being refused they will feel it their duty in the interests of the shareholders to claim full compensation for damages which the company have sustained under various heads, which are clearly attributable to the account of Mess. Coburn & Ewing. I am, dear sir, yours truly,

"'JAMES E. WEBB, *Sec'y.*

"'Geo. W. McCrary, Kansas City, Mo., U. S. A.'

"And on February 26, 1886, you sent to Mr. Karnes the original letter you had on that day received from the same party, and which was as follows:

"'THE CEDAR VALLEY LAND AND CATTLE COMPANY, LIMITED,
"'MOORGATE STREET CHAMBERS, LONDON, E. C., 12*th Febr.*, 1886.

"'DEAR SIR: In reading over the letter which I had the pleasure to address to you yesterday I noticed two points in reference to which I would like to make some observations.

"'The sum of £10,000 is fixed as the damages to be paid by Mess. Coburn and Ewing, and it is added that this sum was the amount paid by Mess. Coburn and Ewing for their shares. Seeing that there is no connection whatever between the claim for damages and the payment of shares, it is advisable that the words "the amount paid by them for the 2000 shares now standing in their names" be eliminated from the letter, if you think advisable to read it or give a copy of it to Mess. Coburn and Ewing.

"'The words "vindictive or ill-judged," on page 3 of the letter should also be eliminated, as Mr. Ewing, in his letter of 24th October last, stated that he was acting for the best interests of the stockholders in turning back the beeves. These words are unnecessary, although the directors could not possibly approve a step which precluded the possibility of paying a dividend, the non-payment of which would have, as had been fully explained to Mr. Ewing, such an injurious effect on an English company. If Mess. Coburn and Ewing should prefer to deliver the cattle of the L. & W. herd, now on the Cedar Valley ranch, the transfer of the 12,000 would be accepted by the board at present, leaving the balance of £4000 to stand over in the meantime.

"'If the valuation of the L. W. herd shall eventually fall short of that sum, the balance of such valuation to be made up to the company by the transfer of an equivalent number of shares in the company on the basis of a par value, the boarding of the above cattle to be paid for at the time of transfer at the agreed-on rate, $1.50 per head.

of all pending litigation between us and the Cedar Valley Land and Cattle Company, Limited, etc." Affiant added that

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"'The board is quite ready to agree to Mr. Ewing's stipulation that he shall be paid his salary during such time as he remained in the service of the company, whatever amount may be found to be due to him upon a proper adjustment of accounts.

"'Will you kindly bear these points in mind in dealing with the other side.

"'I am, dear sir, yours truly, JAMES E. WEBB, *Sec'y.*

"'Geo. W. McCrary, Esq., Kansas City, Mo., U. S. A.'

"Both of these communications, together with your two letters forwarding them to Mr. Karnes, he has placed in our hands. In connection with both our counsel we have fully considered the terms of this proposition. We wish to state emphatically that we regard the proposition as unjust and oppressive, but we have so much involved in this litigation that we agree to and accept the terms of the offer made. The £4,000 will be arranged for with the L. W. cattle, as suggested in the letter of February 12th, and the 1200 shares of stock therein mentioned we herewith hand you, to be transferred to such parties as may be named. We have only two certificates of one thousand shares each, and we deliver both to you, and the company can return us a certificate for 800 shares. The bond called for by the fourth section of the proposition in the letter of February 11th we will give at any time. It will now soon be the season when the L. W. cattle can be counted, and we will be ready at once to name valuers. Now that a settlement has been effected, we hope there will be no delay in carrying it out in all respects as agreed upon.

"We desire to express to you our thanks for the uniform courtesy with which you have treated us throughout this unpleasant matter.

"We are, dear sir, very truly, W. N. EWING.
"JAMES M. COBURN.
"COBURN & EWING."

From appellees' counsel to appellants, February 27, 1886.

"Mr. Karnes has handed me your letter accepting the terms of compromise proposed by the Cedar Valley Land & Cattle Company, and has also placed in my hands the certificates for the two thousand shares of stock held by you in the company. I will wire Mr. Webb, secretary of the company, that you have accepted in writing the company's proposition, and have written him, requesting that the company take immediate steps to choose a valuer and proceed with as little delay as possible to close up the matter of the compromise. Of course it is understood that the settlement embraces all the matters involved in the pending litigation in the several suits between the parties.

"The matter of costs and the balance due you on salary can easily be adjusted hereafter. Col. Karnes and I agree that each party pay its own costs."

he was present as a member of the board of directors of the Cattle company when the proposition of compromise was

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From appellees' to appellants' counsel, March 18, 1886.

"I am just in receipt of a letter from James E. Webb, secretary of the Cedar Valley Land and Cattle Company, Limited, of date March 6th, of which I enclose you a copy. Mr. Webb sends me with this letter an assignment to be executed by Messrs. Coburn and Ewing, transferring to him 1200 shares of their stock in said company. When Mr. Webb wrote this letter he had not received my communication written on the 27th of February, informing him that Messrs. Coburn and Ewing had placed in my hands their certificates for the whole 2000 shares, and had requested that the company would issue to them a new certificate for 800 shares. That letter would reach London about the 7th inst., and an answer may be expected very soon. Probably it would be better to take no further action until it is received."

From Webb, sec'y, to appellees' counsel.

"LONDON, E. C., 6 *March*, 1886.

"DEAR SIR: I have to acknowledge the receipt, on the 27th February, of your cablegram of that date reading:

"'Terms proposed accepted by Coburn & Ewing to-day in writing.'

"That telegram was laid before the board at their meeting on the 3d inst., and I am directed to inform you that they are glad that a settlement has been arrived at upon terms which they believe will be found upon consideration to be satisfactory to all parties. The board is prepared to find that all the obligations entered into by Mess. Coburn and Ewing will be faithfully and honorably carried out by these gentlemen, and they trust that amicable relations will be resumed and will continue uninterruptedly for the future.

"With the view to the carrying out of the provisions of the agreement with Mess. Coburn & Ewing, I now enclose a transfer of 1200 shares, to be executed in my favor, and the company undertake that, if the value of the L. W. herd shall exceed the sum of £4000, the difference shall be adjusted by the retransfer to Mess. Coburn and Ewing of shares to an equivalent value.

"Awaiting confirmation by letter of your cablegram of the 27th."

From appellees' to appellants' counsel, March 27, 1886.

"I am now advised that the Cedar Valley Land and Cattle Company cannot issue the new certificates for eight hundred shares of stock to Coburn and Ewing, as per terms of compromise, until the latter have assigned the twelve hundred shares. They therefore wish Mess. C. & E. to execute the inclosed assignment, to be sent by me to London. This done, they will immediately execute and send over the new certificates for eight hundred shares.

"Please have the assignment executed and return to me at the earliest time practicable, as I wish to forward it without delay."

agreed upon, and that it was intended that the same should be a full and final settlement of all pending litigation between the parties. The original paper referred to was attached.

Mr. McCrary testified that he had principal charge on behalf of the company of the negotiations for compromise and settlement between the parties; that the company and its counsel throughout the negotiations insisted that any settlement made should end the litigation, and the final proposition made by the company February 11 and 12 was not intended to be any departure from this condition, but on the contrary was submitted by this affiant as a proposition "to end the litigation," as appears by the letter transmitting the same; that neither he nor the company ever for a moment intended to settle the claims of the company against Coburn and Ewing, leaving their claims against it to be further litigated, and if Coburn and Ewing or their counsel had such an intention, it was unknown to this affiant at the time the settlement was entered into; that as soon as affiant heard an intimation that it might be claimed that the settlement did not cover all the matters in litigation, he wrote Coburn and Ewing the letter of February 27, 1886, which was written the same day the acceptance of the proposition of compromise was received, and before any steps were taken on behalf of the company by affiant to carry the same out; that if affiant had then been notified that Coburn and Ewing would insist that only one side of the controversy was settled, he would have tendered back the stock certificate and declined to go on with the compromise; and that, receiving soon after the paper filed with Mr. Fisher's affidavit, in which Coburn described the proposition accepted as one to settle "all pending litigation," affiant felt free to go on and perfect the compromise, believing that if Coburn and Ewing intended to attempt to reserve any right of action against the company, it must be on some cause of action not involved in the present litigation.

Mr. Field said that he was one of the attorneys of the Cattle company, and on the 27th of February, 1886, presented to Mr. Karnes a paper prepared after consultation with his associate counsel, which was destroyed or misplaced by affiant

after Mr. Karnes declined to sign the same; that the principal purpose in presenting such writing was to obtain the speedy and formal discharge of the sureties on the injunction bond, which purpose was explained to Karnes, though such paper did contain stipulations as to dismissing the bills and cross-bills at the costs of each party, respectively, all of which counsel for the Cattle company understood was already included in the settlement; and that when such paper was presented to Mr. Karnes, he replied that Mr. Coburn had gone to St. Louis, and that he would make no other agreement of settlement for Coburn and Ewing, but he assured affiant that the sureties on the injunction bond were not to be harmed or disturbed, and affiant dropped the matter and did not further urge Mr. Karnes' signature to such writing.

On behalf of appellants the affidavits of Karnes and Coburn were filed. Mr. Karnes stated that on the 27th of February, 1886, Mr. Field brought to his office a statement to the effect that the settlement of that day was to be in full of all claims or demands between the parties, and he distinctly told Mr. Field that such paper would not be signed, but that Coburn and Ewing had settled their matters with the Cattle company on the propositions of February 11 and 12 and the unconditional acceptance of these propositions by Coburn and Ewing, and that this settlement would not be supplemented by any further agreement. He further said the letter of acceptance had been prepared with the understanding that the terms of the compromise would be accepted only just in the way they were proposed and to cover nothing more; and that every letter and paper since, so far as his knowledge extended, had been prepared with the understanding that the settlement of February 27 spoke for itself, and that nothing was to be added thereto or subtracted therefrom.

Coburn testified that when the propositions of February 11 and 12 were considered, all previous propositions had been rejected; that the compromise proposed by the company would not have been accepted had it not been supposed that it was left open to Coburn and Ewing to assert any claim they had for services rendered in the purchase of the ranch. That in

Statement of the Case.

the early correspondence this matter was referred to, but no mention was made in the later correspondence of this compensation, and consequently to avoid any misunderstanding, the terms proposed were unconditionally accepted; that the letter of Mr. McCrary of February 27, 1886, was received and submitted to affiant's counsel, who advised him that he had distinctly informed Mr. Field that receipts in full were not to be passed, and that there was therefore no necessity of making any reply to Mr. McCrary's letter, for which reason he did not answer the same; that in every step taken in closing up said compromise, Coburn and Ewing had distinctly refused to sign any receipts in full or acknowledge any settlement in full, and that in the many receipts passed, language indicating a settlement in full was in each case stricken out, and in lieu thereof it was inserted that the receipt was given on the basis of the letters of February 11 and 12 and the acceptance of February 27; that affiant had no recollection concerning the interlineation of the paper attached to Fisher's affidavit, but he knew that there was no intention to convey the impression that Coburn and Ewing intended to abandon their claim for services; and that every step taken in the purchase of the ranch was in the utmost good faith and with strict regard to the interests of the company, and Coburn and Ewing had paid to it more than they ever received from Munson, and had received no compensation whatever for their services in the purchase of the ranch.

A hearing having been had, the court rendered a decree in each of the four cases, finding that there had been by the agreement of the parties a full compromise and settlement of all the matters in controversy in the case, and ordering, in pursuance of the agreement, that each of the bills be dismissed at plaintiffs' costs, to be taxed. The opinion of Judge Brewer will be found in 29 Fed. Rep. 584.

On the same day, Coburn and Ewing moved the court to set aside and vacate the decree entered in each of said causes and to grant them a rehearing, which motions were overruled, the Circuit Court delivering an opinion reported in 29 Fed. Rep. 586. Thereupon the cases were brought to this court by appeal.

Mr. L. C. Krauthoff (with whom was *Mr. Henry N. Ess* on the brief) for appellants.

Mr. Morgan H. Beach, for appellee, submitted on his brief.

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

We are entirely satisfied with the conclusion of the Circuit Court, upon the evidence, that all the matters in controversy between the parties had been fully compromised and settled. The litigation was being prosecuted upon two bills and two cross-bills when the negotiations commenced, and involved the claims of the company against Coburn and Ewing and the claim of Coburn and Ewing for compensation for services rendered in the purchase of the ranch. No reason appears for the severance of claims so intimately connected, and the reservation of the latter, while the former were settled. The proposition from Coburn and Ewing's solicitors of November 12 embraced three distinct offers, and each offer included compensation for services in and about the purchase. The response to this proposition stated what the counsel for the Cattle company would recommend, the settlement so recommended "to be a full and final adjustment of all the controversies between the parties, and of all claims of either party against the other," and that counsel would under no circumstances "advise the payment of commissions to C[oburn] and E[wing], or any waiver of the company's right to defend against any claim that they may make on this account." It is ingeniously argued by appellants' counsel that by this last clause it was intended to so exclude from the settlement this claim for compensation as to leave it outstanding to be litigated. But we think, on the contrary, that it was expressed with sufficient clearness that the company would not be advised to consider any offer of settlement except upon the condition of the surrender of this claim, and that it was for this reason that the negotiations were at that time terminated. Upon the 28th of December the negotiations were renewed

upon the basis of the terms suggested by the Cattle company, and the first letter of appellants' solicitor of that date declares that "the terms then proposed contain substantially the correct basis of settlement" and expresses the desire "again to move in the direction of ending all this interminable litigation." Appellees' counsel at once replied that "if you can bring your clients to agree to the terms proposed by us let me know."

On the same day appellants' solicitor, after going over the matter carefully with Mr. Coburn, wrote, proposing: "(1.) That the stock of Coburn and Ewing be taken at $50,000. (2.) That Coburn and Ewing pay back to the company the $40,000 received from Munson. (3.) That the company, with American securities, indemnify Coburn and Ewing against any claim of the representatives of Burnett as to the $16,800. (4.) That all suits be dismissed, each party paying his own costs, all claims for damages or compensation be waived, and full receipts passed. (5.) That the salary of Ewing up to the time of his discharge be paid to him, amounting to about one month's pay, and that there be paid a few small items of expenses, amounting in all to a very small sum. As I understand, this is substantially your proposition to us."

To this appellees' counsel responded on January 5, 1886, that London counsel had advised that the company could not purchase or provide for the cancellation of the stock held by Coburn and Ewing, and therefore that Fisher did not feel at liberty to conclude the settlement upon the basis of taking back the stock, though he would, if a settlement could be agreed on which would leave the stock in the hands of Coburn and Ewing, or which would not require the company to take it; and that he had advised Fisher, who was leaving for London, to lay the whole matter before the board for instructions, which he hoped would enable "us to agree with you upon some disposition of the stock and upon a final satisfactory adjustment of the matters between the parties." On the 26th of January, appellants' solicitors wrote that Coburn and Ewing would settle "the controversy with the company — (1) By returning the $40,000 commission and the company taking their stock at the actual price paid by them; or, (2) they will

turn over to the company 1600 shares and retain 400. (3) In any event, C. & E. are to be protected against any claim by Burnett's estate, either by a release or indemnity. (4) Mess. C. & E. agree not to buy up or otherwise molest any of the range privileges now enjoyed by the company. (5) This settlement in no way to affect the arrangements heretofore made concerning the W. & L. cattle but the same to be carried out by both parties in good faith as agreed upon, but not to enter into this arrangement in any other way whatever. In other words, the W. & L. cattle are in no way taken into consideration in this settlement. (6) The balance of salary as compensation to be paid to Mr. Ewing." This letter should be read in connection with that of December 28, for its apparent object was to accommodate the objection in relation to the stock, as well as to except the W. & L. cattle. The language in respect to the waiver of all claims for damages or compensation and the passing of full receipts, was not repeated; but, taken in connection with the original response of the Cattle company and what had followed thereon, the Cattle company and its counsel could not have understood that there was an intentional reservation of the question of compensation. The controversy referred to, January 26, was the same controversy referred to in the letter of January 8, of the same counsel, and must be held to have covered the entire controversy in respect to which the parties were treating.

On the 2d of February appellees' counsel enclosed the letter received from Mr. Fisher from New York, in answer to which appellants' counsel, referring to the suggestions of Fisher in relation to certain details of the settlement growing out of the difficulty in dealing with Coburn and Ewing's stock in the company, replied, saying, among other things, that Coburn and Ewing ought to repay the $40,000, but "on the other hand this company has received the benefits of their labor without any expense." Fisher carried with him to London, as appellants were informed, "the several propositions of settlement which have been under discussion," and which bore upon their face the concession that Coburn and Ewing no longer claimed to be entitled to compensation.

Opinion of the Court.

Upon the 24th of February the copy of the letter from the secretary of the Cattle company was sent to appellants, stating that the board of directors had had under consideration the two alternative offers of the 26th of January for the settlement of the claims made by the Cattle company, and that neither of these propositions was acceptable. These alternative offers related to the company's taking Coburn and Ewing's stock at the actual amount paid by them, or taking 1600 shares and retaining 400. The secretary then proceeded to state "the only terms upon which the board can agree to compromise the claim of the company," which terms required the payment by Coburn and Ewing of £10,000, £4,000 in cash or in L. & W. cattle, and the remainder by a sufficient number of shares on the basis of par value; and the giving of security by Coburn and Ewing not to interfere with the company's range privileges; and agreed to the indemifying of Coburn and Ewing against any claim from Burnett's or his partner's executors. And the letter says that in view of the facts "that the issue has practically been decided against Mess. Coburn and Ewing by the same judge before whom the case will ultimately be tried," the amount of money received by them from Munson, and the difficulty in placing any of the shares, etc., the board is of opinion that the offer is favorable to Coburn and Ewing, but "is induced to offer these easier terms with the object of settling the matter before the general meeting of the 4th of March." This would repay the company $50,000 instead of $40,000 but only $20,000 would be paid in cash or cattle, and the remainder in shares.

The contention seems to be that, as the terms of compromise mentioned in the secretary's letter addressed to the Cattle company's attorney, did not specifically allude to the claim for compensation, both parties had made and received propositions in which that claim was left open to litigation, and therefore, appellants could accept the proposition contained in the secretary's letter, and at the same time reserve the objectionable claim. But we do not agree with that view, as already indicated, and are of opinion that Coburn and Ewing must have known that the intention of the company was to

settle the entire matters of difference between them, and that in no event would the company entertain any claim for compensation on their part. This must be so, since the whole theory of the negotiation, renewed December 28, conceded the terms of the company's solicitors in response to the proposition of November 12, as the correct basis of settlement, and those terms embraced the rejection of the item of commissions, which was so well understood that appellants' letter of December 28 expressly said that all claims for damages or compensation were to be waived and full receipts passed. What the board was considering, as appellants must be held to have known, was what appellants should pay and how they should pay it, and it was only in regard to the disposition of their stock that any difficulty arose in substantially arriving at a final conclusion before Fisher went to London.

It was claimed by the company that the stock was not worth its par value on account of certain action on Ewing's part, which turned out to be ill-advised, and the directors considered that although they asked Coburn and Ewing to pay $50,000 instead of $40,000 as offered, yet as the larger part of this was to be taken in their stock at par, it was a liberal offer on the company's part, in view of all the other facts and circumstances surrounding the transaction. And to this Mr. McCrary alludes in his letter of February 24, when he says: "The sum demanded is nominally larger than that offered by you; but, as it is proposed to receive payment in cattle and the stock of the company now held by C. and E. at par, I am in hopes your clients will consider it better to accept than to continue the litigation."

The secretary assumed, as we think he had a right to do, that the claim for compensation on the part of Coburn and Ewing had been dismissed as inadmissible, and that his letter to the counsel of the company need only name the terms upon which the company's claim was to be compromised. The attempt, by the letter of February 27, 1886, reciting the secretary's letters, to so limit the compromise as to reserve the right to litigate the question of compensation, is not commendable. Appellants could not in good faith restrict their settlement in

this way, nor attribute the courtesy with which Mr. McCrary had acted as extending to a concession which he had refused to make at the very threshold. And when he notified Coburn and Ewing, on the 27th of February, that "it is understood that the settlement embraces all the matters involved in the pending litigation in the several suits between the parties," it was their duty, if that were not so, to have so advised him at once.

What passed between Mr. Karnes and Mr. Field is in dispute, but it is clear enough that it could not control so important a difference, if it really existed. The letter of Mr. McCrary informed Coburn and Ewing that he should wire the company of its acceptance of the proposition, and his affidavit shows that this letter was written before he had taken any steps to carry out the compromise on behalf of the company. The subsequent letters in March of Mr. McCrary and of the company demonstrated their understanding that the entire controversy was settled, which indeed was the only motive of any negotiations at all.

The grounds upon which the Cattle company resisted the claim for compensation are too obvious to require comment, and were the same which justified the removal of their agent from his agency. We do not doubt that the compromise covered all the matters in controversy; that this was understood by the parties with whom they were dealing; and that the latter were bound, as the court held, in the premises.

But, although the decision of the court was correct upon the merits, it is objected that the decrees in question were improperly rendered, for want of jurisdiction to proceed upon the petitions. Undoubtedly the ordinary rule would have required the matter of the settlement to be presented by a supplemental bill or cross-bill or a bill in that nature; and these decrees were rendered upon petition only. But this objection was not raised until after a decision rendered. Appellants appeared in answer to the petitions, and introduced affidavits to support their views of the meaning to be attached to the correspondence, and they insisted that their claim for compensation was not embraced in the compromise, and, therefore, that the dismissal of the bills should be without prejudice.

The case of *Kelsey* v. *Hobby*, 16 Pet. 269, 277, is decisive against this objection. There a release was filed in a chancery suit by the defendant, who moved to dismiss the bill, which motion was opposed upon the ground that the release was obtained by duress. The parties went on to take testimony as to the circumstances under which the release was given, and it was held by the court, speaking through Mr. Chief Justice Taney: "Some objections have been made as to the manner in which the release was introduced into the proceedings. It was filed in the cause, and a motion thereupon made to dismiss the bill; and it is said that, being executed while the suit was pending, and after the answers were in and the accounts before the master, it should have been brought before the court by a cross-bill or supplemental answer, and could not in that stage of the proceedings be noticed by the court in any other way. It is a sufficient answer to this objection to say that it was admitted in evidence without exception, and both parties treated it as properly in the cause; and the complainant proceeded to take testimony to show that it was obtained from him by duress, and the defendants to show that it was freely and voluntarily given. It had the same effect that it would have had upon a cross-bill or supplemental answer, and the complainant had the same opportunity of impeaching it. And there is no propriety in requiring technical and formal proceedings, when they tend to embarrass and delay the administration of justice; unless they are required by some fixed principles of equity law, or practice, which the court would not be at liberty to disregard." In *Gilbert* v. *Endean*, 9 Ch. D. 259, 267, Sir George Jessel, Master of the Rolls, uses this language: "I think a Court of Appeal cannot refuse to decide on the merits where the parties in the court below argued the case on the merits without objecting to the evidence. They must be taken to have assented to having their rights decided on the motion according to the usual rules governing interlocutory motions. If they wished them to be decided otherwise, they should have objected to the reception of the evidence. I think it is impossible for the appellant to succeed upon that ground, not having taken that course in the court below."

Counsel for Parties.

These cases are cited by appellees together with *Pryer* v. *Gribble*, L. R. 10 Ch. 534; *Tebbutt* v. *Potter*, 4 Hare, 164; *Askew* v. *Millington*, 9 Hare, 65. *Forsyth* v. *Manston*, 5 Madd. 78, *Wood* v. *Rowe*, 2 Bligh, 595, 617, *Rowe* v. *Wood*, 1 Jac. & Walk. 315, 337, and *Tebbutt* v. *Potter*, 4 Hare, 164, were referred to in *Askew* v. *Millington*; and Vice Chancellor Turner held, where the agreement of compromise went beyond the ordinary range of the court in the existing suit, and the right to enforce the agreement in that suit was disputed, that the proper course for proceedings to enforce it was by bill for specific performance, and not by motion or petition in the original suit to stay the proceedings, and he thought this must necessarily be so where the agreement itself was disputed. But, under the circumstances, we have already held that the petitioners' case did not fail upon the merits, and as all parts of the agreement fell within the range of the suits, and appellants did not dispute the form of proceeding, we are of opinion that the decrees cannot be reversed upon this ground. They are therefore

Affirmed.

MILLER *v.* CLARK.

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

No. 1366. Submitted January 19, 1891. — Decided February 2, 1891.

Where the interest of a plaintiff, whose bill in equity was dismissed on the merits by the Circuit Court, in the subject matter of the suit, did not exceed $5000, her appeal to this court was dismissed for want of jurisdiction.

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

Mr. William B. Stoddard for the motion.

Mr. J. M. Buckingham and *Mr. Simeon E. Baldwin* opposing.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

On or about the 14th of April, 1887, Mrs. Irene Clark, of Milford, New Haven County, Connecticut, died, leaving a will which contained the following provisions: (1) She gave to her husband, Bela Clark, all of her household furniture, including beds and bedding, pictures and silver-plated ware; (2) She gave to her grandniece, Martha A. Buckingham, and to five other persons, one of whom was Emma J. Clark, the wife of Albertus N. Clark, one, Mary Bell Clark, and one, Ellen C. Platt, all of her personal estate, including her wearing apparel, to be equally divided between them; and (3) She appointed Albertus N. Clark to be her executor. This will was duly admitted to probate in the proper court on the 16th of April, 1887, and Albertus N. Clark qualified as executor. The inventory of the estate showed that she had $7509.83 in cash, deposits in savings banks, and bank stock; $191.30 in household goods; and $48.50 in wearing apparel.

Martha A. Buckingham, who had become Martha A. Miller by marriage, a citizen of Iowa, filed a bill in equity, on the 3d of January, 1889, in the Circuit Court of the United States for the District of Connecticut, against Emma J. Clark, Mary Bell Clark, Ellen C. Platt and Albertus N. Clark, citizens of Connecticut. The bill sets forth the death of Irene Clark, her will and its admission to probate, and the qualifying of Albertus N. Clark as executor. It further alleges that the deceased left, as a part of her estate, $4500 and accrued interest, deposited in the Connecticut Savings Bank of New Haven, Connecticut; that such sum was evidenced by three bank-books, one in the name of Ellen C. Platt, one in the name of Mary Bell Clark, and one in the name of Emma J. Clark, each of which books represented the deposit of the sum of $1500 and accrued interest; that such books were in the possession of Irene Clark at the time of her death, and came into the possession of Albertus N. Clark, as executor, who, as such executor, was rightfully entitled to the possession of them and to such deposits of money; that he wrongfully parted, or was intending to part, with the possession of such books and deliver them

respectively to the three parties in whose names they stood; that such books were then wrongfully in the possession of said parties; that the money represented by them was, at the time the executor made his inventory, and also now, in said Connecticut Savings Bank; that he had wrongfully neglected to include in his inventory the said $4500; and that that sum is wrongfully withheld from said estate.

The prayer of the bill is for a decree compelling the three other defendants to turn over to the executor the said bank-books, and ordering him to receive them and the money deposited in the Connecticut Savings Bank, and to include the said sum of $4500 and accrued interest as assets of the estate of Irene Clark, and to amend his inventory so as to include the same, and to make final disposition of said money according to the provisions of the will of the deceased. An answer on oath is waived. The defendants joined in a demurrer to the bill, which was overruled; and they then joined in an answer, to which there was a replication, and proofs were taken.

The court, held by Judge Shipman, entered a decree dismissing the bill. The court (40 Fed. Rep. 15) decided the case in favor of the defendants on the merits, the opinion holding that, on the facts proved, the gifts of the moneys to the three female defendants were valid as gifts *inter vivos*, and were accepted by the donees during the lifetime of the testatrix. The plaintiff has appealed to this court. The amount represented by each of the three bank-books, on the 15th of January, 1889, did not exceed the sum of $1792.61, the aggregate of the three being $5377.83. The defendants now move to dismiss the appeal, for want of jurisdiction, because the matter in dispute as to each of the defendants other than the executor does not exceed the sum or value of $5000. United with it is a motion to affirm.

We are of opinion that the appeal must be dismissed, on the ground that the interest of the plaintiff does not exceed $5000. As the total amount involved is only $5377.83, and the interest of the plaintiff in that sum is, under the will, only one-sixth thereof, or $896.30½, this court has no jurisdiction of her appeal.

Appeal dismissed.

ST. LOUIS *v.* RUTZ.

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

No. 1096. Submitted January 5, 1891. — Decided February 2, 1891.

In this case certain land formed by accretion, on the Illinois side of the Mississippi River, in St. Clair County, Illinois, was held to belong to the plaintiff, as part of certain surveys in the common fields of Prairie du Pont, in Illinois, and not to belong to the city of St. Louis, Missouri, as an accretion to, and part of, an island in that city, called "Arsenal Island" or "Quarantine Island," on the Missouri side of the river, which island was originally more than a mile higher up the river than said surveys.

By the law of Illinois the title of the plaintiff extended to the middle of the main channel of the Mississippi River.

It is a rule of property in Illinois, that the fee of the riparian owner of lands in that State bordering on the Mississippi River extends to the middle line of the main channel of the river.

The terms of the deed which conveyed title to the plaintiff construed as not limiting him to the line of low water mark on the river.

The sudden and perceptible loss of land on the premises conveyed to the plaintiff, which was visible in its progress, did not deprive the grantor of the plaintiff of his fee in the submerged land, nor change the boundaries of the surveys on the river front, as they existed when the land commenced to be washed away.

If the bed of a stream changes imperceptibly by the gradual washing away of the banks, the line of the land bordering upon it changes with it; but, if the change is by reason of a freshet, and occurs suddenly, the line remains as it was originally.

If an island or dry land forms upon that part of the bed of a river which is owned in fee by the riparian proprietor, the same is his property.

The right of accretion to an island in the river cannot be so extended lengthwise of the river as to exclude riparian proprietors above or below such island from access to the river, as such riparian proprietors.

The law of title by accretion can have no application to a movable island, travelling for more than a mile, and from one State to another, for its progress is not imperceptible, in a legal sense.

EJECTMENT. The docket title to this case is *Benjamin Seeger and the City of St. Louis* against *Edward Rutz.* The death of Seeger was suggested by counsel on the 5th of January, 1891, and thereupon, an order being entered that the

case proceed in the name of the surviving plaintiff, the cause was on the same day submitted.

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

This was an action of ejectment, commenced January 29, 1884, by Edward Rutz against Benjamin Seeger, in the Circuit Court of the county of St. Clair, in the State of Illinois, to recover the possession of certain land situated in said county, described in the first count of the declaration as follows: "Commencing the survey thereof at a point on the line between surveys one hundred and forty-eight (148) and one hundred and forty-nine, in the common fields of Prairie du Pont, from which the southernmost corner of said survey number one hundred and forty-eight, at the bluffs, bears S. 33½° E. (var. 6°) two hundred and forty-nine and $\frac{25}{100}$ (249.25) chains; thence north 33½° W., with said line of said surveys extended, to the centre thread of the Mississippi River; thence along the centre thread of said river to the line between survey one hundred and fifty-six (156) and survey one hundred and fifty-seven (157) extended to said centre thread of said river, making the right-angle distance between the said extended lines 34.60 chains; thence south 33½° E. along said last-mentioned extended line to a point in the line between said surveys one hundred and fifty-six (156) and one hundred and fifty-seven (157) of said common fields, from which the most southern corner of said survey one hundred and fifty-six bears south 33½° east two hundred fifty-four chains distant; thence along the meanders of the original bank of the Mississippi River, as surveyed by the United States government in surveying said common fields, to the point of beginning, with the appurtenances."

Seeger put in a plea of the general issue; and the city of St. Louis, a municipal corporation of Missouri, and the landlord of Seeger, was made, by an order of the court, a co-defendant with Seeger, and was given the sole control and direction of the defence of the suit; and it put in a plea of the general issue. Afterwards, on the petition of the city of St. Louis and

of Seeger, the suit was removed into the Circuit Court of the United States for the Southern District of Illinois, and that court took jurisdiction of it. By a written stipulation filed, the case was tried by the court without the intervention of a jury, and the court, held by the district judge, made the following findings of fact:

"1. That in the years 1849 and 1850 one Augustus A. Blumenthal acquired by deeds from the parties then in actual possession of said premises as the owners thereof, the title in fee to surveys numbered 149, 150, 151, 152, 153, 154, 155 and 156 of the common fields of Prairie du Pont, in the county of St. Clair, in the State of Illinois, and that Edward Rutz, the plaintiff in this suit, acquired from said Blumenthal his said title to said land prior to the commencement of this suit.

"2. That the map or plat made by G. F. Hilgard, county surveyor of St. Clair County, Illinois, produced in evidence and marked 'Plaintiff's Exhibit B,' is a correct map and plat of the said premises and the several surveys and lines indicated thereon; which said map is hereby included in and made a part of these findings, and to which reference is made for greater certainty.

"3. That, as appears from the evidence and plats read and produced in evidence, the said surveys numbered 149, 150, 151, 152, 155 are each one arpent (or about twelve rods) in width, and the said surveys 153 and 154 are each two arpents (or about twenty-four rods) in width, and that the said survey numbered 156 is three arpents (or about thirty-six rods) in width, and that said several surveys adjoin each other and lie side by side in the order the same are respectively numbered, survey 149 being upon the extreme northerly, and survey 156 being upon the extreme southerly, side of the entire tract, and that each and all of said surveys extended to and were bounded by the Mississippi River on the northwesterly ends thereof, and extend southeasterly from the Mississippi River, the average distance of about one thousand rods, to the hills or bluffs on the Illinois side of said river.

"4. That said Blumenthal, under said deeds to him, whereby he acquired title to said surveys, in the year 1850 entered

upon and took the actual possession of said surveys, including, as a part thereof, the accretions thereto formed on the river front of said surveys embraced within the side lines of said surveys, extended without deflection in a direct line across such accretions northwesterly to the Mississippi River, and said Blumenthal so held such possession of said premises and paid all taxes thereon each year from January 23, 1850, to December 23, 1873, at which said last-mentioned time said Blumenthal conveyed 500 acres off from the northwestern end of said premises, by deed, to said Edward Rutz and others, whose title the plaintiff acquired in fee on and prior to the 7th day of March, 1883, and thereupon succeeded to said Blumenthal's said title to and possession of said premises; and that the said Blumenthal, from whom the plaintiff so derived such title and possession as aforesaid, and the several owners of the surveys and lands in the said Prairie du Pont common fields adjoining said surveys 149 to 156, both on the northerly and southerly sides thereof, have each, ever since the year 1850, up to the present time, claimed, possessed, fenced, enclosed, used and occupied as a part of their said several surveys and lands, respectively, that portion of the said accretions thereto embraced within the side lines of their respective surveys extended without deflection in direct lines northwesterly to said river; and that ever since the year 1849 the several owners of said surveys have, by common consent, recognized and acted upon such extension of the side lines of their several surveys in a direct course across said accretions to the river, as the true and proper boundary and division lines between them, in respect to the accretions formed on the river front of said surveys.

"5. That the premises described in the declaration and sued for are located at the present time, and were at the commencement of this suit, eastwardly of the centre of the main channel of the Mississippi River, and in the county of St. Clair, in the State of Illinois.

"6. And the court further finds, that, as appears from the evidence and from the survey of said lands made by William L. Deneen, as the county surveyor of St. Clair County, Illi-

nois, on November 15, 1850, produced in evidence, at that time, the dry land of said surveys numbered 149 to 156, inclusive, extended westwardly to the line indicated by the words 'River bank, 1850, by Deneen,' on the map marked 'Plaintiff's Exhibit B;' and that the main land of said surveys numbered 149 to 156, inclusive, in the year 1850, extended westwardly over and across, and included about sixty rods in width of the lands described in the declaration, to wit, that portion of said lands lying between the river bank in 1850, as indicated by said Deneen's survey, and the line marked 'Old surveyed river bank, 1814,' as said lines are respectively designated on said map; and that in the year 1863, the main and dry lands of the surveys 149 to 156 extended about fifteen chains or sixty rods further westward and beyond the line of the river bank so surveyed by said Deneen in 1850, and that the eastern bank of the river in 1863 was about one-half a mile west of a certain dwelling-house hereinafter mentioned, then standing on said survey No. 151, and so continued until the year 1865.

"7. That the greater part of the so-called Arsenal Island, which now extends over and is embraced within the boundaries of the lands described in the plaintiff's declaration, is located upon the site of the dry lands of said surveys numbered 149 to 156, inclusive, as the same existed from 1850 to 1865, and that the residue thereof (being about one-eighth of the entire width of the same) is located upon the bed of the Mississippi River as it then existed, and easterly of the thread or middle line of said river.

"8. That between the years 1865 and 1873 the river front of the said surveys numbered 149 to 156 was washed away, so that, in July, 1873, the river front of said lands only extended to the line marked 'River bank, 1873,' on said map, and that said river bank thereafter continued to wash away and cave in until it reached the line marked 'River bank, 1884,' on said map.

"9. And the court further finds, from the evidence, that such washing away of said river bank did not take place slowly and imperceptibly; but, on the contrary, the caving in

and washing away of the same was rapid and perceptible in its progress; that such washing away of said river bank occurred principally at the spring rises or floods of high water in the Mississippi River, which usually occurred in the spring of the year; that such rises or floods varied in their duration, lasting from four to eight weeks, before the waters of the river would subside to its ordinary stage or level; that during each flood there was usually carried away a strip of land from off said river bank from two hundred and fifty to three hundred feet in width, which loss of land could be seen and perceived in its progress; that as much as a city block would be cut off and washed away in a day or two; that blocks or masses of earth from ten to fifteen feet in width frequently caved off and fell into the river and were carried away at one time; that in the spring of the year 1872 Mr. Augustus A. Blumenthal, Jr., the occupant of the land at the time, lived in the dwelling-house situated on said survey No. 151, and the river had, since the year 1865, so encroached upon the land that the house was then but about four or five hundred feet back from the river bank and water's edge, as it then existed. When the spring rise or flood occurred that year, the said Blumenthal became alarmed for the safety of his house, and immediately commenced taking said house down and removing the same further from the river bank, and, in so doing, worked 6 or 8 days in succession, at the expiration of which time the bank had caved in and washed away so rapidly that the bank and waters of the river had approached within a few feet of the foundation of the house, and before the waters subsided carried away the greater portion of the foundation of the house, and the flood which came in the spring of 1873 carried away the residue of said foundation, with at least 100 feet more of the land; and that such caving in and washing away continued until the building of the dyke at the point indicated on said map, on the eastern side of the river, above the said lands, which dyke was built by the United States government in the years 1876 to 1878.

"10. That the said washing away of the bank on the front of the said surveys was caused by dykes built by the city of

St. Louis on the western side of the river, at the points where the same are indicated on said map, by causing the current of the river to flow over to and against the eastern shore; that the western bank of the river opposite the plaintiff's said land is rocky, and there appears to have been no material change in that bank since the first survey thereof by the United States government.

"11. The court further finds, that in 1853 there existed an alluvial formation or body of land on the western side of the river and near the Missouri shore, then called Quarantine Island, which, in that year (1853), was surveyed by William H. Cozzens. The location and boundaries of said island are indicated upon said map, the same being shaded red, and having written thereon the words and figures 'Quarantine Island, also called Arsenal Island, as surveyed in 1853.' In 1858 the said island, in low water, extended to and adjoined the main land on the western or Missouri side of the river. At some time between the years 1853 and 1863 the greater portion of said Quarantine Island washed away, so as only to leave remaining that portion thereof embraced within a second survey thereof made by said Cozzens in January, 1863, the location and boundaries of which are indicated upon said map by the words 'Survey No. 411 of St. Louis land, school lands, Arsenal Island, surveyed in 1863;' the letters and lines thereof being shaded green upon said 'Exhibit B.'

"12. Said Quarantine Island, since its survey in 1863, has been called Arsenal Island, and at the time of said surveys of said island in 1853 and 1863 the same was situated on the west side of the main channel of the Mississippi River and about a mile higher up the river than the lands described in the declaration, and no part of the same then extended down the river opposite said plaintiff's said lands.

"13. On February 10th, 1863, a part of the said island, designated as 'Survey No. 411 of St. Louis school lands,' containing 109 and twenty-two hundredths acres, was assigned to the St. Louis public schools, in pursuance of the act of Congress of June 13th, 1812, entitled 'An act making further provision for settling the claims of land in the Territory of Mis-

souri' (2 U. S. Stat. at Large, p. 748), and of the supplementary act of May 26th, 1824 (4 U. S. Stat. at Large, p. 66), and the residue of said island, as so surveyed in 1863, being nine and sixty-five hundredths acres on the northern end thereof, appears to have been also assigned to said St. Louis public schools on August 25th, 1864, as indemnity for school lands lost in section 16, T. 45 N., range 7 east, of the St. Louis district, Missouri.

"14. By deed dated February 8th, 1866, the St. Louis public schools conveyed its right and title to said Quarantine or Arsenal Island to the city of St. Louis, which lands are described in such deed as situated 'in the county of St. Louis and State of Missouri.' As early as the year 1850 the city of St. Louis occupied said Quarantine or Arsenal Island for quarantine purposes, and so continued to occupy the same until the year 1875, when the said city of St. Louis leased said island to the defendant, Benjamin Seeger, who, as such tenant, lived on and occupied the said island up to the time of the commencement of this suit. During the years 1861 to 1865, inclusive, the United States government occupied a portion of said island for the purpose of a military hospital and as a place for the burial of those dying at such hospital. The dry land described in the declaration in this case did not arise or form in the Mississippi River until about the year 1874 and subsequent thereto, the same having, after the year 1865 and prior to 1874, become, in part, submerged and washed away in the manner stated in the 8th paragraph of these findings.

"15. The court further finds, from the evidence, that there is not now, and was not at the time of the commencement of this suit, any land whatever above the surface of the water in said river on the site or within the boundaries of said Quarantine Island as so surveyed in 1853, nor upon the site or within the boundaries of said island as so surveyed in 1863, but that the same was subsequently wholly washed away.

"16. The court further finds that, in the floods in the Mississippi River, before mentioned, large portions of the upper or northern end of said island washed away; that in such

floods a bar formed each year below, and joined to the foot of the island, extending down the river for the distance of a quarter of a mile or more; that when the water subsided after such a spring flood the surface of such bar appeared in sight above the surface of the water, but nearly on a level with the water, for the greater length of such bar; that during the first summer after such bar had formed, willows grew upon it, and the flood which occurred the next succeeding spring deposited more sand and soil on the bar, which was retained by the willows, and the bar so formed was thus raised higher, in each successive annual flood, so long as it was overflowed in high water, and this process was repeated at each succeeding flood by the formation of another bar below that formed by the preceding flood, which in turn was covered with a growth of willows and raised higher by each succeeding flood until it ceased to be overflowed.

"17. The court further finds, that such bars were not formed by accumulations of sand or soil washed up against the lower end of the island, but by the deposits, in times of flood, of soil and sediment upon the bed of the river below the island.

"18. And the court further finds, that before the said island was washed away the main and navigable channel of the Mississippi River was eastwardly of the island, but after the said bar was formed lower down the river in front of the plaintiff's land the main and navigable channel of the river has been, and still is, on the west side of the said bars or island, and that since the said bars or island had so formed in the river in front of said surveys the boats navigating the river have not run between the bar or island and the bank of the eastern or Illinois shore of the river.

"19. The court further finds that in the years 1876 to 1878 the United States government built a dyke from the eastern or Illinois shore of the river to the bar or island, as it then existed, about sixty rods northerly, or higher up the river than the north line of the plaintiff's said land, and which said dyke is indicated on said map by the line having the word 'dyke' written beneath the same. And that in the years 1878 to

Statement of the Case.

1882 the United States government built a dam above said dyke from a point near the head of said bar or island to the eastern or Illinois shore, on the line designated 'dam' on said map; and after said dyke and dam were built the flow of the water through the channel or space occupied by water between the said bar or island which had so formed in front of the river bank of plaintiff's land, as it existed at that time, was thereby impeded and the channel or space gradually filled up by deposits from the river, so that by the year 1884 the same became dry land from the line in front of the said surveys 149 to 156, marked 'River bank, 1884,' out to the western side of the said bar or island on the northwestern end of said surveys, as indicated on said map, and that the same has since continued to be and is now dry land, except in extremely high water, and that the lands described in the declaration embrace so much thereof as lies westerly of the line marked on said map with the words 'Old surveyed river bank, 1814,' and easterly of the middle or thread of the main channel of the Mississippi River, and between the extended lines of said surveys, as indicated on said map marked 'Plaintiff's Exhibit B.'

"20. The court further finds, that the plaintiff is, and was on and prior to the first day of January, A.D 1884, and at the time of the commencement of this suit, the owner in fee of said lands described in the first count of the declaration, situated in the county of St. Clair and State of Illinois, and that the defendants are guilty of unlawfully withholding the possession thereof from the plaintiff, in manner and form as alleged in the declaration.

"21. And that the value of the said lands in controversy in this suit exceeds sixteen thousand dollars."

On these findings, the court entered a judgment which found that the defendants were guilty of unlawfully withholding from the plaintiff the premises above described; and that the plaintiff, at the time alleged in the declaration, owned the lands in fee; and adjudged that he recover the possession of them in fee from the defendants, according to the finding of the court. A motion for a new trial was made and overruled.

There was in the record a bill of exceptions, which showed

that at the trial the defendants moved the court to make the findings of fact and declarations of law which are set forth in the margin,[1] but that the court overruled such motion and the

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[1] *Defendants' Rejected Findings of Fact.*

This is an action of ejectment instituted in the State Circuit Court of St. Clair County, Illinois, on January 29, 1884, to recover certain premises alleged to be in St. Clair County, Illinois, and described as follows, to wit: Bounded east by the meanders of the original bank of the Mississippi River, as surveyed by the United States government and established in United States surveys 149 to 156, inclusive, of the common fields of Prairie du Pont; bounded west by the centre thread of the Mississippi River; bounded north by the north line of survey 149 aforesaid, produced westwardly to the centre thread of the Mississippi River; and south by the south line of survey 156 aforesaid, produced westwardly to the centre thread of the Mississippi River.

The action was originally commenced against Benjamin Seeger, alleged to be in possession, and, subsequently, the city of St. Louis, a municipal corporation existing under the laws of the State of Missouri, claiming to be the owner of the premises occupied by said Seeger and the landlord of said Seeger was, on its motion, made co-defendant, and, afterwards, the cause, on the application of said defendants, was duly removed into this court.

At the trial of this cause before the court, a jury being waived, it appeared that one Blumenthal, in 1849, took possession, under deeds from Dushanan, Lacroix and Pensoneau, of surveys 149 to 156, inclusive, of the common fields of Prairie du Pont, St. Clair County, Illinois, and paid taxes thereon until 1873, when he conveyed to the plaintiff and others, under whom the plaintiff now claims. The deed from Blumenthal, on which the title and possession of plaintiff now rests, describes the property as bounded northwestwardly by low-water mark of the Mississippi River.

It appeared that Blumenthal, in 1849, took possession, under his deeds, of the property mentioned therein, and that his actual possession never extended further west than the easterly edge of the Mississippi River, and that the plaintiff succeeded to the said possession of Blumenthal prior to the commencement of this action. It appeared that between 1814 and 1850 the Mississippi River in front of the property receded in a westerly direction, so that surveys 149 to 156, inclusive, gained forty acres of ground, and that from 1850 to the present time the river has encroached on the premises so that the same have lost one hundred acres of ground, the net loss being sixty acres of ground.

It appeared that an approved survey of Arsenal, then Quarantine Island, was made by William H. Cozzens, in 1853, under the instructions of the U. S. Surveyor General; also, that said island was assigned by the Secretary of the Interior to the St. Louis public schools, in 1863 and 1864. The first assignment bears date February 10, 1863, and covers 109.92 acres of the island. The second assignment is dated September 8, 1864, and conveys

defendants excepted. The bill of exceptions stated that no declaration of law was given by the court, except so far as the

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9.65 acres. The two assignments embrace the entire island, which contained 119.57 acres; also, that said island was sold and conveyed by the public schools for the sum of $32,000 to the city of St. Louis, in 1866; also, that surveys of the island were made in 1853, 1863, 1881 and 1883, showing its location at these various periods. Witnesses were produced who had known the island as early as 1847. The island was originally in the city of St. Louis and state of Missouri, opposite the arsenal and west of the main channel of the river and of the centre thread of the river. It has moved south and westwardly. The change effected in the location of the island since 1847 has been gradual in its character, and has been caused by the action of the water of the river washing the head of the island and adding new ground to the foot thereof. The city of St. Louis has been in possession of the island from 1850 to the present time. The defendant Seeger occupies the island as the tenant of the city of St. Louis. He cultivates the land and resides thereon. Since 1847, Arsenal Island has always existed as an island in the Mississippi River.

The island existing at the commencement of this action is the same island that existed in 1847, except that its location had changed as above stated, and it had become attached to the Illinois shore, in the manner hereinafter stated. At no time had the island ceased to exist. Prior to 1874 the navigable channel of the Mississippi River was between Arsenal Island and the Illinois shore.

In 1874 boats commenced navigating between the island and the Missouri shore. In or about the years 1878 to 1882 the United States government caused to be constructed a stone dyke leading from the head of the island to the Illinois shore, and subsequently a dam south of the dyke, between the island and the Illinois shore. The effect of these structures has been to stop the flow of water at low water between the island and the Illinois shore, and, as a necessary result, land has been created connecting the island with the Illinois shore in front of the Prairie du Pont common fields. During the yearly stage of high water the water flows between the island and the Illinois shore, and at the date of the trial — July 5, 1888 — it was so flowing.

Defendants' Refused Declarations of Law.

1. The court declares the law to be, that, under the facts in this cause, the plaintiff has shown no title to the premises known as Arsenal Island at and prior to the commencement of this action, and the judgment, therefore, must be for the defendants.

2. The court declares the law to be, that, under the facts in this cause, the plaintiff has exhibited no title to the bed of the Mississippi River beyond low-water mark in front of surveys 149 to 156, inclusive, of the common fields of Prairie du Pont.

3. The court declares the law to be, that, under the facts in this cause,

same may be included in the findings which the court made; and that the defendants excepted to the findings of fact made

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Arsenal Island is not an accretion to plaintiff's land and the plaintiff has no claim to the ownership of said island or any part thereof under the law of accretion.

4. The court declares the law to be, that the title to Arsenal Island held by the city of St. Louis under the United States, and the possession of said premises by said defendant, extending from 1850 to the present time, have not been divested by the movement of the island in the Mississippi River.

5. The court declares the law to be, that the deed of Augustus A. Blumenthal and wife to Edward Rutz and others, introduced in evidence, did not convey title to the bed of the Mississippi River beyond low-water mark in front of surveys 149 to 156, inclusive, of the common fields of Prairie du Pont, except to the accretion or sand-bar lying northwestwardly and between the extended lines of said surveys.

6. The court declares the law to be, that if the property known as Arsenal Island was granted by the United States to the public schools of the city of St. Louis, and that at the time of such grant the same was an island in the Mississippi River situate in the State of Missouri, then the ownership of accretions attaching themselves to such island while said island remained in said State is governed by the laws of the State of Missouri; and if said island was situated entirely up-stream a mile, or two miles, north of the northernmost point of land of the plaintiff fronting on the Mississippi River, and if accretions thereupon formed at the lower or down-stream end of said island in said State until they reached a point opposite to or in front of the river front of the plaintiff's land, or between the extended lines of his surveys 149 to 156 described in the declaration, such accretions became and were the property of the owner of the island shore to which they had become attached, and the title of such owner is not divested by the fact that the navigable channel of the Mississippi River changed its course so as to run between said island and the eastern shore of the State of Missouri, and the further fact that, by means of a dyke and a dam run out from the east shore of the Mississippi River (the Illinois shore) said island has become attached to the Illinois shore, and the intervening space has been filled up by deposits of mud, so that, except in high stages of water, there is no water running between said island and the Illinois shore of said river.

7. The court declares the law to be, that if the current of the Mississippi River undermined the west shore or bank of the land of the plaintiff or of his grantor, Blumenthal, fronting on the Mississippi River, and that by reason thereof perceptible pieces of the shores and banks of said land fell into the river and were washed away, whereby the bed of the river was changed, thereby the west boundary line of the land of the plaintiff or of his grantor changed accordingly, and to correspond with the changes in the bed and centre thread of said river opposite said land.

by the court, and to the rendering of judgment for the plaintiff, and to the overruling of the motion for a new trial.

Seeger and the city of St. Louis sued out a writ of error from this court to review the judgment. During the pendency of the writ of error in this court, Seeger died, and the city of St. Louis is the surviving plaintiff in error.

Mr. Leverett Bell and *Mr. W. C. Kueffner* for plaintiff in error.

I. Under the law of France, in force when the original grant of the Prairie du Pont Common Fields was made in the year 1722, no title passed by the terms of said grant to the bed of the Mississippi River.

II. Under a proper application of the doctrines of the common law, the title of the owner of land on the Mississippi River terminates at the water's edge, and does not extend to the centre of the river. *Railroad Co.* v. *Schurmeir*, 7 Wall. 272; *Barney* v. *Keokuk*, 94 U. S. 324; *Rundle* v. *Delaware &*

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8. The court declares the law to be, that the boundary line between the States of Illinois and Missouri is the centre thread of the Mississippi River.

9. The court declares the law to be, that if accretions formed and attached themselves to the down-stream end of Arsenal Island, in the State of Missouri, and thereafter other accretions attached themselves to the first-mentioned accretions on the east side of the island, toward the Illinois shore, the last-mentioned accretions belong to the owner of the first accretions, notwithstanding they extended eastwardly of the centre thread of the river.

10. The court declares the law to be that, if a sand-bar extended southwestwardly from the foot of Arsenal Island, in the State of Missouri, and subsequently accretions attached themselves to the east side of said sand-bar and extended eastwardly across the centre thread of the river into the State of Illinois, the owner of the island was and is the owner of said sand-bar and said accretions.

11. The court declares the law to be, that if the current of the Mississippi River gradually undermined the west shore or bank of the land of the plaintiff or of his grantor, Blumenthal, fronting on the Mississippi River, and that by reason thereof perceptible pieces of the shores and banks of said land fell into the river and were washed away, whereby the bed of the river was gradually changed, thereby the western boundary line of the land of the plaintiff or said grantor changed accordingly to correspond with the changes in the bed and centre thread of the river opposite said land.

Raritan Canal Co., 14 How. 80; *The Daniel Ball*, 10 Wall. 557; *The Montebello*, 20 Wall. 430; *Carson* v. *Blazar*, 2 Binney, 475; *S. C.* 4 Am. Dec. 463; *Cates* v. *Wadlington*, 1 McCord (Law) 580; *S. C.* 10 Am. Dec. 699; *Wilson* v. *Forbes*, 2 Devereaux (Law) 30; *Bullock* v. *Wilson*, 2 Porter (Ala.) 436; *Elder* v. *Burrus*, 6 Humphreys, 358; *Canal Commissioners* v. *People*, 5 Wend. 423; *People* v. *Canal Appraisers*, 33 N. Y. 461; *Benson* v. *Morrow*, 61 Missouri, 345.

III. Under the terms of the deed from Blumenthal, the title of the defendant in error terminated at low-water mark of the Mississippi River. *Middleton* v. *Pritchard*, 3 Scammon, 510; *S. C.* 38 Am. Dec. 112; *Buttenuth* v. *St. Louis Bridge Co.*, 123 Illinois, 535.

IV. The premises in dispute are the property of the city of St. Louis.

The present location of Arsenal Island is due to the action of the currents of the river, and the island, as it now exists, was created by accretion to the original island. It is settled law that land bounded by the Mississippi River is entitled to the accretion attaching to it. *New Orleans* v. *United States*, 10 Pet. 662; *Jones* v. *Soulard*, 24 How. 41; *St. Clair County* v. *Lovingston*, 23 Wall. 46.

The above doctrine applies to the islands in the river, as well as to the main shore. *Benson* v. *Morrow*, 61 Missouri, 345; *Buse* v. *Russell*, 86 Missouri, 209.

In a case lately decided here, *Jefferis* v. *East Omaha Land Company*, 134 U. S. 178, it is held that the general law of accretion is applicable to land on the Mississippi and Missouri rivers. This view excludes the idea that the bed of said rivers is the property of the adjoining proprietors fronting thereon. It overthrows the rule of the Supreme Court of Illinois that has prevailed in that State from 1842 to the present day on the subject. It decides the present controversy in favor of the plaintiffs in error.

The case also decides that the water line is the boundary of a lot fronting on the river, and remains the boundary no matter how it shifts, and the conveyance of the land conveys the accretion thereto.

It is a matter of which the court will take judicial cognizance that it is seldom that accretion on the Mississippi and Missouri rivers is imperceptible. Bottom lands are added to, or swept away by the acre. This fact makes no change in the rule. The proprietor always holds to the water line; no more, no less.

Mr. James K. Edsall for defendant in error. *Mr. Alonzo S. Wilderman* also filed a brief for the same.

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

The general question involved in the case is, whether the land in dispute is a part of surveys 149 to 156, inclusive, in the common fields of Prairie du Pont, with the accretion thereto, situate on the Illinois side of the Mississippi River, in St. Clair County, Illinois, and is owned by the plaintiff, or whether it is owned by the surviving defendant, the city of St. Louis, as an accretion to, and part of, an island in that city, called "Arsenal Island" or "Quarantine Island," on the western or Missouri side of the Mississippi River, which was originally an island more than a mile higher up the river than the surveys in question.

The assignments of error made are, that the Circuit Court, erred (1) in holding that the title and ownership of the plaintiff extended to the middle of the main channel of the Mississippi River and embraced the premises in controversy; and (2) in refusing to hold that the premises in controversy were an accretion to Arsenal Island, and the property of the city of St. Louis.

We cannot review the action of the Circuit Court in finding the facts which it did find and refusing to find the facts which it was asked to find and did not find. We can only inquire whether the facts found are sufficient to support the judgment. The "defendants' refused declarations of law" do not appear to have been based upon the facts found by the court but upon the defendants' proposed findings of fact, which were rejected by the court. These "refused declarations of law" contained mixed questions of law and fact; and where

such questions are submitted to the court in a trial without a jury, this court will not, on a writ of error, review such questions, any more than it will pure questions of fact.

The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi River, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property, which is governed by the local law of Illinois. *Barney* v. *Keokuk*, 94 U. S. 324, 338; *St. Louis* v. *Myers*, 113 U. S. 566; *Packer* v. *Bird*, 137 U. S. 661. In *Barney* v. *Keokuk* it is said, that if the States "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."

The Supreme Court of Illinois has established and steadily maintained, as a rule of property, that the fee of the riparian owner of lands in Illinois bordering on the Mississippi River extends to the middle line of the main channel of that river. *Middleton* v. *Pritchard*, 3 Scammon, 510; *Braxon* v. *Bressler*, 64 Illinois, 488; *Houck* v. *Yates*, 82 Illinois, 179; *Cobb* v. *Lavalle*, 89 Illinois, 331; *Lavalle* v. *Strobel*, 89 Illinois, 370; *Washington Ice Company* v. *Shortall*, 101 Illinois, 46; *Village of Brooklyn* v. *Smith*, 104 Illinois, 429, 438; *Trustees of Schools* v. *Schroll*, 120 Illinois, 509, 518, 519; *Buttenuth* v. *St. Louis Bridge Company*, 123 Illinois, 535, 550.

The findings of fact by the court make no specific reference to a deed dated December 23, 1873, from Augustus A. Blumenthal and wife to the plaintiff and others, the substance of which is set forth in the bill of exceptions, but state merely that Blumenthal acquired by deeds the title in fee to surveys 149 to 156, and that the plaintiff acquired from Blumenthal "his said title to said land prior to the commencement of this suit."

The defendant, however, refers to the deed of December 23, 1873, and relies upon the fact that the description of the premises contained in it describes the line between surveys 148 and 149 as running north 33½ degrees west, 142.51 chains "to the present bank of the Mississippi River," thence along the extended line between surveys 148 and 149, north 33½ degrees

west, "to low-water mark of the Mississippi River," and "thence down to the extended line between surveys" 156 and 157. The description further says: "The tract hereby conveyed containing 500 acres, more or less; together with all rights as riparian owner to the accretion or sand-bar lying northwestwardly and between the extended lines of said land herein described, situated in the county of St. Clair and State of Illinois." The deed also describes the property conveyed as "being the northwestern part of surveys numbered" 149 to 156, both inclusive, in the Prairie du Pont common fields.

The contention of the defendant is, that this deed did not convey to the grantees the fee of the bed of the river beyond low-water mark. But we think this contention is erroneous. In construing the deed, all the words of the description must be given effect, if possible. The property conveyed is described as "the northwestern part of surveys" numbered 149 to 156. This makes it impossible that the grantor should retain the ownership of any part of the surveys northwest of that which he conveyed to his grantees. Again, the description, after saying "to low-water mark of the Mississippi River," does not say "thence down low-water mark to the extended line between surveys" 156 and 157, but says only "thence down to the extended line between surveys" 156 and 157. The word "down" properly means down the river. As was said in *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 64, "where the calls in a conveyance of land are for two corners at, in or on a stream or its bank, and there is an intermediate line extending from one such corner to another, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise." Here the next preceding call was a point at "low-water mark of the Mississippi River," and the next call was an intermediate line "down to the extended line between surveys" 156 and 157, without specifying whether it was down the river generally or down the line of low-water mark. This description made the river the boundary of the surveys on their northwestern ends, although the termination of the last preceding call was at low-water mark of the river.

The river always had been the boundary of the surveys on their northwestern ends; and there is nothing to show that the parties to the deed intended to make anything but the river the boundary at the northwestern end of what the deed conveyed.

It is plain that the fee of Blumenthal in the surveys extended to the middle of the river; and the contention of the defendant is, that Blumenthal, instead of conveying by the deed all the land which he owned on the northwestern end of the surveys, conveyed only to low-water mark. This would be repugnant to that clause of the description which conveys "the northwestern part of surveys" 149 to 156. Then we have the description "together with all rights as riparian owner to the accretion or sand-bar lying northwestwardly and between the extended lines of said land herein described, situated in the county of St. Clair and State of Illinois." These words show that the grantor intended to convey all his riparian rights appurtenant to the surveys, "between the extended lines" of them, in the county of St. Clair; and it cannot be held, consistently with the terms of the deed, that he intended to retain to himself any interest in the fee of the bed of the river. The accretion or sand-bar mentioned in the deed evidently existed at its date, and it was the nucleus of the bar which subsequently developed into the land in dispute. If the boundary terminated at low-water mark on the margin of the river, it could not have included all the rights of the grantor as riparian owner to the accretion or sand-bar lying northwestwardly in the river opposite the surveys. *Piper* v. *Connolly*, 108 Illinois, 646.

The finding by the court that the plaintiff acquired from Blumenthal, prior to the commencement of the suit, Blumenthal's title to the premises in question, which title was one in fee to such premises, acquired by him by deeds from the parties then in their actual possession as owners thereof, amounts to a finding that the accretion or sand-bar mentioned in the deed of December 23, 1873, was the same sand-bar which first appeared earlier in 1873, and which by subsequent accretions developed into the land in controversy. This find-

ing is conclusive to show that the land conveyed by Blumenthal was not limited by the line of low-water mark on the river. It does not appear that Blumenthal or any one claiming under him asserted any interest in the land after the making of the deed. *Jefferis* v. *East Omaha Land Company*, 134 U. S. 178, 197.

The next question concerns Arsenal Island. By findings of fact 6 to 9 the sudden and perceptible loss of land on the premises conveyed to the plaintiff, which was visible in its progress, did not deprive Blumenthal, as riparian proprietor, of his fee in the submerged land, nor in any manner change the boundaries of the surveys on the river front, as they existed in 1865, when the land commenced to be washed away.

It is contended by the defendant, not only that the plaintiff never had any title to the bed of the river, but that, when the dry land of which he was in possession was swept away by the river and ceased to exist, his ownership of that land also ceased to exist. It is laid down, however, by all the authorities, that, if the bed of the stream changes imperceptibly by the gradual washing away of the banks, the line of the land bordering upon it changes with it; but that, if the change is by reason of a freshet, and occurs suddenly, the line remains as it was originally. This principle is recognized by the Supreme Court of Illinois, in *Buttenuth* v. *St. Louis Bridge Company*, 123 Illinois, 535, 546, in these words: "The law, as stated by law writers, and in the adjudged cases, seems to be, that where a river is declared to be the boundary between States, although it may change imperceptibly, from natural causes, the river, as it runs, continues to be the boundary. But if the river should suddenly change its course, or desert the original channel, the rule of law is, the boundary remains in the middle of the deserted river bed." It is laid down by all the authorities, that, if an island or dry land forms upon that part of the bed of a river which is owned in fee by the riparian proprietor, the same is the property of such riparian proprietor. He retains the title to the land previously owned by him with the new deposits thereon.

It may be asked, pertinently, what has become of the riparian rights of the plaintiff on the river, if his title to the land in dispute is not sustained? It appears by the findings, that the greater part of the so-called Arsenal Island, which is now embraced within the boundaries of the land sought to be recovered by the plaintiff, is located upon the site of the dry land of surveys 149 to 156, as the same existed from 1850 to 1865, and that the residue thereof, being about one-eighth of the entire width of the island, is located upon the bed of the Mississippi River as it then existed, and eastwardly of the thread or middle line of the river; that, between 1865 and 1873 the river front of the surveys was washed away to the extent mentioned in finding 8, and was further washed away thereafter until 1884; and that such washing away did not take place slowly and imperceptibly, but was rapid and perceptible in its progress, and the particulars are given in finding 9. The plaintiff was a riparian proprietor on the river. If his title to the land in question is not sustained, he is no longer such riparian proprietor and is cut off from access to the river. Among his rights as a riparian owner are access to the navigable part of the river from the front of his land, and the right to make a landing, wharf, or pier, for his own use or the use of the public. *Dutton* v. *Strong*, 1 Black, 23; *Railroad Company* v. *Schurmeir*, 7 Wall. 272; *Yates* v. *Milwaukee*, 10 Wall. 497, 504.

No act has been done, or negligence committed, by the plaintiff or his grantor, which occasioned any loss of the land or any transfer of the title to it, either to the State of Illinois or to the city of St. Louis. Finding 10 shows that the washing away of the bank of the surveys was caused by dikes built by the city of St. Louis on the western side of the river, which caused its current to flow to and against the eastern shore. When land was formed again on the place where the plaintiff's land had been washed away, it became the property of the plaintiff, and although the land thus newly formed extended a short distance into the old bed of the river beyond the former shore line, such additional formation belonged to the plaintiff as a deposit on that part of the bed of the river which was

owned by him in fee, and not to the State of Illinois or to any third party. Otherwise, the plaintiff would be cut off without his fault from the river front and from his riparian rights.

When the United States government, from 1876 to 1878, as found in finding 19, built the dike from the eastern shore of the river to the bar or island as it then existed, above the north line of the plaintiff's land, the result was, that the space or channel of water between the bar or island as it had formed in front of the river bank of the plaintiff's land, and the eastern bank of the river as it existed when the cutting away of the plaintiff's land ceased, was filled up, so that by 1884 it had become dry land, and it has since continued to be such on the front of the plaintiff's land out to the western side of the island or land in question. The fact that more land has thus been restored to the plaintiff than was cut away, cannot deprive him of his riparian right or of his access to the river. The State of Illinois does not claim any part of such land, but concedes to the riparian proprietor the bed of the river where the land formed.

It is found by findings 17 and 18, that the bars which formed below and were joined to the foot of Arsenal Island were not formed by accumulations of soil washed up against its lower end, but by the deposit, in times of flood, of soil and sediment on the bed of the river below the island; that, before the island was washed away, the main and navigable channel of the river was eastwardly of the island, but after the bar was formed lower down the river in front of the plaintiff's land, the main and navigable channel of the river was removed to the west side of the bar or island, and since that time boats navigating the river have not run between the bar or island and the eastern shore of the river. It, therefore, appears, that the dry land in question was formed on that part of the bed of the river which was owned in fee by the plaintiff, or his grantor, as the riparian owner, and that their rights were governed by the established rules of law in force in Illinois. It is well settled that the owner in fee of the bed of a river, or other submerged land, is the owner of any bar, island or dry land which subsequently may be formed thereon. *Mulry* v. *Norton*. 100 N. Y. 424.

It is shown by the findings of the court that the space which was covered by water between the front of the plaintiff's dry land and the bar or island, when the latter first was formed, has since been so filled up by deposits from the river that by the year 1884 it was all dry land on the river front of the plaintiff's land out to the western side of the land in question, except in high water. Therefore, when the bar or island formed in front of Blumenthal's land, within the boundaries over which such land extended prior to 1865, the bar or island which was so formed continued to be the land of Blumenthal, notwithstanding a part of it extended farther westward than the boundary of his dry land in 1865. It was formed upon that part of the bed of the river which was owned in fee by Blumenthal and the plaintiff, and continued in such ownership after it became dry land.

The land described in the declaration is on the eastern side of the Mississippi River, in the county of St. Clair and State of Illinois. The land to which the city of St. Louis acquired title was on the western side of the Mississippi River, more than a mile higher up the river, and situated in the city of St. Louis, in the State of Missouri. The only possible claim of the city of St. Louis to the land is based on the act of June 13, 1812, 2 Stat. 748, and on section 2 of the act of May 26, 1824, 4 Stat. 66, and on section 2 of the act of January 27, 1831, 4 Stat. 435. By the terms of those acts, the village of St. Louis was authorized only to acquire title to lands within said village, in the Territory (or State) of Missouri; and it obtained no right thereby to acquire title to land in the State of Illinois.

The enabling act of April 18, 1818, 3 Stat. 429, § 2, under which Illinois was organized as a State and admitted into the Union, made "the middle of the Mississippi River" the western boundary of the State. The enabling act of March 6, 1820, 3 Stat. 545, § 2, under which Missouri was organized as a State and admitted into the Union, made the "middle of the main channel of the Mississippi River" the eastern boundary of Missouri, so far as its boundary line was coterminous with the western boundary of Illinois. It has been held by the Supreme Court of Illinois, *Buttenuth* v. *St. Louis Bridge Co.*,

123 Illinois, 535, that these two enabling acts are to be construed as *in pari materia*, and that the common boundary line between Missouri and Illinois is the "middle of the main channel of the Mississippi River." The "middle of the main channel of the Mississippi" has been constantly treated as the eastern boundary of the State of Missouri. *Jones* v. *Soulard*, 24 How. 41; *The Schools* v. *Risley*, 10 Wall. 91.

It follows that an island in the Mississippi River, in its course between Illinois and Missouri, must lie wholly in one of those States or the other, because the main channel of the river must run on one side or the other of such island. Arsenal Island, to which the city of St. Louis acquired title, was on the Missouri side of the river in 1863 and 1864, and wholly within that city. The land described in the declaration was never in the city of St. Louis or in the State of Missouri. This follows from the facts stated in finding 18.

The title of the St. Louis Public Schools to the island is set forth in finding 13, and was acquired in 1863 and 1864, under the Cozzens survey of 1863, mentioned in finding 11. By finding 14, the title of the St. Louis Public Schools in the island was conveyed, in 1866, to the city of St. Louis by a deed which is stated in such finding to have described it as situated "in the county of St. Louis and State of Missouri." The land described in the declaration, a mile lower down the river and situated in the State of Illinois, on the other side of the river, is manifestly not the land to which the city of St. Louis so acquired title. Dry land which should again form on the site where Arsenal Island existed when it was surveyed in 1863 would be the property of the city of St. Louis. *Mulry* v. *Norton*, 100 N. Y. 424. In such event, could the city hold both tracts of land, a mile distant from each other? Of course it could not.

The city of St. Louis, by virtue of its original title to the island, is still the owner in fee of the submerged site where the island existed before it was washed away. As its right under the acts referred to, to acquire land was limited to land situated within the boundaries of the city and on the west side of the middle of the river, it cannot acquire, indirectly and by

implication or construction of law, land which it was not authorized to acquire directly and in pursuance of law. Nor is the land described in the declaration an accretion to the land in Missouri which the city of St. Louis acquired, a mile higher up the river, because the middle of the main channel of the river is the eastern boundary of the State of Missouri, and the land described in the declaration is east of the middle of the main channel of the river. The title to land acquired by accretion is a title acquired under the operation of the law of the State, which each State determines for itself. *Barney* v. *Keokuk*, 94 U. S. 324.

As the law of Illinois confers upon the owner of land in that State which is bounded by, or fronts on, the Mississippi River, the title in fee to the bed of the river to the middle thereof, or so far as the boundary of the State extends, such riparian owner is entitled to all islands in the river which are formed on the bed of the river east of the middle of its width. That being so, it is impossible for the owner of an island which is situated on the west side of the middle of the river, and in the State of Missouri, to extend his ownership, by mere accretion, to land situated in the State of Illinois, the title in fee to which is vested by the law of Illinois in the riparian owner of the land in that State.

We must not be understood as implying, that if an island in the Mississippi River remains stable in position, while the main channel of the river changes from one side of the island to the other, the title to the island would change, because it might be at one time on one side and at another time on the other side of the boundary between two States.

The right of accretion to an island in the river cannot be so extended lengthwise of the river as to exclude riparian proprietors above or below such island from access to the river, as such riparian proprietors. *Mulry* v. *Norton*, 100 N. Y. 424, 436, 437. It appears from the map, "Exhibit B," that the so-called Arsenal Island extended as far down the river as is shown on that map, which was made from surveys in 1873 and 1884; and if the plaintiff thereby has lost such newly-formed land and been deprived of access to the river in front

of his surveys, then all the riparian proprietors down the river, as far as the bars have formed or may form hereafter in front of their land, must lose their titles and surrender them to the city of St. Louis, as a part of Arsenal Island. Such rapid changes in these alluvial formations cannot transfer title from one proprietor to another.

This Arsenal Island was the subject of the case of *Carrick* v. *Lamar*, 116 U. S. 423, and in the opinion in that case is described as "a mere moving mass of alluvial deposits." To such a movable island, travelling for more than a mile and from one State to another, the law of title by accretion can have no application, for its progress is not imperceptible, in a legal sense.

As it is found by finding 16, that the bar formed at the foot of the island in the flood of a single year extended down the river for the distance of a quarter of a mile or more, in front of the surveys in question, and such bar subsequently appeared as a part of the so-called Arsenal Island, the question arises as to when the transfer of it passed, if it did pass, from the plaintiff to the city of St. Louis. Whenever it occurred, whether when the sediment first commenced to form a deposit on that part of the bed of the river, or whether when it formed a bar which, though still submerged, could be discerned by soundings, or whether when it came so near to the surface that its extent could be discerned by navigators, or whether when it arose above the surface and became dry land, there must have been, in order to maintain the contention of the defendant, an instantaneous transfer of a quarter of a mile of land from the plaintiff to the city of St. Louis, at one and the same moment of time. Such a transfer was not a title by accretion, within the meaning of the law on that subject.

Judgment affirmed.

WATERMAN *v.* MACKENZIE.

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

No. 82. Argued November 19, 1890. — Decided February 2, 1891.

An agreement, by which the owner of a patent for an invention grants to another person "the sole and exclusive right and license to manufacture and sell" the patented article throughout the United States, (not expressly authorizing him to use it,) is not an assignment, but a license, and gives the licensee no right in his own name to sue a third person, at law or in equity, for an infringement of the patent.

The mortgagee of a patent, by assignment recorded within three months from its date in the patent office, is the party entitled (unless otherwise provided in the mortgage) to maintain a bill in equity against an infringer of the patent.

This was a bill in equity, filed April 24, 1886, against James A. Mackenzie and Samuel R. Murphy, by Lewis E. Waterman, claiming to be the sole and exclusive owner of a patent granted to him by the United States on February 12, 1884, for an improvement in fountain pens, and of the invention thereby secured; alleging an infringement thereof by the defendants; and praying for an injunction, a discovery, an account of profits and damages.

The defendants filed a plea, which alleged that the plaintiff, at the time of filing the bill, was not possessed, either of the patent, or of an exclusive right under it to the whole or any specified part of the United States; for that certain assignments in writing under seal of the patent and invention, from the plaintiff to Sarah E. Waterman, his wife, from her to the firm of Asa L. Shipman's Sons, and from that firm to Asa L. Shipman, were made by the parties thereto, and were recorded in the Patent Office, at the dates stated below, and that Shipman continued to be possessed of the patent and invention until and including the time of the filing of the bill.

The plaintiff filed a general replication. At the hearing on the issue thus joined, the following instruments, executed in

New York by and between citizens of that State, were duly proved:

1st. An assignment, made February 13, 1884, and recorded March 27, 1884, from Lewis E. Waterman, the plaintiff, to Sarah E. Waterman, his wife, of the whole patent and invention.

2d. A "license agreement," made between Mr. and Mrs. Waterman on November 20, 1884, and never recorded, by which she granted to him "the sole and exclusive right and license to manufacture and sell fountain penholders containing the said patented improvement throughout the United States," and he agreed to pay her "the sum of twenty-five cents as a license fee upon every fountain penholder so manufactured by him."

3d. An assignment, made November 25, 1884, and recorded November 29, 1884, from Mrs. Waterman to the firm of Asa L. Shipman's Sons, of the whole patent and invention, expressed to be made in consideration of the payment of the sum of $6500, and containing this provision: "The consideration of this assignment is, that whereas the said Lewis E. Waterman and the said Sarah E. Waterman have, on this 25th day of November, 1884, made a joint note of hand for the sum of $6500, payable to the said Asa L. Shipman's Sons three years from this date, with interest at six per cent; now, if the said Lewis E. Waterman and myself, or either of us, shall well and truly pay the said note, according to its tenor, then this assignment and transfer shall be null and void, otherwise to be and remain in full force and effect." It also contained covenants of full right to assign, and against all incumbrances, "except a license to the said Lewis E. Waterman to manufacture and sell pens" under the patent, being the license above mentioned.

4th. An assignment, made November 25, 1884, in consideration of the payment of the sum of $6500, and recorded November 29, 1884, from the firm of Asa L. Shipman's Sons to Asa L. Shipman, of all the right and title acquired by the assignment made to them by Mrs. Waterman, as well as the promissory note thereby secured.

Counsel for Parties.

5th. An assignment, made April 16, 1886, and recorded April 22, 1886, from Mrs. Waterman to the plaintiff, of all her right, title and interest in the patent and invention, and all her claims or causes of action for the infringement of the patent, and rights to damages or profits by reason thereof.

The Circuit Court allowed the plea, for reasons stated in its opinion, as follows: "The transfer to Asa L. Shipman is in language so emphatic and exact that there is little opportunity for misapprehension. It matters not what the instrument is called. It matters not that it may be defeated by the payment of $6500 on November 25, 1887. The fact remains that by virtue of this assignment or mortgage the title to the patent was, on April 24, 1886, when this action was commenced, outstanding in Asa L. Shipman. If it was not absolute, it was a present, existing title, defeasible upon a condition subsequent. On April 16, therefore, when Sarah E. Waterman assigned all her right, title and interest to the complainant, she had nothing to assign which could at all change the legal status of the parties. She could not vest a clear title to the patent in the complainant, for the obvious reason that she had previously disposed of it and did not own it. The agreement of November 20, 1884, being a license and nothing more, does not enable the complainant to maintain this action without joining the holder of the legal title. The suggestion that, irrespectively of the Shipman assignment, the complainant is entitled to prosecute for infringements alleged to have occurred between February 12 and November 25, 1884, is equally unavailing; for, assuming such a right of action to exist, it could only be maintained on the law and not on the equity side of the court. The plea is allowed. The complainant may amend, upon payment of costs, within ten days." 29 Fed. Rep. 316.

The plaintiff not having filed an amended bill within the ten days, a final decree was entered dismissing his bill, with costs, and he appealed to this court.

Mr. Walter S. Logan for appellant.

No appearance for appellees.

Opinion of the Court.

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

Every patent issued under the laws of the United States for an invention or discovery contains "a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the exclusive right to make, use and vend the invention or discovery throughout the United States and the Territories thereof." Rev. Stat. § 4884. The monopoly thus granted is one entire thing, and cannot be divided into parts, except as authorized by those laws. The patentee or his assigns may, by instrument in writing, assign, grant and convey, either, 1st, the whole patent, comprising the exclusive right to make, use and vend the invention throughout the United States; or, 2d, an undivided part or share of that exclusive right; or, 3d, the exclusive right under the patent within and throughout a specified part of the United States. Rev. Stat. § 4898. A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers; in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone. Any assignment or transfer, short of one of these, is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement. Rev. Stat. § 4919; *Gayler* v. *Wilder*, 10 How. 477, 494, 495; *Moore* v. *Marsh*, 7 Wall. 515. In equity, as at law, when the transfer amounts to a license only, the title remains in the owner of the patent; and suit must be brought in his name, and never in the name of the licensee alone, unless that is necessary to prevent an absolute failure of justice, as where the patentee is the infringer, and cannot sue himself. Any rights of the licensee must be enforced through or in the name of the owner of the patent, and perhaps, if necessary to protect the rights of all parties, joining the licensee with him as a plaintiff. Rev. Stat. § 4921. *Littlefield* v. *Perry*, 21 Wall. 205, 223; *Paper Bag Cases*, 105 U. S. 766, 771; *Birdsell* v. *Shaliol*, 112 U. S. 485–487. And see *Renard* v. *Levinstein*, 2 Hem. & Mil. 628.

Whether a transfer of a particular right or interest under a patent is an assignment or a license does not depend upon the name by which it calls itself, but upon the legal effect of its provisions. For instance, a grant of an exclusive right to make, use and vend two patented machines within a certain district, is an assignment, and gives the grantee the right to sue in his own name for an infringement within the district, because the right, although limited to making, using and vending two machines, excludes all other persons, even the patentee, from making, using or vending like machines within the district. *Wilson* v. *Rousseau*, 4 How. 646, 686. On the other hand, the grant of an exclusive right under the patent within a certain district, which does not include the right to make, and the right to use, and the right to sell, is not a grant of a title in the whole patent right within the district, and is therefore only a license. Such, for instance, is a grant of "the full and exclusive right to make and vend" within a certain district, reserving to the grantor the right to make within the district, to be sold outside of it. *Gayler* v. *Wilder*, above cited. So is a grant of "the exclusive right to make and use," but not to sell, patented machines within a certain district. *Mitchell* v. *Hawley*, 16 Wall. 544. So is an instrument granting "the sole right and privilege of manufacturing and selling" patented articles, and not expressly authorizing their use, because, though this might carry by implication the right to use articles made under the patent by the licensee, it certainly would not authorize him to use such articles made by others. *Hayward* v. *Andrews*, 106 U. S. 672. See also *Oliver* v. *Rumford Chemical Works*, 109 U. S. 75.

An assignment of the entire patent, or of an undivided part thereof, or of the exclusive right under the patent for a limited territory, may be either absolute, or by way of mortgage and liable to be defeated by non-performance of a condition subsequent, as clearly appears in the provision of the statute, that "an assignment, grant or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration without notice, unless it is recorded in the Patent Office within three months from the date thereof." Rev. Stat. § 4898.

Opinion of the Court.

Before proceeding to consider the nature and effect of the various instruments given in evidence at the hearing in the Circuit Court, it is fit to observe that (as was assumed in the argument for the plaintiff) by the law of the State of New York, where all the instruments were made and all the parties to them resided, husband and wife are authorized to make conveyances and contracts of and concerning personal property to and with each other, in the same manner and to the same effect as if they were strangers. *Armitage* v. *Mace*, 96 N. Y. 538; *Adams* v. *Adams*, 91 N. Y. 381.

By the deed of assignment of February 13, 1884, the plaintiff assigned to Mrs. Waterman the entire patent right. That assignment vested in her the whole title in the patent, and the exclusive right to sue, either at law or in equity, for its subsequent infringement.

The next instrument in order of date is the "license agreement" between them of November 20, 1884, by which she granted to him "the sole and exclusive right and license to manufacture and sell fountain penholders containing the said patented improvement throughout the United States." This did not include the right to use such penholders, at least if manufactured by third persons, and was therefore a mere license, and not an assignment of any title, and did not give the licensee the right to sue alone, at law or in equity, for an infringement of the patent. *Gayler* v. *Wilder*, *Paper Bag Cases* and *Hayward* v. *Andrews*, above cited. The plaintiff not having amended his bill, pursuant to the leave granted by the Circuit Court, by joining the licensor as a plaintiff, this point requires no further notice.

Nor is it doubted that the Circuit Court rightly held that, if the plaintiff was entitled to recover only for infringements occurring between February 12 and November 25, 1884, his remedy was at law. *Root* v. *Railway Co.*, 105 U. S. 189.

The remaining question in the case, distinctly presented by the plea, and adjudged by the Circuit Court, is of the effect of the deed of November 25, 1884, by which Mrs. Waterman assigned to the firm of Asa L. Shipman's Sons all her right, title and interest in the invention and the patent, with an

express provision that the assignment should be null and void if she and her husband, or either of them, should pay at maturity a certain promissory note of the same date made by them and payable to the grantees. This instrument, being a conveyance made to secure the payment of a debt, upon condition that it should be avoided by the subsequent payment of that debt at a time fixed, was a mortgage, in apt terms and in legal effect. *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386, 446, 447. On the same day, the mortgagees assigned by deed to Asa L. Shipman all their title under the mortgage, and the promissory note thereby secured. Both assignments were recorded in the Patent Office within three months after their date; and the title thereby acquired by Shipman was outstanding in him at the times of the subsequent assignment of the patent right by Mrs. Waterman to the plaintiff, and of the filing of this bill. This last assignment was therefore subject to the mortgage, though not in terms so expressed.

By a mortgage of personal property, differing in this respect from a pledge, it is not merely the possession or a special property that passes; but, both at law and in equity, the whole title is transferred to the mortgagee, as security for the debt, subject only to be defeated by performance of the condition, or by redemption on bill in equity within a reasonable time; and the right of possession, when there is no express stipulation to the contrary, goes with the right of property. Story on Bailments, § 287; Story Eq. Jur. §§ 1030, 1031; *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386, 441; *Casey* v. *Cavaroc*, 96 U. S. 467, 477; *Boise* v. *Knox*, 10 Met. 40, 43; *Brackett* v. *Bullard*, 12 Met. 308, 310.

A mortgage of real estate has gradually, partly by the adoption of rules of equity in courts of common law, and partly by express provisions of statute, come to be more and more considered as a mere security for the debt, creating a lien or incumbrance only, and leaving the title in the mortgagor, subject to alienation, levy on execution, dower and other incidents of a legal estate; but the rules upon the subject vary in different States; and a mortgage is everywhere considered as passing the title in the land, so far as may be

necessary for the protection of the mortgagee, and to give him the full benefit of his security. *Stelle* v. *Carroll*, 12 Pet. 201; *Van Ness* v. *Hyatt*, 13 Pet. 294; *Hutchins* v. *King*, 1 Wall. 53, 58; *Brobst* v. *Brock*, 10 Wall. 519, 529, 530. After the mortgagee has taken possession, the mortgagor has no power to lease; and the mortgagee is entitled to have, and is bound to account for, the accruing rents and profits, damages against trespassers, timber cut on the premises, and growing crops. *Keech* v. *Hall*, 1 Doug. 21; *Turner* v. *Cameron's Coalbrook Co.*, 5 Exch. 932; *Dawson* v. *Johnson*, 1 Fost. & Finl. 656; *Fairclough* v. *Marshall*, 4 Ex. D. 37, 47, 49; *Scruggs* v. *Memphis &c. Railroad*, 108 U. S. 368, 375; *Teal* v. *Walker*, 111 U. S. 242; *Hutchins* v. *King*, above cited; *Gore* v. *Jenness*, 19 Maine, 53; *Bagnall* v. *Villar*, 12 Ch. D. 812. Even against a mortgagor in possession, the mortgagee may obtain an injunction or damages for such cutting of timber as tends to impair the value of the mortgage security, or as is not allowed by good husbandry or by express or implied license from the mortgagee. *Robinson* v. *Litton*, 3 Atk. 209, 210; *Farrant* v. *Lovel*, 3 Atk. 723; *Hampton* v. *Hodges*, 8 Ves. 105; *Humphreys* v. *Harrison*, 1 Jac. & Walk. 581; *King* v. *Smith*, 2 Hare, 239; *Kountz* v. *Omaha Hotel Co.*, 107 U. S. 378, 395; *Verner* v. *Betz*, 1 Dickinson (46 N. J. Eq.) 256, 267, 268; *Page* v. *Robinson*, 10 Cush. 99; *Searle* v. *Sawyer*, 127 Mass. 491; *Waterman* v. *Matteson*, 4 R. I. 539.

A mortgagee of a leasehold or other personal property has the like right to an injunction to stay waste by the mortgagor. *Farrant* v. *Lovel*, above cited; *Brown* v. *Stewart*, 1 Maryland Ch. 87; *Parsons* v. *Hughes*, 12 Maryland, 1. The right of action against a stranger for an injury to goods mortgaged, generally, though not always, depends upon the right of possession. When the right of possession is in the mortgagor, he is usually the proper party to sue. *Sellick* v. *Smith*, 11 J. B. Moore, 459, 475; *Brierly* v. *Kendall*, 17 Q. B. 937; *Luse* v. *Jones*, 10 Vroom (39 N. J. Law) 707; *Copp* v. *Williams*, 135 Mass. 401. But even a mortgagee out of possession may sometimes maintain an action for an injury to his interest. *Gooding* v. *Shea*, 103 Mass. 360; *Manning* v. *Monaghan*, 23

N. Y. 539, and 28 N. Y. 585; *Woodside* v. *Adams*, 11 Vroom (40 N. J. Law) 417, 421, 422. And when the right of possession, as well as the general right of property, is in the mortgagee, the suit must be brought by the mortgagee, and not by the mortgagor or any one claiming under a subsequent conveyance from him. *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386; *Wood* v. *Weimar*, 104 U. S. 786; *Clapp* v. *Campbell*, 124 Mass. 50; *Watson* v. *Macquire*, 5 C. B. 836, 844. When it is provided by statute that a mortgage of personal property shall not be valid against third persons, unless the mortgage is recorded, a recording of the mortgage is a substitute for, and (unless in case of actual fraud) equivalent to, a delivery of possession, and makes the title and the possession of the mortgagee good against all the world. *Aldrich* v. *Ætna Ins. Co.*, 8 Wall. 491, 497; *Robinson* v. *Elliott*, 22 Wall. 513, 521; *Bullock* v. *Williams*, 16 Pick. 33; *Coles* v. *Clark*, 3 Cush. 399, 401.

A patent right is incorporeal property, not susceptible of actual delivery or possession; and the recording of a mortgage thereof in the Patent Office, in accordance with the act of Congress, is equivalent to a delivery of possession, and makes the title of the mortgagee complete towards all other persons, as well as against the mortgagor. The right conferred by letters patent for an invention is limited to a term of years; and a large part of its value consists in the profits derived from royalties and license fees. In analogy to the rules governing mortgages of lands and of chattels, and with even stronger reason, the assignee of a patent by a mortgage duly recorded, whose security is constantly wasting by the lapse of time, must be held (unless otherwise provided in the mortgage) entitled to grant licenses, to receive license fees and royalties, and to have an account of profits or an award of damages against infringers. There can be no doubt that he is "the party interested, either as patentee, assignee or grantee," and as such entitled to maintain an action at law to recover damages for an infringement; and it cannot have been the intention of Congress that a suit in equity against an infringer to obtain an injunction and an account of profits, in which the court is authorized to award damages, when necessary to fully

compensate the plaintiff, and has the same power to treble the damages as in an action at law, should not be brought by the same person. Rev. Stat. §§ 4919, 4921; *Root* v. *Railway Co.*, 105 U. S. 189, 212.

The necessary conclusion appears to us to be that Shipman, being the present owner of the whole title in the patent under a mortgage duly executed and recorded, was the person, and the only person, entitled to maintain such a bill as this; and that the plea, therefore, was rightly adjudged good.

In the light of our legislation and decisions, no weight can be given to the case of *Van Gelder* v. *Sowerby Bridge Society*, 44 Ch. D. 374, in which, upon pleadings and facts similar to those now before us, the mortgagor of a patent was treated as a mortgagor in possession, and was allowed to maintain a suit for infringement, under the provisions of the English Judicature Act of 1873 and Patent Act of 1883. Stats. 36 & 37 Vict. c. 66, § 25; 46 & 47 Vict. c. 57, §§ 23, 46, 87.

Whether, in a suit brought by the mortgagee, the court, at the suggestion of the mortgagor, or of the mortgagee, or of the defendants, might, in its discretion, and for the purpose of preventing multiplicity of suits or miscarriage of justice, permit or order the mortgagor to be joined, either as a plaintiff or as a defendant, need not be considered, because no such question is presented by this record.

Decree affirmed.

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

BEARDSLEY *v.* BEARDSLEY.

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

No. 119. Submitted December 12, 1890. — Decided February 2, 1891.

The appellant signed and delivered to the appellee a paper in which he said, "I hold of the stock of the Washington and Hope Railway Company $33,250 or 1350 shares, which is sold to Paul F. Beardsley [the appellee], and which, though standing in my name, belongs to him, subject to a payment of $8000, with interest at same rate, and from same date as interest on my purchase of Mr. Alderman's stock." *Held*, that this was an executed contract, by which the ownership of the stock passed to the appellee, with a reservation of title, simply as security for the purchase money.

On the second question at issue the court holds that the contested facts establish a joint interest in the parties in the railroad enterprises which form the subject of the controversy, and not a mere stock transaction.

This was a suit in equity brought by the appellee as plaintiff below, against the appellant and the Arkansas and Louisiana Railway Company to enforce the rights of the plaintiff in the railway, under certain alleged trusts. The material facts in this controversy were stated by the court as follows:

The undisputed facts of this case are as follows: On January 1, 1882, appellant signed and delivered to appellee the following instrument:

"W. H. Carruth, President. J. D. Beardsley, Superintendent.

"Superintendent's Office, Washington and Hope Railway Company,

"Washington, Ark., Jan. 1st, 1882.

"I hold of the stock of the Washington and Hope Railway Company thirty-three thousand two hundred and fifty dollars, or thirteen hundred and fifty shares, which is sold to Paul F. Beardsley, and which, though standing in my name, belongs to him, subject to a payment of eight thousand dollars, with

interest at same rate and from same date as interest on my purchase of Mr. Alderman's stock.

"Witness: J. H. BURT. J. D. BEARDSLEY."

The parties to the litigation are brothers. Prior to the execution of this instrument, and in 1877, the Washington and Hope Railway Company had been incorporated for the purpose of building a railroad between Washington, in Hempstead County, and Hope Station, on the Iron Mountain and Southern Railway, a distance of ten miles. On September 10, 1879, the company, having graded a road-bed, entered into a contract with appellant for the completion and equipment of the road, the consideration of which contract, on the part of the railroad company, was, among other things, the transfer, practically, of the entire stock in the company to appellant. In the execution of this contract, appellant associated Vinton Alderman, under an agreement that they would contribute equally to the expense and divide equally the stock of the company. By the first of January, 1881, the contractors had complied with the contract and completed the road, and it was accepted as of that date by the company; and paid-up stock to the amount of one hundred thousand dollars was issued to them, excepting therefrom a few shares to persons to qualify them to be directors of the company. Alderman became tired of his investment and proposed to sell his interest. This proposition, made to J. W. Paramore, president of the Texas and St. Louis Railway Company, came to the knowledge of appellant. Fearing complications if the sale should be made to that party, he wrote to Alderman offering to buy the stock for twelve thousand dollars, on a credit. This offer was accepted, and the stock transferred to appellant, who thereby became the owner of substantially all the paid-up stock of the company. After such purchase he executed the instrument of January 1, 1882. Prior to this purchase from Alderman by appellant, appellee had come from California and commenced working on the road. Appellant continued, under construction contracts, in possession and control of the road until February, 1886, a period of a little more

than four years from the date of the agreement. During these years both brothers were giving up their time and labor to the operation and extension of this railroad, appellant having the principal charge, as superintendent or manager. The road was widened from a narrow to a standard gauge. Two corporations were organized, the one looking towards an extension of the road eastward, and the other to a like extension westward; and in those extensions contracts were entered into between the several companies and the appellant, and much work was done thereunder. In the execution of those contracts the appellant associated with himself other parties, the details of which contracts and arrangements with his associates are immaterial to the matter in controversy. Until about the first of January, 1886, the brothers worked harmoniously together in this enterprise, the appellee contending that all this time their relations were substantially those of joint owners, their respective interests being in the proportion of two-thirds to appellant and one-third to appellee. About the first of January, 1886, differences arose between the brothers, in consequence of which the appellee was discharged from service on the road by the appellant, acting as general manager. At the same time the appellant repudiated all interest of the appellee in the enterprise. After this disagreement and discharge the appellee brought this suit to establish his rights as the owner of substantially one-third of the property. The case went to proofs and hearing, and the Circuit Court granted a decree in appellee's favor. From such decree appellant appealed to this court.

Mr. A. H. Garland, *Mr. John M. Moore* and *Mr. H. J. May* for appellant.

We submit that the memorandum must be construed as executory. It is true it recites that the stock is sold to P. F. Beardsley and belongs to him, but these words must be construed in connection with the entire instrument. The true construction is not to be found in any particular provision contained in the instrument, disconnected from all others; but in

the ruling intention of the parties gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The mere form of the instrument is of little account. *Heryford* v. *Davis*, 102 U. S. 235.

The use of the word "sold" in the contract of sale does not necessarily make the contract an executed one. That language must be construed in connection with the rest of the instrument which must be taken as a whole. *Anderson* v. *Read*, 106 N. Y. 233.

The entire instrument must be examined to get at its substance and meaning. *Canal Co.* v. *Hill*, 15 Wall. 94. Mr. Benjamin lays down the rule thus: Where the buyer is by the contract bound to do anything as a consideration, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer. This rule is cited with approval in *The Elgee Cotton Cases*, 22 Wall. 180. See also *French* v. *Hay*, 22 Wall. 231; *Joyce* v. *Adams*, 8 N. Y. (4 Selden) 291; *Kelley* v. *Upton*, 5 Duer, 336; *Lester* v. *Jewett*, 11 N. Y. (1 Kernan) 453; *Nesbit* v. *Burry*, 25 Penn. St. 208.

Mr. Daniel W. Jones and *Mr. Thomas B. Martin* for appellee.

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

The first and principal question in this case arises on the contract of January 1, 1882. By the appellant it is claimed that this is a mere executory contract, an agreement to sell; by the appellee, that it is an executed contract, a sale with reservation of security. The distinction is obvious, and the significance important. If an agreement to sell, the moving party must be the purchaser. If a sale, an executed contract with reservation of security, the moving party is the vendor, the one retaining security. If an agreement to sell, the moving party, the purchaser, must within a reasonable time tender performance or make excuse therefor. If an executed con-

tract, a completed sale, then the moving party is the vendor, the security holder, and he assumes all the burdens and risks of delay. What, therefore, is the significance and import of this instrument? This, as claimed by the appellant, is not to be determined by any separate clause, but by the instrument as a whole. The rule is well stated by Mr. Justice Strong, delivering the opinion of this court in *Heryford* v. *Davis*, 102 U. S. 235, 243, 244, where he says: "The answer to this question is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provisions it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account."

It is not always easy to determine whether an instrument is a contract of sale or one to sell; yet certain rules of interpretation have become established. These rules are noticed in the opinion delivered in the *Elgee Cotton Cases*, 22 Wall. 180, 188. Two of these rules have no application here, as they refer to those steps necessary to put the property into a deliverable state, or the determination of the price by weighing, measuring and testing. The third only is significant, which is there stated in these words: "Where the buyer is by the contract bound to do anything as a consideration, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer."

Tested by this rule, this instrument must be adjudged not a contract to sell, but a sale with reservation of security. Note the language of the instrument: "which is sold." Again "which, though standing in my name, belongs to him." These words imply nothing executory, but something executed. It is not that the vendor will sell, but has sold. Not that the title remains in the vendor, yet to be transferred, but that it already has been transferred. The ownership, equitable if not legal, is in the vendee. It is not that the stock belongs to the

vendee, upon payment, as appeared in the case of *French* v. *Hay*, 22 Wall. 231, but that it is now his, subject to a lien. Its meaning is, therefore, that of a sale, with retention of the legal title as security for purchase money. It is an equitable mortgage, and the rights created and assumed by it are like those created and assumed when the owner of real estate conveys by deed to a purchaser, and takes back a mortgage as security for the unpaid purchase money. Under those circumstances action is the duty of the vendor and mortgagee, and delay imperils no right of the purchaser and mortgagor. We have little doubt as to the significance of this contract, and hold that its effect was to make the appellee one-third owner with the appellant of the stock of the railroad company. Such, obviously, is the import, and, therefore, such must be adjudged the intention of the parties by this contract. With this construction of the instrument, it is unnecessary to consider the various suggestions made by counsel for appellant upon the theory that the contract was purely executory, a mere contract to sell. Taking it as an executed contract, one by which the ownership passed to the appellee, with a reservation of title simply as security for the purchase money — in other words, an equitable mortgage — we pass to the second and most difficult matter in the case.

Appellant contends that it was a mere stock transaction, while appellee contends that it is not only in harmony with, but a part of, the full arrangement between the brothers, to wit, a joint interest in the railroad enterprise, on the basis of a two-thirds' share in the appellant and a one-third in the appellee. The instrument, by itself considered, expresses a stock transaction. If that was the extent of the arrangement between the brothers, then the appellant might enter into subsequent contracts with the railroad company, or any new corporations organized by the parties interested in the old company, without thereby interesting his brother in such contracts, or entitling him to a share in the proceeds thereof. He, of course, could not deprive him of any interest in the corporation, or the corporate property, evidenced by his ownership of stock; but ownership of stock of a corporation does

not of right give a proportional interest with every contractor in the contracts made by him with the corporation. Was this instrument part and parcel of a general arrangement between the brothers that they should be jointly interested in the railroad enterprise, looking at it as a whole, in proportions of one-third and two-thirds? Along this line of inquiry there is a painful contradiction between the brothers, the two parties who alone fully understood their relations, and who are necessarily the principal witnesses concerning them. In a general way, it may be said that the testimony of appellee is, that the understanding between the brothers was that they were to be jointly interested in the whole enterprise in the proportion stated; while, on the other hand, that of the appellant is, that there was no talk or thought of partnership, or unity of ownership, and all that was thought of or agreed upon between them was expressed by the written contract — a mere contract to sell stock. A great deal of testimony was introduced as to what was apparent to other parties employed on this railroad as to the relations between the brothers, and as to what they knew and understood to be those relations. The significance of such testimony is limited. The brothers were in fact engaged in the operation and extension of the road, each holding a position in the corporate management. If there was a personal arrangement between them, it is not strange that the terms and the extent of it were not known by the employés, or disclosed to or talked of with them. Obviously, during the years 1882 to 1886, the relations between the brothers were harmonious, and neither thought of misunderstanding or difference. That they consulted together, often, about the enterprise, appears from the testimony of the appellant as well as that of the appellee, and, while the appellant limits the effect of his testimony by the statement that he also consulted with the other employés, the fact remains conceded by him, and asserted by appellee, that during those years they consulted about the operation, the management, and the extension of the railroad enterprise. In the midst of this unpleasant contradiction we notice these significant facts: After the completion of the ten miles of narrow-gauge road provided for by

the original organization, the enterprise grew larger in the contemplation of its promoters and owners. A broadening of the road from a narrow to a standard gauge, and an extension eastward and westward, became their scheme. For this, two corporations were organized; one, as stated, looking to its extension eastward, and the other to a like extension westward. In the organization of these corporations, four hundred shares were taken by the appellant and two hundred by the appellee. This is upon the same basis of interest claimed by appellee in the whole railroad enterprise. These two subscriptions covered practically the entire stock, so that the new corporations were owned as the original. Interpreting these transactions, it must be borne in mind that neither brother was putting into this enterprise, to any extent, his individual property. The thought was to make the enterprise pay for itself, and out of it, and out of local aid, and out of their efforts to promote it and secure outside assistance, the accomplishment of the scheme, with its resultant benefits, was contemplated. So that, when into these new enterprises the brothers passed, with the same proportional interests as in the old, it is very significant, in the face of disputed testimony, as to their unity of interest in the whole railroad enterprise.

Further than this, the letter of appellant to appellee, of date February 7, 1886, and after differences had arisen between the brothers, is worthy of note. In that letter, after referring to the fact that Alderman and himself had undertaken to build the road, that thereafter Alderman desired to sell, and that he had purchased his interest, he says: "Some time after this Mr. Alderman desired to sell me his interest in the road, but I declined to purchase it. In the course of the next six months I declined it several times. Later, Colonel Paramore, of the Texas and St. Louis Railway, wrote me that Mr. Alderman had offered him his interest at $12,000, and that he was considering the purchase. Finding this, if carried out, would involve us in trouble with the Iron Mountain Railway, I wrote Mr. Alderman, that day, saying I would take his interest at $12,000, and by return mail he advised me that he considered it sold to me. After I had purchased this interest you importuned me to let

you have it. This I declined to do, but I finally consented to let you have two-thirds of the purchase, you to pay me $8000, with interest from the time of my purchase, and at the same rate I paid Mr. Alderman, stock to remain in my hands until paid for. Previous to this time the road had been legally valued at $100,000, and stock to that amount had been issued or was ordered to be issued. At the time of your purchase you represented that you expected to get a considerable sum of money from a mine in California, and you would pay this on the purchase. So far, however, I believe you have not paid anything. Some time afterwards, knowing that, as our understanding was purely verbal, you would have no rights whatever in case of my death, I made a written memorandum showing that you were entitled to one-third of the stock then standing in my name, or $33,333, subject, however, to a payment of $8000, with interest as aforesaid. This memorandum I gave you, and I presume you still have it. Here the business part of our transactions, so far as interest in the property is concerned, rests."

Now, the transactions between appellant and Alderman were not mere stock transactions. They were jointly interested in the construction contract, and by the completion thereof became practically joint owners of the road. That their relations to the corporation were evidenced by stock certificates, does not preclude the fact that, as between themselves, they were joint owners. So, when Alderman sold to him his one-half interest, and he transferred to his brother the two-thirds of that one-half interest, the significance of it, as expressed by the appellant himself, was something more than a mere stock transaction. As he says in his letter, after purchasing Alderman's interest he consented to let appellee have two-thirds of such purchase. It is difficult to believe, that, by this transaction, nothing more was meant than a transfer of stock. Obviously, he understood that two-thirds of Alderman's interest passed to appellee. Suppose Alderman had not sold, can it be doubted that equity would regard them as jointly the owners of this property, although their ownership was evidenced by separate shares of stock? Would equity tolerate

any transaction by which appellant, securing the influence of a few shares of stock held by the nominal directors, should obtain bonds or contracts by which the value of the stock would be substantially destroyed, and he become the real owner? Bonds issued might be valid in law, and apparently prior to the stock; contracts might give superior rights; yet, is it not clear that equity would interfere if he, by collusion with the resident directors, attempted to ignore Alderman and create in himself a supremacy of ownership? That which is true when there was equality of ownership between himself and Alderman is also true when, by a subdivision of Alderman's interest, a like ownership as between himself and his brother was established on a different basis.

We conclude, therefore, that the Circuit Court was right, when, in view of this contract and the other testimony, it adjudged that the relationship between the brothers was not that of mere stockholders in a corporation, but that of joint owners in a common enterprise, the profits and losses of which were to be shared between them in the proportion of their respective interests. If that be, as we think, the true interpretation of the relations between them, we do not understand that the appellant presents any substantial objection to the form and terms of the decree. It is, therefore,

Affirmed.

Mr. Justice Brown did not sit in this case and took no part in its decision.

NORTH *v.* PETERS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

No. 148. Argued January 13, 1891. — Decided February 2, 1891.

L., a merchant in Dakota, intending to defraud his creditors, sold his entire stock of goods, much of which was of a perishable nature, together with the good will of the business, to N., who was entirely ignorant of his purpose, and who paid an adequate consideration for them. Sun-

Statement of the Case.

dry creditors of L. sued out writs of attachment against him. These were placed in the hands of a sheriff, who seized the goods as the property of L. N. brought this suit against the sheriff to compel him to surrender the property and to restrain him from again levying upon it as the property of L., and a preliminary injunction was issued. The question of the validity of the sale was submitted to a jury, who found in plaintiff's favor. The court thereupon ordered that the preliminary injunction should be made perpetual. The defendant moved for a new trial, claiming that the court had failed to find on certain material issues. The court at a subsequent term denied the motion and made further findings more explicitly responsive to the questions presented by the pleadings, and a further conclusion of law that it was extremely difficult to ascertain the amount of compensation that would afford adequate relief; that it was necessary to restrain the acts done and prevent a multiplicity of suits; and that the plaintiff was entitled to the relief demanded. *Held*,

(1) That the findings of fact, taken in connection with the verdict of the jury, entitled N. to the equitable relief sought, and were sufficient to sustain the judgment;

(2) That neither an action of trespass nor an action of replevin could have afforded him as complete, prompt and efficient a remedy for the destruction of the business as would be furnished by a court of equity in preventing the injury;

(3) That the court below had authority, under the Dakota Code of Civil Procedure, after the term had closed, to make additional findings of fact in support of its judgment, upon a motion for a new trial;

(4) That the sheriff was the proper party defendant, and that, in case he exceeded his authority he could be proceeded against at law, if that was a sufficient remedy, or in equity, and it was not necessary to join the plaintiffs in the writs of attachment as defendants in either case, as it did not appear that they had directed the seizure;

(5) That the act admitting the two Dakotas, Montana and Washington Territories as States authorized this court to hear and determine cases of this character from Territorial courts.

This suit was brought in November, 1883, by Andrew Peters against J. M. North, sheriff of Lincoln County, Dakota Territory, (now in the State of South Dakota,) in a District Court of that Territory, to compel the defendant to surrender certain merchandise which he had seized and levied upon as the property of the firm of P. M. Lund & Co., and to restrain and enjoin him from again seizing and levying upon the same property as the property of that firm, all of which the plaintiff himself claimed to own.

The amended complaint alleged that plaintiff was, and since

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November 12, 1883, had been, the owner of a stock of merchandise worth $10,000, which was situated in a store lately occupied by P. M. Lund & Co., in Canton, Dakota Territory; that on November 15, 1883, the clerk of the court in which this suit was brought issued pretended and informal writs of attachment against the property of Lund & Co., and was about to issue many more such writs for the purpose of annoying and vexing plaintiff; that the defendant, the sheriff of the county, had maliciously and excessively levied those writs upon the property of plaintiff, above described, well knowing it to be plaintiff's property, and threatened to levy many more, and had entered into a conspiracy with divers persons to annoy, oppress and defraud the plaintiff; that neither said Lund & Co. nor any one else but plaintiff had any right, title or interest in and to said property; that the property levied upon had been purchased for the current season, and was of a perishable nature; that plaintiff had to borrow some money in order to make the purchase, and depended on his sales to repay the same; that he was an old man, with a family partly dependent upon him for support, and had always borne a good name and credit which was about to be destroyed by the acts of the defendant, complained of; that unless the sheriff was restrained from levying those writs, irreparable injury and damage would result to him; that he feared he would not be able to give the bonds required to retake the property; that the sheriff's official bond was inadequate to afford him protection; that if he was not allowed to pursue his business peaceably, the injury to him could not be amply compensated in damages; that the property was situated in a wooden building, amongst a row of similar buildings, and was insured for $8000; that, by reason of the premises, the insurance companies were about to cancel said insurance, and other companies would refuse to carry the risk, by reason of the litigation; that if the property should be destroyed by fire, great and irreparable damage would result to the plaintiff; that plaintiff was the *bona fide* owner of the property levied upon, having purchased it from Lund & Co., together with the good will and trade of that firm, for a valuable consideration, and

before purchasing caused the records of the county to be searched to ascertain whether there were any claims, liens or incumbrances against the property; and that the records were clear from any such claims or liens, and Lund & Co. informed plaintiff that there was nothing due for the property, but that the same was free and clear.

The prayer of the bill was for an injunction to restrain the defendant, or any one acting through or for him, from interfering with the property in any way whatever, and to compel him to surrender and replace the property which he had already levied upon, and for other and further relief.

Upon the filing of the complaint, accompanied by an affidavit of the plaintiff setting forth a more detailed account of the injury complained of, the court issued a temporary restraining order. The defendant thereupon filed his answer, denying all the material averments of the bill, except the one relating to the levy upon the property. With respect to that averment, by way of justification, he alleged that, as sheriff of Lincoln County, he had received certain specified writs of attachment directed to him, requiring him to attach the property of Lund & Co., and that, under and by virtue of those writs, he had levied upon the property described in the complaint as the property of Lund & Co.; and that it was in fact the property of Lund & Co., having been transferred to the plaintiff by a pretended and fraudulent sale made for the purpose of putting it beyond the reach of the creditors of Lund & Co., who had sued out the writs of attachment, which sale was known to plaintiff to be fraudulent.

The case coming on for trial, the question as to the validity of the sale from Lund & Co. to the plaintiff was, by order of the court, submitted to a jury, which found the issue in favor of the plaintiff, thus recognizing the validity of the sale.

At the trial the allegations of fraud, malice, oppression and collusion, on the part of the defendant, were stricken from the complaint, upon motion of plaintiff's attorney, and no evidence was introduced tending to show that the writs of attachment were pretended and informal. The defendant then moved to dismiss the complaint and action, which motion the

court overruled, and upon consideration of the verdict of the jury, and arguments of counsel, it made and filed the following findings of fact and conclusions of law:

"1. On the 13th day of November, 1883, one P. M. Lund was the owner of property described in the plaintiff's complaint.

"2. On said 13th day of November, 1883, said Lund sold and conveyed the said property to the plaintiff, and he, plaintiff, entered into immediate possession thereof.

"3. That said sale by Lund to Peters, the plaintiff, was made by Lund for the purpose of putting said property and proceeds thereof beyond the reach of his (Lund's) creditors and to defraud said creditors.

"4. That the plaintiff at the time of purchase of said property from said P. M. Lund had no knowledge of Lund's purpose in the disposition of said goods.

"5. That the defendant is, and at the time of said sale and transfer of said property was, sheriff of said Lincoln County; that on the 15th and 16th days of November, 1883, he, the said defendant, as sheriff aforesaid, levied upon the said property as the property of said Lund, the same then being in the possession of the plaintiff, under and by virtue of certain warrants of attachment issued out of this court at the suit of various creditors of said Lund, being the same warrants of attachment the enforcement of which against said property is sought to be enjoined in this action.

"6. That at the trial by the jury of the question of fact, as hereinbefore stated, all the allegations of fraud, malice, oppression and collusion on the part of the defendant were stricken from the plaintiff's complaint on the motion of plaintiff's attorney.

"7. That no evidence was adduced that the plaintiff would suffer any irreparable injury in consequence of the seizure by the sheriff of said property.

"*Conclusions of law.*

"1. That the verdict of the jury heretofore rendered in this case on the question of fact, as herein stated, is but an advisory

verdict, and should be received and accepted only as such by the court in determining the issues in this action.

"2. Under the pleadings and proofs herein the plaintiff is entitled to the relief demanded in his complaint; that the preliminary injunction heretofore issued should be made perpetual and final in accordance with the prayer of plaintiff's petition. Let judgment be entered accordingly."

Judgment was entered in accordance with the findings and conclusions of law. Afterwards a motion for a new trial was denied by the court, at which time the court found the following facts and conclusions of law, in addition to those theretofore found, to wit:

"First. That the purchase by plaintiff from P. M. Lund of the goods and chattels mentioned in the complaint included the good will of the business heretofore carried on by the said Lund under the name of P. M. Lund & Co.

"Second. That the consideration for the said sale and transfer from the said P. M. Lund to the plaintiff was the sum of ten thousand three hundred and eighty dollars, then and there paid by plaintiff to said Lund, and that said consideration was fairly adequate.

"Third. That at the time of the seizure by the defendant of the goods and chattels mentioned in the complaint and composing the former stock of P. M. Lund & Co. the plaintiff was in possession thereof as the owner, conducting a profitable business as a retail merchant, and that the acts and threatened acts of the defendant under and by virtue of the said attachments mentioned and referred to in the pleadings would, unless restrained by the court, necessarily destroy plaintiff's said business, and deprive him of the probable profits that might be realized therefrom, and that it would be extremely difficult to ascertain or estimate the pecuniary detriment which the plaintiff would sustain thereby.

"Fourth. That the said goods and chattels mentioned in the complaint and the plaintiff's said business comprised his entire property and pecuniary resources.

"Fifth. That it is admitted by the pleadings and appears as a fact that at the time referred to in the complaint the defend-

ant, as sheriff of Lincoln County, seized the said goods and chattels under and by virtue of sundry warrants of attachment sued out against the property of P. M. Lund; that the defendant, as such sheriff, then had in his hands many more such attachments against the said Lund which he threatened to levy upon the said goods and chattels, and that numerous other creditors of said Lund were then threatening to sue out and place in the hands of defendant additional warrants of attachment for the purpose of having the same levied upon the said goods and chattels as the property of the said Lund.

"*Conclusions of law.*

"1. That it would be extremely difficult to ascertain the amount of compensation which would afford the plaintiff adequate relief from the acts done and threatened to be done by the defendant.

"2. That it is necessary to restrain the acts threatened to be done by the defendant to prevent a multiplicity of judicial proceedings.

"3. That the plaintiff is entitled to the relief demanded in the complaint."

An appeal was taken to the Supreme Court of the Territory, which, on October 9, 1886, rendered a judgment affirming the judgment of the court below, without delivering any opinion in the case. An appeal from that judgment brought the case here.

Mr. Enoch Totten, (with whom was *Mr. Frederic B. Dodge* on the brief,) for appellant.

I. The court was without power in the premises to make, long after the trial term, and nearly six months after the judgment, additional findings in support of its judgment.

It is conceded that courts have jurisdiction over their records to make them conform to what was actually done, that where the records do not speak the truth as to what was done, the court may amend them and make them conformable to the truth; and that as to defects in matters of form, judgments

may be corrected within a reasonable time after their rendition. *Ætna Ins. Co.* v. *Boon*, 95 U. S. 117. This power is the inherent common law power of the court. It is a power now generally defined by the practice acts and decisions of the several States, and it is understood that this court will adopt the rules established and follow the decisions of state courts in matters of practice.

The Dakota Code of Civil Procedure provides as follows: Caldwell's Codes, §§ 5066, 5067.

"Sec. 266. Upon the trial of a question of fact by the court its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision. . . .

"Sec. 267. In giving the decision the facts found and the conclusions must be separately stated. Judgment upon the decision must be entered accordingly."

With respect to these requirements the Territorial Supreme Court as early as 1874 held: (1) That where a judge in a cause tried by the court fails to find on all the material issues, it is such error as will invalidate any judgment rendered therein. (2) The court cannot after pronouncing judgment re-open the case and make an additional finding, "that would in legal effect be no less than setting aside the judgment and rendering a different one." *Dole* v. *Burleigh*, 1 Dakota, 227. That a valid judgment cannot be rendered unless all the material issues are passed on was also held in *Holt* v. *Van Eps*, 1 Dakota, 206. These decisions were subsequently followed and approved in *Uhlig* v. *Garrison*, 2 Dakota, 99.

These points of practice were settled by the Supreme Court of the Territory after argument, and their adjudication was necessary in order to determine the cases wherein they arose. They thus became rules of decision in that jurisdiction, and, until other or different rules are declared, they must be deemed of binding force. They have never been by any reported decision of that court either overruled or criticised.

II. There existed a plain, adequate and complete remedy at law.

The bill of complaint in the case at bar was framed to fit

the case of *Watson* v. *Sutherland*, 5 Wall. 74, and its averments are set in nearly the precise language there used. The facts there found in support of the jurisdiction were as follows, to wit: (1) That Sutherland was the *bona fide* owner of the goods levied upon; (2) That he purchased these goods for the business of the current season, and that they were not all paid for; (3) That his only means of payment was through his sales; (4) That he was a young man recently engaged in business; (5) That he had succeeded in establishing a merchantable trade; and (6) That if sale of the goods was delayed, the effect would be to break up his business, destroy his credit and render him insolvent.

The facts in Peters' case do not run on parallel lines. He did not purchase the stock on credit, was not dependent on immediate sales to meet maturing bills. The goods for aught that is found, were worth as much to him at one time as another, and at one place as another. He had not acquired credit as a merchant, nor built up a trade upon which he could depend: at the most he was threatened with loss of "probable profits." In the absence of facts showing the likelihood and value of profits, it must be presumed in equity, as in law, that interest on the value of the goods from the time of the taking will equal or compensate the loss of profits.

The only remedy at law which the court recognized as open to the plaintiff below in *Watson* v. *Sutherland*, 5 Wall. 74, was an action for trespass. Under the decisions of the Maryland courts, where the case arose, and under the decisions of this court, replevin against the marshal could not have been maintained. *Powell* v. *Bradlee*, 9 Gill & Johns. 220, 274; *Freeman* v. *Howe*, 24 How. 450. But replevin can be maintained against a sheriff, and would have furnished a remedy plain, adequate and complete, and more practical and efficient than the remedy in equity. *Long* v. *Barker*, 85 Illinois, 431; *Tomlinson* v. *Rubio*, 16 California, 203; *Baker* v. *Rinehard*, 11 West Va. 238; *Davidson* v. *Floyd*, 15 Florida, 667; *Bouldin* v. *Alexander*, 7 T. B. Mon. 425; *Johnson* v. *Connecticut Bank*, 21 Connecticut, 148.

III. There was no proper party defendant of record against

whom the court had jurisdiction to proceed. In the absence of charges of fraud, malice or collusion, a public ministerial officer cannot be made a party to an action for an injunction to restrain the enforcement of a judgment or other process of a court. If so made, no decree can be taken against him. *Edney* v. *King*, 4 Ired. Eq. 465; *Lackay* v. *Curtis*, 6 Ired. Eq. 199; *Howell* v. *Foster*, 122 Illinois, 276; *Stephens* v. *Forsyth*, 14 Penn. St. 67; *Olin* v. *Hungerford*, 10 Ohio, 268; *Allen* v. *Medill*, 14 Ohio, 445; *Montgomery* v. *Whitworth*, 1 Tenn. Ch. 174; *Bloomstein* v. *Brien*, 2 Tenn. Ch. 778; *Holmes* v. *Chester*, 11 C. E. Green (26 N. J. Eq.) 79, 80.

Mr. J. W. Taylor for appellee.

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

There are thirty-two assignments of error found in the record, which it is not necessary to discuss in detail.

We are of opinion that the findings of fact by the District Court, taken in connection with the verdict of the jury upon the sole issue submitted to it, entitled the appellee to the equitable relief sought, and are sufficient to sustain the judgment of the Supreme Court of the Territory. They fully establish the allegations of the complaint, that the appellee, Peters, was the true owner of the stock of merchandise, levied upon and seized as the property of P. M. Lund & Co.; that he bought the stock from Lund & Co., paying the adequate consideration of $10,000, and upwards, for the entire stock, including the good-will of the business carried on by Lund & Co. at the same stand; that, though Lund & Co. sold the stock for the purpose of defrauding their creditors, the appellee was no party to the fraud, and had no knowledge of the purpose of Lund & Co. in disposing of said stock and business; that, at the time the appellant, North, as sheriff of the county of Lincoln, levied upon the goods and merchandise, the appellee was in possession of them, and was conducting a profitable business; that the acts of the sheriff, in levying upon and seiz-

ing the property, by virtue of the writs of attachment, described in the complaint, and the threatened acts, under and by virtue of other writs, unless restrained by the court, would have destroyed the appellee's business; that it would be extremely difficult to ascertain or estimate the pecuniary injury the appellee would sustain; that the merchandise and the business above mentioned comprised all the property owned by the appellee, and all his pecuniary resources; that the appellant, North, as sheriff of Lincoln County, at the time the suit was brought, had in his hands a large number of writs of attachment, which he threatened to levy upon the merchandise belonging to the appellee; and that creditors of P. M. Lund & Co. were about to sue out writs of attachment, and place them in defendant's hands to be levied on the same property.

Upon these facts the judgment of the Supreme Court of the Territory must be affirmed, unless the appellant can show some legal ground for making this particular case an exception to the general rules upon the subject of equitable relief.

The main ground relied on by the appellant is, that the relief sought should be refused, because the appellee had a plain, adequate and complete remedy at law, to wit, either the action of trespass or replevin. The answer to this is, that the measure of damages in an action of trespass could not have exceeded the value of the property seized, with interest thereon from the date of the seizure; and that the only remedy in an action of replevin would have been limited to a recovery of the property, and damages for its detention, with costs. It does not need argument to show that neither of these actions would afford as complete, prompt and efficient a remedy for the destruction of the business which, with the goods levied upon, constituted the appellee's entire estate and pecuniary resources, as would be furnished by a court of equity in preventing such an injury. The case of *Watson* v. *Sutherland*, 5 Wall. 74, 78, 79, is, in its material facts, similar to this case. In that case a bill was filed by one Sutherland to enjoin the further prosecution of certain writs of *fieri facias* levied by the sheriff, Watson, on a lot of goods claimed to belong exclusively to the plaintiff, so as to prevent what the plaintiff

alleged to be an irreparable injury, to wit, the ruin of his business as a merchant. The defence set up was, as in this case, that the injunction should have been refused, because the action of trespass furnished a complete and adequate remedy at law. In answer, the court, Mr. Justice Davis delivering the opinion, said: "How could Sutherland be compensated at law, for the injuries he would suffer, should the grievances of which he complains be consummated? . . . Commercial ruin to Sutherland might, therefore, be the effect of closing his store and selling his goods, and yet the common law fail to reach the mischief. To prevent a consequence like this, a court of equity steps in, arrests the proceedings *in limine;* brings the parties before it; hears their allegations and proofs, and decrees, either that the proceedings shall be unrestrained, or else perpetually enjoined."

It is further argued by the appellant that the District Court, after making and filing the first findings of fact and conclusions of law, and ordering judgment thereon, (which was duly entered,) had not the power, after the term had closed, to make additional findings in support of its judgment, upon a motion for a new trial. We think this point not well taken. The appellant, in support of his motion for a new trial, claimed that the court had omitted to find upon certain material issues in the case. The court refused to grant the motion, and made additional findings, more explicitly responsive to the questions presented by the pleadings. We are of opinion that the court, if, in the consideration of such a motion, it considers that material findings have been omitted or imperfectly stated, has authority to make such additional findings as will cure the omission, so that its record will be amended, and made to conform to the truth. When the court below made its decree, it made a concurrent order giving the defendant (the appellant) until a certain day within which to prepare and serve his motion for a new trial. The record, therefore, had not passed out of the control of the court by appeal when those additional findings were made.

Counsel for appellant is mistaken in saying that the rule of practice, under the Dakota Code of Civil Procedure (secs. 266,

267), as established by the decisions of the Supreme Court of that Territory, does not allow the trial court to make additional findings after judgment has been ordered and entered. The cases cited are inapplicable and do not sustain the position assumed. None of them were cases in which the trial court made additional findings, and that question was not presented in any of them. In the case of *Dole* v. *Burleigh*, 1 Dakota, 227, on which counsel for appellant mainly relies, the trial court omitted to find upon a material issue presented by the pleadings, but it made no additional findings. The court laid down and applied the long-established principle, nowhere controverted, that the findings of fact by a court, like a special verdict, must decide every point in issue, and that the omission to find any material fact in issue is an error which invalidates the judgment. A remark of the judge, in his opinion, favoring the view taken by appellant is *obiter*, and contrary to adjudged cases, on like questions, in the highest courts of those States whose statutory provisions respecting the trial by the court of questions of fact correspond in almost every particular with §§ 266, 267 of the Dakota Code, *supra*. Those authorities hold that the omission to file findings of fact, judgment having been entered, is an irregularity which the court has authority to cure by supplying additional amendments until an appeal is taken, or a bill of exceptions is settled and signed by the judge. *Williams* v. *Ely*, 13 Wisconsin, 1; *Pratalongo* v. *Larco*, 47 California, 378; *Ogburn* v. *Conner*, 46 California, 346; *Bosquett* v. *Crane*, 51 California, 505; *Hayes* v. *Wetherbee*, 60 California, 396; *Swanstrom* v. *Marvin*, 38 Minnesota, 359; *Vermule* v. *Shaw*, 4 California, 214.

A further ground relied on by the appellant is, that there was no proper party defendant of record against whom the court had jurisdiction to proceed; and that the defendant below, acting in the capacity of sheriff, had no material interest in the subject matter of the suit, and was not, therefore, the proper defendant thereto. We think there is no merit in this proposition.

By the terms of the writs of attachment the sheriff was commanded to levy upon and attach personal property belong-

ing to P. M. Lund & Co. Those writs did not authorize him to seize the property of any other person; and when he did seize other property he became a trespasser, and was not protected by the law. The rule in this respect was tersely stated by Mr. Justice Miller, who delivered the opinion of the court in *Buck* v. *Colbath*, 3 Wall. 334, 343, 344. Speaking of the variety of writs, orders, or processes of the court, under which property may be seized by an officer, the learned justice divided them into two general classes: (1) "Those in which the process or order of the court describes the property to be seized, and which contain a direct command to the officer to take possession of that particular property;" and, (2), "Those in which the officer is directed to levy the process upon property of one of the parties to the litigation, sufficient to satisfy the demand against him, without describing any specific property to be thus taken." Referring to the second class he said: "In the other class of writs to which we have referred, the officer has a very large and important field for the exercise of his judgment and discretion. *First*, in ascertaining that the property on which he proposes to levy, is the property of the person against whom the writ is directed; *secondly*, that it is property which, by law, is subject to be taken under the writ; and, *thirdly*, as to the quantity of such property necessary to be seized in the case in hand. In all these particulars he is bound to exercise his own judgment, and is legally responsible to any person for the consequences of any error or mistake in its exercise to his prejudice. He is so liable to plaintiff, to defendant, or to any third person whom his erroneous action in the premises may injure. And what is more important to our present inquiry, the court can afford him no protection against the parties so injured; for the court is in nowise responsible for the manner in which he exercises that discretion which the law reposes in him, and in no one else." See also Cooley on Torts, 396.

In a case where the officer has exceeded his authority, he may be proceeded against either by an action for damages, if such remedy be sufficient, or by a writ of injunction to restrain the continued wrongdoing; and it is not essential that

Counsel for Parties

the plaintiffs in the writs be joined as parties defendant, where, as in this case, it does not appear, either from the pleadings or the proofs, that they advised or directed the sheriff to seize the particular property, as the property of their judgment debtor. In our opinion injunction was the proper remedy, the remedy at law being wholly inadequate to prevent or repair the injuries set forth in the pleadings, and stated in the findings of the court.

We have not deemed it necessary to discuss the jurisdictional question raised by the appellee. It is clear that the appeal in this case was allowed by the proper court; that all the proceedings relative to the perfecting of an appeal were taken within two years from the date of entering the judgment of the court below; and that the enabling act admitting the two Dakotas, Montana and Washington Territories as States authorizes us to proceed to hear and determine cases of this character. *Judgment affirmed.*

KAUFFMAN *v.* WOOTTERS.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 1360. Submitted January 5, 1891. — Decided February 2, 1891.

State 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 process of law, is not in violation of the Fourteenth Amendment. *York* v. *Texas*, 137 U. S. 15, affirmed and applied.

THIS was a motion to dismiss or affirm. The case is stated in the opinion.

Mr. A. H. Garland and *Mr. H. J. May* for the motion.

Mr. T. N. Waul opposing.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case is before us upon a motion to dismiss the writ of error for want of jurisdiction in this court to reëxamine the judgment below; or, if this court has jurisdiction, to affirm the judgment upon the ground that the question on which our right of review depends is too frivolous to require argument upon it.

Certain provisions of the statutes of Texas relating to the service of process are, it is contended, in violation of the clause of the Fourteenth Amendment, declaring that no State shall deprive any person of property without due process of law. These provisions are as follows: (Rev. Stats. Texas.)

"Art. 1240. The defendant may accept service of any process, or waive the issuance or service thereof, by a written memorandum signed by him or by his duly authorized agent or attorney, and filed among the papers of the cause; and such waiver or acceptance shall have the same force and effect as if the citation had been issued and served as provided by law. Art. 1241. The defendant may in person, or by attorney, or by his duly authorized agent, enter an appearance in open court, and such appearance shall be noted by the judge upon his docket and entered in the minutes, and shall have the same force and effect as if citation had been duly issued and served as provided by law. Art. 1242. The filing of an answer shall constitute an appearance of the defendant so as to dispense with the necessity for the issuance or service of citation upon him. Art. 1243. Where the citation or service thereof is quashed on motion of the defendant, the case may be continued for the term, but the defendant shall be deemed to have entered his appearance to the succeeding term of the court. Art. 1244. Where the judgment is reversed on appeal or writ of error taken by the defendant for the want of service, or because of defective service of process, no new citation shall be issued or served, but the defendant shall be presumed to have entered his appearance to the term of the court at which the mandate shall be filed. Art. 1245. No judgment shall in any case be rendered against any defendant unless

upon service, or acceptance, or waiver of process, or upon an appearance by the defendant, as prescribed in this chapter, except where otherwise expressly provided by law."

The Supreme Court of Texas, construing these statutory provisions, has held, and it so held in this case, that a defendant who appears only to obtain the judgment of the court upon the sufficiency of the service of process upon him, is thereafter subject to the jurisdiction of the court, although the process against him is adjudged to have been insufficient to bring him into court for any purpose. The question here is whether such legislation is consistent with "due process of law." That question, arising upon the above statute, was presented in *York* v. *Texas*, 137 U. S. 15, 19, and it was there held that State 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," was not forbidden by the Fourteenth Amendment.

Upon the record of this case there was color for the motion to dismiss, and, upon the authority of *York* v. *Texas*, the motion to affirm the judgment is sustained.

Affirmed.

WHEELING AND BELMONT BRIDGE COMPANY *v.* WHEELING BRIDGE COMPANY.

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

No. 1425. Submitted December 15, 1890. — Decided February 2, 1891.

When the highest court of a State holds a judgment of an inferior court of that State to be final, this court can hardly consider it in any other light in exercising its appellate jurisdiction.

A ferry connecting Wheeling with Wheeling Island was licensed at an early day in Virginia. Subsequently a general law of that State prohibited

Statement of the Case.

the courts of the different counties from licensing a ferry within a half a mile in a direct line from an established ferry. In 1847 the defendant purchased the ferry and its rights. *Held*,

(1) That the general law of Virginia had in it nothing in the nature of a contract;

(2) That the transfer of the existing rights from the vendor to the vendee added nothing to them.

An alleged surrender or suspension of a power of government respecting any matter of public concern must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions upon particular officers, or special tribunals, or from any doubtful or uncertain expressions.

THIS was a motion to dismiss or affirm. The case was thus stated by the court.

This was a proceeding commenced by petition in a court of West Virginia by the Wheeling Bridge Company, a corporation under the laws of that State, to condemn for its use a parcel of ground owned by the Wheeling and Belmont Bridge Company, a corporation formed under the laws of Virginia, of which the territory composing West Virginia was then a part. The petitioner represented that it was created a corporation for the purpose of constructing and maintaining a bridge across the Ohio River, from a point on the east side of its main channel, north of the public landing in the city of Wheeling, to a point nearly opposite on Wheeling Island in that city — the bridge to be for public use; and that in order to construct it and its approaches it was necessary to build over and to take a parcel of land belonging to the Wheeling and Belmont Bridge Company on Wheeling Island, which parcel was described in the petition and designated on an accompanying plat, and contained about thirty perches.

The petitioner averred that there was no lien or charge upon the parcel of land; that it was unable to agree with the Wheeling and Belmont Bridge Company on the terms of purchase; and that the land was necessary for the construction of the proposed bridge and the approaches to it. It therefore prayed that notice might be given to the Wheeling and Belmont Bridge Company of the filing of the application, and

Statement of the Case.

that the same would be heard on a day designated; that commissioners be appointed by the court to ascertain what would be a just compensation for the land; and that upon the payment of the compensation thus ascertained the title might be vested in the petitioner.

To this petition the Wheeling and Belmont Bridge Company appeared and tendered seven pleas; in the first four of which the defendant joined issue, raising the question of the necessity of the parcel of land desired for the purpose of maintaining the proposed bridge of the petitioner and its approaches, and of the necessity of the parcel and certain structures thereon for the proper exercise by the defendant of its franchise. The issues were found in favor of the petitioner by a jury, establishing the fact that the land desired was essential to the proposed work of the petitioner and was not essential to the proper exercise of the franchise of the defendant. No questions were raised as to the correctness of the rulings upon the trial of these issues, at least none which can be considered by this court.

The other three pleas raised the question of the power of the legislature to authorize the construction of a new bridge within half a mile either way from the bridge of the defendant, to transport persons and property across the Ohio River, the defendant contending that, by its charter and the privileges of owners of ferries which it had acquired, it had become invested with the exclusive right to thus transport persons and property within that distance of its bridge. The court held the pleas insufficient, and rejected them, and rendered judgment sustaining the proceedings for the condemnation of the property, adjudging that it was necessary for the petitioner to take it for the purpose of prosecuting its proposed work, and was not necessary to the defendant for the exercise of its franchise. The court thereupon named commissioners to ascertain what would be just compensation for the land. A writ of error was subsequently allowed, the proceedings of the commissioners stayed, and the case taken to the Supreme Court, where the judgment of the lower court was affirmed. To review this latter judgment the case was brought here.

Mr. W. P. Hubbard for the motion.

Mr. Daniel Lamb, *Mr. A. J. Clarke* and *Mr. Henry M. Russell* opposing.

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

The defendant in error, the plaintiff below, moves in the alternative to dismiss the appeal on the ground that the judgment recovered is not final, or to affirm the judgment on the ground of the manifest insufficiency of the errors assigned. The essential points of contention in the case related to the necessity of the property for the purpose of the petitioner, and to its necessity to the defendant for the proper exercise of its franchise. The judgment for the condemnation was conclusive upon both particulars. A right to condemn, as held by the Supreme Court of the State, is to be determined before the appointment of commissioners to estimate the amount of compensation to be made. *Baltimore & Ohio Railroad* v. *Pittsburgh, Wheeling &c. Railroad*, 17 West Va. 812. If the judgment had been different, all further proceedings would have been ended. Being for the condemnation, the estimate of the compensation, which was to follow, was to be made by commissioners, to be appointed, and might therefore be treated as being a distinct proceeding. The judgment appears to have been considered by that court as so far final as to justify an appeal from it; and if the Supreme Court of a State holds a judgment of an inferior court of the State to be final, we can hardly consider it in any other light, in exercising our appellate jurisdiction. The motion to dismiss must, therefore, be denied. But upon the motion to affirm, other considerations arise upon the 5th, 6th and 7th special pleas, which were held insufficient and rejected.

The fifth special plea sets forth, in substance, that the defendant was organized under a charter from the State of Virginia to erect a bridge across the Ohio River at or near the town of Wheeling; that in pursuance of the charter it erected and has for many years maintained for public use,

in consideration of tolls lawfully exacted, a wire suspension bridge extending from the eastern shore of the river at Tenth Street in the city of Wheeling to the eastern shore of Zane's or Wheeling Island; that it was empowered by the legislature to purchase, acquire and hold all ferry rights and privileges between Zane's Island and the main Virginia shore at the city of Wheeling; that in the year 1847 there was, and for many years had been, between those points, a ferry maintained and owned by certain parties named, together with the rights and privileges by law incident thereto; that in September, 1847, it acquired by purchase from them the said ferry and the rights and privileges thereof, and has since owned and enjoyed the same; that its present toll bridge was erected and has been maintained substantially in the location of the ferry, and by the use of the bridge for the public it has kept in full force and vigor the rights and privileges appertaining to the ferry. The plea also sets forth that at the time when the defendant acquired the ferry and the rights and privileges incident thereto, one of them was the exclusive right to transport persons, animals and vehicles across the Ohio River within the limits of one-half a mile from the ferry; and that the bridge proposed to be built by the petitioner is to be located, and the whole parcel of land proposed to be condemned is situated, within half a mile of the said ferry and of the defendant's bridge.

The sixth special plea embodies substantially the averments of the fifth, with an additional one to the effect that out of the powers and authorities granted to the defendant and the acquisition by it of the said ferry and the rights, privileges and franchises thereof, a contract arose between the State of Virginia and the defendant, that it should have and enjoy during its chartered existence, the exclusive privilege of transporting persons, animals and vehicles across the Ohio River at all points within half a mile of the location of the ferry; that upon the formation of the State of West Virginia it became a party to the contract and is bound by it, but that the legislature of the State, not regarding its obligations, in March, 1882, passed an act providing that corporations might be formed,

for the purpose of erecting and maintaining toll bridges over the Ohio River for the transportation of persons, vehicles and other things, and that no ferry privileges or franchises should preclude the erection of such bridges, or entitle the owner to damages by reason thereof. The defendant avers that this act of the legislature of West Virginia is unconstitutional and void, as impairing the obligation of the contract between West Virginia and Virginia and the defendant. The seventh special plea adds nothing material to the averments of the other two.

The contention of the defendant is, that by the acquisition of the ferry and its privileges, and the authority to construct its bridge, it has the exclusive right to transport passengers, animals and vehicles over the Ohio River at all points within half a mile of the bridge. The ferry which it purchased — the one connecting the main land with Wheeling Island — was licensed at an early day, and no exclusive privileges, such as are claimed now, were then attached to the franchise. The subsequent general law of Virginia, passed in 1840, prohibiting the courts of the different counties from licensing a ferry within half a mile in a direct line from an established ferry, had in it nothing of the nature of a contract. It was a gratuitous proceeding on the part of the legislature, by which a certain benefit was conferred upon existing ferries, but not accompanied by any conditions that made the act take the character of a contract. It was a matter of ordinary legislation, subject to be repealed at any time when, in the judgment of the legislature, the public interest should require the repeal. The mere purchase by the defendant of existing rights and privileges added nothing to them. It would be absurd to suppose that the transfer from vendor to vendee gave them any additional force or validity. Here the prohibition of the act of 1840 was only upon the county courts, and that in no way affected the legislative power of the State. *Fanning* v. *Gregoire*, 16 How. 524. Nor did the charter of the defendant contain any inhibition upon the State to authorize the establishment of another bridge within the distance claimed whenever the public interest should require it. An alleged surren-

der or suspension of a power of government respecting any matter of public concern must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions upon particular officers, or special tribunals, or from any doubtful or uncertain expressions. As was said substantially in the case of *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 548, whenever it is alleged that a State has surrendered or suspended its power of improvement and public accommodation on an important line of travel, along which a great number of persons must daily pass, the community has a right to insist that its surrender or suspension shall not be admitted, in a case in which the deliberate purpose of the State to make such surrender or suspension does not appear; referring to several adjudications of this court in support of the doctrine. And whatever of exclusiveness there was in the privilege extended by the act of 1840 within half a mile on each side of an established ferry, was repealed in 1882. From that time the defendant could claim no exclusive privilege to transport passengers, animals and vehicles over the Ohio River within the distance mentioned under the repealed statute, even if it could have done so before.

Judgment affirmed.

UNITED STATES *v.* GREEN.

APPEAL FROM THE COURT OF CLAIMS.

No. 1343. Submitted January 9, 1891. — Decided February 2, 1891.

The plaintiff was a commander in the navy of the United States, with the following record of entry and promotion: in the volunteer service, acting master's mate, May 7, 1861; acting ensign, November 27, 1862; acting master, August 11, 1864: — in the regular service, master, March 12, 1868; lieutenant, December 18, 1868; lieutenant-commander, July 3, 1870; commander, March 6, 1887. He had never received any benefit of longevity pay under that clause in the act of March 3, 1883, 22 Stat. 473, c. 97, providing that "all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the benefits

of such actual service in all respects in the same manner as if all said service had been continuous and in the regular navy in the lowest grade having graduated pay held by such officer since last entering the service. *Held*, That, as he was a lieutenant during some days succeeding June 30, 1870, when the act of July 15 took effect, the lowest grade he held having graduated pay was that of lieutenant.

THE case is stated in the opinion.

Mr. Solicitor General for appellants.

Mr. John Paul Jones and *Mr. Robert B. Lines* for appellee.

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

This is an action to recover longevity pay under the clause of the act of March 3, 1883, providing that "all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular Navy in the lowest grade having graduated pay held by such officer since last entering the service: *Provided*, That nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers: *Provided, further*, That nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his service in the volunteer Army or Navy." 22 Stat. 473, c. 97.

The plaintiff is a commander in the Navy of the United States, with the following record of entry and promotion: In the volunteer service, acting master's mate, May 7, 1861; acting ensign, November 27, 1862; acting master, August 11, 1864: In the regular service, master, March 12, 1868; lieutenant, December 18, 1868; lieutenant-commander, July 3, 1870; commander, March 6, 1887. He has never received any benefit of longevity pay under the act of March 3, 1883. The court below held that his prior service should be credited on

his grade of lieutenant-commander, not on that of lieutenant, and gave judgment in his favor for $796.08. If such prior service had been credited on his grade of lieutenant, the judgment would have been for only $4.17. 25 C. Cl. 300.

By section 3 of the act of July 15, 1870, making appropriations "for the naval service for the year ending June thirtieth, eighteen hundred and seventy-one, and for other purposes," 16 Stat., c. 295, 321, 330, 332, it was provided "that from and after the thirtieth day of June, eighteen hundred and seventy, the annual pay of the officers of the Navy on the active list shall be as follows:

* * * * *

"Lieutenant-commanders, during the first four years after date of commission, when at sea, two thousand eight hundred dollars; on shore duty, two thousand four hundred dollars; on leave or waiting orders, two thousand dollars; after four years from such date, when at sea, three thousand dollars; on shore duty, two thousand six hundred dollars; on leave or waiting orders, two thousand two hundred dollars. Lieutenants, during the first five years after date of commission, when at sea, two thousand four hundred dollars; on shore duty, two thousand dollars; on leave or waiting orders, one thousand six hundred dollars; after five years from such date, when at sea, two thousand six hundred dollars; on shore duty, two thousand two hundred dollars; on leave or waiting orders, one thousand eight hundred dollars." And section 4 provided: "That the pay prescribed in the next preceding section shall be the full and entire compensation of the several officers therein named, and no additional allowance shall be made in favor of any of said officers on any account whatever, and all laws or parts of laws authorizing any such allowance shall, on the first day of July, eighteen hundred and seventy, be repealed. . . . And from and after the thirtieth day of June, eighteen hundred and seventy, so much of the fourth section of the act approved July fourteen, eighteen hundred and sixty-two, 'making appropriations for the naval service for the year ending June thirty, eighteen hundred and sixty-three, and for other purposes,' as allows to persons in the naval service five

cents per day in lieu of the spirit ration, is hereby repealed; and from and after that day thirty cents shall in all cases be deemed the commutation price of the navy ration."

By the same act, appropriations were made for the payment of officers and seamen at the designated rates, and all acts or parts of acts inconsistent with that act were thereby repealed.

Under the statute of July 16, 1862, (12 Stat. 583, 586,) in force up to June 30, 1870, the pay of lieutenants was not graduated, but by the act of July 15, 1870, their pay, and that of lieutenant-commanders and other officers therein mentioned, was graduated from and after June 30, 1870. The lawful pay of lieutenants ceased to be what it had been during the prior fiscal year and years preceding, and became for the fiscal year commencing July 1, 1870, as prescribed by the act of July 15. Claimant accordingly received pay for his services on July 1, 2 and 3, 1870, under the latter act, which furnished the measure of his compensation. There was no other statute and no other appropriation in accordance with which his pay was regulated, disbursed and received. Nearly thirteen years after this the act of 1883 was passed, and the extent to which the claimant could avail himself of it depends upon what was the lowest grade having graduated pay held by him since last entering the service; and, as he was a lieutenant during some days succeeding June 30, 1870, when the act of July 15 took effect, we are constrained to hold that the lowest grade he held having graduated pay was that of lieutenant. If the act had been passed ten days before June 30, to take effect on that day, and claimant had become lieutenant-commander within the ten days, the lowest grade held by him having graduated pay attached would have been that of lieutenant-commander, notwithstanding when the act was passed he held a lower grade. And though this act was passed after June 30, yet as Congress directed that it should take effect as of that date, the result must be the same.

In *United States* v. *Rockwell*, 120 U. S. 60, Rockwell re-entered the service as master in March, 1868, and subsequently during that year became lieutenant, and continued in such position until 1878. The government contended that the

lowest grade having graduated pay held by him was that of master, masters being entitled to graduated pay under the act of 1870, but it was held that this view was incorrect, and that the act of 1883 referred to the lowest grade having graduated pay held by the officer after the act providing for graduated pay took effect. Rockwell had ceased to be a master for nearly two years before the act in respect to graduated pay was passed, and consequently that act became operative as to him when he was holding the rank of lieutenant.

In this case, the only law under which claimant could receive pay after June 30, 1870, was the act of July 15, 1870, and as it took effect as of June 30, he was holding the grade of lieutenant at that time, and that fact disposes of this controversy.

It is suggested that the act of July 15, 1870, operated in reduction of earned compensation for services rendered during the fifteen days succeeding June 30, and to that extent was invalid, upon the ground that while the pay of a lieutenant as fixed by the act of 1862 was in terms increased by the act of 1870, yet part of his prior compensation given in lieu of allowances was cut off, and that his total compensation by reason of the equivalent for allowances was larger during the fiscal years prior to June 30, 1870, than that fixed by the act of July 15. But the payments referred to were made in accordance with an order of the Secretary of the Navy of May 23, 1866, which established a fixed rate of compensation in lieu of prior extra allowances at a sum equal to thirty-three and one-third per cent of the pay, and the validity and force of the order depended on the appropriation by Congress of moneys for specified objects connected with the naval service, to the distribution of which the order related. It was upon this view that the opinion of the court, delivered by Mr. Justice Harlan, proceeded in *United States* v. *Philbrick*, 120 U. S. 52, 58, where "the power of the Secretary to establish rules and regulations for the apportionment of the sums set apart by Congress, in gross, for such objects as those involved in the allowances here in dispute," was sustained. The order was not a contract with the naval officers by the Department, and independent of Congressional action.

Syllabus.

The appropriation by Congress in this instance was by the act of July 15, 1870, and that act in terms prohibited any extra allowances from and after June 30, so that the act increased the actual pay and did not so disturb any vested rights of the claimant as to give force to his position in this regard, if it would in any aspect have affected the conclusion reached.

The judgment of the Court of Claims is reversed and the cause remanded with directions to enter judgment for $4.17 in favor of claimant.

KANSAS CITY, FORT SCOTT AND MEMPHIS RAILROAD COMPANY *v.* DAUGHTRY.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 1361. Submitted January 19, 1891. — Decided February 2, 1891.

When an issue of fact is raised upon a petition for the removal of a cause from a state court to a Circuit Court of the United States, that issue must be tried in the Circuit Court.

The statutes of the United States imperatively require that application to remove a cause from a state court to a federal court should be made before the plea is due under the laws and practice of the State; and if the plaintiff does not take advantage of his right to take judgment by default for want of such plea, he does not thereby extend the time for application for removal.

The statutes of Tennessee require the plaintiff to file his declaration within the first three days of the term to which the writ is returnable and the defendant to appear and demur or plead within the first two days after the time allotted for filing the declaration. After due service of the writ, the plaintiff's declaration was filed within the prescribed time. The defendant three days later pleaded the general issue, and, after the lapse of four terms, filed a petition in the state court for removal on the ground of diverse citizenship. This was denied, and exceptions taken. The Supreme Court of the State upheld the refusal, passing upon the question of citizenship as an issue of fact. *Held*,

(1) That that court had no jurisdiction over that issue of fact;

(2) But that, as the application for removal was made too late, its denial was right as matter of law, and the judgment of that court should be affirmed.

Opinion of the Court.

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

Mr. Luke E. Wright and *Mr. George Gantt* for the motion.

Mr. Wallace Pratt opposing.

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

This was an action commenced in the Circuit Court of Shelby County, Tennessee, by R. S. Daughtry as administrator of John W. Daughtry, deceased, against the Kansas City, Fort Scott and Memphis Railroad Company and the Kansas City, Memphis and Birmingham Railroad Company on the 16th of August, 1888, for the recovery of damages for the death of John W. Daughtry, alleged to have been occasioned by the negligence of defendants. The summons was returnable on the third Monday of September, 1888, and alleged as to the defendants, "both of which are railroad corporations conducting business in Shelby County, Tennessee, with offices and agencies in said county and State." The return of the sheriff was as follows: "Came to hand 16th day of August, 1888. Executed on the Kansas City, Fort Scott and Memphis Railroad Company by reading the contents of this writ to J. H. Sullivan, sup't of said railroad co., he being the highest officer to be found in my county, and executed on the Kansas City, Birmingham and Memphis Railroad Company by reading the contents of this writ to J. H. Sullivan, sup't, he being the highest officer of said co. to be found in my county. This 23d day of August, 1888."

The declaration was filed September 17, 1888, and averred, in the first count, defendants to be "corporate persons, doing business as such in Tennessee (under license and by consent of the State);" and in the second count described the defendant corporations as "doing business in Tennessee as aforesaid." It was also alleged in the first count that defendants "are and were on and prior to the 16th of August, 1888, engaged in operating important lines of railway under one common or

general management, with depots and terminal facilities in the taxing district of Shelby County;" and in the second count, that "on or about the 12th day of August, 1888, defendant companies were operating cars and engines on their railroad lines leading into the taxing district of Shelby County."

The statutes of Tennessee provide as follows:

"4238. The declaration of the plaintiff shall be filed within the first three days of the term to which the writ is returnable, otherwise the suit may, upon motion of the defendant, be dismissed at plaintiff's cost.

"4239. The defendant shall appear and demur or plead within the first two days after the time allotted for filing the declaration, otherwise the plaintiff may have judgment by default.

"4240. The plaintiff and defendant shall, within the first two days after each subsequent step taken by the other in making up an issue, demur or plead thereto, on penalty of having the suit dismissed or judgment taken by default, according as the failure is by the plaintiff or defendant.

"4241. The court may, however, enlarge the time for pleading, upon application of either party, in proper cases, or excuse the failure to plead within the time prescribed, upon good cause shown." 2 Thompson and Steger's Tenn. Stats. 1871, p. 1714 *et seq.;* Milliken and Vertrees' Code of Tenn. 1884, p. 949; in which edition of the code the sections are numbered respectively 5010, 5011, 5012 and 5013.

The declaration was filed on the first day of the term to which the writ was returnable, and the defendants' pleas were due during that week. Upon the 25th of September the Kansas City, Memphis and Birmingham Railroad Company filed its plea of the general issue. The Circuit Court of Shelby County had five regular terms, "commencing on the third Mondays in January, March, May, September and November of each year." Acts Tenn. 1883, p. 257; Milliken and Vertrees' Code, § 129, p. 49.

On the 29th of May, 1889, after the lapse of four terms, the Kansas City, Fort Scott and Memphis Railroad Company filed

its petition and bond for the removal of the suit to the Circuit Court of the United States, for the Western District of Tennessee. This petition commenced: "Comes your petitioner, the Kansas City, Fort Scott and Memphis Railroad Company, and shows to the court" that the matter in dispute, exclusive of interest and costs, exceeds the sum or value of $2000; "that the controversy in said suit is between citizens of different States; that your petitioner, the Kansas City, Fort Scott and Memphis Railroad Company, was at the time when this suit was commenced and still is a corporation created and existing under and by virtue of the laws of the States of Missouri, Arkansas and Kansas and was and still is a citizen of said States; that the plaintiff, R. S. Daughtry, administrator, was at the beginning of this suit and still is a citizen and resident of the State of Tennessee;" that there is in the suit a controversy wholly between the administrator and the petitioner, which can be fully determined as between them without the presence of petitioner's co-defendant; "that its said co-defendant, the Kansas City, Memphis and Birmingham Railroad Company, is a corporation created and existing under and by virtue of the laws of the State of Tennessee, and that it is a citizen thereof;" that the acts alleged to have been done jointly by petitioner and its co-defendant were, if done at all, done by petitioner alone, and its co-defendant did not at the time, and "does not now, and never did, own, possess, control or use the said railroad track upon which said acts were done," etc.; "that the said Kansas City, Memphis and Birmingham Railroad Company has been joined in this action as a nominal party defendant for the sole purpose of preventing your petitioner from removing this case to the Circuit Court of the United States."

Upon the first of June, 1889, the affidavit of Daughtry, the administrator, was filed, stating "that he is a citizen of the State of Arkansas and has been a citizen of said State for the last ten years; that all beneficiaries in said suit are also citizens of the State of Arkansas and have been for the last ten years." On that day the state circuit court entered this order:

"This day the defendant, the Kansas City, Fort Scott and Memphis Railroad Co., presented to the court its petition and bond to remove this case to the Circuit Court of the United States for the Western Division of the Western District of Tennessee, which was filed herein on May 29th, 1889; and the court, having duly considered said petition, together with the affidavit of R. S. Daughtry filed herein June 1st, 1889, and heard argument of counsel, is of the opinion that upon said petition and affidavit said defendant is not entitled to the order of removal prayed in its said petition, and its application in that behalf is denied and said defendant is allowed one day to plead to the merits; to all of which the said Kansas City, Fort Scott and Memphis Railroad Company, by its attorney, excepts and asks that its exceptions be noted of record, which is accordingly done."

Thereupon, on the 6th day of June, the cause came on for trial before a jury duly empanelled, and on the 7th was dismissed by plaintiff as against the Kansas City, Memphis and Birmingham Railroad Company. Verdict and judgment then passed in favor of the plaintiff and against the Kansas City, Fort Scott and Memphis Railroad Company, whereupon the latter took the cause by appeal to the Supreme Court of Tennessee, where, among other errors assigned, was one that "it was error to refuse to order the case removed to the Circuit Court of the United States." The judgment of the circuit court of Shelby County was affirmed by the Supreme Court of Tennessee, which, as to the question of removal, referred to the case of *Railway Companies* v. *Hendricks, Adm'r*, just disposed of by it, as governing that question. Both cases are reported in 88 Tennessee (4 Pickle) 710, 721. The cause was brought to this court by writ of error, and a motion to dismiss or affirm has been made by the defendant in error.

The Supreme Court of Tennessee was of opinion that it was competent for the state circuit court to pass upon the issue of fact made by the affidavit of Daughtry upon the statement in the petition in regard to his citizenship, and to retain the suit, because on that issue the railroad company had not shown that he was a citizen of Tennessee; but it is thor-

oughly settled that issues of fact raised upon petitions for removal must be tried in the Circuit Court of the United States. *Crehore* v. *Ohio & Mississippi Railway*, 131 U. S. 240; *Burlington, Cedar Rapids &c. Railway* v. *Dunn*, 122 U. S. 513; *Carson* v. *Hyatt*, 118 U. S. 279. In *Louisville & Nashville Railroad* v. *Wangelin*, 132 U. S. 599, the case came before us on a writ of error, bringing under review the judgment of the Circuit Court remanding the cause to the state court, and the language of the opinion has no relation to the action of the latter court.

It is true that the petition was not verified, contrary to good practice, and that Daughtry's affidavit was explicit, so that if the record had been filed in the Circuit Court, the cause would, as it then stood, have been remanded, but this would not justify the state court in acting upon the facts, though it arrived at the same result. If, however, the denial of the application was right as matter of law, the judgment should not be reversed. And it is apparent that if the service of process upon the defendant was sufficient, a plea was required from it at the September term, 1888, and that its application for removal came too late, for section 3 of the act of Congress of March 3, 1887, as corrected by the act of August 13, 1888, provides that the party desiring to remove must file his petition "at the time, or any time before the defendant is required by the laws of the State or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." 24 Stat. c. 373, p. 554; 25 Stat. c. 866, p. 435.

The statute is imperative that the application to remove must be made when the plea is due, and because a plaintiff in error does not take advantage of his right to take judgment by default, it cannot be properly held that he thereby extends the time for removal. The lapse of four terms before the petition was filed dispenses with argument on this question, if the petitioner was properly in court.

The law of Tennessee relating to service of process on corporations is embraced in the following section:

"2831. Service of process on the president or other head of

a corporation, or, in his absence, on the cashier, treasurer, or secretary, or in the absence of such officers, on any director of such corporation, shall be sufficient.

"2832. If neither the president, cashier, treasurer or secretary resides within the State, service on the chief agent of the corporation, residing at the time in the county where the action is brought, shall be deemed sufficient.

"2833. If the action is commenced in the county in which the corporation keeps its chief office, the process may be served on any one of the foregoing officers, in the absence of those named before him.

"2834. When a corporation, company, or individual has an office or agency in any county other than that in which the principal resides, the service of process may be made on any agent or clerk employed therein, in all actions growing out of or connected with the business of the office or agency.

"2834a. That sections 2831, 2832, 2833, 2834 be so amended, that hereafter when a corporation, company or individual has an officer or agency, or resident director in any county other than that in which the chief officer or principal resides, the service of process may be made on any agent or clerk employed therein in all actions brought against said company growing out of the business of, or connected with said company or principal's business. Act 1859–1860, c. 89, sec. 1.

"2834b. The provisions of this act shall only apply to cases where the action is brought in such counties as such agency, resident director, or office is located." Ib. sec. 2. 2 Thompson and Steger's Stats. Tenn. 1871, pp. 1190, 1191; Milliken and Vertrees' Code Tenn. p. 660. In this edition of the code these sections are numbered respectively 3536–3539.

On the 29th of March, 1887, an act was passed by the legislature of Tennessee, entitled "An act to subject foreign corporations to suit in this State," (Acts 1887, p. 386,) which defendant in error contends should control here; but in *Telephone Co.* v. *Turner*, 88 Tennessee (4 Pickle) 265, it was held that this act did not apply to foreign corporations having an office and resident agent in the State, and already subject to suit, but only to such foreign corporations as engaged in

business in the State without such office and agent; that it was not a limitation but an enlargement of the jurisdiction over foreign corporations; and that sections 2831, 2832, 2833 and 2834 of the code regulated the mode in which corporations might be sued, and applied equally to domestic and foreign corporations having an office or agency and a resident local agent in the county in which suit was brought. We perceive no reason for declining to accept the conclusions of the Supreme Court of the State upon this subject, and the act of 1887 need not, therefore, be considered.

From the summons it appeared that the two defendants were railroad corporations conducting business in Shelby County, Tennessee, with offices and agencies in that county and State; from the petition for removal that the petitioner was a citizen of the States of Missouri, Arkansas, and Kansas; and from the return, that J. H. Sullivan, superintendent of the petitioning railroad company, was the highest officer of that company to be found in Shelby County.

The return, in its statement that the superintendent was the highest officer of the company to be found in the county, excluded the assumption that others were or could have been so found, and, indeed, while there may be exceptions, officers of a foreign corporation, of the character of president, cashier, treasurer and secretary, do not ordinarily reside in a State of which the corporation is not a citizen. At all events, a return that a party is not to be found is regarded in Tennessee as more correct than a return of not found, because indicative of proper exertion to find him, *Hill* v. *Hinton*, 2 Head, 124; and it has been distinctly laid down that service on the chief agent of a corporation, residing in the county, is sufficient, although the return does not show that the president or other head of the corporation, or the cashier, treasurer, secretary or director thereof, were absent or non-resident, and that "the presumption in all such cases, is, that until the contrary is made to appear, the sheriff has done his duty, and has served the process upon the proper party." *Wartrace* v. *Wartrace &c. Turnpike Co.*, 2 Coldwell, 515.

At common law, service was made on such head officer of a

corporation as secured knowledge of the process to the corporation, and the provisions of this statute seem constructed *ex industria* to increase the number of officers or agents, service upon either of whom would be sufficient. In view of the State legislation and decisions, service upon the highest officer of the corporation to be found in the county, and that officer the superintendent there, was within the spirit of the rule and the intent and meaning of the statute.

The petition for removal did not question the sufficiency of service, and the state court apparently assumed it to be sufficient, for it allowed but one day to plead to the merits.

Under all the circumstances, we hold that the application came too late, and the judgment is, therefore,

Affirmed.

AMES *v.* MOIR.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 1404. Submitted January 12, 1891. — Decided February 2, 1891.

"Fraud" in the act of Congress, defining the debts from which a bankrupt is not relieved by a discharge in bankruptcy, means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong: citing and affirming previous decisions to the same point.

A. purchased a lot of high-wines, to be delivered to him upon call, between certain dates, and to be paid for on each delivery at a named price per gallon. He made the call at a time when he knew himself to be insolvent, and with the intent to get possession of the wines and convert them to his own use without paying for them. They were delivered at his place of business pursuant to the call, and he shipped part and attempted to ship the balance, without paying for them; *Held*, that, within the meaning of the statute, the debt, in respect of the wines, was not created until the wines were delivered at his place of business under the call, or, at least, until he took possession of them without paying for them, and with the intent not to pay for them.

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

Wilson Ames, the plaintiff in error, a rectifier and wholesale dealer in whiskies and high-wines in the city of Chicago,

executed and delivered to Robert Moir & Co., distillers and merchants at Oquawka, Illinois, the following writing, bearing date June 9, 1870: "I have this day bought of Robert Moir & Co. one hundred (100) barrels high-wines, 'iron bound,' at one dollar seven cents ($1.07) per proof gallon. The conditions of sale are as follows: The buyer can call from 1st July to 20th of same month by giving three days' notice, and if not called for by the 20th July the seller has the privilege of delivering up to the end of July by giving three days' notice; to be delivered in fifty barrel lots. To insure the fulfilment of this contract a margin of three hundred dollars will be put up by both parties."

On the 15th of July, 1870, Ames made a call upon Phillips & Carmichael, brokers for Robert Moir & Co., in the city of Chicago, for the high-wines mentioned in this writing, deliverable on the 18th instant. Shortly before this call the bonded warehouse of Moir & Co. was burned, destroying the wines from which they expected to meet any call by Ames. This made it necessary for the brokers to buy in the Chicago market, on account of their principal, enough high-wines to meet the demand of Ames. They obtained for that purpose fifty barrels of such wines from Conklin & Bro. and fifty from Lynch & Co., for delivery on the 18th at Ames's place of business in Chicago; and they were so delivered. The delivery was completed about six o'clock in the afternoon of that day.

In the opinion of the Supreme Court of Illinois in this case, *Ames* v. *Moir*, 130 Illinois, 582, 590, it is said: "After the high-wines had been delivered late in the afternoon of July 18, Ames absented himself from his place of business, and could not be found by the agents of Moir & Co. to make a demand of payment for the high-wines. They directed the porter in charge of Ames's warehouse to take care of the goods until morning, when they would call for the pay. When the agents called in the morning Ames was nowhere to be found, and they found that he had shipped fifty barrels of the high-wines for New York, and the remaining fifty barrels were loaded in cars ready for shipment. Phillips & Carmichael immediately replevied the fifty barrels which were found in cars in Chicago,

and went on to Detroit, Michigan, where they overhauled the other fifty barrels, and they were also replevied. Phillips & Carmichael sold the wines thus replevied to Shufeldt & Co. at ninety-seven cents per gallon, the market price at that time, and deposited the proceeds in bank to await the result of the replevin suits. It appears that between the time the wines were delivered, late in the afternoon of July 18th, and the time the agents reached Ames's store next morning, Ames had sent all the wines to the Michigan Central depot, shipped them, obtained bills of lading, which were attached to drafts on the consignee in New York, one for $2800 and the other for $2900, which drafts he discounted at the National Bank of Commerce on the security of the bills of lading. The replevin suits were defended by the National Bank of Commerce, and the defence interposed, that the bank was the pledgee of the wines from Ames in good faith, and without notice of Moir & Co.'s rights, was in the end sustained, *Michigan Central Railroad Co.* v. *Phillips*, 60 Illinois, 190, and the money realized on the sale of the high-wines to Shufeldt & Co. was turned over to the National Bank of Commerce in payment of the drafts."

It should be stated that a judgment by confession was taken against Ames in favor of a former partner, on which execution was issued, and under which the sheriff took possession of and closed up Ames's store. As soon as the levy was made, Ames went to his bank and checked against the proceeds of the drafts that were discounted on the security of the bills of lading in favor of a creditor whom he identified to the officers of the bank as the payee of the checks.

The present suit was brought by the defendants in error in the Superior Court of Cook County, Illinois, to recover from Ames the value of the high-wines taken to his place of business on the 18th of July, 1870, for delivery upon payment of the price. One of his defences — the only one of which this court can take cognizance — was that he was discharged September 13, 1872, by the District Court of the United States for the Northern District of New York, sitting in bankruptcy, from all debts and claims which, by the act of Congress, were "made

provable against his estate, and which existed on the 28th day of March, 1872, on which day the petition for adjudication was filed against him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy."

There was a verdict and judgment in favor of the plaintiffs. That judgment was affirmed in the Appellate Court, and the judgment of the latter court was affirmed by the Supreme Court of Illinois. *Ames* v. *Moir &c.*, 130 Illinois, 582, 593. In respect to the defence based upon the discharge in bankruptcy, the Supreme Court of the State said: "It is also contended that Ames's discharge in bankruptcy was a bar to the action. Section 5117 of the Bankrupt Act is as follows: 'No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy.' Whether the debt in this case was created by the fraud of Ames, was a question of fact upon which the judgment of the Appellate Court is conclusive. But it is said incompetent evidence was admitted upon this question. No evidence was introduced, except such as tended to establish fraud on behalf of Ames, and the sufficiency of the evidence was a question for the jury. But it is said the debt was created when the contract was executed, — June 9, 1870, — and up to this time there was no fraud on the part of Ames. The debt was not entirely created until Ames induced the agents of Moir & Co. to place the wines in his possession, and if he obtained the possession by fraud, with the intent to ship the goods out of the country, and thus defeat the lien of the vendors, those were facts from which the jury might infer fraud within the meaning of the bankrupt law. *Darling* v. *Woodward*, 54 Vermont, 101. It is apparent from the evidence that Ames had no intention of paying for the wines when he called for them on the 15th day of July. His object seemed to be to get possession and control of the wines, and convert them to his own use without payment. This the evidence tends to show he did, and thus the debt was created."

Mr. John G. Reid and *Mr. William H. Barnum* for plaintiff in error.

It is provided in Rev. Stat. § 5117 that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy." This fraud must be positive actual fraud; not merely fraud in law. The evidence in this case did not show such fraud, and the Superior Court of Chicago erred in admitting it, and the Supreme Court of the State erred in affirming a judgment founded on it. *Neal* v. *Clark*, 95 U. S. 704; *Pierce* v. *Shippee*, 90 Illinois, 371; *Hennequin* v. *Clews*, 111 U. S. 676; *Palmer* v. *Hussey*, 87 N. Y. 303; *Cronan* v. *Cotting*, 104 Mass. 245; *Blow* v. *Gage*, 44 Illinois, 208; *Wood* v. *Clark*, 121 Illinois, 359; *Schroeder* v. *Walsh*, 120 Illinois, 403; *Morris* v. *Tillson*, 81 Illinois, 607; *Bowden* v. *Bowden*, 75 Illinois, 143; *Mey* v. *Gulliman*, 105 Illinois, 272, 285; *Hide & Leather Bank* v. *West*, 20 Ill. App. 61; *Hammond* v. *Noble*, 57 Vermont, 193; *Noble* v. *Hammond*, 129 U. S. 65; *Wolf* v. *Stix*, 99 U. S. 1; *Fisher* v. *Consequa*, 2 Wash. C. C. 382; *Choteau* v. *Jones*, 11 Illinois, 300, 318; *S. C.* 54 Am. Dec. 60; *United States* v. *Rob Roy*, 13 Bank. Reg. 235; *Jones* v. *Knox*, 8 Bank. Reg. 559; *Warner* v. *Cronkhite*, 13 Bank. Reg. 52; *Shuman* v. *Strauss*, 10 Bank. Reg. 300; *In re Williams & McPheeters*, 11 Bank. Reg. 145; *Brown* v. *Broach*, 16 Bank. Reg. 296; *Palmer* v. *Preston*, 45 Vermont, 154; *Springfield* v. *Edwards*, 84 Illinois, 626, 632, 633; *Law* v. *People*, 87 Illinois, 385, 393, 398; *Prince* v. *Quincy*, 105 Illinois, 138; *Prince* v. *City of Quincy*, 105 Illinois, 215; *Mattingly* v. *Wulke*, 2 Illinois App. 169; *City of Erie's Appeal*, 91 Penn. St. 398; *Wallace* v. *San Jose*, 29 California, 180.

Mr. James K. Edsall for defendants in error.

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

The only question for the determination of this court is whether Ames's discharge in bankruptcy was a bar to the

present action; and that question depends upon the inquiry whether the defendant is sued on account of a debt created by fraud within the meaning of the bankruptcy act. It is the settled doctrine of this court that "fraud" in the act of Congress defining the debts from which a bankrupt is not relieved by a discharge in bankruptcy means "positive fraud, or fraud in fact involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality." *Neal* v. *Clark*, 95 U. S. 704, 709; *Wolf* v. *Stix*, 99 U. S. 1, 7; *Hennequin* v. *Clews*, 111 U. S. 676, 682; *Strang* v. *Bradner*, 114 U. S. 555, 559; *Noble* v. *Hammond*, 129 U. S. 65, 69; *Upshur* v. *Briscoe*, *post*, 365.

The argument, in behalf of the defendant, proceeds, mainly, upon the ground that the claim or debt, on account of which he is sued, was created by the writing of June 9, 1870; and as that writing was executed in good faith, nothing done by him at a subsequent date for the purpose of obtaining possession of the high-wines for which he contracted, could be proved under the issue as to whether the claim or debt was created by fraud. This view of the transaction is inadmissible. The writing referred to did not, in itself, create a debt within the meaning of the bankruptcy act. It could not become effective as an instrument creating a debt in favor of plaintiffs until, pursuant to a call by defendant prior to July 20, they delivered, or offered to deliver, to him, the high-wines he agreed to take at the price stipulated, or — the defendant failing to make a call for them within the time limited for his doing so — until the high-wines were delivered, or tendered, to him by the plaintiffs, after the 20th and before the end of the month of July. When the plaintiffs delivered, or offered to deliver, the high-wines at the defendant's place of business on the 18th of July, in fulfilment of the agreement of June 9, and defendant failed to pay for them, then, and not before, was a debt created within the meaning of the bankruptcy act. Until the 18th of July, or, at least, until the defendant took possession, without making payment, of the high-wines that were left at his place of business in discharge of the plaintiffs' obligation to

deliver upon three days' notice, there was no debt for which the plaintiffs could maintain an action against the defendant, or which would have been provable against his estate in bankruptcy. If the month of July, 1870, had passed without any call by the defendant for the high-wines, and without the plaintiffs' exercising the privilege they reserved of delivering or offering to deliver before the end of that month, the writing of June 9, 1870, would have been of no value to any one; which fact shows that that instrument did not, in itself, create a debt, and that no debt could be created by it without the exercise by one or the other of the parties of the privilege reserved to each respectively.

The vital inquiry, therefore, is whether the defendant in making the call on the 15th day of July for the high-wines, and in taking possession of them without payment on the 18th, and shipping them on the cars, committed such fraud, in fact, as involved moral turpitude or intentional wrong upon his part. As the jury was instructed that Ames's discharge in bankruptcy was a complete defence to the action unless it appeared, by a preponderance of evidence, that he was guilty of positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, it must be assumed that they found that in the creation of the debt in question he had committed fraud of that character. When the wines were delivered, Moir & Co. were entitled to payment. Delivery and payment were, substantially, concurrent acts. And if Ames made his call, with the knowledge that he was then insolvent, and with the purpose of getting possession of the wines and shipping them out of the State without paying for them according to the terms of the executory agreement of June 9, and received them with that preconceived intent,—and there was evidence that justified the jury in so finding—he was guilty of fraud in fact, involving moral turpitude or intentional wrong, and is not protected against the claim of the plaintiffs by his discharge in bankruptcy. Such was the view taken by the court of original jurisdiction and by the Supreme Court of Illinois.

There is no error in the record in respect to the question of Federal law arising in the case, and the judgment is

Affirmed.

UNITED STATES MORTGAGE COMPANY *v.* SPERRY.

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

No. 22. Argued January 31, February 3, 1890. — Decided February 2, 1891.

The power of a guardian, under the statute of Illinois relating to guardians and wards, approved April 10, 1872, (Rev. Stats. Illinois, 1874, c. 64), to mortgage the real estate of the ward is subject to these express restrictions: (1) that he obtain the leave of the county court, based upon petition setting out the condition of the estate, the facts and circumstances on which the petition is founded, and a description of the premises to be mortgaged; (2) that the mortgage, if not in fee, must be for a term of years not extending beyond the minority of the ward; and (3) that the time of the maturity of the indebtedness secured by it should not extend beyond the minority of the ward. It is, also, subject to the implied restriction, controlling the discretion and power both of the guardian and the county court, that the indebtedness secured by the mortgage must arise out of, and have some necessary or appropriate connection with, the management of the ward's estate.

Mortgages executed in 1872, 1873 and 1876, by a guardian in Illinois, with the leave of the county court, to secure the payment of bonds given by him for moneys borrowed to pay off existing encumbrances upon the ward's real property and to improve such property by replacing thereon buildings that had been destroyed by fire, are sustained as not invalid under the above statute.

Such mortgages were not invalid because authorizing an absolute sale, and not expressly recognizing the right of redemption after sale; for such right of redemption exists, by statute, as a rule of property, whether recognized or not in the mortgage.

The United States Mortgage Company, a corporation of New York, being authorized by its charter to lend money on bond and mortgage on real estate situated within the United States, or upon any hypothecation of such real estate, or upon hypothecation of bonds or mortgages on such real estate, for any period of credit, could contract in Illinois to lend money there upon bond and mortgage of real estate, at nine per cent per annum, (which the law of that state permitted,) although the highest rate of interest permitted by the general laws of New York was seven per cent, and although the special charter of the company provided that no loan or advance of money should be made by it "at a rate of interest exceeding the legal rate."

In Illinois, overdue coupons, so drawn as to be negotiable securities according to the general commercial law, bear interest after maturity at the rate of six per cent per annum. But an interest warrant signed by a guar-

Statement of the Case.

dian, who has contracted to be exempt from personal liability for the principal debt, or for the interest thereon, practically payable out of particular funds, are not a security of that class, and do not bear interest after maturity.

Where a certain sum of money is due, and the creditor enters into arrangements with his debtor to take a less sum, provided that sum is secured in a certain way and paid at a certain day, but if any of the stipulations of the arrangement are not performed as agreed upon the creditor is to be entitled to recover the whole of the original debt, such remitter to his original rights does not constitute a penalty, and equity will not interfere to prevent its observance.

A guardian having obtained leave of the County Court to borrow the sum of $95,000 and mortgage the ward's estate to secure its payment, allowed the mortgagee, in the settlement of the loan, (but without the assent of that court,) the sum of $7219.27 in payment of interest on overdue coupons upon previous loans, and received from the mortgagee only $87,780.73. *Held*, (1) That this was not a contract, (within the meaning of the statute,) that the company should receive usurious interest, for no such contract had been attempted to be authorized by the county court; (2) That, as the allowance by the guardian of interest upon interest was under a mistaken view of the obligation of the coupons in that regard, the remedy was to treat the loan as one for only $87,780.73, making the calculation of interest at the contract rate upon that basis, and not to forfeit the interest upon the sum actually received by the guardian from the mortgagee.

Where a guardian, in Illinois, with leave of the county court, contracted on behalf of his ward's estate, for the repayment of money borrowed, with interest at nine per cent per annum, payable semiannually until the principal sum "shall be fully paid" — the principal debt maturing, as required by the statute, before the majority of the ward — interest is to be calculated, after the ward's majority, at the contract rate, and not at the statutory rate of six per cent. In such case, it is the right of the ward, immediately upon attaining full age, to pay off the debt, or, by agreement with the lender, obtain an extension of the time of maturity, and a less rate of interest.

Whatever may be the rate of interest contracted for in Illinois, after the debt is merged in a judgment or decree the contract ceases to exist, and the rate of interest upon the sum adjudged to be due, is thereafter controlled by the statute.

This appeal brought up for review a decree (*United States Mortgage Co.* v. *Sperry*, 24 Fed. Rep. 838, and *United States Mortgage Co.* v. *Sperry*, 26 Fed. Rep. 727) ordering the sale of certain real property in the city of Chicago, belonging to the appellee Henry W. Kingsbury, in satisfaction of the aggregate amount found to be due on three bonds given by

his guardian to the United States Mortgage Company, with the approval of the county court of Cook County — by which court the guardian was appointed — for moneys borrowed to be used in improving the ward's property and discharging certain encumbrances upon it. The bonds, all signed by the guardian, were payable, respectively, May 1, 1882, April 1, 1883, and December 1, 1883, and each one was secured by mortgage of distinct parts of the real estate directed to be sold. The mortgages bore date, respectively, July 10, 1872, April 1, 1873, and December 1, 1876, and provided, as did the bonds, that upon default, continuing for one month, in the payment of interest as stipulated, the principal sum, together with all arrearages of interest thereon, should, at the option of the Mortgage Company, become immediately due and collectible. Default having occurred and continued for one month in the payment of interest on each of the bonds, the company, on the 2d of November, 1877, exercised that option, declared the principal and all arrearages of interest to be immediately payable and collectible, and within a few days after that date brought the present suit for foreclosure.

The circumstances under which the bonds, coupons and mortgages were executed were as follows:

On the 5th of July, 1872, Anson Sperry, guardian of Kingsbury, presented his petition, properly verified, to the county court of Cook County, showing that the real property of the minor was subject to encumbrance by mortgages to the amount of about $78,500; that the debts secured by some of them were due, and the holders demanding payment; that the holders of other mortgage debts, soon to mature, were willing to accept payment and to assign or cancel their mortgages; that upon all of the mortgages considerable accumulations of interest were due and unpaid; that a portion of the real estate belonging to the minor consisted of lot six and a part of lot five, in block twenty-five of the original town of Chicago, and that the buildings formerly thereon were destroyed by fire, October 9, 1871; that the premises constituted a very large part of his estate in point of productive value, were centrally located in Chicago, and, before the destruction of the build-

ings thereon, yielded large rents; that in the judgment of all persons interested in the estate and in its proper management, the buildings should be restored, and the property made productive; that no money had come to the guardian's hands with which to liquidate the existing mortgage debts or the accumulated interest thereon; that the rents from the estate being insufficient for that purpose, it was necessary that provision be made to prevent the foreclosure of the mortgages; that there was no money of the estate to be applied in restoring the buildings; that the cost of constructing suitable buildings upon the premises would be about $100,000; and that for the purpose of funding, consolidating and paying off the mortgage debts and constructing proper buildings, it would be necessary to borrow about $200,000.

The prayer of the guardian was that he be authorized to negotiate, for the purposes stated, a loan of not exceeding $200,000, and to pay usual and reasonable commissions and brokerage therefor, upon such terms and for such time as shall be approved by the court and allowed by law; the mortgage to rest upon certain premises, belonging to the minor, the metes and bounds of which were given in the petition of the guardian. The authority asked for was given, and a loan in gold for $175,000 was negotiated with the appellant. The bonds given therefor were made payable, in gold, May 1, 1882, with interest (evidenced by coupons signed by the guardian) in like coin at the rate of nine per cent, payable semi-annually, until the principal was paid; and the mortgage to secure the payment of principal and interest was submitted to and approved by the county court. The order of approval was made August 6, 1872.

Subsequently on the 4th of September, 1872, the guardian filed in the county court an inventory of the real and personal estate of the minor, which recited all the mortgages upon his property, including those executed before he inherited it, and the above mortgage for $175,000. This inventory was examined, approved and ordered to be recorded. A subsequent inventory filed by him December 26, 1872, showed a balance of receipts in his hands of $496.98, and a cash balance of

$30,026.71 unexpended from the loan that had been authorized by the court. In that report he said: "That upon consultation with all parties interested and with persons of sound discretion and without interest, it is thought best to construct on the north one hundred feet of lot six, fronting on the alley north of Randolph street, and being the north end of Randolph street lot, a public hall. There are no halls of the character intended to be built north of 22d street and east of the south branch of the Chicago River, and the large number of conventions, meetings, concerts, readings and other assemblages of a like character requires proper accommodations. The ground proposed to be used is useless for almost any other purpose, but is a source of large expense. The ground is eighty feet wide by one hundred feet deep, and a hall with seating room for fifteen to eighteen hundred people can be built at a cost of about $50,000, from which an annual income of $10,000, at least, can be realized. An entrance can be made through the Clark street building, and the basement thereunder will rent for the purposes of an eating house at a fair rent. All the property belonging to said estate is liable to the dower right of Mrs. Jane C. Kingsbury of one-third of the net income thereof, and to the dower right of Mrs. Eva Lawrence of two-ninths of said net income." This report was examined, approved and recorded.

On the 3d of March, 1873, the guardian presented another petition to the county court, showing that he had used $68,643.80 out of the above loan in paying off old mortgages on the minor's estate, leaving a balance of $126,002.58, which he estimated would all or nearly all be required in the construction of buildings then being erected on the Randolph-street front of lot six in block thirty-five, and the building on that part of lot five, in the same block, owned by the minor. His petition also showed that the rear part of lot six had upon it, before the fire of 1871, a public hall or theatre; and that upon careful consideration, and after consultation with judicious, competent persons, it was best for the estate to erect a public hall upon the rear of that lot, having its front on Clark street, and to be used for concerts, lectures, readings, etc. It

further appeared that, in addition to the old mortgages previously described, there were two other encumbrances, that were either in whole or in part charges upon the estate of the infant, and which amounted to $15,000 and interest; and that the money in his hands, of the former loan, would be needed for the buildings on lot six, and more was needed to erect the building on the rear of that lot and to pay off said encumbrances. His petition showed "that the entire estate of the said Henry W. Kingsbury consists of real estate nearly all situate in the City of Chicago, and the only revenue and income of said estate to meet the various charges and encumbrances upon it and its expenses and taxation must be derived from the rental of said real estate; that no revenue can, in his judgment and that of judicious persons with whom he has consulted, be derived from the said rear portion of said lot six (6) unless the same be improved; that the said premises have heretofore, as thus improved, been largely productive and profitable until the said improvements were destroyed by fire, and it is believed that, if judiciously built upon, as proposed, they would be again equally productive and profitable, if not more so." He, therefore, asked authority to negotiate an additional loan of $75,000 in gold coin or the equivalent thereof in paper currency of the United States, paying usual and reasonable commissions and brokerage therefor, upon such terms and for such time as the court would approve and the law allowed, and to secure the same by mortgage upon certain described premises.

The prayer of that petition was also granted, and an order was made authorizing a further loan of $75,000 in gold coin, or its equivalent in paper currency, upon the terms stated in the petition. Under this order the mortgage of April 1, 1873, was executed to secure the payment of $70,000 in gold coin borrowed by the guardian from the Mortgage Company, and for which amount the guardian gave his bond maturing April 1, 1883, payable with interest (evidenced by coupons signed by him as guardian) at the rate of nine per cent per annum, payable half-yearly in like coin, until the principal sum was fully paid. This mortgage did not seem to have been formally

Statement of the Case.

presented to the court for examination, but the fact of its execution was brought to its attention in the guardian's reports from time to time of the condition of the estate, and was recognized.

On the 12th of October, 1876, the guardian — who, at that time, was Herman G. Powers — presented to the county court a petition showing a large indebtedness against the minor's estate, arising in part from the erection of buildings upon the lots before referred to, and including $51,987.04 in gold, which he stated was due the United States Mortgage Company for unpaid interest up to August 15, 1876. For the purpose of discharging said indebtedness, he asked authority to make an additional loan in gold of a sum not exceeding $95,000, or its equivalent in paper currency of the United States, paying interest thereon at the rate of nine per cent per annum in gold. The authority asked was granted, and the amount above named having been negotiated with the appellant, he executed a mortgage, December 1, 1876, to secure the payment of that sum in gold coin on the 1st of December, 1883, with interest (evidenced by coupons signed by him as guardian) payable half-yearly in like coin, at the rate of nine per cent per annum until the principal sum was paid; the guardian giving his bond for the principal sum, and coupons for the interest. The mortgage, bonds and coupons having been submitted to the court, were examined and approved.

Upon the basis of the master's report the aggregate amount due on the 15th day of December, 1885, was $343,399.96. This amount was reduced by the final decree to the sum of $221,727.64, making a difference against the company, at that date, of $121,672.32.

The following extract from the final decree showed how this result was reached:

"And the court finds that there was due the complainant, October fifteenth, 1884, of principal and interest on the loans made by said Anson Sperry as guardian, calculating interest at nine per cent per annum from the time to which the interest on said loans had been paid or funded and secured by the mortgage executed by the said Powers, the following sums, to wit:

"Principal of first loan	$175,000 00
"Interest at nine per cent from November first, 1876, to October fifteenth, 1884	125,343 75
"Principal of second loan	70,000 00
"Interest at nine per cent from April first, 1877, to October fifteenth, 1884	47,512 50
"Making a total of	$417,856 25
"And the court finds and the master's report shows payments to the complainant, made October fifteenth, 1884, and previously, to the amount of	$302,568 17
"And that said Powers improperly paid to said complainant the sum of $370.57 as interest on coupons secured by said 1st and 2d mortgages, which sums should be charged to complainant	370 57
"Total payments	$302,938 74
"Leaving a balance due October fifteenth, 1884, on said first two loans of	$114,917 51
"The interest upon which at nine per cent to December fifteenth, 1885, is	12,066 33
"Leaving a balance due on the first two loans at that date	$126,983 84
"And the court finds that the principal of said third mortgage made by Herman G. Powers should be reduced by deducting the amount of interest on coupons included therein, or $7219.27, leaving	$87,780 73
"And that the complainant should be allowed as interest thereon to December fifteenth, 1885, the sum of	6,963 07
"Making a total of principal and interest due on said mortgage of	$94,743 80
"Which, added to the sum due on said first two mortgages, makes a total of	$221,727 64

due the complainant on all three of said mortgages December fifteenth, 1885."

Argument for Appellees.

The calculation of interest was made to December 15, 1885, because on that day the court below filed an opinion sustaining the defendant's exceptions to the master's report so far as it allowed, (1) interest on coupons after their maturity; (2) interest on coupons of the first and second loans included in the third mortgage; and (3) interest on the third loan at the rate of nine per cent.

The assignment of errors questioned the correctness of the ruling on the exceptions, but made no distinct point as to interest at the contract rate having been calculated to December 15, 1885, rather than to date of the entry of the final decree passed on the 23d of March, 1886.

Mr. John J. Herrick, (with whom was *Mr. Wirt Dexter* on the brief,) for appellant.

Mr. Lyman Trumbull and *Mr. John P. Wilson* for appellees.

I. Was it competent for the guardians of Henry W. Kingsbury, an infant of tender years, to borrow, July 10, 1872, $175,000; April 3, 1873, $70,000; and, December 1, 1876, $95,000, all in gold, at nine per cent, semi-annual interest payable in gold, with commissions of two and one-half per cent added, and secure the same by mortgages on the infant's entire estate, for the purpose of erecting buildings upon some of his vacant lots, when his estate, before any of the loans were made, was yielding an annual income, from rentals, of $26,444.61, and the vacant lots could have been rented for six or eight thousand dollars besides, an amount more than sufficient to take care of the estate, and provide for and educate the minor?

In October, 1876, the successor of Sperry, as guardian, with all the advantages of the increased income from buildings erected, reports that there is past due interest to August 15, 1876, on the two previous mortgages amounting to $51,987.04; that the lands mortgaged had been sold for taxes, that the amount due for tax certificates was $10,150.78, and for other taxes about $9000.

The record demonstrates the utter failure of the speculation of borrowing money to erect buildings upon the minor's estate, the result of which is this foreclosure suit.

Had the county court power to authorize the guardian to borrow money for this speculation, which has turned out so disastrously, and to mortgage his ward's real estate for payment of the borrowed money?

Counsel for appellant contend it had, and that the Supreme Court of Illinois has decided this precise question in the case of *Kingsbury* v. *Powers*, 131 Illinois, 182, involving the payment of interest by Powers as guardian upon these very mortgages. If the Supreme Court of Illinois has so decided, it is conceded that the decision involving the construction of an Illinois statute would be followed by this court. But has the Illinois court so decided? We think a critical examination of the decision referred to will show, that, so far from having so decided, the court carefully avoided making any such decision. Now, when a bill is filed for the foreclosure of these mortgages, the authority of the probate court to sanction, and of the guardian to execute them, is for the first time submitted for adjudication. That their validity may be questioned in this foreclosure proceeding, has been expressly decided in the case of *Kingsbury* v. *Sperry*, 119 Illinois, 279.

It follows from these decisions, that, in this foreclosure proceeding, the appellee is entitled to raise every question which he could have raised if this case had come before the Circuit Court on a writ of error to review the action of the county court in granting leave to borrow the money and execute the mortgages.

The county court had no power to authorize money to be borrowed for the purpose of erecting buildings, and the infant's estate to be mortgaged as security for repayment. A court of chancery had no such power at the common law. *Rogers* v. *Dill*, 6 Hill, 415; *Williamson* v. *Ball*, 8 How. 556; *Genet* v. *Tallmadge*, 1 Johns. Ch. 561; *Taylor* v. *Phillips*, 2 Ves. Sen. 23.

It has, however, been held in Illinois, that a court of chancery has power, in the absence of a statute, to direct a sale of

a minor's real estate when it is necessary for his support; but the Illinois courts are not so far in conflict with all other authorities as to have held that such power exists at the common law when no necessity is shown. The cases where a court of chancery, whether acting by virtue of its common law powers or of statutes, has authorized a mortgage of the infant's estate, are few, and, it is believed, none can be found where such mortgage secured money borrowed for the purpose of making improvements. Wherever an infant's estate has been encumbered or sold, whether at common law or by force of statutes, it has been under the pressure of a demonstrated necessity. *Cummins* v. *Cummins*, 15 Illinois, 33. No case cited by counsel, or by the text writers cited, upholds the power to authorize encumbering the infant's estate to raise money for improvements.

The Illinois statute in reference to guardians has not conferred on the county court in all respects as to an infant's estate the common law powers of a court of chancery. *Bond* v. *Lockwood*, 33 Illinois, 213.

It is only for the purposes for which the statute confers the authority, that the county court has jurisdiction to authorize a mortgage of an infant's estate. *Kingsbury* v. *Sperry*, above cited, at p. 283. That the general assembly did not intend to confer a limitless power on the county court, is apparent from the many provisions in the guardian and ward act of fifty sections, directing what shall be done with the ward's money, how it shall be used, applied and invested. Why all these provisions, if the county court may, in its discretion, authorize the guardian to borrow money to be used for any and all purposes, and mortgage the infant's real estate for its repayment?

The original and all the petitions by the guardian to the county court were for leave to borrow money, and to mortgage the ward's realty for its payment. They were not for leave to mortgage to secure an indebtedness already existing, but to create a debt by borrowing money, and then secure it by a mortgage. The statute confers on the county court no jurisdiction or authority to sanction such a proceeding. It is

only to secure an indebtedness of the minor, or of his estate, that a mortgage of his real estate is authorized in any case. A county court had no jurisdiction to authorize a mortgage of the ward's realty, to secure Sperry's debt; hence the mortgage in this case is void. The same objections apply to each of the other mortgages. The case of *Payne* v. *Stone*, 7 Sm. & Marsh. 367, was analogous in many of its features to the present case. The power of the guardian, by leave of the county court, to mortgage the real estate of the ward, does not include the power to borrow money.

The law is equally clear that the county court, even if, under any circumstances, it had power, under the statute, to authorize these mortgages, committed error in doing so without proof that such course was necessary for the preservation of the minor's estate, or, at the very least, proof that the estate would be benefited thereby. *Loyd* v. *Malone*, 23 Illinois, 43; *S. C.* 74 Am. Dec. 179.

II. The Circuit Court did not err in refusing to allow interest on overdue interest. *Cromwell* v. *Sac County*, 96 U. S. 51; *Ohio* v. *Frank*, 103 U. S. 697; *Leonard* v. *Villars*, 23 Illinois, 377; *Barker* v. *International Bank*, 80 Illinois, 96; *Thompson* v. *Hoagland*, 65 Illinois, 310; *McFadden* v. *Fortier*, 20 Illinois, 509; *Harper* v. *Ely*, 70 Illinois, 581; *Humphreys* v. *Morton*, 100 Illinois, 592; *Lexington* v. *Butler*, 14 Wall. 282; *Broughton* v. *Mitchell*, 64 Alabama, 210; *Wilson* v. *Davis*, 1 Montana, 183; *Doe* v. *Warren*, 7 Maine, 48; *Union Bank* v. *Williams*, 3 Coldwell, 579; *Stokely* v. *Thompson*, 34 Penn. St. 210; *Mason* v. *Collender*, 2 Minnesota, 302; *S. C.* 72 Am. Dec. 102; *Denver Brick M'f'g Co.* v. *McAllister*, 6 Colorado, 261; *Force* v. *Elizabeth*, 28 N. J. Eq. 403; *Connecticut* v. *Jackson*, 1 Johns. Ch. 13; *S. C.* 7 Am. Dec. 471; *Ferry* v. *Ferry*, 2 Cush. 92.

III. The third mortgage was usurious, and no interest should have been allowed thereon. *Harris* v. *Bressler*, 119 Illinois, 467; *Van Benschooten* v. *Lanson*, 6 Johns. Ch. 13; *S. C.* 10 Am. Dec. 333; *Peddicord* v. *Connard*, 85 Illinois, 102; *Leonard* v. *Patton*, 106 Illinois, 99; *Loveland* v. *Ritter*, 50 Illinois, 54; *Farwell* v. *Meyer*, 35 Illinois, 40; *Payne* v.

Newcomb, 100 Illinois, 611; *Amundson* v. *Ryan*, 111 Illinois, 506.

IV. The indebtedness due appellant after Kingsbury attained lawful age drew interest only at six per cent. *Brewster* v. *Wakefield*, 22 How. 118; *Holden* v. *Trust Company*, 100 U. S. 72; *Phinney* v. *Baldwin*, 16 Illinois, 108; *S. C.* 61 Am. Dec. 62; *Etnyne* v. *McDaniel*, 28 Illinois, 201.

V. In no event should interest be allowed on coupons maturing after November 2, 1887.

VI. Appellant was prohibited by its charter from taking more than seven per cent interest. *Farmers' and Mechanics' Nat. Bank* v. *Dearing*, 91 U. S. 29; *Burnhisel* v. *Firman*, 22 Wall. 170; *Turner* v. *Calvert*, 12 S. & R. 46; *Ewing* v. *Toledo Savings Bank*, 43 Ohio St. 31; *Farwell* v. *Hanover Savings Fund Society*, 40 Ohio St. 274.

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

1. In the court below one of the contentions of the appellee Kingsbury — who reached his majority before the final decree, and became a defendant — was, that the guardian had no authority to borrow moneys for the purpose of erecting buildings to be rented, or to mortgage the minor's property to secure the payment of moneys borrowed for that or any other purpose; that no such authority could be conferred by the county court; and, consequently, that the mortgages were absolutely void. The Circuit Court did not concur in this view. It held the mortgages to be valid instruments to secure the payment of whatever amount was legally and justly due upon an accounting. The reduction of the amount reported arose from the disapproval of the mode in which the master computed interest on the several debts.

The contention that the mortgages were unauthorized by law is renewed in this court; and, although the Mortgage Company alone has prosecuted an appeal, Kingsbury insists that even if the mode adopted by the Circuit Court for computing interest was erroneous, the decree cannot be reversed,

if this court finds that the mortgages were void for want of authority in the guardian to execute them. As the present appeal necessarily brings before us the defence based upon the alleged invalidity of the mortgages — a defence that questions the right to a foreclosure for any amount — it is necessary to inquire at the outset whether, by the law of Illinois, the guardian had authority to mortgage the real estate of his ward to secure the payment of moneys borrowed to be used in improving the ward's property or to discharge existing mortgages upon it.

By the constitution of Illinois, county courts are courts of record with original jurisdiction in the appointment of guardians and the settlement of their accounts, and with such other jurisdiction as may be given by general law. Art. V. sec. 18. And by the act of the general assembly relating to guardians and wards, approved April 10, 1872, Rev. Stats. Illinois, 1874, c. 64, it is provided (§§ 2, 4) that a guardian shall have, under the direction of the county court, "the custody, nurture and tuition of his ward, and the care and management of his estate;" although, under some circumstances, the custody of the person, as well as the education of the minor, would be committed to the father or mother. By the same statute it is provided (§§ 19, 20) that the guardian "shall manage the estate of his ward frugally and without waste, and apply the income and profit thereof, so far as the same may be necessary, to the comfort and suitable support and education of his ward," and "shall educate his ward." §§ 19, 20. It is made his duty by § 22 "to put and keep his ward's money at interest, upon security to be approved by the court, or invest the same in United States bonds, or other United States interest-bearing securities;" all loans in amounts exceeding $100 to be upon real estate security, but no loan to be for a longer time than three years, nor beyond the minority of the ward. He "may [§ 23] lease the real estate of the ward upon such terms and for such length of time, not extending beyond the minority of the ward, as the county court shall approve." So, also, (§ 24) he "may, by leave of the county court, mortgage the real estate of the ward for a term of years not exceeding

the minority of the ward, or in fee; but the time of the maturity of the indebtedness secured by such mortgage shall not be extended beyond the time of the minority of the ward." But (§ 25) "before any mortgage shall be made, the guardian shall petition the county court for an order authorizing such mortgage to be made, in which petition shall be set out the condition of the estate, and the facts and circumstances on which the petition is founded, and a description of the premises sought to be mortgaged." The statute, also, declares (§ 26) "that foreclosures of mortgages authorized by this act shall only be made by petition to the county court of the county where letters of guardianship were granted, or in case of non-resident minors, in the county in which the premises, or some part thereof, are situated, in which proceeding the guardian and ward shall be made defendants; and any sale made by virtue of any order or decree of foreclosure of such mortgage may, at any time before confirmation, be set aside by the court for inadequacy of price, or other good cause, and shall not be binding upon the guardian or ward until confirmed by the court;" and (§ 27) "that no decree of strict foreclosure shall be made upon any such mortgage, but redemption shall be allowed, as is provided by law, in cases of sales under executions upon common law judgments." Power is given to the county court (§ 28) to order "the sale of the real estate of the ward, for his support and education, when the court shall deem it necessary, or to invest the proceeds in other real estate, or for the purpose of otherwise investing the same," upon the verified petition of the guardian (§ 29) filed at least ten days before the commencement of the term of court at which the application shall be made, and setting forth "the condition of the estate and the facts and circumstances on which the petition is founded." Of the application to sell, notice must be given (§ 31) by publication to all persons concerned, and tried "as in other cases in chancery." Any order made or judgment rendered under the act may be reviewed upon appeal to the Circuit Court (§ 43), the appellant giving such bond and security as the court directs. The statute contains many other sections, but those

referred to are all that have any bearing, directly or indirectly, upon the questions raised in the present case.

It is clear, from the statement of the proceedings in the county court, that in each instance of borrowing, the guardian's petition for an order authorizing the loan and mortgage set out the condition of the estate, the facts and circumstances on which it was founded and a description of the premises sought to be mortgaged. And the maturity of the debt, incurred by borrowing, did not extend beyond the minority of the ward. §§ 24, 25. The petition, in form, met all the requirements of the statute.

The question of the validity of the mortgages is within a very narrow compass, depending, as it does, upon statutory provisions so clearly expressed as to leave but little room for construction. The statute by secs. 4 and 19 commits to the guardian, under the direction of the county court, the care and management of the ward's estate, and makes it his duty to manage it frugally and without waste, applying the income and profit therefrom, so far as may be necessary, to the comfort and suitable support, as well as to the education of the ward. It is also made his duty to put and keep the ward's money at interest. Now, it is clear that the proper management of the ward's estate involves something more than his maintenance and education. It involves the payment of taxes, and may involve the payment of assessments, insurance premiums and mortgages, as well as the repairing of buildings; and, in order that the interests of the ward may be guarded and promoted in every emergency arising in the management of his estate, the statute empowers the guardian, with the leave of the county court, to lease, mortgage or sell his real property. While the statute (§ 28) defines the objects for which his real property may be sold, it is silent as to the circumstances under which the guardian may lease or mortgage it. Nevertheless, the power to lease or mortgage is expressly given. For what purposes may the power to mortgage be exerted? One of the learned counsel for Kingsbury insists that the guardian cannot borrow money for any purpose or under any circumstances. If this view be sound, it

would result that he could not borrow money to pay taxes, or insurance premiums, or for necessary repairs upon buildings, or to discharge mortgages, even when that mode of raising money is absolutely required by the best interests of the estate. We cannot suppose that any such result was within the contemplation of the legislature when it imposed upon the guardian the duty to care for and manage the ward's estate, under the direction of the county court, and empowered him, with the leave of that court, to mortgage real property for debts maturing on or before the ward's majority. If the guardian could not, with such leave, borrow money upon mortgage of real estate to discharge existing encumbrances, pay taxes, insurance premiums and assessments, or to make necessary repairs, in what mode could it be raised by him? If he could only sell, with the leave of the court, real property for the particular purposes named in the 28th section — namely, for the support and education of the ward, or to invest the proceeds in other real estate, or to invest them otherwise — in what way, when he was without sufficient income from the estate, could money be raised to discharge existing mortgages, pay taxes, insurance premiums, assessments or to make repairs? The answer to this question suggests that the construction sought to be placed upon the statute is too narrow. We are of opinion that the legislature intended to commit the whole subject of mortgaging the real estate of the ward, primarily, to the guardian, subject to certain restrictions, some of which are expressed in the statute, while others are necessarily implied from its provisions. The express restrictions are: First, that he obtain the leave of the county court, based upon petition setting out the condition of the estate, the facts and circumstances on which the petition is founded, and a description of the premises to be mortgaged; second, that the mortgage, if not in fee, must be for a term of years not extending beyond the minority of the ward; third, that the time of the maturity of the indebtedness secured by it should not extend beyond the minority of the ward. §§ 24, 25. The implied restriction, controlling the discretion and power both of the guardian and the county court, is, that the

indebtedness secured by the mortgage must arise out of, and have some necessary or appropriate connection with, the management of the ward's estate. We have seen that the express restrictions, imposed by the statute, were all observed in the proceedings in the county court. It is equally clear that the debts created by the borrowing of money from the Mortgage Company arose out of and had connection with the proper management of the ward's estate. When the buildings upon Kingsbury's lots were destroyed by fire in 1871, the question naturally occurred whether it was prudent or for the benefit of the ward that the lots be sold and the proceeds invested in other real estate or in securities, or whether the buildings destroyed should not be replaced, and other lots belonging to the ward improved. It was the duty of the guardian, as well as of the county court when informed of the situation, to consider those questions, because they were involved in the management of the estate. If the guardian had not taken such action as his best judgment indicated, he would have been neglectful of his duty. At any rate, these questions were, in the first instance, for him and for the county court; and their determination of them in the mode prescribed by the statute was subject to be reviewed, upon appeal, in the Circuit Court.

This interpretation does not recognize, as belonging to the guardian and to the County Court, any larger powers than they have by the express words of the statute in respect to the disposition by sale of the real estate of the ward. Before the fire of 1871 it was competent for him, with the leave of the county court, to sell even the improved property of the ward in Chicago for the purpose of investing the proceeds in other real estate, improved or unimproved, or of otherwise investing them. For like purposes, and with the leave of that court, he could have sold the lots after the buildings were destroyed by fire. But no such sales should have been made if they could have been avoided, nor if, in the judgment of the guardian and of the county court, looking to the probable future of Chicago, it was best to replace the buildings destroyed and to improve lots not theretofore occupied by buildings. It

is asked, why did not the guardian lease the property, and thus avoid the expense of rebuilding? As leases could not extend beyond the minority of the ward, it may be that the property could not have been advantageously leased for a short term of years, or a sufficient amount raised in that mode to meet the unpaid and constantly accruing taxes as well as the existing mortgages upon the property about to be foreclosed. Be this as it may, and independently of these considerations, it is sufficient to say that the question of lease, mortgage or sale was, under the statute, for the determination of the guardian and the county court. The power to sell real estate for the purpose of investing the proceeds in other real estate, improved or unimproved, or of lending them upon real estate security, is not, looking at its nature or the consequences to result from its exercise, less important than the power to borrow money, secured by mortgage, to improve the ward's real property. If the former may be determined by the guardian and the county court, as the statute expressly declares it may be, we do not feel at liberty to hold that the latter may not be also determined by them, especially as the power to mortgage is given without any restriction other than such as is necessarily implied.

It is also suggested by counsel for Kingsbury that if a guardian may, under any circumstances or for any purpose, borrow money and mortgage the real property of the ward to secure its payment, he can only do so when thereunto authorized by the Circuit Court of the proper county exercising the usual powers of a court of chancery. We cannot perceive anything in the statute to sustain this interpretation. It may be that the Circuit Court of the proper county, in virtue of its general equity jurisdiction, and in a suit brought in behalf of the ward, by the guardian, could have authorized the latter to borrow money to improve the ward's real property, and give a mortgage to secure payment of the amount borrowed. It was held in *Smith* v. *Sackett*, 5 Gilman, 534, 545, that "the jurisdiction of the court of chancery to order the sale of the whole, or a portion of the estate of an infant, or to order it to be encumbered by mortgage whenever the interest of the infant demands

it, will not be denied, whether that interest be of a legal or equitable nature." And in *Allman* v. *Taylor*, 101 Illinois, 185, 191, the jurisdiction of the Circuit Court sitting in equity, in a suit brought in the name of the infant by his guardian, to order the sale of the minor's unimproved lands in Illinois, that the proceeds might be applied in removing encumbrances on his improved land in Indiana, was sustained upon the principle announced in *Smith* v. *Sackett*. See also *Frith* v. *Cameron*, L. R. 12 Eq. 169. But it does not follow that the statute of 1872 did not confer like jurisdiction upon the county court. That court, we have seen, is, by the state constitution, a court of record and of original jurisdiction, in the appointment of guardians, and the settlements of their accounts. It has, also, by the statute, general authority over the matters committed to it by the statute of 1872.

It is further contended that, if the county court could authorize the execution of mortgages to secure the payment of money borrowed, the mortgages in suit are not of that class, because the act of 1872 provides that the mortgages executed under it shall be foreclosed only upon petition in the county court, and that no strict foreclosure shall be made, but that redemption shall be allowed as is now provided by law in cases of sales under execution upon common-law judgments, (§§ 26, 27); whereas, the mortgages executed by Kingsbury's guardian authorize an absolute sale, and did not expressly recognize the right of redemption after sale. The declaration in the statute that foreclosures authorized by it shall only be made by petition to the county court, granting the letters of guardianship, was not intended to exclude — indeed, it could not have excluded — the jurisdiction, in such cases, of the Circuit Court of the United States, if that court would otherwise have jurisdiction. *Davis* v. *James*, 10 Bissell, 51. It had reference only to the courts of the State, and to the mode of foreclosing mortgages in the county court. Upon the other point, in respect to the right of redemption, it need only be said that it was not necessary to the validity of the mortgage that it should expressly reserve the right of redemption. That right is given by the statute, and is recognized by the Circuit

Court of the United States, sitting in Illinois, as a rule of property, and was so recognized in the final decree in this case. The decree expressly provides, in conformity with the law of Illinois and the rules adopted in the court below, that the purchaser shall receive a deed only after the expiration of fifteen months from the date of the sale. *Connecticut Mut. Life Ins. Co.* v. *Cushman*, 108 U. S. 51.

Again, it is insisted that, if the county court had power under the statute to authorize these mortgages, it could not authorize them without proof that such course was necessary for the preservation of the minor's estate, or, at the very least, that the estate would thereby be benefited. If such an objection as this can be urged in defence of a suit to foreclose the mortgages, or for the purpose of impeaching their validity, it is met by the fact that the record of this case fails to show that the county court made the orders authorizing the execution of the mortgages without full proof as to the necessity or propriety of making them. The statute does not require that the petition to the county court for leave to mortgage shall be supported by any particular amount of proof, nor prevent the court from acting upon its personal knowledge of the facts. The orders, showing the leave of the county court to make the mortgages in suit, are entirely consistent with a thorough investigation of the facts by that court, in some appropriate form, before the orders were made. Those orders recite that the court, upon examining the guardian's petition, was sufficiently advised in the premises. Even without such recital, and in the absence of anything to the contrary, it must be assumed that the court, if required by law to hear formal proof of the allegations in the verified petition of the guardian, discharged its whole duty.

At the argument it was contended by the appellant that the question of the validity of the mortgages in suit was concluded, in its favor, by *Kingsbury* v. *Powers*, 131 Illinois, 182, 192, where it was held that the guardian was entitled to credit for the amounts paid to the United States Mortgage Company for interest. One of the contentions there was that the county court had no power to authorize a guardian to borrow money

for the purpose of erecting new and costly buildings upon unimproved real estate, and that, therefore, the money so borrowed, upon which interest was paid, was borrowed without authority of law, and imposed no obligation whatever upon the estate of the ward. The court, referring to this contention, said: "That under certain circumstances the probate court [which had succeeded to the jurisdiction of the county court] exercising a chancery power, in that respect, (*Bond* v. *Lockwood*, 33 Illinois, 213,) is empowered to authorize a guardian to borrow money — under circumstances, as, for instance, for the prevention of irreparable injury to the estate, — is clear; and our statute expressly authorizes that court to empower the guardian to mortgage the real estate. (See Rev. Stats. 1874, c. 64, §§ 24, 25, etc.) The several steps pointed out by those sections were pursued in this instance, in obtaining the decree. There was, therefore, authority in that tribunal to adjudicate, and, at most, its orders were erroneous only, and not void. Until reversed on appeal, or set aside by some appropriate proceeding, they were binding, and it was, therefore, incumbent on the guardian to pay the interest accumulating upon the indebtedness." There is certainly some ground for the appellant's contention that this decision, in effect, sustains the power of the guardian, with the leave of the county court, to borrow money to improve his ward's real property and secure its payment by mortgage; for it would seem that the order of the county court would have been not simply erroneous, but void, if the statute did not, under any circumstances, authorize the borrowing of money to erect new buildings upon the unimproved real property of the ward, and to pay off existing mortgage encumbrances. It is, however, proper to say that *Kingsbury* v. *Powers*, as well as *Kingsbury* v. *Sperry*, 119 Illinois, 279, have been treated as not directly deciding the precise question before us, in respect to the validity of the mortgages in suit, and, in the absence of any direct determination by the Supreme Court of the State, we have given the statute that construction which, in our judgment, is required by its provisions. We hold, in accordance with the views of the Circuit Court, that the mortgages, and,

therefore, the bonds in suit, were not invalid for want of authority in law for their execution by the guardian, acting under the direction of the county court.

We pass to the examination of questions relating to interest, and to the mode of computing it.

2. The appellant is a corporation of New York, created by special act passed May 12, 1871. It is authorized by its charter (§ 2) "to lend money on bond and mortgage on real estate situated within the United States, or upon any hypothecation of such real estate, or upon hypothecation of bonds and mortgages on such real estate for any period of credit and repayable by annuity or otherwise." Its loans on mortgage or hypothecation (§ 16) "may be made to individuals, corporations, associations, states, cities, provinces and towns, or other municipal bodies authorized thereto." Its charter also provides (§ 21) that "no loan shall be made directly or indirectly to any director or officer of the company, nor shall any loan or advance of money be made at a rate of interest exceeding the legal rate." The highest rate of interest permitted by the general laws of New York to be contracted for, at the time the loans in question were made, was seven per cent. The same laws provided that no person or corporation should, directly or indirectly, take or receive interest at a greater rate. 2 Rev. Stats. N. Y. Part 2, Title 3, §§ 1, 2; vol. 2, 6th ed. p. 1164; vol. 4, 8th ed. p. 2512. By the statutes of Illinois, in force when the bonds and mortgages in suit were given, it was lawful for parties to stipulate for interest at the rate of ten per cent per annum, or any less rate. 1 Gross's Stats. Illinois, 371, § 10; 3 Ib. 244, § 4.

It is contended that the appellant, although having express authority by its charter to lend money on bond and mortgage of real estate, "situated within the United States," could not contract in Illinois for the highest rate of interest allowed by that State, but was limited to a rate of interest not exceeding that established by the State under whose laws it was created a corporation; and, therefore, it cannot, in the accounting, be allowed more than seven per cent interest upon the principal sum. We concur with the court below in holding this posi-

tion to be untenable. Reasonably construed, the appellant's charter authorized it to contract for such rate of interest as was lawful in the State where the contract of loan was made, and where the property mortgaged to secure the loan was situated. The general statute of New York had for its object to regulate the rate of interest upon loans there made, and not the rate upon loans made elsewhere. That State did not assume to fix the maximum of compensation to be paid to the lender for the use of money in other States. What compensation is fair or just for the use of money borrowed cannot well be determined upon principles applicable alike to all parts of the country. The risk is much greater for the lender, and the amount the borrower can reasonably pay is larger, in some localities than in others. Laws regulating the rate of interest necessarily depend upon the condition of the people in the particular States or communities enacting them. Such laws express the policy of the respective States upon that subject. When New York created the Mortgage Company, with power to loan money upon real estate anywhere within the United States, and prohibited it from lending money at a rate of interest "exceeding the legal rate," it did not intend to withhold from it the power to contract in other States, for interest upon moneys loaned, upon terms less favorable than those States permitted in respect to loans there made by other corporations, and by individuals. The legal rate referred to in the appellant's charter is the rate established by the law of the place where the contract of loan is made. This view is supported by those decisions in New York which hold, in respect to loans made in other States, that the rate of interest, allowed by the State where the contract of loan is made, will be respected by the courts of New York, although such rate is in excess of that fixed by its own laws, and although, in some of the cases, one of the parties to the contract, the lender, was a resident of that State. *Sheldon* v. *Haxtun*, 91 N. Y. 124; *Wayne County Savings Bank* v. *Low*, 81 N. Y. 566; *Pratt* v. *Adams*, 7 Paige, 615. See also *Tilden* v. *Blair*, 21 Wall. 241, and *Scudder* v. *Union Nat. Bank*, 91 U. S. 406, 412.

3. The next question to be considered is whether the over-

due coupons drew interest? The master allowed interest thereon, after maturity, at the statutory rate of six per cent per annum, but the Circuit Court held that interest upon interest was inadmissible.

By the statutes of Illinois in force when these loans were made — indeed, ever since 1845 — it was provided that "creditors shall be allowed to receive [interest] at the rate of six per cent per annum for all moneys after they become due on any bond, bill, promissory note or other instrument of writing;" although under other statutory provisions parties might stipulate for, or agree upon, ten per cent or any less rate, "for money loaned or in any manner due and owing from any person or corporation to any other person or corporation in that State." Rev. Stats. Ill. 1845, 294; 1 Gross's Stats. Ill. 370, c. 54; 3 Gross's Stats. Ill. 243; 1 Starr & Curtis, 1356; Rev. Stats. 1874, p. 614.

The bond, given by the guardian on the first loan, dated July 10, 1872, provided for the payment of "the principal sum of $175,000, in gold coin of the United States, on the 1st day of May, 1882, with interest for the same, to be computed from the day of the date hereof, at the rate of nine per centum per annum, in like gold coin, which said interest shall be paid half-yearly, to wit, on the first day of each of the months of November and May from and after the date hereof, which will be in each and every year until the said principal sum shall be fully paid, which said interest payments, until the said principal sum shall become due, are specified in and further secured by twenty coupons given herewith. . . . But this bond is not intended to bind said Anson Sperry personally or his personal estate, but to bind him as such guardian and the estate of the said minor, Henry W. Kingsbury, [of] which he is guardian as aforesaid." These provisions were also contained in the mortgage given to secure the payment of the bond. The coupons of this bond were also signed by the guardian, and were in the following form: "Due the United States Mortgage Company, $—, on the first day of ——, 18—, in gold coin of the United States, payable, at such place at the city of Chicago, in the State of Illinois, as the United States Mortgage Com-

pany, their successors, legal representatives or assigns, shall in writing from time to time appoint, and in default of such appointment, then at the agency of said company in the said city of Chicago, being for the payment of an instalment of interest due on that day on my bond to the said United States Mortgage Company of this date, conditioned for the payment in gold coin of the United States of $—, with semi-annual interest at nine per cent per annum on the whole sum from time to time remaining unpaid, in gold coin of the United States, said bond being made to secure a loan made to me in like gold coin." The bonds, mortgages and coupons executed for the other two loans contained similar provisions.

Each contract of loan was made and was to be performed in Illinois; and each bond provides that it is to be construed by the laws of Illinois. Interest upon interest, as represented by the coupons, must therefore be allowed or disallowed as may be required by the law of that State. In Illinois, the whole subject is regulated by statute, and interest cannot be recovered unless the statute authorizes it. *Sammis* v. *Clark*, 13 Illinois, 544, 546; *Phinney* v. *Baldwin*, 16 Illinois, 108; *Aldrich* v. *Dunham*, 16 Illinois, 403; *Pekin* v. *Reynolds*, 31 Illinois, 529, 532; *Illinois Central Railroad* v. *Cobb*, 72 Illinois, 148, 152; *Chicago* v. *Allcock*, 86 Illinois, 384; *Ohio* v. *Frank*, 103 U. S. 697.

The precise question before us is, whether the interest provided for in the bonds and mortgages in suit, and further evidenced by coupons, drew interest after maturity, in virtue of the above statute allowing interest at the rate of six per cent per annum "for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing." The scope and effect of this statute have been considered by the Supreme Court of Illinois in numerous cases, which have been the subject of extended discussion by counsel.

Walker v. *Hadduck*, 14 Illinois, 399; *Heiman* v. *Schroeder*, 74 Illinois, 158; and *Knickerbocker Ins. Co.* v. *Gould*, 80 Illinois, 388, referred to by appellant, and the recent case of *Heissler* v. *Stose*, 131 Illinois, 393, 397, hold, respectively, that instalments of rent due on a written lease, instalments due on

a written contract for building, and the amount due on a policy of insurance are moneys due on instruments of writing, and, therefore, by the statute, draw interest after maturity. These cases do not bear directly upon the question of interest upon interest; for the moneys due in them were principal sums. Interest upon such sums is in no sense interest upon interest. In *McFadden* v. *Fortier*, 20 Illinois, 509, 516, a proceeding by *scire facias* to foreclose a mortgage given to secure promissory notes, each for a definite principal sum to be paid at a named date, "with six per cent interest," the court said that the rule for casting interest on notes, bonds, etc., upon which partial payments have been made, was to apply such payments to keep down the interest, "but the interest is never allowed to form a part of the principal so as to carry interest."

Leonard v. *Villars*, 23 Illinois, 377, much relied on by the appellee, was a suit to foreclose a mortgage given to secure four promissory notes, which, upon their face, were made payable, respectively, in one, two, three and four years from date, with interest at the rate of ten per cent per annum, "the interest to be paid annually in advance." Only the first year's interest was paid in advance. In relation to the computation of interest, the court said: "To compute interest upon interest after its maturity, has, by all courts, whether exercising equity or common law jurisdiction, been held to be compound interest, and in violation of law. This question is one that has been frequently presented, and it is believed, as uniformly held to be unauthorized. We are not aware of any well-considered case, which has held that there is an implied legal or moral obligation to pay interest upon interest after its maturity. The court below erred in computing interest after it fell due." p. 380. This case was referred to in *Barker* v. *International Bank*, 80 Illinois, 96, which was a suit to foreclose a deed of trust given to secure the payment of a promissory note on a named day, "with interest at the rate of six per cent." The court said: "No payments having been made upon the note, the interest should have been computed from the date of the note until the rendition of the decree, and added to the principal, and a decree rendered for that

amount. It was expressly decided by this court, in *Leonard* v. *Villars*, 23 Illinois, 377, that it was error to compute interest upon interest. The rule there announced must control here." p. 101.

In *Dulaney* v. *Payne*, 101 Illinois, 325, 331, which was an action of assumpsit for the principal amount due on a promissory note payable at a named date, "with ten per cent interest from date, interest payable semi-annually," a previous judgment obtained in a separate action for an instalment of interest was pleaded in bar, but the court held the plea to be bad, upon the ground that the note contained two distinct contracts — one to pay the principal, and the other the interest — and that a separate action could be maintained after the maturity of interest to recover such interest only. The same principle had been announced in *Walker* v. *Kimball*, 22 Illinois, 537, and was repeated in *Wehrly* v. *Morfoot*, 103 Illinois, 183, 186, and in *McDole* v. *McDole*, 106 Illinois, 452, 459. *Thayer* v. *Star Mining Company*, 105 Illinois, 541, was a suit for the specific performance of a contract for the sale of real estate, in which there was a question as to the computation of interest on the amount of promissory notes maturing at named dates, each "with interest payable annually." The court said: "It is true that compound interest will not be allowed in the absence of an agreement to pay it; but after interest has accrued due, it may by agreement between the parties be turned into principal, and made to bear interest for delay of payment." See also *Haworth* v. *Huling*, 87 Illinois, 23; *McGovern* v. *Union Mut. Life Ins. Co.*, 109 Illinois, 151, 156, and *Gilmore* v. *Bissell*, 124 Illinois, 488.

In none of these cases were there separate coupons or warrants representing the stipulated interest. But *Harper* v. *Ely*, 70 Illinois, 581, 586, (*Harper* v. *Ely*, 56 Illinois, 179,) and *Humphreys* v. *Morton*, 100 Illinois, 592, were of that class. *Harper* v. *Ely* involved a question as to interest evidenced by coupons of a bond secured by a trust deed. The court said: "The coupons provide for the payment of a definite sum of money at a specified time. They are in writing, and in effect are promissory notes, and we are aware of no reason why in-

terest should not be computed upon them after they became due. *Gelpcke* v. *Dubuque*, 1 Wall. 175, 206; *Hollingsworth* v. *Detroit*, 3 McLean, 472; *Dunlap* v. *Wiseman*, 2 Disney (Ohio) 398." *Humphreys* v. *Morton* was a suit to foreclose mortgages given by a railroad company to secure bonds, with interest warrants attached, which it had issued. The warrants were in the following form: "$35. Peoria, Pekin and Jacksonville Railroad Company. Interest warrant for thirty-five dollars, payable at the Importers' and Traders' Bank of the city of New York, on the first day of —, 18—, for 6 months' interest on bond No. —. L. Chapman, Jr., Secretary." The court said: "That interest was properly allowed and computed on this instrument, is settled by *Harper* v. *Ely*, 70 Illinois, 581, and the cases there referred to; and reference may, also, be made to *Clark* v. *Iowa City*, 20 Wall. 583; *Genoa* v. *Woodruff*, 92 U. S. 502; and *Amy* v. *Dubuque*, 98 U. S. 470, 473, holding the same doctrine." So, in the late case of *Benneson* v. *Savage*, 130 Illinois, 352, 367, it was said that "the executing of a coupon is the executing of an instrument, which, *ex vi termini*, bears interest after maturity — if no rate is expressed, six per cent; and, at the date of executing these coupons, any rate not exceeding ten per cent might be fixed by agreement of the parties;" citing *Harper* v. *Ely* and *Humphreys* v. *Morton*.

The case of *Leonard* v. *Villars*, referred to with approval in *Barker* v. *International Bank*, undoubtedly proceeds upon the broad ground, that the statute does not allow interest upon interest, even where the instrument given for the payment of the principal sum at a named date is a promissory note, and provides on its face, but not also in separate coupons, for the payment of interest at stated periods intermediate the date of the note and the maturity of the principal sum. The question was much discussed at the bar as to whether the doctrine of that case was modified by later cases.

It is argued that, as a note or other written instrument providing on its face for the payment of the principal debt, with interest at named dates in advance of the maturity of the principal sum, contains two distinct contracts, one to pay the

principal and the other to pay the interest, (*Dulaney* v. *Payne*, *Walker* v. *Kimball*, and *Wehrly* v. *Morfoot*, above cited,) such interest is as much money due on an instrument of writing as if it were evidenced by separate coupons. But that interpretation of the statute is scarcely consistent with *Leonard* v. *Villars*, and we cannot assume that the Supreme Court of Illinois has intended by its later decisions to overrule the doctrine of that case. *Harper* v. *Ely*, *Humphreys* v. *Morton*, and *Benneson* v. *Savage* decide nothing more than that separate coupons, when they are, in effect, negotiable promissory notes, and, therefore, instruments upon which the obligor may be held personally liable for the amount named in them, draw interest after maturity by virtue of the statute, and are exceptions from the general rule announced in *Leonard* v. *Villars*. That such is the state of the local law is manifest from the case of *Drury* v. *Wolfe*, 25 N. E. Rep. 626, decided since this cause was submitted. It was there said by Mr. Justice Scholfield, speaking for the court: "The general rule recognized by this court, is, that parties cannot be bound by any contract made before interest is due for the payment of compound interest [citing, among other cases, *Leonard* v. *Villars*]; . . . but, after interest is due, it may, by agreement then made, be added to the principal, and made to thereafter bear interest. . . . There is, perhaps, an exception to the rule, as first above stated, in the case of interest coupons annexed to commercial paper. Such coupons bear interest. *Benneson* v. *Savage*, 130 Illinois, 352, and cases there cited. But in such case interest is not compounded indefinitely. Interest is simply payable upon the amount of the face of the coupon; and that the coupon bears interest is solely because of the character given it by commercial usage. *Aurora* v. *West*, 7 Wall. 82, 105; *Mercer Co.* v. *Hacket*, 1 Wall. 83; *Meyer* v. *Muscatine*, 1 Wall. 384. There is, therefore, no authority in this for holding that interest may be compounded indefinitely, or at all, in cases where the payment of interest is not secured by some negotiable instrument, independent of the instrument whereby the original indebtedness is presumed to be paid."

The present case is controlled by the general rule that

interest upon interest will not be allowed, and is not within the exception established by the recent cases in the Supreme Court of Illinois. The coupons signed by the guardian, although additional evidence of the interest agreed to be paid, are not independent obligations, nor strictly commercial securities, upon which he can be held liable; for, by the express contract between the parties, recited in the bonds and mortgages, he and his estate are exempt from all liability for the moneys borrowed. And as the ward was not personally liable for these moneys (Story on Bills, §§ 74, 75; *Forster* v. *Fuller*, 6 Mass. 58; 1 Daniel on Nego. Instr. § 271; 1 Parsons on Notes and Bills, 89, 90,) the bonds as well as the coupons were, in effect, payable out of particular funds, and not absolutely and at all events as in the case of commercial paper.

It results that the Circuit Court properly disallowed interest upon interest.

4. It is said that the company agreed, during the progress of the cause below, that interest be computed at nine per cent until the date of the appointment of LeMoyne as guardian of Kingsbury, and at only six and one-half per cent after that date; and that as the sum adjudged to the company was the precise sum due, at the date of the decree, upon the above basis, the decree was for the right amount, and ought not to be reversed, even if the court below erred in holding that coupons do not draw interest after maturity, and that the third mortgage embraced items that ought not to have been included in it.

The facts out of which this contention arises are as follows:

On the 20th of September, 1877, John V. LeMoyne became Kingsbury's guardian in place of Powers, resigned, and, by an order entered May 15, 1878, was directed to pay into court, for investment in United States bonds, all sums secured by him as rents subsequently to November 26, 1877, and thereafter pay into court, on the first day of each month, all sums received by him, less such sums as might be paid, under the order of the court, for the support of the ward and to meet other expenses. LeMoyne, December 2, 1878, filed an

answer impeaching the validity of the mortgages and denying the right of the Mortgage Company to do business in Illinois. On the 18th of January, 1882, there was filed in court a written stipulation, signed by the appellant's attorneys, which recited that a large net income was being collected annually from the ward's estate which could be applied to the reduction of whatever claim the Mortgage Company may have, and that it had agreed to a reduction of the rate of interest on the indebtedness claimed, under the arrangement and on the terms and conditions in that stipulation set forth. Those terms and conditions were as follows: "1. That if an order is made in said cause that the amount now deposited in this court to the credit of said estate shall be forthwith paid to said United States Mortgage Company, and that hereafter the income from said estate, after deducting all necessary expenses of said property, shall be paid monthly to said Mortgage Company, the said payments to be credited by said Mortgage Company on any amount which may be ultimately found due to said company from said estate, then the said United States Mortgage Company agrees that from the date of the appointment of said John V. LeMoyne as guardian of said minor the rate of interest on the indebtedness claimed by said company shall be reduced from nine per cent per annum to six and one-half per cent; said reduction being made, however, upon the express condition that the payments above provided for shall be made, and that the said minor shall, within six months after his majority, pay to said Mortgage Company the principal sums included in said mortgages, with interest thereon to be computed (to the date of said LeMoyne's appointment as guardian) at the rate and according to the terms of said mortgages, and thereafter at said reduced rate; and upon the further express condition that if said payments are not made as aforesaid, then said company shall have the same right to proceed with the foreclosure of said mortgages, and to demand and collect the full amount secured by said mortgages, according to their terms, and without deduction from the rate of interest provided for in said mortgages, and shall have the same rights in all respects under said mortgages as if this

stipulation had not been made. 2. An order shall be entered in said cause directing the payments to be made to said Mortgage Company according to the terms of this stipulation, and this stipulation shall take effect from the date of the entry of said order."

On the same day the court made an order, which, after reciting the pending motion of the complainant that the money deposited in court by LeMoyne, pursuant to the order of May 15, 1878, be paid to it, and also the terms of the above stipulation, directed "that all the money now in court in this cause, including proceeds of bonds to be converted by the clerk, amounting to a total sum of sixty-one thousand nine hundred and sixty-nine dollars and twenty cents, be paid to said complainant, less the clerk's commissions of one per cent, said clerk taking its receipt therefor, and that hereafter said defendant LeMoyne pay to the said complainant monthly the money required by said order of May 15, 1878, to be paid into court, and that he take the receipt of the said complainant and file the same in lieu of the money with his monthly report herein, and that all such sums of money so to be paid to said complainant shall be paid on account of any indebtedness which may ultimately be found by this court to be due to said complainant in this suit, without determining any of the questions involved herein." The monthly payments provided for in the stipulation were made to the appellants up to September, 1884. On the 15th of October, 1884 — Kingsbury having become of full age in December, 1883 — there was paid to the company, out of the proceeds of a certain portion of the mortgaged property, released by it from the mortgages in suit, the sum of $180,000. As evidence of that payment, a writing was filed in court, signed by Kingsbury, by LeMoyne, his attorney in fact, and by the Mortgage Company, which stated: "The United States Mortgage Company has received from Henry W. Kingsbury, by John V. LeMoyne, one hundred and eighty thousand dollars, to be applied on any indebtedness or claim which may be found due it from said Kingsbury in the above suit, and said payment is made by said Kingsbury and received by said Mortgage Company upon

the agreement that it shall not in any way operate or be considered a waiver of any claim that either of said parties have made or claimed or may have or claim in said suit or in regard to the subject matter thereof, it being expressly understood that neither this nor any other payment received by said Mortgage Company from said Henry W. Kingsbury shall be construed in any way to be a waiver of the claim now made by said Mortgage Company, that it is entitled to demand the full amount of the principal and semi-annual interest thereon at nine per cent per annum, specified to be paid by the terms of the original bonds and mortgages, held by the said Mortgage Company."

On the 2d day of June, 1885, Kingsbury filed his separate answer, in which, among other things, he denied that the county court had ever authorized, or could legally authorize, the creation of the loans, or the giving of the mortgages, here in suit. Subsequently, June 13, 1885, he filed a petition in the cause, referring to the stipulation and order of January 18, 1882, the payment to the appellant, under that order, of $65,730.40, and the payment of the further sum of $60,598.97 up to September, 1884, and stating that the Mortgage Company had refused to come to any settlement with him unless he recognized the validity of the mortgages, and allowed interest on the principal debts at nine per cent, although he was willing, while denying the validity of the mortgages, that a decree be entered binding his property for the actual cash received by his guardians, subject to all payments made, with six per cent interest; that the net income of the estate was about $40,000, having nearly doubled since this action was brought; that the then fair appraised value of the mortgaged property was fully $800,000; and that LeMoyne had collected and had in his hands $17,000 of income from the petitioner's property. The prayer of his petition was that an order be entered directing LeMoyne to pay over such moneys to him, "and that the orders of May 15, 1878, and January 18, 1882, may be discharged and declared to be of no effect as to the future income of said property, and all other relief." On the 28th of November, 1885, this application was heard,

and an order entered granting the prayer of the petition, discharging the receiver, and directing him to forthwith deliver to Kingsbury the possession and control of all the real estate, buildings, personal property and choses in action, money, books and papers in his hands or under his control. The order was made upon certain conditions that do not affect the question now being considered.

The contention of the appellee Kingsbury is, that under this state of facts the Mortgage Company cannot claim interest at a greater rate than six per cent after the date of the appointment of LeMoyne as guardian. It is argued that the court, by its order of January 18, 1882, accepted, for the benefit of the ward, the company's offer to reduce the rate of interest, without assenting to the express conditions imposed by the stipulation; that if the company did not approve the order, in the form in which it was entered, it should have declined to receive the moneys then in the registry of the court, which were directed to be paid to it; and that the receiving those moneys, as well as the monthly rents subsequently accruing, was a waiver of the express conditions set forth in the stipulation, and equivalent to an unconditional agreement by the company to reduce the interest. We cannot assent to this view. The court below certainly did not intend, by the order of January 18, 1882, to ignore the conditions upon which the company's offer to reduce the rate of interest was based. It intended, so far as it had the power, to put the ward in a position in which he could, upon arriving at age, avail himself of the proposed reduction of interest. And if Kingsbury had, within the time specified in both the stipulation and the order, paid into court the full amount of any balance due, allowing only six and a half per centum interest after the date of LeMoyne's appointment as guardian, the company's stipulation to reduce the interest could, perhaps, have been enforced. But he chose not to perform the required condition, but to take his chances of a favorable decision of the cause upon the issues made by the pleadings. To that end he obtained the order setting aside that of January 18, 1882, as of no effect. So that, before the final decree was made, the plan of settle-

ment, indicated in the order of 1882, was repudiated by both parties, and by the court itself. The effect of the order of November 28, 1885, setting aside that of January 18, 1882, and giving Kingsbury full control of the mortgaged property, of the moneys then in court or thereafter to come from rents — even if that effect had not been produced by the failure of Kingsbury to meet the condition to be performed by him within six months after reaching his majority — was to remit him and the company to whatever rights either had under the original contracts of loan prior to the stipulation and order of January 18, 1882. The construction placed upon the stipulation and order of January 18, 1882, is in harmony with the rule, supported by authority, that "where a certain sum of money is due, and the creditor enters into arrangements with his debtor to take a lesser sum, provided that sum is secured in a certain way and paid at a certain day, but if any of the stipulations of the arrangement are not performed as agreed upon, the creditor is to be entitled to recover the whole of the original debt, such remitter to his original rights does not constitute a penalty, and equity will not interfere to prevent its observance." White & Tudor's Leading Cases Eq. vol. 2, p. 2025; Pomeroy's Eq. § 438; *Thompson* v. *Hudson*, L. R. 4 H. L. 1; Coote on Mortgages, 4th ed. 883; Powell on Mortgages, 6th ed. 900; Adams on Equity, 7th ed. 109; *Reeves* v. *Stipp*, 91 Illinois, 609.

5. We come to consider the transaction of the third mortgage, the one for $95,000 in gold. In the settlement of that loan, which occurred December 19, 1876, the guardian received in money only $41,805.73. The balance of $53,194.27 was paid (1) in over-due coupons of the first and second loans, which were cancelled and surrendered to the guardian; and (2) in the company's claim of interest upon such over-due coupons, at the rate of nine per cent, after their maturity. The amount of this interest upon over-due coupons was $7219.27, which was disallowed, and the loan treated as one in fact of $87,780.73 only. According to the views already expressed, the company was not entitled, in the final computation, to interest upon over-due coupons, after their maturity, even at the

statutory rate of six per cent per annum. The application to the county court for leave to make the loan for $95,000 did not indicate the purpose of the guardian, in the settlement of that loan, to allow interest upon over-due coupons to be taken up by him. No such question was passed upon by that court, and if its assent would have authorized the guardian to pay such interest, no such assent was given. Certainly, the guardian could not, without leave of the court, make an allowance of interest upon past-due coupons that were not negotiable securities. The court below was, therefore, right in treating the loan as one only of $87,780.73.

It is contended that this loan was usurious, (*Peddicord* v. *Connard*, 85 Illinois, 102; *Leonard* v. *Patton*, 106 Illinois, 99; *Amundson* v. *Ryan*, 111 Illinois, 506,) and that the whole interest on it was, for that reason, forfeited under the statute of Illinois, which allows parties to stipulate for any rate of interest for money loaned, not exceeding ten per cent per annum, but which, also, provides: "5. No person or corporation shall, directly or indirectly, accept or receive, in money, goods, discounts or thing in action or in any other way, any greater sum or greater value, for the loan, forbearance or discount of any money, goods or thing in action, than as above prescribed. 6. If any person or corporation in this State shall contract to receive a greater rate of interest or discount than 10 per cent upon any contract, verbal or written, such person or corporation shall forfeit the whole of said interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation." The ground of this contention is, that nine per cent on $95,000 for the full term of the loan, seven years, $59,850, increased by the $7219.27 included in the principal sum, in all, $67,069.27, would be in excess of ten per cent interest, for that term, on the amount really loaned by the company. We do not concur in the view taken by the appellee. If the county court had authorized the guardian, in the settlement of the $95,000 loan, to allow interest upon interest, and make the interest, thus increased, a principal sum to draw interest, a different question would have been presented; for it is the settled doc-

trine of the Supreme Court of Illinois that an agreement made after interest is due to make it a principal sum does not render the transaction usurious. *Haworth* v. *Huling*, 87 Illinois, 23; *Thayer* v. *Star Mining Co.*, 105 Illinois, 540, 553; *McGovern* v. *Union Mut. Life Ins. Co.*, 109 Illinois, 151; *Gilmore* v. *Bissell*, 124 Illinois, 488; *Drury* v. *Wolfe*, 25 N. E. Rep. 626. In the case of *Gilmore* v. *Bissell*, above cited, the court said: "This was a bill to foreclose a mortgage. The only defence relied upon was usury. . . . This note was secured by mortgage on the premises in controversy. On the 28th day of August, 1878, no interest having been paid on the note, Finley required the parties to pay the debt or renew the note. They concluded to renew. In computing the amount due, the agent of Finley charged on the interest due, from the time it became due to the date of renewal, interest at six per cent per annum. This was added to the interest due and the principal, which all amounted to the sum of $1350, for which a new note and mortgage were given. The interest on the interest included in the mortgage amounted to $12.50, as is claimed by the defendants. The addition of this amount to the debt and the agreement to pay it, it is insisted, rendered the transaction usurious. We do not concur in this view. The mortgagors had agreed to pay the interest on the mortgage debt annually, and it was their duty to observe that agreement; but they had failed to pay, as the interest each year became due. When the time, however, came to renew the debt, the mortgagors had the right, if they saw proper, to redeem their agreement and pay interest on the interest; and their agreement to pay that interest was not illegal nor did it render the transaction usurious. What was done was but the performance of a contract made by the parties, which they had the right to do. If authority was needed to sustain the view of the circuit and appellate courts, *Haworth* v. *Huling*, 87 Illinois, 23, is conclusive of the question made." But the county court did not authorize the guardian of Kingsbury to allow interest upon interest when making the settlement in respect to the third loan. It only authorized him to borrow $95,000 in gold, or its equivalent in currency. But, on the

settlement of the loan, he received only $87,780.73, and wrongfully permitted the company to retain the $7219.27 in payment of interest upon interest, because he, in good faith, believed that it was entitled to such interest. There was no contract, within the meaning of the statute, that the company should receive usurious interest, for no such contract was attempted to be authorized by the county court. In fact, the allowance by the guardian of interest upon interest was under a mistaken view of the obligation of the coupons in that regard. The remedy for the wrongful retention of the $7219.27 out of the amount the Mortgage Company agreed to lend is to treat the loan as one for only $87,780.73, making the calculation of interest on the principal sum on that basis, and not to forfeit the interest on the sum actually received by the guardian from the company.

6. It is contended that the Mortgage Company could not demand interest, after Kingsbury reached his majority, at a rate in excess of six per cent. The argument made in support of this proposition is that, as the guardian could not, under the statute, have created a debt, secured by mortgage, that did not mature at or before the ward's majority, he had no authority to contract for the payment of interest after the ward reached full age, and that the rate, after his majority, must be controlled by the statute, and not by express contract. We do not concur in this interpretation of the statute. The guardian had authority, with leave of the court, to make these loans, and to stipulate for any rate of interest not exceeding ten per cent. He stipulated for interest at nine per cent, payable half-yearly in each year until the principal sum "shall be fully paid." Such a contract, in case of individuals, capable of acting for themselves, would bind the obligor to pay interest on the principal sum at that rate after its maturity. *Phinney* v. *Baldwin*, 16 Illinois, 108; *Etnyre* v. *McDaniel*, 28 Illinois, 201. We perceive no reason why the guardian may not, under the statute, make such a contract, subject, of course, to the condition that the maturity of the debt, created by him, on behalf of the estate, shall not extend beyond the ward's minority, and subject, therefore, to the right of the

ward, immediately upon attaining full age, to pay off the debt, or, by agreement with the lender, obtain an extension of the time of maturity, and a less rate of interest. The statute does not mean that the ward may retain the benefit of the contract after he attains full age, and repudiate its provisions. Of course what is here said must be taken in connection with the statute of Illinois providing that "judgment recovered before any court or magistrate shall draw interest at the rate of six per centum per annum from the date of the same until satisfied." Rev. Stats. Illinois, 1874, c. 74, § 3. Where the debt is merged in a judgment or decree, the contract ceases to exist, and the rate of interest is thereafter controlled by the statute. *Mason* v. *Eakle*, Breese, 52; *Tindall* v. *Meeker*, 1 Scammon, 137; *White* v. *Haffaker*, 27 Illinois, 349; *Wayman* v. *Cochrane*, 35 Illinois, 152; *Palmer* v. *Harris*, 100 Illinois, 276, 280; *Phinney* v. *Baldwin and Etnyre* v. *McDaniel*, above cited; *Conn. Mut. Life Ins. Co.* v. *Cushman*, 108 U. S. 51, 54.

It results that the decree below must be reversed as to that part which allowed only $6963.07 as interest to December 15, 1885, on the third loan. It should have allowed interest on $87,780.73, the real amount of that loan, at the rate of nine per cent per annum to the date to which, as above, the calculation was made, and interest after that date at the statutory rate of six per cent. In that respect, and to that extent only, the decree must be modified.

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

ALEXANDER *v.* UNITED STATES.

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

No. 1309. Argued and submitted January 16, 1891. — Decided February 2, 1891.

It is the duty of counsel, in a criminal case, to seasonably call the attention of the court to any error in impanelling the jury, in admitting testimony, or in any other proceeding during the trial by which the rights of the accused may be prejudiced, and, in case of an adverse ruling, to note an exception; and if counsel fails in this respect, error cannot be assigned for such causes.

It being shown in a trial on an indictment for murder, that on the day of the disappearance of S. (the murdered man), and of Mrs. H., her husband and his relatives were seen, armed with guns and pistols, hunting for S. and Mrs. H., who were supposed to have eloped together, the declarations at that time of H. as to his purpose in doing so were part of the *res gestæ:* but this court does not decide whether it was error to rule them out.

Statements regarding the commission of a crime already committed, made by the party committing it to an attorney at law when consulting him in that capacity, are privileged communications, whether a fee has or has not been paid, and whether litigation is pending or not.

The rule announced in *Queen* v. *Cox*, 14 Q. B. D. 153, should be limited to cases where the party is tried for the crime in furtherance of which the communication is made.

THE case is stated in the opinion.

Mr. A. H. Garland and *Mr. H. J. May*, for appellant, submitted on their brief.

Mr. Solicitor General for appellees.

MR. JUSTICE BROWN delivered the opinion of the court.

This was a writ of error sued out under the sixth section of the act of February 6, 1889, 25 Stat. 655, 656, c. 113, § 6, to review a judgment of the Circuit Court of the United States for the Western District of Arkansas, imposing a sentence of death upon the plaintiff in error for the murder of David C. Steadman "at the Creek Nation in the Indian country."

The plaintiff in error relied upon the following grounds for reversal:

1. That the court erred in its selection of the jury, in that the defendant was required to make his challenges without first knowing what challenges the government's attorney had made, and thus challenged two jurors, to wit, C. F. Needles and Samuel Lawrence, who were also challenged by the government, whereby he was deprived of two of his challenges contrary to law.

2. That the court erred in excluding the testimony offered by the defendant to prove threats to kill Steadman made by House and others, while they were hunting Steadman under the belief that he had seduced the wife of the said House, and was secreting himself with her in the neighborhood.

3. Because the court erred in admitting the testimony of J. G. Ralls as to confidential communications made to him as the attorney of the defendant.

(1) With regard to the first error assigned, it appears from the record that "the court directed two lists of thirty-seven qualified jurymen to be made out by the clerk, and one given to the district attorney and one to the counsel for the defendant; and the court further directed each side to proceed with its challenges independent of the other, and without knowledge on the part of either as to what challenges had been made by the other. To which method of proceeding in that regard defendant at the time offered no objections, but proceeded to make his challenges, and in so doing challenged two jurors, to wit, C. F. Needles and Samuel Lawrence, who had been also challenged by the government." We do not deem it necessary to inquire whether there was error in the method pursued by the court in impanelling this jury. It appears distinctly from the bill of exceptions that the defendant offered no objection to it at the time, and made no demand to challenge any of the jury beyond the twenty allowed by Revised Statutes, section 819. Indeed, it does not clearly appear which side made the first challenges, or that defendant had not exhausted his challenges before the government challenged the two jurors in question. If it were a fact that the defend-

ant had made his twenty challenges before the government challenged these two men, it is difficult to see how his rights were prejudiced by the action of the district attorney.

But the decisive answer to this assignment is, that the attention of the court does not seem to have been called to it until after the conviction, when the defendant made it a ground of his motion for a new trial. It is the duty of counsel seasonably to call the attention of the court to any error in impanelling the jury, in admitting testimony, or in any other proceeding during the trial by which his rights are prejudiced, and in case of an adverse ruling to note an exception. *Stoddard* v. *Chambers*, 2 How. 284; *De Sobry* v. *Nicholson*, 3 Wall. 420; *Canal Street Railroad* v. *Hart*, 114 U. S. 654; Thompson on Trials, §§ 690, 693, 700.

(2) To understand fully the force of the second error assigned, it is necessary to state so much of the evidence as exhibits substantially the case made out by the government. The evidence tended to show that the defendant and the deceased, Steadman, had agreed to go into the stock business together, and, upon the day of the murder, were endeavoring to rent a farm for the purpose of wintering their horses, and making a crop the following year. They were returning to their camp both armed with guns. Defendant was also armed with a pistol. So far as the evidence discloses, Steadman disappeared and was never seen alive again. A few minutes after they were last seen, a witness, who had met them, saw the two horses, without riders, standing in the road near a wood. Shortly after, eight or nine shots were heard in the wood, and after this the defendant was seen upon the road, sitting upon one of the horses, and leading the other, which had no rider. In about twelve days the body of Steadman was found half a mile from the place from which he and defendant had been seen, and within seventy-five yards of the place where the horses were seen standing. His skull was crushed, and there was a bullet hole in it back of the ear. There was also evidence that Steadman had a large amount of money on his person at the time he disappeared. The defendant offered contradictory explanations of Steadman's disappearance — at

one time said he had probably been killed, and at another time suggested suicide, and, at another, pretended to believe a story that had been circulated in the neighborhood that Steadman and a married woman by the name of House had disappeared and were hiding together. Evidence was admitted tending to show that Mrs. House and Steadman had been seen in conference the day before, and that the general impression in the neighborhood at the time was that they had gone off together. House and his friends had armed themselves with guns and pistols and had ridden through the country hunting for them, under the belief that they were hiding together in the neighborhood, or had fled the country together.

Now, if evidence was admitted to show that House had armed himself, and was hunting for Steadman under the impression that the latter had eloped with his wife, and was secreting himself in that vicinity, it is difficult to see upon what principle his threats in that connection were excluded. Accepting the theory of the government that mere threats, unaccompanied by acts of a threatening nature, were irrelevant to the question of defendant's guilt, it is not easy to understand how the acts themselves could be made pertinent without testimony tending to show the reason why House had armed himself, and, with other parties, was scouring the country for Steadman. Their statements in that connection would be clearly illustrative of the act in question, and a part of the *res gestæ*, within the rule laid down in *Lord George Gordon's Case*, 1 Greenl. Ev. § 108, and within all the authorities upon the subject of declarations as part of the *res gestæ*.

At the same time we recognize a certain discretion on the part of the trial judge to rule out this entire testimony, both of the acts and the declarations of House, if, in his opinion, they were so remote or insignificant as to have no legitimate tendency to show that House could have committed the murder. If, for instance, it were clearly proven that the murder was committed before the threats of House were uttered, or the two occurrences were so remote in time and place as to demonstrate that there could have been no connection between them, it would be the duty of the court to exclude the testi-

mony. But, if on the other hand, the time, and the circumstances attending the murder were uncertain or obscure, the conduct and threats of House might have a material bearing upon the identification of the murderer. It is held by some of the authorities that the question whether such evidence should be admitted or excluded, is to a certain extent a matter of discretion with the trial judge. *Shailer* v. *Bumstead*, 99 Mass. 112; *Thayer* v. *Thayer*, 101 Mass. 111; *Commonwealth* v. *Abbott*, 130 Mass. 472; *Commonwealth* v. *Ryan*, 134 Mass. 223; *McInturf* v. *The State*, 20 Tex. App. 335.

In the present case, however, it is assumed, both in the exception noted to the exclusion of the testimony, and in the briefs of counsel, to have been proven as a fact, by the witness Terry, that on the day of the disappearance of Steadman and Mrs. House, he saw Samuel House, her husband and several others, relatives and friends of House, riding around the neighborhood armed with Winchester guns and pistols, hunting for deceased and Mrs. House, who were then believed to have eloped together, or to be secreting themselves in the neighborhood; and although the testimony of Terry, as set forth in the bill of exceptions, fails to support this statement, or to show definitely what he did intend to swear to, yet assuming it to be as stated, we think that, if it were shown that House was in search of Steadman, his declarations as to his purpose in so doing stand upon the same basis, with regard to admissibility, as his conduct, and were a part of the *res gestæ*. But in the view we take of the next assignment we find it unnecessary to determine whether there was such error in ruling out this testimony as to require a reversal.

(3) The third assignment relates to the admission of the testimony of J. G. Ralls, an attorney at law, to which objection was made upon the ground that it related to a confidential communication made by the defendant, who had consulted Ralls as an attorney at law, and was therefore privileged. Ralls stated in substance that he was practising law at Muscogee; that defendant came to his office there between the time of Steadman's disappearance and the finding of his body, "and asked me if I was an attorney; I told him I was; he

said his name was Alexander, and he went on to state that he and his partner had some forty head of horses across the river, in partnership, and that some time before that, probably a week before, his partner was missing, and he hadn't heard from him. He says his partner had a brother in California, and he was afraid his brother would come up there and make some trouble about the horses; he stated at the time his partner had taken off the money, and he wanted to know if he could hold the horses so as to secure his part of the money. I asked him if the horses would pay him for his part, and he said it would; I told him to hold the horses; they could not take them until that was settled." It is evident from this statement that defendant consulted with Ralls as a legal adviser, and while, if he were guilty of the murder, it may have had a tendency to show an effort on his part to defraud his partner's estate, and to make profit out of his death, by appropriating to himself the partnership property, it did not necessarily have that tendency and was clearly a privileged communication. If he consulted him in the capacity of an attorney, and the communication was in the course of his employment, and may be supposed to have been drawn out in consequence of the relations of the parties to each other, neither the payment of a fee nor the pendency of litigation was necessary to entitle him to the privilege. *Williams* v. *Fitch*, 18 N. Y. 546; *Britton* v. *Lorenz*, 45 N. Y. 51; *Bacon* v. *Frisbie*, 80 N. Y. 394; *Andrews* v. *Simms*, 33 Arkansas, 771.

In the language of Mr. Justice Story, speaking for this court in *Chirac* v. *Reinicker*, 11 Wheat. 280, 294: "Whatever facts, therefore, are communicated by a client to a counsel solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent."

We are referred, however, to the case of *Queen* v. *Cox*, 14 Q. B. D. 153, as holding the doctrine that where a communication is made to counsel in furtherance of a scheme to commit a crime, the client is not entitled to the privilege. This was a Crown case reserved and argued before ten judges of the

Queen's Bench Division. The defendants Cox and Railton were indicted for a conspiracy to defraud one Munster. The facts stated show that Munster had obtained a judgment against Railton in an action for libel, upon which an execution had issued, which the sheriff proposed to levy upon the defendant's stock in trade. He was met, however, by a bill of sale from Railton to Cox, the other defendant, antedating the execution. It was claimed that the bill of sale was fraudulent and made for the purpose of depriving Munster of his rights under the judgment, and Railton and Cox were indicted for conspiracy. The question was whether an interview had by Railton and Cox with Goodman, a solicitor, as to what could be done to prevent the property from being seized under execution, was competent evidence, or was a privileged communication. No point was made that Goodman was not consulted as an attorney. The court unanimously held that the evidence was competent. Mr. Justice Stephen, who delivered the opinion of the court, said, in a very exhaustive discussion, that the question was, "whether, if a client applies to a legal adviser for advice intended to facilitate or to guide the client in the commission of a crime or fraud, the legal adviser being ignorant of the purpose for which his advice is wanted, the communication between the two is privileged? We expressed our opinion at the end of the argument that no such privilege existed. If it did, the result would be that a man intending to commit treason or murder might safely take legal advice for the purpose of enabling himself to do so with impunity, and that the solicitor to whom the application was made would not be at liberty to give information against his client for the purpose of frustrating his criminal purpose." pp. 165, 166. After citing and commenting upon a large number of cases, he comes to the conclusion that if the communication be made in furtherance of any criminal or fraudulent purpose, it is not privileged. This case, however, is clearly distinguishable from the one under consideration, in the fact that the solicitor was consulted with regard to a scheme to defraud, for which his clients were subsequently indicted and tried, and the testimony was offered upon that trial; while in this case the consultation

was had after the crime was committed, and was offered in evidence as an admission tending to show that defendant was concerned in the crime, or rather as a statement contradictory to one he had made upon the stand. Had he been indicted and tried for a fraudulent disposition of his partner's property, the case of *Queen* v. *Cox* would have been an authority in favor of admitting this testimony, but we think the rule announced in that case should be limited to cases where the party is tried for the crime in furtherance of which the communication was made.

Had the interview in this case been held for the purpose of preparing his defence, or even for devising a scheme to escape the consequences of his crime, there could be no doubt of its being privileged, although he had made the same statement, that his partner was missing and he had not heard from him. Now the communication in question was perfectly harmless upon its face. If it were true that his partner was missing, and he had not heard from him, and that Steadman had taken off the money, there was no impropriety in his consulting counsel for the purpose of ascertaining if he could hold the horses, so as to secure his part of it. Ralls asked him in that connection if the horses would pay him for his part, and defendant said they would; he then told him to hold the horses, that they could not take them until that was settled.

It is only by assuming that he was guilty of the murder that his scheme to defraud his partner becomes at all manifest. His statement that his partner was missing and that he had not heard from him, is the only material or relevant part of the conversation, and was plainly privileged.

The judgment of the court below must be reversed, and the case remanded for a new trial.

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

CRUMPTON v. UNITED STATES.

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

No. 1310. Argued and submitted January 16, 1891. — Decided February 2, 1891.

Whether a verdict in a trial for murder was contrary to the evidence cannot be considered in this court, if there was any evidence proper to go to the jury in support of the verdict.

When the defendant's counsel in a criminal trial fails to at once call the attention of the court to remarks by the prosecuting officer which are supposed to be objectionable, and to request its interposition, and, in case of refusal, to note an exception, an assignment of error in regard to them is untenable.

Whether, in a criminal case, a court will grant an application by the prisoner, made during the trial, for process for witnesses, and will delay the trial during the execution of the process, is a matter of discretion with the trial court, not reviewable here.

THE case is stated in the opinion.

Mr. A. H. Garland for plaintiff in error.

Mr. Solicitor General for defendants in error.

MR. JUSTICE BROWN delivered the opinion of the court.

This was a writ of error sued out under the sixth section of the act of Congress of February 6, 1889, 25 Stat. 655, 656, c. 113, § 6, to review a judgment of the Circuit Court of the United States for the Western District of Arkansas, imposing a sentence of death upon the plaintiff in error for the murder of Sam. M. Morgan, "at the Cherokee Nation, in the Indian country." The plaintiff in error relied for a reversal of the judgment upon the following grounds:

1. That the verdict was contrary to the evidence:

2. That the court erred in permitting the district attorney to refer in his argument to matters not in evidence:

3. That the court erred in refusing to grant the prisoner

sufficient time to procure the testimony of three witnesses, whose testimony he claims was material to his defence.

(1) It is clear that the question, whether the verdict was contrary to the evidence, which is the first error assigned, is not one which can be considered in this court, if there were any evidence proper to go to the jury in support of the verdict.

The testimony on behalf of the government tended to show that deceased had, on the 3d of November, about fifty dollars on his person; and that on the morning of that day, which was Sunday, after having slept together the night before, the prisoner and the deceased, riding two horses belonging to the deceased, started out from the house of Mrs. Harris, to visit some young women by the name of Davis, who lived about four miles away. The prisoner was armed with a pistol.

About noon of that day shots were heard by a witness for the government in the neighborhood of the hole where the body of the deceased was afterwards found, and in a short time the defendant was seen riding one horse and leading the other away from this place. Toward evening of the same day the defendant returned to a house in the neighborhood of Mrs. Harris's, with the two horses. When inquired of as to the deceased he said that they had met a man riding in a buggy on the prairie, who had induced the deceased to go with him to the Pawnee Agency. He stated that the deceased had directed him to bring the horses back, to take charge of all his effects, and to pay his debts in case he did not return by a certain time.

Three days before Christmas the body of the deceased was found in the hole above referred to, which was some six or seven feet deep, on the bank of Coody's Creek, and some three miles from Mrs. Harris's. His hat had a bullet hole in it, and his broken skull showed where the bullet had entered it and caused his death. There was no doubt, from what was found on his person, as to whose corpse it was, though the face and front part of his skull had been battered so as to prevent recognition of the features. No money was found in his pockets.

It appeared from other evidence, and was admitted by the

defendant, that some time before the disappearance of the deceased the defendant had come upon this hole and was familiar with its location. There was evidence showing that an overcoat belonging to the deceased was in the possession of the defendant the next day after the disappearance of the deceased. Before the finding of the body on the 22d of December, the defendant exhibited two letters which he claimed to have received from the deceased at the Pawnee Agency. They were letters without envelopes. Defendant explained the absence of envelopes by saying that the children had destroyed them. On the trial the letters themselves could not be found, and were not produced. When the body of the deceased was found, and the report of it came to the defendant, he immediately left the settlement in which he lived and went away some twenty or twenty-five miles, where he was arrested.

The evidence for the defendant was conflicting. One man testified that he saw a government witness, Burt by name, in a carriage with the deceased, on the Sunday in question, going toward the place where the body was found, and that later he saw him returning without the deceased. This evidence was at variance with the statement of the defendant himself, who swore that the man in whose buggy the deceased drove away was not Burt.

There is no doubt that this testimony was sufficient to lay before the jury, and it would have been improper to direct a verdict for the defendant. The weight of this evidence and the extent to which it was contradicted or explained away by witnesses on behalf of the defendant, were questions exclusively for the jury, and not reviewable upon writ of error. If the verdict were manifestly against the weight of evidence, defendant was at liberty to move for a new trial upon that ground; but that the granting or refusing of such a motion is a matter of discretion is settled in *Freeborn* v. *Smith*, 2 Wall. 160; *Railway Company* v. *Heck*, 102 U. S. 120; *Lancaster* v. *Collins*, 115 U. S. 222, and many other cases in this court.

(2) The second assignment of error is clearly untenable. It appears that during the argument of the case the defendant's

counsel said to the jury: "Either the defendant or Burt [a government witness] is guilty of this crime. I will show you that Burt is guilty, and, therefore, that defendant is not." In reply to this, the district attorney, in his closing argument, said: "The issue is squarely made by Mr. Neal, that either the defendant or William Burt is guilty of this crime. I have shown you that Burt is not guilty; therefore, by his logic, the defendant is guilty." No objection was made at the time to this argument, nor was the court requested to interrupt it, or caution the jury against its force; and no exception appears to have been taken. There is no doubt that, in the excitement of an argument, counsel do sometimes make statements which are not fully justified by the evidence. This is not such an error, however, as will necessarily vitiate the verdict or require a new trial. It is the duty of the defendant's counsel at once to call the attention of the court to the objectionable remarks, and request its interposition, and, in case of refusal, to note an exception. Thomp. on Trials, § 962.

In the present case it is by no means clear that the district attorney transcended the proper limits of an argument. Counsel for the defendant had tendered the issue to the jury, that either his client or Burt was guilty of the crime, and we perceive no impropriety in the district attorney accepting the challenge and attempting to demonstrate that Burt was not guilty, and arguing that the jury, upon the issue thus presented, had a right to infer that the defendant was guilty.

(3) The third assignment is based upon the refusal of the court to grant an application by the prisoner for process for three witnesses, such process to be served at the expense of the government. The trial was begun on the 27th of May, 1890; the application was not made until the 31st day of May, just before the defendant was called as the last witness in his own behalf. It would probably have delayed the trial a number of days to send the process into the Indian Territory, make service of it there, and bring in these witnesses to testify. Whether the trial should be delayed for the production of these witnesses was clearly a matter of discretion and not reviewable upon a writ of error. The testimony of

the proposed witnesses seems to have been of little importance, and the application was to subpœna these witnesses at the expense of the government, which would of itself have been a matter of discretion, even had the application been made before the trial began. Rev. Stat. § 878. It is clear that the ruling of the court is not subject to review. *Silsby* v. *Foote*, 14 How. 218; *Cook* v. *Burnley*, 11 Wall. 672, 676.

There is no error in the proceedings in the court below, and the judgment must be *Affirmed.*

UPSHUR *v.* BRISCOE.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 146. Submitted January 12, 1891. — Decided February 2, 1891.

The cases reviewed on the question of what are debts created by a bankrupt while acting in a fiduciary character, so as not to be discharged, under § 33 of the bankruptcy act of March 2, 1867, c. 176 (14 Stat. 533).

The obligation in the present case held to have been discharged.

A debt is not created by a person while acting in a "fiduciary character" merely because it is created under circumstances in which trust or confidence is reposed in the debtor, in the popular sense of those terms.

In this case it was held that the widow of the bankrupt, who was alleged to be a fraudulent grantee, was entitled to the benefit of his discharge, she having pleaded it.

On the 25th of January, 1857, James Andrews, of the parish of Tensas, in the State of Louisiana, executed and delivered to William J. Briscoe, also of said parish and State, the following instrument in writing:

"James Andrews to "Annie M. Andrews. } Donation.

"State of Louisiana, "*Parish of Tensas.*

"Know all men by these presents that I, James Andrews, of said parish and State, do nominate, constitute and appoint William J. Briscoe, also of said parish and State, my true and

lawful attorney for me and in my name to pay or cause to be paid to Annie M. Andrews the sum of seven hundred dollars ($700) annually, said amount to be paid at the counting-house of some commission merchant, or at some banking-house, in the city of New Orleans, in equal quarterly instalments of one hundred and seventy-five dollars each, said commission or banking-house to be named and specified before the day of payment, by the said W. J. Briscoe to the said Annie M. Andrews. The said payments are to be made commencing with the date of this instrument, and continuing during the natural life of the said Annie M. Andrews, subject to the conditions and restrictions hereinafter enumerated, viz.: The payments are to be regularly made as above set forth, according to the discretion of the said William J. Briscoe of the general good conduct of the said Annie M. Andrews, which conduct must in all respects comport with the character and bearing of a discreet, prudent female.

"The said William J. Briscoe, being here present, accepts this appointment and trust, and binds himself to carry out the provisions of the same according to its true intent and meaning; and I do further constitute and appoint the said William J. Briscoe my attorney-in-fact to have and receive the sum of ten thousand dollars ($10,000), to be held by him for the benefit of the said Annie M. Andrews, subject to the conditions hereinafter enumerated, viz.: It is understood that the annual payment of seven hundred dollars, as above secured, shall be considered as interest upon said amount of ten thousand dollars; and, first, it is provided that in case the said Annie M. Andrews shall hereafter marry and leave issue, this amount of ten thousand dollars shall remain invested as heretofore in the hands of said William J. Briscoe, and the interest shall continue to be paid as heretofore mentioned, and, in case of the death of the said Annie M. Andrews, such children, legal issue of her, shall become possessed of the above amount of ten thousand dollars unconditionally in full possession, to be paid by the said William J. Briscoe.

"Second. It is provided, that in case of my death occurring before that of the said Annie, the above amount of ten

thousand dollars shall be placed unconditionally in her hands by the said William J. Briscoe, provided only she shall have no legal issue. In case, however, she shall, at the time of my death, have any child or children, legal issue of her body, that the provisions heretofore enumerated shall be strictly adhered to;

"And, third, It is provided that, in case of the death of the said Annie M. Andrews without legal issue of her body surviving, then the above sum of ten thousand dollars shall revert to me, my heirs or assigns.

"This done and signed, at St. Joseph, in said parish and State, this 25th day of January, A.D. 1857, in presence of Geo. W. Williams and Edgar D. Farrar, competent witnesses.

"JAMES ANDREWS.

"G. W. WILLIAMS.
"E. D. FARRAR."

On the same day, and on the same paper, Briscoe signed the following instrument:

"And now to these presents also comes William J. Briscoe, who accepts this mandate in all its clauses, and binds himself faithfully to carry the same into effect, and the more effectually to secure the faithful performance of the same he also binds himself as surety for the said James Andrews, that the within mandate and all the stipulations therein contained shall be well and faithfully executed, and that the same shall be complied with in all its clauses.

"Thus done and signed, at St. Joseph, on the 25th of January, A.D. 1857, in the presence of G. W. Williams and Edgar D. Farrar.

"Witnesses: W. J. BRISCOE.

"G. W. WILLIAMS.
"E. D. FARRAR."

Annie M. Andrews, named in the paper signed by James Andrews, at the same time and place signed the following instrument:

"And at the same time and place also came the said Annie M. Andrews, who hereby declares that she accepts the above in all its parts and clauses, ratifying and accepting the said appointment of the said William J. Briscoe as her trustee, and binding herself to confirm and abide by the above mandate in all its provisions.

"Thus done and signed, at St. Joseph, on the 26th of January, A.D. 1857, in presence of Geo. W. Williams and Edgar D. Farrar.

"Witnesses: ANNIE M. ANDREWS.

"G. W. WILLIAMS.

"E. D. FARRAR."

On the 18th of February, 1857, these papers were all of them recorded in the office of the recorder of the parish, in a "Book of wills and donations."

On the 1st of August, 1881, Annie M. Andrews, who had become by marriage Annie M. Upshur, and whose husband had died, and her son, James A. Upshur, an adult, filed their petition in the Ninth District Court for the parish of Tensas, Louisiana, against Mary E. Castleman, widow of William J. Briscoe, who had died about September, 1880, intestate, and his three daughters and heirs-at-law and legal representatives, Mrs. Elizabeth Clinton, Mrs. Frances Chamberlain and Mrs. Betty Scott Goldman and their respective husbands. The petition set forth the three instruments signed, respectively, by James Andrews, W. J. Briscoe and Annie M. Andrews, and averred as follows: William J. Briscoe received from James Andrews the sum of $10,000, and paid to the female plaintiff annually $700, until about January, 1861. On February 26, 1866, Briscoe, to secure the payment of his five promissory notes for $10,000 each, given for borrowed money, mortgaged to Given, Watts & Co., of New Orleans, all the property owned by him, consisting of a cotton plantation in the parish of Tensas, known as the Mound plantation, embracing 4357 acres, with all the growing crops, buildings, household furniture, machinery, corn, stock, fodder, hay, and all other appurtenances. On November 29, 1866, he intermarried

with the defendant, Mary E. Castleman. On January 14, 1868, Mrs. Mildred Gregory, as holder of three of the five notes secured by said mortgage, instituted suit thereon against Briscoe, and on March 7, 1868, caused the property described in it to be adjudicated to her for $20,000. On April 1, 1868, Briscoe was adjudged a bankrupt, and was duly discharged December 19, 1868. The petition states that duly certified copies of the proceedings in bankruptcy are annexed to it, but they are not found in the record. On November 13, 1868, the defendant Mary E. Castleman instituted suit against her husband, Briscoe, for a separation of property, and a judgment was entered on the same day decreeing her to be separate in property from her husband, and dissolving the community of acquests and gains between them. On December 12, 1868, Mrs. Mildred Gregory, for the consideration of $4517.82 in cash and $25,000 in notes, conveyed to Mary E. Castleman the Mound plantation, together with all the growing crops, stock, material and other property acquired by her at the sheriff's sale. Briscoe at his death left no other property. The female plaintiff was married in July, 1858, and the other plaintiff, the sole issue of such marriage, was born in 1859. James Andrews died about January, 1860, and by the terms of the constitution of mandate, the female plaintiff then having one child, the said sum of $10,000 was to remain invested in the hands of Briscoe, the interest to continue to be paid to her; but she had not received from Briscoe any part of the principal, nor any part of the stipulated interest since about April, 1867, and there is now due to the plaintiffs, to be paid from the property and effects of Briscoe, wherever found, the sum of $10,000, with arrears of interest at the rate of $700 per year since January 1, 1861, less the sum of about $700 paid about April, 1867, with legal interest on the stipulated annual payments of $700, from January 1 of each year, from the year 1862, inclusive. The conveyance of the property by Mrs. Mildred Gregory to Mary E. Castleman, December 12, 1868, was a fraudulent simulation, contrived and intended by Briscoe to defraud the plaintiffs and to defeat the execution of the trust, and Mary E. Castleman received the title of the

property for the use of Briscoe, who paid the consideration expressed therefor and continued in possession of the property. He procured Mrs. Mildred Gregory, a preferred creditor, to provoke the seizure and sale of all his property and accept the adjudication thereof, and he then made a surrender in bankruptcy, and was adjudicated a bankrupt and discharged. He then procured Mary E. Castleman to obtain the judgment of separation, and Mrs. Mildred Gregory to convey the entire property to her. Briscoe, up to the time of his death, retained the exclusive control of the property and of the business relating to it, and himself paid to Mrs. Gregory the said sum of $4517.82, from the proceeds of the crops of 1868. The plaintiffs very recently, for the first time, have been informed that Briscoe procured the conveyance of the property to Mary E. Castleman with the intent to defraud them and prevent the enforcement of the trust. The prayer of the petition is, that the defendants pay to the plaintiffs the sum of $10,000, with 7 per cent per annum interest from January 1, 1861, less the sum of $700 paid about April 1, 1867, with 5 per cent per annum interest on each annual payment of $700, from January 1 of each year, from the year 1862, inclusive; that the conveyance of December 12, 1868, be declared simulated and fraudulent, and the property be declared to be the property of the estate of Briscoe and subject to the payment of his debts and obligations; and for general relief.

Mary E. Castleman, by the name of Mary E. Briscoe, filed exceptions to the petition, also an answer, which set up as a defence the discharge of Briscoe in bankruptcy, with other defences. Mrs. Goldman and her husband answered the petition, but did not set up the discharge in bankruptcy.

In November, 1882, the plaintiffs filed an amendment to their original petition, adding further allegations intended to show that the transfer of the property from Briscoe to his wife was void; that at least one undivided half of it belonged to his succession, subject to a settlement of the community between him and his wife; and that the pretended judgment of separation was a nullity.

Mary E. Briscoe (now Mary E. Castleman) answered the

amended petition, and reaffirmed all the averments of her original answer. She also pleaded a prescription of five years. Mrs. Goldman and her husband, for answer to the amended petition, adopted all the allegations of their original answer, but did not plead the discharge in bankruptcy. Mrs. Clinton and her husband and Mrs. Chamberlain and her husband answered the petition and amended petition, but did not set up the discharge in bankruptcy.

The case was tried by the District Court, which entered a judgment in favor of Mary E. Briscoe, and adjudged a recovery in favor of the plaintiffs against the heirs of Briscoe, for $700 annually from January 1, 1872, with 5 per cent interest, as claimed, and costs, restricting the judgment as to those sums to the property and effects of the succession of Briscoe, wherever found, reserving the right to his heirs to renounce or accept the succession, with the benefit of inventory thereafter, and rejecting the demand of the plaintiffs for $10,000, set out in the petition, as premature in respect to the heirs of Briscoe.

The plaintiffs appealed from this judgment to the Supreme Court of Louisiana. The opinion of that court was given May 19, 1884, by Mr. Justice Manning, and is reported in 37 La. Ann. 138. It considered the question whether the obligation assumed by Briscoe was fiduciary, within the meaning of section 33 of the bankruptcy act of March 2, 1867, c. 176, (14 Stat. 533,) which is the statute applicable to the present case, and reads as follows: "That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt; and no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise." The court arrived at the conclusion that the instrument signed by Andrews created a trust; that the debt of Briscoe to the plaintiffs was a debt created by him while acting in a fiduciary character, within the meaning of

section 33; and that his discharge in bankruptcy did not affect his liability for the obligation which he assumed.

On the same day, the court entered a judgment reversing the judgment of the District Court in these particulars: "That instead of rejecting the plaintiffs' demand the same is maintained, and the sales and conveyances by which Mildred Gregory received title to the Mound plantation and its appurtenances from the sheriff, and by which she afterwards conveyed title to Mary E. Briscoe, are annulled, cancelled and set aside, and the property thus conveyed is declared to belong to the succession of William J. Briscoe, and to be liable to plaintiffs herein for the satisfaction of this judgment;" that the plaintiffs recover of the succession of Briscoe $700, with 5 per cent interest thereon from January 1, 1872, and the same sum with the same interest from January 1 of each succeeding year until paid, and the further sum of $10,000, and costs of suit; and that in other respects the judgment be affirmed. Five days afterwards the heirs of Briscoe applied for a rehearing, which was granted, and the case was argued orally in November, 1884.

On the 16th of March, 1885, the court filed an opinion, delivered by Mr. Justice Fenner, reported in 37 La. Ann. 148, and concurred in by Mr. Justice Manning in a separate opinion, 37 La. Ann. 154. The court held, in regard to the discharge in bankruptcy, that the decision of this court in *Hennequin* v. *Clews*, 111 U. S. 676, made since the original opinion and judgment, had altered its conclusions as to the effect of such discharge. It also cited the cases of *Chapman* v. *Forsyth*, 2 How. 202, *Neal* v. *Clark*, 95 U. S. 704, and *Wolf* v. *Stix*, 99 U. S. 1, as showing that its former conclusion was erroneous; and held that the debt of Briscoe was not created by him while acting in a fiduciary character. The views it announced were as follows: "Andrews delivered to Briscoe $10,000, for which Briscoe obligated himself to pay seven per cent interest annually. This interest was to be paid to Annie M. Andrews, during her life or that of Briscoe, with the discretion, however, of withholding it from her in case of her improper deportment. But the obligation to pay the interest was, nevertheless, abso-

lute and unconditional, and if he judged Annie M. Andrews unworthy to receive it, it would have remained as a debt due to the ultimate beneficiary of the capital. This is apparent from the absence of any indication of a purpose to let Briscoe have the use of the money without interest, and from the incongruity of construing otherwise the discretion confided to him of judging of her worthiness to receive it; for if, by deciding against the propriety of her conduct, he could absolve himself from the obligation of paying the interest at all, it would create an antagonism between his duty and his interest, which could find no support in a rational interpretation of the writing. Therefore, we say, he was absolutely and unconditionally bound to pay interest on the money as long as he held it. This, unquestionably, implied the right to use the money, and to use it as his own; for no authority is given to make particular investments of it for account of the beneficiary, and such investments would have been at his own exclusive risk; and if unfortunate, however prudently made, they would have furnished him no excuse for non-payment of either principal or interest. It imposed the further obligation of returning the $10,000 (together, as we have shown, with any unpaid interest) to the beneficiary named, or to Briscoe or his heirs or assigns, in certain definite contingencies named and not necessary here to detail. Such is the plain import of the provisions of the so-called 'trust.'" It said that the trust reposed in Briscoe was a trust simply in his "punctuality" and "integrity," the same trust which lies at the base of every agency and of every loan or other credit; that the fact that the trust was expressed in the instrument added nothing to its nature, force or effect; and that if the word "trust" had not been used, it would, nevertheless, have been implied in identical measure and strength.

On the same day, the court entered a judgment revoking and setting aside its former judgment, and amending the judgment of the District Court so as to condemn the succession of Briscoe to pay to the plaintiffs the sum of $700, with five per cent interest from January 1, 1872, and the same sum with like interest for each succeeding year, and the further sum of

$10,000 and costs of suit, and affirming the judgment in all other respects, including the limitations on the moneyed judgment, the plaintiffs to pay the costs of the appeal.

The plaintiffs sued out a writ of error from this court, and assigned as errors, that the Supreme Court of Louisiana erred in deciding (1) that Mrs. Briscoe could plead the discharge in bankruptcy of her husband, and (2) that the obligation of Briscoe was affected by his discharge in bankruptcy.

Mr. Wade R. Young for plaintiffs in error.

I. The plea of the discharge in bankruptcy was personal to the bankrupt and his representatives, and could not avail the defendant widow, fraudulent assign. This proposition is sustained by the opinion of this court in the case of *Moyer* v. *Dewey*, 103 U. S. 301, in which this court decided that the effect of a discharge in bankruptcy is personal to the bankrupt, and does not avail to release others.

II. The instrument upon which the action is based sets out an express, private discretionary trust, with a remainder and a reversion, one of the strictest trusts known to the English system. Such a technical trust does not come within the operation of the bankrupt act.

The opinion of this court in the case of *Hennequin* v. *Clews*, 111 U. S. 676, cited and relied on by the Louisiana court, can have no possible bearing on this case, except to remove any doubt which might exist as to the right of the plaintiffs to the writ of error, in a case in which the judgment is in favor of the defendant on the plea of bankruptcy.

A factor entrusted with the goods of his principal to be sold, and a pledgee having possession of the property pledged, are not cases of express trusts, and such was all that this court decided in that case.

Mr. Assistant Attorney General Maury for Mary E. Briscoe, one of the defendants in error.

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

In regard to the character of the obligation assumed by Briscoe, we concur with the views of the Supreme Court of Louisiana in its second opinion. By the instrument signed on the 25th of January, 1857, the relation of debtor and creditor was created between Briscoe and the beneficiaries. It was stated expressly that the annual payment of $700 was to "be considered as interest upon the said amount of $10,000;" and that, in case Annie M. Andrews should marry and leave issue, the $10,000 should remain invested as theretofore in the hands of Briscoe, and the "interest" should continue to be paid as theretofore mentioned. These terms made Briscoe the owner of the $10,000 in his own right. He had the right to use the money in any way he thought proper. Presumably, he could not pay interest on it unless he invested it. The right to use it in any way he thought proper was repugnant to the idea of any fiduciary relation to the money, for there was no obligation upon him to keep it separate from his own money, or to put upon it any marks of identification, or to invest it in any particular securities. The statement in the paper signed by Andrews, that Briscoe accepts the "trust," the statement in the paper signed by Briscoe, that he accepts the "mandate," and the statement in the paper signed by Annie M. Andrews, that she accepts the appointment of Briscoe "as her trustee," do not create a "trust" in its technical sense, or make the debt of Briscoe one created by him while acting in a "fiduciary character." The relation created was merely the usual one of contract between debtor and creditor. Within the meaning of the exception in the bankruptcy act, a debt is not created by a person while acting in a "fiduciary character," merely because it is created under circumstances in which trust or confidence is reposed in the debtor, in the popular sense of those terms.

The case of *Chapman* v. *Forsyth*, 2 How. 202, arose under the bankruptcy act of August 19, 1841, c. 9, 5 Stat. 440, the first section of which provided for the discharge from debts "which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capac-

ity." In that case, it was said that the exception applied to the debts and not to the person, if he owed other debts; and that, if the act embraced, as a fiduciary debt, the debt of a factor who retains the money of his principal, it would be difficult to limit its application. The court added: "It must include all debts arising from agencies; and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act. 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."

The construction by this court of section 33 of the bankruptcy act of 1867 has been as follows:

In *Neal* v. *Clark*, 95 U. S. 704, the question was as to the meaning of the expression in that section, of the exception of a debt created by "the fraud" of the bankrupt; and it was held that the "fraud" referred to in that section meant positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does "embezzlement," with which "fraud" was directly associated in the section, and not implied fraud or fraud in law, which might exist without the imputation of bad faith or immorality.

In *Wolf* v. *Stix*, 99 U. S. 1, the case of *Neal* v. *Clark* was approved; and it was held that the "fraud" intended by section 33 of the act of 1867 did not include such fraud as the law implied from the purchase of property from a debtor with the intent by him thereby to hinder and delay his creditors in the collection of their debts.

In *Hennequin* v. *Clews*, 111 U. S. 676, it was held that one

hypothecating, to secure a debt due from himself, securities which had been pledged to him to secure the obligation of another to him, and failing to return them when the latter obligation was discharged, did not create thereby a debt by fraud, or in a fiduciary character, so that such debt was excepted by section 33 of the act of 1867 from the operation of a discharge in bankruptcy. Mr. Justice Bradley, delivering the opinion of the court said: "There is no more — there is not so much — of the character of trustee in one who holds collateral securities for a debt as in one who receives money from the sale of his principal's property — money which belongs to his principal alone, and not to him, and which it is his duty to turn over to his principal without delay. The creditor who holds a collateral, holds it for his own benefit under contract. He is in no sense a trustee. His contract binds him to return it when its purpose as security is fulfilled; but if he fails to do so, it is only a breach of contract and not a breach of trust."

In *Palmer* v. *Hussey*, 119 U. S. 96, the case of *Hennequin* v. *Clews* was affirmed and followed, in holding, on similar facts, that there was no such fraud in the creation of the debt, and no such trust in respect to the possession of the securities, as to bar the operation of a discharge in bankruptcy. See also *Strang* v. *Bradner*, 114 U. S. 555; *Noble* v. *Hammond*, 129 U. S. 65; and *Ames* v. *Moir*, (decided herewith,) *ante*, 306.

There is no appreciable distinction between the failure of the bankers to return the collaterals, in *Hennequin* v. *Clews*, and the failure of Briscoe to pay the interest in question.

In *Cronan* v. *Cotting*, 104 Mass. 245, it was held, that the provision of section 33 of the bankruptcy act of 1867, excepting from the effect of a discharge debts created by the bankrupt while acting in any fiduciary character, did not include the obligation of a creditor, to whom the debtor delivered property with directions to sell it and apply in satisfaction of the debt so much of the proceeds as might be necessary for the purpose, to pay over to the debtor the balance of the proceeds of the sale remaining after such satisfaction; but rather implied a fiduciary relation existing previously to, or independ-

ently of, the transaction from which the excepted debt arose; and that, if such an obligation constituted a fiduciary relation such as the statute contemplated, almost all pecuniary obligations, especially those implied by law, would be included in the exemption. The court said: "The debt, in this case, arose exclusively out of a single transaction between the parties. Its creation involved no element other than that of contract. The existence of the liability did not spring from any breach of trust. The only default consisted in the non-payment of the balance due to the plaintiff, after satisfying the purpose of the pledge. The debt did not result from, but preceded, that default." In the present case, the debt of Briscoe preceded his default, and was not created by his failure to carry out the provisions of the mandate.

It is to be noted that the language of section 33 of the act of 1867 excepts debts created by the bankrupt "while acting in any fiduciary character;" and the language would seem to apply only to a debt created by a person who was already a fiduciary when the debt was created. In this view, it was said in *Cronan* v. *Cotting*, *supra*: "We are inclined to the opinion that the phrase implies a fiduciary relation existing previously to, or independently of, the particular transaction from which the debt arises. The collocation tends to favor this interpretation. If the phrase 'while acting,' etc., be referred to that which immediately precedes, it implies something in the nature of defalcation. If it be referred to the first branch of the provision, its association with fraud and embezzlement carries the implication of a debt growing out of some fraudulent misappropriation, or, at least, breach of trust."

It is also assigned for error that the plea of the discharge of Briscoe in bankruptcy was personal to him and his representatives, and could not avail his widow; and the case of *Moyer* v. *Dewey*, 103 U. S. 301, is relied on to sustain this view. But it is not applicable. In that case the bankrupt, after his discharge, confessed judgments founded on debts which existed prior to his discharge, and the suit was brought to reach property which had been conveyed by him to the defendants,

before his bankruptcy, in fraud of his creditors. The defendants other than the bankrupt pleaded the discharge in bankruptcy, and he failed to answer. This court held that, so far as the discharge was concerned, its only effect was personal to the bankrupt, and did not avail to release the fraudulent grantees from liability for the fraud committed by them. It is manifest that the discharge would not have availed the bankrupt if he had pleaded it, and that it could not avail his fraudulent grantees. Moreover, in *Moyer* v. *Dewey*, the transfer of property which was attacked took place prior to the bankruptcy, while that assailed in the present case was made subsequently thereto, so far as Mrs. Briscoe is concerned; and in that case the judgments which were rendered against the debtor subsequently to the discharge, were founded on debts which existed prior to the discharge. Therefore, the attacking creditors in that case were creditors at the date of the fraudulent transfer, and remained such, by the subsequent judgments, at the date they brought their suit to set aside the fraudulent transfer. But in the present case the transfer to Mrs. Briscoe took place after the bankruptcy, and the debts here sued on were barred, and they were not revived by judgments taken subsequently to the discharge. As she derived her title, as is alleged, from Briscoe, she is entitled to the full benefit of the position in which he stood at the time the alleged fraudulent transfer was made, and to all defences resulting therefrom. She is entitled to plead the discharge in her own defence, and cannot be deprived of its benefit by the failure of his heirs to plead it. See also *Botts* v. *Patton*, 10 B. Mon. 452, 455.

Judgment affirmed.

WADSWORTH *v.* ADAMS.

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

No. 152. Argued and submitted January 20, 21, 1891. — Decided February 2, 1891.

A, the owner of five promissory notes for $100,000 each, being in want of money, empowered B, who knew of his necessities, to sell them at a discount which would net the sum of $380,000, agreeing to give him $10,000 in case of success. B took the notes to New York, and there offered them to C for $380,000. C declined to take them at that price, but offered $350,000 for them. B at first refused to communicate this offer to A; but, on being pressed to do so, said to C that as A was in need of money he would send the offer by telegraph, and he did so send it. At a later hour on the same day B asked C what he would do in case his offer should be refused, to which C replied that he would take the notes at $380,000. B did not communicate this to A. On the following day A received a telegram purporting to come from B: "Please answer my telegram of yesterday." As he received this telegram he was in conversation with D, who thereupon offered to take the notes and pay $380,000 for them. This offer was immediately accepted by A. A then wired to B, "Cannot accept offer." B replied: "Have made the negotiations on the terms you gave me." This transaction with C not being carried out, B sued A to recover the agreed compensation of $10,000, and recovered judgment therefor in the court below. *Held*, that B was not entitled to compensation under the contract on which he sued, and that the court, having been requested by the defendant to so instruct the jury, should have complied with the request.

It is a condition precedent to the right of an agent to the compensation agreed to be paid to him that he shall faithfully perform the services he undertook to render; and if he abuses the confidence reposed in him, and withholds from his principal facts which ought, in good faith, to be communicated to the latter he will lose his right to any compensation under the agreement; being no more entitled to it than a broker would be entitled to commissions who, having undertaken to sell a particular property for the best price that could be fairly obtained for it, becomes, without the knowledge of the principal, the agent for another, to get it for him at the lowest possible price.

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

By the judgment below the defendant in error recovered the sum of twelve thousand eight hundred dollars as damages for

the alleged breach of an agreement made, in March, 1883, at Birmingham, Alabama, between him and H. F. De Bardeleben, representing Frank L. Wadsworth, trustee, whereby the plaintiff was to receive ten thousand dollars if he negotiated the sale, at a discount of eight per cent per annum, of five promissory notes, of one hundred thousand dollars each, payable in one, two, three, four, and five years, executed to said trustee by the Pratt Coal and Coke Company, and secured by mortgage upon its property. The proceeds of the notes at that discount would have been three hundred and eighty thousand dollars.

The undisputed facts in the case are as follows: Adams went to the city of New York for the purpose of finding a purchaser of the notes. He there offered them to J. J. McComb at a discount of 8 per cent per annum. According to the plaintiff's testimony, McComb did not say whether he would take them or not, but put his clerk to making calculations in relation to them, and left his office to see if he could make arrangements to get the money in the event he bought the notes. On his return, McComb said he would give $350,000 for them, and requested plaintiff to telegraph that offer to De Bardeleben. Plaintiff told him that it was useless to send such a telegram, as De Bardeleben would not accept the offer. McComb insisting on his offer being sent, Adams telegraphed De Bardeleben from New York, under date of March 27, 1883: "I can sell the five notes with mortgage for three hundred and fifty thousand dollars cash, the right of trustee to sell and transfer being all right. Answer." It does not appear at what hour of the day this telegram was sent, but the plaintiff testified that just before he left McComb, at four o'clock in the afternoon of the 27th of March, 1883, he asked him what he should do if De Bardeleben refused the offer of $350,000. McComb replied that "if De Bardeleben refused the offer of $350,000, then he would take the notes at De Bardeleben's proposition — that is, at eight per cent per annum discount." Adams then went from New York to Philadelphia; and he testified that, after leaving McComb on the afternoon of the 27th of March, he did not see or have any communication with him in relation to the notes or their sale or purchase.

Under date of March 28, 1883, De Bardeleben telegraphed to Adams at Philadelphia, where the latter resided: "Cannot accept offer." Adams, immediately, on the same day, replied by telegram from Philadelphia; "Have made the negotiation on the terms you gave me. Bring on your papers with Smith's opinion on the matters I mentioned to you. Let me know here when I shall meet you in New York." On the same day there was sent from New York, in the name of Adams, this telegram to De Bardeleben: "Please answer my telegram of yesterday." In reference to the latter telegram, which was received by De Bardeleben on the day of its date, the plaintiff was asked on cross-examination whether he did not send it. The bill of exceptions states: "After some hesitation he said possibly he might have done so, but had no recollection of going back to New York on the 28th. He was then asked by defendant if he had not given McComb authority to send said dispatch in his name: to which he said, possibly I may have done so, but I have no recollection of it. Upon further cross-examination, he said he had not sent said dispatch, nor had he any recollection that he authorized McComb to send it in his name." He further testified, on cross-examination, that he told McComb that De Bardeleben, for whose wife and children Wadsworth was trustee, "wanted money very badly, and that he wanted it as soon as possible; that he told McComb this while talking to him about the sale of said notes." Why Adams felt obliged to inform McComb of his principal's urgent need for money does not appear from the evidence.

De Bardeleben replied, on the 29th of March, to Adams's Philadelphia telegram of the 28th in these words: "You are too late. Have disposed of the notes." Adams telegraphed to De Bardeleben, under date of the 30th: "You are too late. You gave me explicit authority to sell at certain price, you to pay my commission. I wired you an offer I had below price you had named. You answered you could not accept offer, but said nothing about withdrawal of my authority to sell. I then sold to J. J. McComb, of Dobbs' Ferry, New York, on terms authorized by you, and you should confirm that sale forthwith. Answer." Under date of March 31, De Bardele-

ben telegraphed to Adams: "Your effort to beat me down in price has lost you the notes; will write." To this Adams replied by telegram, under date of April 2: "Assumptions of your dispatch wholly unfounded; no effort to beat you down; reported you the offer had. Your refusing the first offer led me to dispose of the notes at your offer, which I did, and so reported to you." The plaintiff received from De Bardeleben, two or three days after it was written, the following letter, under date of March 31: "I telegraphed you this A.M.: 'Your effort to beat me down in price has lost you the notes; will write,' which I now confirm. When you left me on the hotel piazza you said that if Gov. Smith pronounced the papers all right you would take one-half and McComb the balance, you to telegraph me so soon as you got home. When I received your telegram offering me three hundred and fifty thousand dollars, I saw you were trying to make me take as little as you could, which was not in accordance with our understanding, so I at once took steps to sell to another party, which I have done. I am very sorry it has turned out so, as I expected to have you in my big coal company that I am now forming, you to do the financiering and I to get the property in shape, by which each would have made a quarter of a million dollars. I very much regret that it looks as though we will not be interested together."

It should be stated in this connection that when De Bardeleben received the telegram offering $350,000, and the telegram of March 28 from New York, requesting an answer to the New York telegram of the 27th, he was in conversation with Colonel Ensley, who offered $380,000 for the notes. The offer was immediately accepted. So that the notes were sold by De Bardeleben before he received the telegram from Adams that he had sold them on the terms originally named to him.

Touching the first interview between Adams and McComb on the 27th in New York, the latter, a witness for the former, said: "That he was acquainted with the parties to this suit; that he had known the plaintiff, Theodore Adams, for thirty-five years; that he made a contract with Adams in New York city on the 27th day of March, 1883, for the purchase, through

him, of five notes made by the Pratt Coal and Coke Company, payable to Frank L. Wadsworth, as trustee, in the sum of one hundred thousand dollars each; that by the terms of his said contract with Adams he (witness) was to take said notes at eight per cent per annum discount; that the proposition by Adams to sell witness said notes was made in his (witness's) office, No. 35 Broadway, New York city, on the 27th of March, 1883; that he did not accept the proposition immediately, but set his book-keeper to work on a careful calculation as to what the result would be to him (witness) on the said notes, if he purchased them on the terms offered, and on the supposition that he (witness) should borrow the money at six per cent to carry the transaction; that while this calculation was being made he discussed the matter with Adams, and suggested that he (Adams) should telegraph an offer of a lump sum of three hundred and fifty thousand dollars for the five notes of one hundred thousand dollars each, which Adams, after some hesitation, did; that afterwards, and before parting, witness told Adams that if this offer was declined he would take the notes on the terms offered, namely, eight per cent per annum discount, and that in either case he (witness) was the purchaser of the notes; that Adams told him he was authorized to make the sale; that all this transpired in his office, No. 35 Broadway, New York city, at one interview."

The court charged the jury, among other things, that "the plaintiff was a special agent, clothed with special power to sell the five notes at a price specified by De Bardeleben, and that if when the plaintiff, on March 27, 1883, first offered to sell said notes at said specified price to J. J. McComb, the said McComb did not express any acceptance of the offer, but told plaintiff to telegraph to said De Bardeleben a lump offer of three hundred and fifty thousand dollars, and also told plaintiff that if De Bardeleben declined that offer he (McComb) would take the notes at the price originally specified by De Bardeleben, amounting to three hundred and eighty thousand dollars; if afterwards, and in the same interview on said March 27, 1883, said McComb, in relation to said five notes, told plaintiff that if the said offer of three hundred and fifty

thousand dollars was declined, he (McComb) would take the notes on the terms first offered, viz., eight per cent discount, and that in either case he (McComb) was the purchaser of the notes, all this amounted to a conditional offer only to take the notes at the specified price first offered, and did not impose upon the plaintiff the duty or obligation to communicate to his principal the fact that McComb was ready and willing to buy the notes at the said price at which they were first offered, amounting to three hundred and eighty thousand dollars; and the failure of plaintiff to communicate that fact in any manner to his principal was not a breach of his duty nor bad faith in itself, as he was only a special agent to sell at a fixed, specified price, and not an agent to get the best price he could obtain." To this charge, and to each proposition contained in it, the defendant duly excepted. Among the requests by defendant for instructions was one to the effect that if the jury believed all the evidence, their verdict should be in his favor. The court refused to so instruct the jury, and to its ruling in that respect the defendant excepted.

Mr. John T. Morgan for plaintiff in error, submitted on his brief.

Mr. A. H. Wintersteen (*Mr. David D. Smith* and *Mr. Wayne McVeagh* were on the brief) for defendant in error.

The court below correctly charged that Adams was a special agent, as distinguished from a general agent. The agency was to sell the notes at eight per cent discount per annum. It was undisputed that De Bardeleben employed Adams to sell the notes, and it is very clear this act of employment was within the scope of his own agency, for it was a necessary means of rendering his agency effective. *Williams* v. *Getty*, 31 Penn. St. 461; *S. C.* 72 Am. Dec. 757.

The plaintiff in error is therefore wide of the mark in endeavoring at length to establish from the evidence that there was nothing to show that Adams was Wadsworth's special agent. All that is necessarily in the case in this connection is that Adams was a subagent lawfully employed by De Bar-

deleben. Wadsworth was then liable to carry out with Adams what De Bardeleben stipulated.

So, also, the jury were correctly instructed that, if the facts in evidence were believed there was no fraud or breach of duty on the part of Adams in failing to report the willingness of McComb to buy at the authorized price, if the lower price of $350,000 was declined.

The whole argument of the plaintiff in error in assailing this feature of the charge is postulated upon the theory that Adams was a general agent, with authority to get the best price possible, and that any communication to the vendor of a lower price than the best was a fraud.

So far is this theory without basis, that Adams was in fact, the price having been fixed by the vendor, practically merely a middleman to bring the parties together at that price, a commission accruing to him in the event of sale. The general rule is that an agent whose duty it is to bring the parties together may act for both parties without their knowledge or consent. *Rupp* v. *Sampson*, 16 Gray, 398; *S. C.* 77 Am. Dec. 416; *Collins* v. *Fowler*, 8 Mo. App. 588; *Orton* v. *Scofield*, 61 Wisconsin, 382. Adams's acquiescence in McComb's request to communicate his offer of $350,000 was therefore quite compatible with his duty to De Bardeleben.

But, supposing, for argument's sake, there had been a breach of duty on the part of Adams. He would not thereby forfeit his commissions, but would merely have been liable to pay such damages as resulted from his breach; and inasmuch as no damages resulted, he would be entitled to the full commissions agreed to be paid. In the following cases agents had authority to sell for a fixed price. They sold for sums in excess of the fixed price and retained the difference, together with the agent's commissions. It was held that the principal was bound to the agent only for the commission, and that the latter was entitled to the commission. *Kilbourn* v. *Sunderland*, 130 U. S. 505; *Blanchard* v. *Jones*, 101 Indiana, 542; *Kerfoot* v. *Hyman*, 52 Illinois, 512; *Merryman* v. *David*, 31 Illinois, 404.

When the agent defrauds his principal, the principal can

recover only the damages sustained. *McMillan* v. *Arthur*, 98 N. Y. 167.

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

We cannot give our assent to the proposition that Adams, being a special agent only, was not guilty of a breach of duty in withholding from his principal information of the fact that McComb was willing to take the notes at a discount of eight per cent per annum, that is, for $380,000, provided he could not get them for $350,000. That fact came to his knowledge before he and McComb separated on the 27th of March, and good faith, upon his part, required that he should at once, with the utmost dispatch, have communicated it to his principal, and not have permitted him — pressed for money, as Adams knew him to be and as he took care to inform McComb he was — to consider the offer of $350,000 in the belief that that was the highest price his agent could obtain for the notes. The agreement to pay the latter ten thousand dollars, if he negotiated a sale of them at a discount of eight per cent per annum, was in consideration of his endeavoring to dispose of them upon those terms. It was a condition precedent to his right to such compensation that the services he undertook to render should be faithfully performed. If his principal had accepted the offer of $350,000, he would have lost $30,000 by reason of the concealment or the withholding by his agent of the fact that the party making the offer intended to accede to the principal's terms, if he could not do better. In effect, Adams abandoned the position of agent for De Bardeleben to negotiate the notes for a specified sum, and, practically, coöperated with McComb in the latter's effort to get them at a sum less than De Bardeleben had authorized the agent to accept. He conducted himself as if he were more interested in McComb than in his principal. We have seen that when he learned, on the 28th, by telegram from his principal, that McComb's offer of $350,000 was rejected, he immediately, on the same day, telegraphed, from Philadelphia, to De Bardele-

ben that he *had* negotiated the notes on the terms originally given him — that is, for $380,000. As he testifies that he did not, after parting from McComb in New York, in the afternoon of the 27th, see or have any communication with the latter in relation to the notes or their sale or purchase, it could not be true that he had, himself, on the 28th, or before being notified of the sale by De Bardeleben, negotiated a sale for $380,000, unless, as stated by McComb, it was understood between him and Adams, before they separated on the 27th, that McComb was to take the notes at $380,000 if his offer of $350,000 was not accepted by De Bardeleben. So that, for every substantial purpose, involving the interests of the principal, the agent did precisely what he would have done if he had expressly, and for compensation, stipulated with McComb that, pending the latter's efforts, through the agent, to induce the principal to part with the notes for $350,000, he would conceal from his principal the fact that, by remaining firm, he could get $380,000 from McComb.

We cannot agree that such conduct upon the part of Adams was consistent with the duty he owed to his principal in virtue of his agency for the sale of the notes. He abused the confidence reposed in him, and thereby lost the right to claim the stipulated compensation of ten thousand dollars or any other sum. *Sea* v. *Carpenter*, 16 Ohio, 412, 418; Story on Agency, § 331. He cannot complain of the sale to Ensley, for the reason, if there were no other, that his telegram of the 27th gave no intimation of his purpose to make further effort to negotiate the notes upon the terms originally given him. On the contrary, in view of all the circumstances, De Bardeleben might not unreasonably have supposed, from that telegram, that the offer of $350,000 was the highest that Adams could obtain, and that nothing better was to be expected from his efforts. Be that as it may, we are of opinion that Adams was not entitled to any compensation under the contract upon which he sues, and that the court should have so instructed the jury in accordance with the defendant's request. He is no more entitled to compensation than a broker will be entitled to commissions who, having undertaken to sell particular prop-

erty for the best price that could be fairly obtained for it, becomes, without the knowledge of his principal, the agent of another to get it for him at the lowest possible price. The assumption of the latter position would be a fraud upon the vendor who is entitled, in such cases, to the benefit of the diligence, zeal and disinterested exertions of the agent in the execution of his employment. The law requires the strictest good faith upon the part of one occupying a relation of confidence to another. *Kilbourn* v. *Sunderland*, 130 U. S. 505, 519; Story on Agency, §§ 31, 211; *Farnsworth* v. *Hemmer*, 1 Allen, 494; *Rice* v. *Wood*, 113 Mass. 133; *Scribner* v. *Collar*, 40 Michigan, 375, 378; *Raisin* v. *Clark*, 41 Maryland, 158; *Lynch* v. *Fallon*, 11 R. I. 311.

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

BROWN v. TROUSDALE.

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

No. 158. Argued January 22, 23, 1891. — Decided February 2, 1891.

A large number of taxpayers in Muhlenburgh County, Kentucky, filed their bill against the officers of the county, and against two holders of bonds of the county, one holding "original" bonds issued to pay a county subscription to stock in a railway company, the other holding "compromise" bonds issued in lieu of some of the "original" bonds. The relief sought was to restrain the sheriff from levying a tax already ordered, and to restrain the county judge from making future levies, and to have both classes of bonds declared invalid, and the holders enjoined from collecting principal or interest, and that notice might be given to unknown bondholders, and for general relief. A large number of the bonds of each class were held by citizens of Kentucky. The two bondholders, defendants, (who were taxpayers in the county,) declined to make defence. Bondholders, citizens of Tennessee, then voluntarily appeared and asked to be made parties, and, their prayer being granted, petitioned in August, 1885, for the removal of the cause to the Circuit Court of the United States on the ground that there was a controversy that was wholly between citizens of different States, and which could be fully

Statement of the Case.

determined as between them, that the defendants, the ministerial officers of the county, had no interest in the controversy, that the two bondholders were acting in concert with the plaintiffs, and that the petitioners were the only parties that had a real interest in the controversy adverse to the plaintiffs. The cause was removed to the Circuit Court, and, a motion to remand having been denied, the bill was dismissed. *Held*,

(1) That the amount involved was sufficient to give jurisdiction;

(2) That the motion to remand should have been granted;

(3) That the removal could not be sustained under the first clause of the act of March 3, 1875, 18 Stat. 470, then in force, because the controversy was not between citizens of different States, as the parties could not be so arranged on the opposite sides of the matter in dispute as to bring about that result; nor, under the second clause of the section, because there did not exist a separable controversy wholly between citizens of different States, and which could be fully determined between them.

Upon the 27th of July, 1885, several hundred taxpayers of the county of Muhlenburgh, Kentucky, filed their bill of complaint in the Circuit Court of that county for themselves and others associated with them, numbering about twelve hundred, as well as "for and on behalf of all other taxpayers in the said county of Muhlenburgh, and for the benefit likewise of said county," against Tinsley, the sheriff, and Morton, the county judge, of the county; and Kittinger, Young, Weir, Whitaker, Newman and Mills, members of a funding board, and "any other member of the funding board; and Robert Glenn, holder of original bonds; George D. Park, holder of compromise bonds, and all holders of bonds issued to the Elizabethtown and Paducah Railroad Company;" alleging upon various grounds the invalidity of an issue of bonds in 1869, under an act of February 24, 1868, to the amount of $400,000, in payment of an alleged subscription of that amount on behalf of the county to the capital stock of the railroad company, and also of certain new bonds issued in 1878 in compromise of the former bonds, under an act of March 18, 1878, creating a board for the purpose of funding the prior indebtedness. The bill averred the levy of a tax to pay interest on bonds by the county judge, and that the sheriff was about to proceed in the collection thereof, and made the sheriff and county judge parties defendant; and prayed an injunction against the sheriff from attempting to

collect the particular tax, and against the county judge from making any order or further levy in the premises, and for a decree that the original bonds be declared invalid and all holders thereof be perpetually enjoined from collecting the principal of the bonds and the interest thereon, and that a like decree be made as to the bonds issued under the funding act.

The plaintiffs made the members of the funding board and two bondholders residing in the county of Muhlenburgh, one holding an original bond or bonds, and one holding a bond or bonds under the funding act, defendants; and alleged that they did not know the other holders of the bonds and therefore could not give their names, and asked for notice to be given to the unknown bondholders under both acts, and for general relief.

The bill was sworn to on the 22d of July, 1885, and an order granting the injunction as prayed was made by the judge of the Muhlenburgh Circuit Court on the 23d, and entered of record, upon the filing of the bill. A summons and injunction issued and were served accordingly. Notice was given by counsel for defendants, dated August 5, and served August 8 and 10, that on the 12th of August the defendants would move for an order dissolving the injunction, and a motion to that effect was filed, as also a general demurrer to the petition. On that day an order was entered, setting down the motion to dissolve and the demurrer, for hearing, on the 14th of August, "by consent of counsel on both sides." On the 21st of August, the application and affidavit of James Alexander was presented, stating that "he is one of the defendants hereto, described generally as a holder of bonds issued to the Elizabethtown and Paducah Railroad Company;" and "that he holds and owns, and so held and owned at the time of the commencement of this action, nine bonds of the face value and denomination of one hundred dollars each and one bond of five hundred dollars" to which bonds interest coupons since March 1, 1884, were attached, and he asked "to enter his appearance and make defence to this action." Whereupon an order was entered in these words: "This day came James Alexander and presented his petition to be made a

party defendant to this action and to be allowed to make defence to the same; which petition is ordered to be filed, and said James Alexander is made a party defendant to this action."

Simultaneously, Charles W. Trousdale made a similar application, as the holder of $7000 of the compromise bonds of the county of Muhlenburgh, and a like order was entered thereon. On the same day Trousdale and Alexander presented their petition for a removal of the cause to the United States Circuit Court for the District of Kentucky, stating: "That the matter and amount in dispute in the above-entitled suit and action exceeds, exclusive of costs, the sum or value of five hundred dollars, $500.00; that the controversy in this suit is between different citizens of different States; that your petitioners were at the commencement of this action and still are citizens of the State of Tennessee, and the plaintiffs, each and all of them, were then and still are citizens of the State of Kentucky. Your petitioners further state that in this suit and action above mentioned, there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, that is to say, a controversy between these petitioners on the one side and the said plaintiffs on the other; that the defendants Alexander Tinsley, J. H. Morton, Martin Kittinger, Wm. Young, Samuel Weir, A. E. Newman and J. E. Mills, and each and every one of them, are ministerial officers of the said county of Muhlenburgh, and have no pecuniary interest in this controversy; that the defendants Robert Glenn and George D. Park refuse to make defence to the petition, and are acting in concert with the plaintiffs therein, and petitioners are the only parties that have any real interest in the controversy adverse to plaintiffs;" and tendering bond and praying for the transfer of the suit. They also made a formal motion for the order of removal.

On the 22d of August, the affidavit of Glenn and Park was filed, averring that "they were made parties defendant in said cause without their knowledge or consent; that no collusion existed between affiants and the plaintiffs in said cause before the filing of their petition and no collusion exists now, and the affiants are holders and owners of the bonds of said

county in good faith, and that the statement alleging affiants' collusion, in the petition for a removal of this cause to the United States Circuit Court, with the plaintiffs, is not true;" that their action was "based on their own judgment as to the justice of the same, and believing that the justice is with the plaintiffs they do not choose to resist the plaintiffs' claim;" and they also severally answered, saying that they had no defence to make and asking that the motion to dissolve the injunction and the demurrer be withdrawn, so far as they might be parties thereto.

Upon the same day the affidavit of C. L. Morehead was filed, stating that he was the agent of the funding board, and from information he had obtained from his coagent, he believed "that a majority of the new bonds of said county are owned and held by citizens of the State of Kentucky;" and also the affidavit of Louis Jones, "that he has opportunity for knowing the professed owners of the bonds of Muhlenburgh County, Ky., issued to the Elizabethtown and Paducah R. R. Co." This opportunity resulted from the fact that he was a member of the General Assembly of Kentucky from which the bondholders aforesaid sought legislation on their behalf, and also from the fact that he was a justice of the peace of said Muhlenburgh County, and was proceeded against on behalf of said bondholders for the purpose of compelling a levy to satisfy interest on the said bonds. He states, from all the facts, expressions and disclosures in their affairs, he is satisfied that at that time about three-fourths of the said bonds were held and owned by residents of the State of Kentucky, and it is his conviction now that the owners of the said bonds are, at least to the extent of two-thirds, residents of Kentucky.

The Muhlenburgh Circuit Court entered an order removing the case to the United States Circuit Court, where a motion was subsequently made to remand and overruled, to which ruling and judgment plaintiffs by their counsel excepted. The injunction was thereupon dissolved by the Circuit Court "upon the face of the petition and exhibits filed therein." Trousdale and Alexander then filed their answers, and issues being joined, the cause came on upon the pleadings and an

agreed statement of facts and proofs, and a decree was entered dismissing the bill, and the case thereupon brought to this court.

Mr. T. W. Brown for appellants.

Mr. D. M. Rodman for appellees.

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

The main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay interest thereon and finally the principal thereof, and not the mere restraining of the tax for a single year. The grievance complained of was common to all the plaintiffs and to all whom they professed to represent. The relief sought could not be legally injurious to any of the taxpayers of the county, as such, and the interest of those who did not join in or authorize the suit was identical with the interest of the plaintiffs. The rule applicable to plaintiffs, each claiming under a separate and distinct right, in respect to a separate and distinct liability and that contested by the adverse party, is not applicable here. For although as to the tax for the particular year, the injunction sought might restrain only the amount levied against each, that order was but preliminary, and was not the main purpose of the bill, but only incidental. The amount in dispute, in view of the main controversy, far exceeded the limit upon our jurisdiction, and disposes of the objection of appellees in that regard.

As the plaintiffs sought to restrain the collection of taxes already levied, and any further levies by the county judge, and also a decree adjudging the invalidity of the bonds, the sheriff, who was about to enforce the collection, and the county judge, were necessary parties to the bill as framed, as were the bondholders, whose interests were directly affected. There is nothing to show that the latter were so numerous as to render it impossible to bring them all before the court, and we need not discuss the proper course to be pursued in such a contin-

gency. The plaintiffs made two of the bondholders residing in Kentucky, representing, the one the original, and the other the new, bonds, parties defendant, and averred that they did not know the names of the other holders of the bonds and asked for notice to be given to the unknown bondholders. Before that notice had been directed by the court, or the names of the other bondholders had been ascertained and steps taken to bring them in, the two non-resident bondholders voluntarily became parties to the proceedings, and thereupon the case was removed upon their application. And while the two Kentucky bondholders, on the day of the order of removal, withdrew the motion to dissolve and the demurrer, so far as they were parties thereto, and declared that they had no defence to make to the bill, because, as alleged in their affidavits, they believed that the justice of the cause was with the plaintiffs, and they, therefore, did not choose to resist in the premises, denying at the same time all collusion, yet this is not a controlling circumstance, in view of the frame of the bill.

Such being the attitude of the case, we are of opinion that the motion to remand should have been granted. The removal was had under the act of March 3, 1875, (18 Stat. 470,) but cannot be sustained under the first clause of the second section of that act, as the controversy was not between citizens of different States, unless the parties could be so arranged on the opposite sides of the matter in dispute as to bring about that result; nor, under the second clause of the section, unless there existed a separable controversy wholly between citizens of different States, and which could be fully determined between them.

In *Harter* v. *Kernochan*, 103 U. S. 562, 566, this court said: "Disregarding, as we may do, the particular position, whether as complainants or defendants, assigned to the parties by the draughtsman of the bill, it is apparent that the sole matter in dispute is the liability of the township upon the bonds [described in the bill]; that upon one side of that dispute are all of the State, county and township officers and taxpayers, who are made parties, while upon the other is Kernochan, the owner of the bonds whose validity is questioned by this suit. He,

alone, of all the parties, is, in a legal sense, interested in the enforcement of liability upon the township. It is, therefore, a suit in which there is a single controversy, embracing the whole suit, between citizens of different States, one side of which is represented alone by Kernochan, a citizen of Massachusetts, and the other by citizens of Illinois." There the bonds were all owned and held by Kernochan, while here they are in large part held and owned by citizens of Kentucky. If this case admitted, then, of so arranging the parties as to put the county officers and taxpayers on one side of the controversy and the bondholders on the other, still the cause would not be susceptible of removal, under the first clause.

Was there, then, a separable controversy wholly between citizens of different States, and that a controversy which could be wholly determined between them? "The case," said Mr. Chief Justice Waite, in *Fraser* v. *Jennison*, 106 U. S. 191, 194, "must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more States on one side and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun." Testing the right of removal by the case as made by the present bill, and as it stood at the time of removal, it was a case against all the bondholders, in respect to whom it was not denied that a large number were citizens of Kentucky, upon a cause of action not susceptible of division.

The plaintiffs were not prosecuting an action against individual bondholders for the cancellation of individual bonds. They were attacking the validity of the entire subscription and seeking a decree which would invalidate the entire issue. The petitioners were out of the jurisdiction, and if they had remained so would not have been concluded. The federal courts were open to them for the pursuit of the remedies which the law afforded. When they voluntarily submitted themselves to the jurisdiction of the state court, they became so associated with the resident bondholders as to render it impossible for them to contend that the controversy which involved all was separable as to them, and that they were

thereby enabled to transfer the particular suit, as it affected all the defendants, to the Circuit Court.

The decree is reversed, and the cause remanded, with directions to remand it to the state court.

BEAUPRE *v.* NOYES.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 160. Argued and submitted January 23, 1891. — Decided February 2, 1891.

Although a case from the highest court of a State may involve a Federal question, yet, if that court proceeds upon another and distinct ground, not involving a Federal question, and sufficient in itself to maintain the final judgment, without reference to the Federal question involved, its judgment will be affirmed here.

This court is without authority to review an order denying a motion for a new trial.

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

This action was brought in the District Court of Ramsey County, Minnesota, by the defendants in error, partners as Noyes Bros. & Cutler, against the plaintiffs in error, partners as Beaupré, Keogh & Co., each firm doing business in the city of St. Paul.

The complaint alleges that Charles Young, engaged in general mercantile business at Forsyth, in Custer County, Montana, being insolvent, and indebted to many persons, — among others, to the plaintiffs in the sum of $425.71, and to the defendants in the sum of $1080.43, — executed, on the 27th of April, 1883, a deed of assignment for the benefit of his creditors, whereby, and for the purpose of making equal provision for all of them, he transferred to C. A. Winchester his property, real and personal, in trust for his creditors; that Winchester accepted the trust, qualified as assignee, took actual possession of the property assigned, proceeded in due form to execute the trust, and has ever since been such assignee;

that the deed was duly recorded May 1, 1883, in the proper office; that the property so transferred was worth $6000, and consisted, among other things, of a stock of general merchandise, books, book accounts, etc.; that of said assignment the plaintiffs were notified by Winchester as soon as he had taken possession of the property under the deed of assignment, and defendants assented thereto; that afterwards, on and between May 1, 1883 and January 2, 1884, Winchester, as such assignee, and not otherwise, with the consent of all the creditors, especially of the defendants, carried on business at Forsyth, purchasing large amounts of goods and merchandise as such assignee, and placing the same in the store building, previously occupied by Young at Forsyth, with the goods transferred by said deed of assignment; that Winchester continued until January 2, 1884, to sell both the original stock and the new goods so purchased, and applied the proceeds thereof, not required to meet the expenses of the assignment, to the payment as fast as possible of Young's creditors and of the debts incurred by the assignee; that the new goods were obtained solely to enable the assignee to dispose of all the property to the best advantage and were paid for out of the proceeds of the trust property as well as from the proceeds of the new goods purchased; that the defendants were paid as well on account of their claims against Young as for the goods purchased from them by the assignee, out of the proceeds of both the old and new stock; and that the defendants knew of all these matters and consented thereto.

It also alleges that, on the 2d of January, 1884, the defendants caused two actions to be commenced in the District Court for Custer County, Territory of Montana, one against Young and the other against Young and Winchester, the first to recover $683.71, (the balance claimed to be due them from Young on his original indebtedness to them,) and the second to recover $931.44, as the balance due them from Young and Winchester for merchandise sold and delivered by the defendants between the date of the assignment and the commencement of those actions; that they caused attachments to be issued in such actions against the property of Young, and of

Young and Winchester, respectively, under which, by the direction of the defendants herein, the stock of merchandise, in the possession of Winchester as aforesaid, was seized and taken possession of by the officer serving the attachments; that said property was of the value of $6000; that afterwards, January 15, 1884, Winchester, as such assignee, sold and conveyed to the plaintiffs herein the property so attached, which writing was duly recorded on the day of its date; and that the plaintiffs by such sale and conveyance became the owners of said property.

The complaint further alleged that the plaintiffs purchased the property for the sole purpose of preserving it from sacrifice by sale under the attachments, and that it might be applied to the purposes and objects of the trust, and for the benefit, share and share alike, of all the creditors of Young and of Winchester, as assignee; that the officer having the attachments refused, upon the demand of the plaintiffs, and under the order of the defendants, to deliver the attached property to them; that a like demand was made upon the defendants, but they refused to surrender it, and have wrongfully converted all of it to their own use and benefit, to the damage of plaintiffs in the sum of $6000; and that the total value of the merchandise sold by the defendants to Winchester, as assignee, was $2675, on which he had paid $1743.36.

The prayer of the plaintiff is for a judgment for $6000, the value of the property, with interest, and $1500 damages.

The answer alleges that while the defendants supposed from the representations made to them by Young and Winchester that an assignment had been made by Young to Winchester, in good faith, for the benefit of their creditors without preference, and while they had sold goods to Winchester in the belief that he ordered and procured them merely to facilitate his disposal of the goods acquired by him under the alleged assignment, they, subsequently, ascertained that no valid assignment had been made; that the goods, so pretended to be assigned, remained in the actual possession of Young, and never were delivered to Winchester; that the alleged assignment was a mere device to hinder Young's creditors from collecting their

debts by legal process; and that the whole arrangement was a trick, upon the part of Young, to continue in the control of the goods, through Winchester, who was only his clerk, and to so manage his business that he could pay out of the proceeds of the trust property and out of the new goods procured by him in the name of Winchester such creditors as he chose to pay, and to delay and defraud others, including the defendants.

The answer avers that the alleged deed of assignment was fraudulent and void under the statutes of the Territory of Montana, in force in 1883, when the deed was made. Those statutes provided: "§ 165. All deeds of gift, all conveyances and transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person." "§ 169. Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by the immediate delivery, and be followed by an actual and continued change of possession of the things sold and assigned, shall be conclusive evidence of fraud as against the creditors of the vendor or the person making such assignment or subsequent purchasers in good faith. § 170. The term creditors, as used in the last 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." "§ 172. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands or in goods in action, or of the rents or profits thereof, made with intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and any bond or other evidences of debt given, suits commenced, decrees or judgment suffered, with the like intent as against the person hindered, delayed or defrauded, shall be void." Laws of Montana, 1879, pp. 436–7. [These provisions are printed in the Compiled Laws of Montana, ed. 1887, on pages 652 and 653, as sections 222, 226, 227 and 229 of the Fifth Division.]

The answer averred that under these circumstances and in conformity with these statutory provisions, the above actions were brought in Montana by the present defendants. In those actions Young and Winchester appeared and such proceedings were had therein that judgment was rendered against Young in the action against him for $1024.93 and against Winchester in the other action for $1995.35. The attached property was sold under executions on those judgments for $676.90, which is alleged to have been its full value.

There was a verdict in the present action in favor of the plaintiffs. The case has been twice before the Supreme Court of Minnesota, first upon appeal from the order overruling a demurrer to the complaint, *Noyes* v. *Beaupré*, 32 Minnesota, 496, where the complaint was adjudged to be sufficient in law, and then upon appeal from the final judgment, *Noyes* v. *Beaupré*, 36 Minnesota, 49.

Mr. I. V. D. Heard for plaintiffs in error, submitted on his brief.

Mr. C. K. Davis for defendants in error.

Mr. Justice Harlan delivered the opinion of the court.

The contention of the plaintiffs in error is, that by the statutes of the Territory of Montana, above quoted, the alleged assignment by Young to Winchester was conclusively fraudulent as to them, for the want of the immediate delivery, followed by an actual and continued change of possession, of the goods assigned; that their right to so treat the assignment, although such right was specially set up and claimed, was denied; and that, consequently, they were denied a right arising under an authority exercised under the United States. Whether the state court so interpreted the Territorial statute as to deny such right to the plaintiffs in error, we need not inquire, for it proceeded, in part, upon another and distinct ground, not involving any federal question, and sufficient, in itself, to maintain the judgment, without reference to that question. That ground is, that there was evidence tending to

show that the defendants acquiesced in and assented to all that was done, and waived any irregularity in the mode in which the assignee conducted the business; and that the question whether the defendants so acquiesced and assented with knowledge of all the facts and thereby waived their right to treat the assignment as fraudulent, was properly submitted to the jury. The state court evidently intended to hold that, even if the assignment was originally fraudulent, as against the creditors, by reason of Young remaining in the store as clerk for Winchester, and assisting the latter in carrying on the business, it was competent for the plaintiffs in error to waive the fraud and treat the assignment as valid for all the purposes specified in it. That view does not involve a federal question. Whether sound or not, we do not inquire. It is broad enough, in itself, to support the final judgment, without reference to the federal question, and for that reason the judgment must be

Affirmed.

BEAUPRÉ *v.* NOYES. Error to the Supreme Court of the State of Minnesota. No. 159 argued and submitted with No. 160, January 23, 1891. MR. JUSTICE HARLAN delivered the opinion of the court. This case is the same case, in respect to the issues and facts as the above case. It is a writ of error to review the judgment of the Supreme Court of the State affirming the order of the court of original jurisdiction refusing a new trial in the above action. This writ was sued out upon the theory that the denial of a new trial might be regarded as a final judgment of the state court within the meaning of the act of Congress. But, clearly, this court has no jurisdiction to review such an order. The writ of error in case 159 must, therefore, be

Dismissed.

Mr. I. V. D. Heard for plaintiffs in error.

Mr. C. K. Davis for defendants in error.

CHENEY *v.* HUGHES.

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

No. 741. Submitted January 5, 1891. — Decided January 12, 1891.

The court refuses to permit a plaintiff in error, at whose motion the cause has been dismissed at his cost, to withdraw the transcript of the record from the files of this court.

THE following motion signed by the counsel was made and submitted in this case on behalf of the plaintiff in error.

"Now comes Prentiss D. Cheney the plaintiff in error and moves the court for leave to withdraw the transcript of the record of the court below heretofore filed herein.

"A motion to dismiss at the cost of the plaintiff in error being also filed herewith."

Mr. William A. McKenney for the motion. No appearance on the other side.

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

The writ of error in this case was dismissed by plaintiff in error on the 5th of January, and at the same time a motion was made on his behalf for leave to withdraw the transcript of record heretofore filed herein. The transcript has become a part of the records of this court, which we cannot permit to be mutilated or destroyed. Its contents are accessible here, and the original record remains in the Circuit Court. If information is desired, either source may be resorted to.

The motion is denied.

In re COOPER, Petitioner.

ORIGINAL.

No number. Argued January 27, 28, 1891. — Decided February 2, 1891.

This court has jurisdiction to proceed, in respect to the District Court of the United States for the District of Alaska, by way of prohibition, under Rev. Stat. § 688; and therefore gives leave to file the petition for such a writ, and the accompanying suggestion in this case.

On the 12th day of January, 1891, *Mr. Joseph H. Choate* presented to the court a petition for a writ of prohibition to be directed to the judge of the District Court of the United States in and for the Territory of Alaska, and moved for leave to file the same. This petition was as follows:

"*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

"Comes now, Thomas Henry Cooper, a British subject, and gives this honorable court to understand and be informed —

"*That whereas*, by the law of nations, the municipal laws of a country have no extra-territorial force and cannot operate on foreign vessels on the high seas, and it is legally impossible, under the public law, for a foreign vessel to commit a breach of municipal law beyond the limits of the territorial jurisdiction of the law-making State;

"*And whereas*, the seizure of a foreign vessel beyond the limits of the municipal territorial jurisdiction for breach of municipal regulations is not warranted by the law of nations, and such seizure cannot give jurisdiction to the courts of the offended country, least of all where the alleged act was committed by the foreign vessel at the place of seizure beyond the municipal territorial jurisdiction;

"*And whereas*, by the law of nations, a British vessel sailing on the high seas is not subject to any municipal law except that of Great Britain; and by the said law of nations a British ship so sailing on the high seas ought not to be arrested,

seized, attached or detained under color of any law of the United States;

"*And whereas*, by the laws of the United States as well as by the law of nations, the District Courts of the United States have not, and ought not to entertain jurisdiction, or hold plea of an alleged breach upon the high seas of the municipal laws of the United States by the captain and crew of a British vessel, and can acquire no jurisdiction by a seizure of such vessel on the high seas, though she be afterwards brought by force within the territorial limits of the jurisdiction of said courts;

"*And whereas*, on the ninth day of July, 1887, there was between the governments and peoples of Great Britain and the United States profound peace and friendship, which relations of peace and friendship had happily subsisted for nearly three-quarters of a century before said ninth day of July, 1887, and still endure to the great comfort and happiness of two kindred peoples;

"*And whereas*, on the said ninth day of July, 1887, the schooner W. P. Sayward, a British vessel, duly registered and documented as such, and having her home port at Victoria in the Province of British Columbia, Dominion of Canada, and commanded by one George R. Ferry, a British subject, as captain and master thereof, was lawfully and peaceably sailing on the high seas, to wit: in latitude 54° 43′ north, longitude 167° 51′ west, fifty-nine miles from any land whatsoever, and then being fifty-nine miles northwest from Cape Cheerful, Oonalaska Island, upon waters between Oonalaska and Prybyloff Islands in Behring's Sea, as more fully appears by the chart in the record of the proceedings of the District Court of the United States in and for the Territory of Alaska hereinafter referred to;

"*And whereas*, said schooner was at said time and place unlawfully and forcibly seized and arrested by an armed vessel of the United States Revenue Marine, to wit, the United States Revenue Cutter Rush, cruising under instructions of the Secretary of the Treasury of the United States for the sole purpose of enforcing the municipal law of the United States,

and the said British schooner was thereupon unlawfully, wrongfully and forcibly detained and seized, and was by force taken by the said Rush to the port of Sitka, in the territory of Alaska, United States of America, and within the territory of Alaska and the waters thereof and within the dominion of the United States in Behring's Sea;

"*And whereas*, the said British schooner being as aforesaid so unlawfully, wrongfully and forcibly seized on the high seas and without the limits of Alaska Territory or the waters thereof, and being so unlawfully, wrongfully and forcibly brought within the limits of Alaska Territory and the waters thereof; nevertheless a certain M. D. Ball, an attorney of the United States for the District of Alaska, not ignorant of the premises, but unmindful of the danger of disturbing the peace and harmony subsisting between the United States and Great Britain, did, by process out of the District Court of the United States in and for the District of Alaska, attach and arrest the said schooner W. P. Sayward, so as aforesaid wrongfully seized while lawfully sailing on the high seas under the protection of the law of nations, and so as aforesaid wrongfully and forcibly brought within the said port of Sitka in the territory of Alaska, and before the judge of the said District Court, contrary to the said laws of nations and the laws of the United States, did unjustly draw in plea to answer a certain libel by him, the said M. D. Ball, against the said schooner, her tackle, apparel, boats, cargo and furniture exhibited and promoted, craftily and subtilely therein alleging and articulating that the said schooner W. P. Sayward, her tackle, apparel, boats, cargo and furniture were seized *on the ninth day of July*, 1887, within the limits of Alaska Territory, and in the waters thereof, and within the civil and judicial District of Alaska, to wit, within the waters of that portion of Behring's Sea belonging to the United States and said District, and that all said property was *then and there* seized as forfeited to the United States for the following causes: That the said vessel and her captain, officers and crew were *then and there* found engaged in killing fur seal within the limits of Alaska Territory and in the said waters thereof in violation of section nineteen hundred and fifty-six

of the Revised Statutes of the United States, and that on said ninth day of July, 1887, George R. Ferry and certain other persons whose names were to the said attorney unknown, who were *then and there* engaged on board said schooner W. P. Sayward, as seamen and seal hunters, did, under the direction and by the authority of George R. Ferry, *then and there* master of said schooner, engage in killing, and did kill in the Territory and District of Alaska and in the waters thereof, thirty fur seals in violation of section 1956 of the Revised Statutes of the United States in such cases made and provided. *Without this*, however, and the said M. D. Ball not in any way alleging, or articulating, that the said seizure was made, or the said killing of seal was done within any river or bay of the United States, or within a marine league of the coast of any portion of the mainland, or any island belonging to the United States, or that the said vessel and her master and crew were subject to the laws of the United States sailing upon the high seas, or that any portion of the high seas beyond a marine league from the coasts of the mainland or adjacent islands was within the jurisdiction of the United States;

"*And whereas*, a demurrer by claimant filed on the fifteenth day of September, 1887, alleging the insufficiency of the libel, was overruled by the court on the said fifteenth day of September, 1887, and thereafter the claimant filed his answer specifically denying the allegations of the libel that the seizure aforesaid was made within the waters of Alaska Territory, or within the civil and judicial District of Alaska, or in any portion of Behring's Sea belonging to the United States, and specifically denying the allegations of the libel that the said vessel, her captain, officers and crew were *then and there* found engaged in killing fur seal within the limits of Alaska Territory, or in the waters thereof, or that any of them did kill any fur seal therein;

"*And whereas*, at the trial of said cause, the libellant, through its witnesses, by it called in that behalf, to wit, the captain and officers of the Rush, did make plain and clear to the court what was not clearly disclosed in the libel, that is to say, the place of the alleged offence, and the place of said

seizure; and did support the averments of the claimant's answer and by its evidence so offered in its behalf and not gainsaid in any way, did show that the place of the alleged killing of seal was without the limits of Alaska Territory or the waters thereof, and that the said seizure was not made, nor said killing of seal done, within the waters of Alaska Territory, or within the civil and judicial District of Alaska, or in any portion of Behring's Sea belonging to the United States, but that the place of the alleged offence, and the place of said seizure, was upon the high seas, to wit: in latitude 54° 43′ north, and longitude 167° 51′ west, fifty-nine miles distant from any land whatsoever, and fifty-nine miles northwest from Cape Cheerful, Oonalaska Island, upon waters between Oonalaska and Prybyloff Islands in Behring's Sea, which said testimony for libellant, as to place of seizure and place of alleged offence, was supported by that of the claimant. So that the judge of the District Court of the United States for the District of Alaska was fully informed that the seizure had been made and the alleged killing of seal done on the high seas without the limits of Alaska Territory or the waters thereof, and that said vessel was brought by force within the jurisdiction of said court, and that therefore, under the laws of nations and under the laws of the United States, he had, and could have, no jurisdiction of the alleged offence or of the vessel so as aforesaid unlawfully, wrongfully and tortiously seized without the jurisdiction of the United States and of the court, and so wrongfully and by force brought within the jurisdiction of the United States and of the court, yet nevertheless, being so fully advised, said judge of the District Court of Alaska aforesaid, did, on the nineteenth day of September, 1887, in contempt of the authority of the United States, in violation of the laws of the United States and of the law of nations, and to the great danger of the friendly relations happily subsisting between Great Britain and the United States, assert and attempt to exercise jurisdiction over the said vessel, the same being the vessel of a friendly nation at peace with the United States, knowing the same to have been unlawfully seized on the high seas without the jurisdiction of

the United States, and knowing the place of the alleged offence against a statute of the United States to be alleged and proved to be the same place as the place of seizure, that is to say, the high seas without the limits of the territory of Alaska or the waters thereof, and without the jurisdiction of the United States; all this the said district judge well knowing, he did find as fact the killing of fur seal on the ninth day of July, 1887, by the captain and crew of the aforesaid British vessel, the W. P. Sayward, at the said place of seizure as aforesaid, and did find as conclusion of law that such killing at such place on the high seas, to wit, at the said place of seizure in latitude 54° 43′ north and longitude 167° 51′ west, and fifty-nine miles from any land whatsoever and fifty-nine miles northwest from Cape Cheerful, Oonalaska Island, was in violation of section 1956 of the Revised Statutes of the United States, and by reason thereof the libellant was entitled to a decree of forfeiture of the said British vessel, her tackle, apparel, boats, cargo and furniture;

"*And whereas*, after said assertion of jurisdiction to condemn and forfeit said vessel, and before decree or sentence, the claimant did move the court to arrest the decree of forfeiture, and among other grounds did distinctly set up that the court had no jurisdiction over the subject matter of the cause, as shown by libellant's own testimony as to place of offence and seizure;

"Yet the said court did, nevertheless in contempt of the authority of the United States and in violation of the laws of the United States and in violation of the law of nations, and to the manifest danger of the peaceful relations of the two countries, assert and attempt to exercise jurisdiction in the premises; and on the nineteenth day of September, 1887, did make and enter a pretended decree of forfeiture to the United States of said vessel, her tackle, apparel, boats, cargo and furniture, and direct that unless an appeal be taken the usual writ of *venditioni exponas* be issued to the marshal commanding him to sell all said property and bring the proceeds into court to be distributed according to law, costs to be taxed and awarded against the claimants.

"*And whereas*, said Thomas Henry Cooper, being admitted as the actual owner of the said schooner W. P. Sayward, by order of the District Court to interpose as claimant did, in order to prevent the execution of said decree, take an appeal to this honorable court on the 26th day of April, 1888, and docketed the same on the 30th day of October, 1888, under No. 1037;

"*And whereas*, all matters of fact hereinbefore recited and alleged, save and except those of which this honorable court takes judicial notice, appear by the record and proceedings of the District Court of the United States in and for the Territory of Alaska;

"*And whereas*, the said appeal has been dismissed by this honorable court on the application of the claimant, appellant, himself, not only because he is advised that there is no appeal given to this court from the District of Alaska by the laws of the United States, but because he is advised that, the District Court being wholly without jurisdiction, its decree was and is a nullity, and this honorable court is fully authorized by section 688 of the Revised Statutes of the United States to prohibit any proceedings in the District Court for the enforcement of the same;

"*And whereas*, the said Thomas Henry Cooper is advised that in consequence of the dismissal of his appeal, according to the practice of this honorable court, its mandate will issue in due course without further consideration by this court, which said mandate would, in ordinary course, not only permit, but command the District Court of Alaska to proceed to execute its pretended decree of forfeiture, and it is therefore the duty of the said Thomas Henry Cooper, now here, to give this honorable court to understand and be informed of all and singular the matters in this suggestion recited and alleged, to the end that this court shall consider this application for prohibition before issuing its mandate, so that it may either frame a special mandate or take order that the ordinary mandate shall not reach the District Court before the writ of prohibition hereinafter prayed, or a rule to show cause why said writ should not issue, shall be served upon said court.

Statement of the Case.

"Wherefore the said Thomas Henry Cooper, the aid of this honorable court most respectfully requesting, prays remedy by writ of prohibition to be issued out of this honorable court to the judge of the District Court of the United States in and for the territory of Alaska to be directed, to prohibit him from holding the plea aforesaid, the premises aforesaid, anywise concerning further before him, and to prohibit him from in any manner enforcing the said decree or sentence, or from treating the said decree as a valid sentence, for any purpose, or from taking any steps whatsoever in the cause aforesaid as to said decree or any matter or thing remaining to be done in consequence of said decree, and prohibiting him, the said judge, from making or entering any order, judgment or decree in and about the certain stipulation exacted and required in the course of said proceedings, and generally from the further exercise of jurisdiction in said cause, or the enforcing any order, judgment or decree made under color thereof.

"JOSEPH H. CHOATE,
"*Of Counsel.*"

"I have read the foregoing petition by me subscribed, and the facts therein stated are true to the best of my information and belief. JOSEPH H. CHOATE."

"Subscribed and sworn to before me this 12th day of January, 1891.

"OSCAR LUCKETT,
"[SEAL.] *Notary Public.*"

On the same 12th day of January, and at the same time, *Mr. Calderon Carlisle*, on behalf of Sir John Thompson, K. C. M. G., Her Britannic Majesty's Attorney General of Canada, presented to the court a suggestion for a like writ of prohibition. This suggestion was in every respect identical with Cooper's petition, except that the party presenting it was the Attorney General of Canada, and that the suggestion for the writ was in these words:

"Wherefore the said Sir John Thompson, K. C. M. G., Her Britannic Majesty's Attorney General of Canada, the aid of

this honorable court most respectfully requesting, for said Thomas Henry Cooper, submits to this honorable court that a writ of prohibition ought to be issued out of this honorable court to the judge of the District Court of the United States in and for the territory of Alaska to be directed, to prohibit him from holding the plea aforesaid, the premises aforesaid, anywise concerning further before him, and to prohibit him from in any manner enforcing the said decree or sentence, or from treating the said decree as a valid sentence, for any purpose, or from taking any steps whatsoever in the cause aforesaid as to said decree or any matter or thing remaining to be done in consequence of said decree, and prohibiting him, the said judge, from making or entering any order, judgment or decree in and about the certain stipulation exacted and required in the course of said proceedings, and generally from the further exercise of jurisdiction in said cause, or the enforcing any order, judgment or decree made under color thereof.

"And the said Sir John Thompson, K. C. M. G., Her Britannic Majesty's Attorney General of Canada, most respectfully informs this honorable court that the fact that this his suggestion is presented with the knowledge and approval of the imperial government of Great Britain, will be brought to the attention of the court by counsel duly thereunto authorized by Her Britannic Majesty's representative in the United States.

"CALDERON CARLISLE,

"*Counsel for Sir John Thompson, K. C. M. G., Her Britannic Majesty's Attorney General of Canada.*"

"I have read the foregoing suggestion by me subscribed, and the facts therein stated are true to the best of my knowledge and belief. CALDERON CARLISLE."

"Subscribed and sworn to before me this 12th day of January, 1891.

"OSCAR LUCKETT,

"[SEAL.] *Notary Public.*"

The court thereupon ordered that two weeks' time be al-

lowed to the Attorney General of the United States in opposition to the motion.

On the 26th of January, the day so appointed, the parties appeared and were heard on that and the following day. A wide range of argument took place, in which points were taken which are not considered by the court in its decision.

Mr. Calderon Carlisle and *Mr. Joseph H. Choate* for the motion for leave to file.

Mr. Attorney General and *Mr. Solicitor General*, opposing, took the following positions:

The government of the United States opposes the filing of a petition for a writ of prohibition to the District Court of Alaska in this case for the following reasons:

I. This court has no power, in any case, to issue a writ of prohibition to that court, because it is not a District Court of the United States within section 688, Revised Statutes.

II. The question of jurisdiction of the Alaska court, which petitioners seek to present, cannot be raised on the record of the admiralty proceedings on file in this court, because (*a*) The face of those proceedings shows jurisdiction in the Alaska court, and after sentence, in such a case, prohibition will not issue. (*b*) Even if the evidence on appeal may be here examined, it shows the taking of seals within three miles of the Alaskan islands, which is confessedly within the jurisdiction of that court, and the seizure did not oust the jurisdiction to condemn the vessel; first, because objection on that account was waived; second, because, however tortious or illegal, the seizure could not annul the proceeding; and third, because the seizure, even if upon the high seas, was legal.

III. Conceding all the facts averred in the petition, the question of the jurisdiction of the Alaskan court depends upon the extent of the dominion of the United States in Behring Sea. This is a political question to be decided by the political department of the government — the Executive and Congress. They have both decided it against the petitioners' contention. This is conclusive upon the judiciary.

Syllabus.

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

This is an application for leave to file a petition for a writ of prohibition to the District Court of the United States for the District of Alaska. The Attorney General being present and expressing a desire to that effect, opportunity was afforded him to be heard in opposition to granting the leave to file, and this resulted in argument having a much wider range than was necessary to the disposition of the motion.

We are of opinion, upon the preliminary question, that this court has jurisdiction to proceed in respect to the District Court of the United States for the District of Alaska, by way of prohibition, under section 688 of the Revised Statutes, and leave will therefore be given to file the petition for such writ and the accompanying suggestion. A rule will be entered as in like cases, returnable on such day as will allow reasonable time for service and return, in relation to which we invite the views of counsel.

(Counsel having conferred, the second Monday of April was made the return day.)

Leave granted.

CENTRAL TRUST COMPANY *v.* KNEELAND.

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

No. 137. Argued January 7, 1891. — Decided March 2, 1891.

When a railroad company is incorporated to construct a railroad between two cities named as its termini, a mortgage given by it which, as expressed, is upon its line of railroad constructed, or to be constructed, between the named termini, together with all the stations, depot grounds, engine-houses, machine-shops, buildings, erections in any way now or hereafter appertaining unto said described line of railroad, creates a lien upon its terminal facilities in those cities, and is not limited to so much of the road as is found between the city limits of those places.

When a railroad mortgage contains the "after-acquired property" clause, the mortgage is made thereby to cover not only property then owned by

the company and described in it, but also property coming within the words of description and subsequently acquired, whether by a legal title or by a full equitable title; and there are no equities here to set aside that rule.

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

On the 17th of January, 1880, the Toledo, Delphos and Burlington Railroad Company, a corporation organized by the consolidation of several constituent companies, executed a mortgage to the Central Trust Company of New York, by which it conveyed the following property: "All and singular the line of railroad of the said party of the first part, as the same now is or may hereafter be constructed between Toledo, Lucas County, Ohio, through the counties of Lucas, Wood, Henry, Putnam, Allen and Van Wert, in the State of Ohio, and the counties of Adams, Wells, Huntington, Wabash, Miami, Grant and Howard, in the State of Indiana, (and not including the branch line from Delphos, Allen County, Ohio; thence via Spencerville, Mendon and Mercer, and through the counties of Allen, Van Wert and Mercer, to Shanesville, Mercer County, Ohio,) being about one hundred and eighty miles in length, together with all and singular the rights of way, road-bed made or to be made, its track, laid or to be laid, between the terminal points aforesaid, together with all the stations, depot grounds, rails, fences, bridges, sidings, engine-houses, machine-shops, buildings, erections in any way now or hereafter appertaining unto said described line of railroad, together with all the engines, cars, machinery, supplies, tools and fixtures, now, and at any time hereafter held, owned or acquired by the said party of the first part, for use in connection with its line of railroad aforesaid, and all its depot grounds, yards, sidings, turnouts, sheds, machine-shops, leasehold rights and other terminal facilities now or hereafter owned by the said party of the first part, together with all and singular the powers and franchises thereto belonging, and the tolls, income and revenue to be levied and derived therefrom;" and also provided: "The said party of the first part expressly covenants and agrees that it will, on demand, from

time to time hereafter execute, acknowledge and deliver unto said party of the second part any and all such further and other conveyances and assignments as may be necessary and proper to fully convey to and vest in the party of the second part, or the trustee for the time being, all such future acquired depots, grounds, estates, equipments and property as it may hereafter from time to time purchase for use in and upon its said line of railroad and intended to be hereby conveyed."

On June 21, 1880, the same railroad company executed to the same trustee another mortgage, known as the "terminal trust mortgage." The property thereby conveyed is thus described: "All and singular the line of railroad of the said party of the first part as the same now is or may hereafter be constructed, between the southeasterly end of Washington Street, in the city of Toledo, Lucas County, Ohio; thence northwesterly along Washington Street to the aforesaid canal lands in said city; thence southwesterly along said abandoned canal lands to Swan Creek in said city; thence over said Swan Creek and the Miami and Erie Canal and over and along Mill Street and Canal Avenue, in said city, to the westerly limit thereof; and thence to the point where said railroad crosses the westerly limit of said city of Toledo; together with all and singular the franchises, rights of way, station grounds, shop grounds, side-track grounds and grounds of any and every kind, for whatever purpose bought, between the points aforesaid, viz., the southeasterly end of Washington Street, in the city of Toledo, State of Ohio, and the westerly limits of said city, and together with the road-bed made or to be made, and tracks and side-tracks laid and to be laid thereon, together with all stations, workhouses, engine-houses, shops, turn-tables, water-tanks, buildings, erections of every description and all facilities of any and every description appertaining to said road-bed, station grounds, shop grounds and lands of every kind and for every purpose lying between the points aforesaid owned or acquired by the said party of the first part, for the use in connection with the part of its line of railroad aforesaid, and all its said depot grounds, yards, sidings, turnouts, sheds, machine-shops, leasehold rights and other terminal facilities now and

here*in*after owned by the said party of the first part in connection with the said part of its railroad, together with all and singular the powers and franchises thereto belonging, and the tolls, income and revenue to be levied or derived therefrom."

On foreclosure proceedings, duly had, of the first mortgage, appellee became, in the interest of the bondholders, the purchaser. After confirmation of sale and passage of title, and during the pendency of a suit to foreclose the second mortgage referred to, this proceeding was commenced by the trustee in the latter mortgage and certain holders of bonds secured thereby, against Kneeland, the purchaser. The bill was practically one to quiet the title of those security holders to the terminals in Toledo. To this bill Kneeland filed an answer and cross-bill. In the latter he set up his title under the first mortgage and the sale, and prayed to have his title quieted to these terminals. Upon proofs and hearing, the Circuit Court rendered a decree in favor of Kneeland, quieting his title to all except a small strip of the right of way, thereby adjudging priority of lien to the first mortgage. This decree the appellants brought to this court for review.

Mr. W. W. McFarland for appellants.

What the description in the mortgage of January 17, 1880, actually covered is a matter of fact, to be ascertained by any relevant evidence. *People* v. *Storms*, 97 N. Y. 364. It is conclusively proved that at the date of the Kneeland or Main Line Mortgage, the Toledo, Delphos and Burlington Company neither owned nor possessed any of the property embraced in the complainant's Terminal Trust Mortgage, nor did that company or its promoters have in January, 1880, any intention of acquiring *that property.* The intention was to obtain some property in the City of Toledo, if possible, upon which a railroad into the city could be built and terminal facilities there be created. The company had been successfully excluded from the city, and the promoters were at that time contemplating a terminal trust mortgage as the only means of obtaining money for the acquisition of terminal

Counsel for Appellees.

property. These considerations exclude the idea of any intention to include in the mortgage any other than the existing lines of railroad and such additions as might be made to them, and as matter of construction necessarily limit the language quoted to additions that might be made to those lines of road.

We are not concerned with the rules of law concerning accessions or fixtures. Of course anything acquired by mortgaged railroads under those rules will come under the mortgage. The property in question was wholly separate and distinct from that described in the defendant's mortgage, and whatever title to it the mortgagor ever acquired was acquired long after the date of the mortgage. Now, a mortgagee claiming, by virtue of a provision in the mortgage, property so after acquired, must claim through the mortgagor, putting himself in his place and standing in his shoes. No person can ever obtain any pecuniary benefit from the act of another without adopting and confirming the whole act in form and substance with all its incidents. That part which may be considered advantageous cannot be affirmed and that which may be considered burdensome repudiated. "A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands." *United States* v. *New Orleans Railroad*, 12 Wall. 262, 264. See also *Beall* v. *White*, 94 U. S. 382, 387; *Williamson* v. *New Jersey Southern Railroad*, 28 N. J. Eq. (1 Stewart) 277; *Fosdick* v. *Schall*, 99 U. S. 235.

It follows from the foregoing principle that the Terminal Trust mortgage of June 21, 1880, made by the Toledo, Delphos and Burlington Company, being a valid and binding instrument according to its tenor as between that company and the mortgagee, is likewise a valid and binding instrument according to its tenor against the defendant, who claims under that company through the mortgage of January 17th of the same year.

Mr. Robert G. Ingersoll and *Mr. Clarence Brown* for appellee.

Mr. John M. Butler, filed a brief for appellee.

Opinion of the Court.

MR. JUSTICE BREWER delivered the opinion of the court.

The first mortgage had the "after-acquired property" clause in it. It is settled that such a clause is valid, and that thereby the mortgage covers not only property then owned by the railroad company, but becomes a lien upon all property subsequently acquired by it which comes within the description in the mortgage. *Pennock* v. *Coe*, 23 How. 117; *Dunham* v. *Cincinnati, Peru &c. Railway*, 1 Wall. 254; *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459; *Thompson* v. *Valley Railroad Company*, 132 U. S. 68. And this is true, not only as to property to which it acquires the legal title, but also as to that to which it acquires only a full equitable title. *Toledo &c. Railroad Co.* v. *Hamilton*, 134 U. S. 296.

Where a company is incorporated to construct a railroad between two cities named as its termini, a mortgage given by it which, as expressed, is upon its line of railroad constructed or to be constructed between the named termini, together with all the stations, depot grounds, engine-houses, machine-shops, buildings, erections in any way now or hereafter appertaining unto said described line of railroad, creates a lien upon its terminal facilities in those cities, and is not limited to so much of the road as is found between the city limits of those places. The stations, depot grounds, etc., in the terminal cities appertain to the railroad as fully as similar structures in places intermediate those termini. In the absence of restrictive words, such is the natural import, and therefore must be adjudged the intent and scope of a mortgage containing that description. This first mortgage contains not only the general terms referred to, but after them, and as if it were to avoid any possible doubt, adds: "And all its depot grounds, yards, sidings, turnouts, sheds, machine-shops, leasehold rights, and other terminal facilities now or hereafter owned by the said party of the first part." It would be difficult to make language more full, accurate and descriptive. *Willink* v. *Morris Canal Co.*, 3 Green Ch. (4 N. J. Eq.) 377; *Morris & Essex Railroad* v. *Central Railroad Co.*, 31 N. J. Law, (2 Vroom,) 205; *Mohawk Bridge Co.* v. *Utica & Schenectady Railroad*, 6

Paige, 554; *Commonwealth* v. *Erie & Northeast Railroad*, 27 Penn. St. 339. There can be no doubt that by this mortgage a lien was created on the terminal facilities in the city of Toledo, and as this mortgage was executed some months before the terminal trust mortgage, apparently it created a prior lien. And if there were no other facts to be considered, the disposition of this case would be easy.

That the parties receiving bonds under this mortgage would understand that they were to have a first lien on all terminal facilities in Toledo then owned or thereafter acquired, is clear. That the railroad company also understood that it owned and was giving a prior lien upon such terminals is evident from the fact that in the year 1879 it executed a mortgage for one million two hundred and four thousand dollars and negotiated six hundred and thirty thousand dollars of the bonds secured thereby, which bonds and mortgages were taken up and satisfied out of the proceeds of the mortgage of January 17, 1880, and in the prospectus, issued for the purpose of inviting investors to purchase those bonds, was this statement:

"*Terminal Advantages.*

"The Toledo, Delphos and Burlington Railroad has the right of way through and down the very centre of the city of Toledo. It enters the city near the Miami and Erie Canal, and substantially follows the canal to Washington Street; thence down Washington Street to Swan Creek and to Lake Navigation, within three squares of the post-office. This franchise is very valuable and of very great importance to the business of the road, and adds greatly to the pecuniary value of the property of the corporation. No other road entering the city approaches so near to its centre; none whose freight and passenger business is transacted so near to the business of the city. This franchise is considered valuable to the road not only from the fact that it affords unusual business facilities, but because it becomes independent of other corporations and renders its business secure without submitting to a heavy tax on its traffic."

Not only this, but when the mortgage of January 17, 1880,

was in contemplation, and on December 12, 1879, when its execution was ordered, the resolution of the directors declared: "That for the purpose of borrowing money for the use of the company to enable it to carry out the purposes for which it is organized and was consolidated, . . . and build, complete, equip, pay for right of way and depot grounds, and operate its railroad, it is expedient to prepare, issue and negotiate a series of first mortgage bonds, amounting in the aggregate to $1,250,000," and, "that in order to secure the payment of said issue of first mortgage bonds and the interest thereon, . . . the president shall also forthwith cause to be prepared a mortgage or deed of trust conveying . . . all this company's present and future-to-be-acquired line of railroad, appurtenances, and equipment and income thereof, between said city of Toledo in the State of Ohio and the town of Kokomo in the State of Indiana."

No one can misunderstand these declarations. They expressed to every purchaser of a bond secured by this first mortgage a purpose to vest in him a prior lien on all the property of the railroad company, including its terminal facilities —a lien superior to every incumbrance thereon. They unite, therefore, with the clear language of the mortgage the expressed intent of the mortgagor. To thwart this purpose, so obvious and expressed, there should be a clear disclosure of higher equity, and to the suggestions of that we pass.

The second, the terminal trust mortgage, was executed on June 21, 1880. On September 4, 1880, more than two months thereafter, the Toledo and Grand Rapids Railroad Company executed its mortgage to the Central Trust Company, to secure, not its own indebtedness, but the bonds secured by the terminal trust mortgage above referred to. This mortgage, in terms, conveyed the grantor's right of way within the city of Toledo, property which is, in fact, a part of the right of way and terminal facilities of the Toledo, Delphos and Burlington Railroad Company. On November 29, 1880, George W. Ballou and wife executed a mortgage to the same Trust Company, conveying certain properties similarly situated and also as security for those terminal trust bonds. On April 12, 1881,

the Toledo and Grand Rapids Railroad Company conveyed to the Toledo, Delphos and Burlington Railroad Company all its properties. The consideration of such transfer was $265,477.86 cash, an amount supposed to be sufficient, and provided to pay all the indebtedness of the Toledo and Grand Rapids Railroad Company. So far as the property standing in the name of Ballou is concerned, he was the financial agent of the mortgagor, the Toledo, Delphos and Burlington Railroad Company; and while he took the title to some properties in his own name, the purchase was with moneys of the mortgagor. Hence, while he held the legal title, the full equitable title was in the railroad company, and that property became, therefore, in equity subject to the lien of the first mortgage. Further, the mortgage from Ballou to the Central Trust Company, of date November 29, 1880, was really a tripartite agreement between Ballou, the Toledo, Delphos and Burlington Railroad Company, and the Central Trust Company, and recited that the mortgage to the Trust Company was in consideration of forty thousand of these terminal trust bonds received by Ballou. So, not only was this purchase by Ballou made with the funds of the Toledo, Delphos and Burlington Railroad Company, but he received also forty thousand dollars of the terminal trust bonds. Further than that, as we read the record — and there are seventy to eighty deeds and relinquishments of right of way contained in it — apparently the title to the bulk of the right of way passed directly to the Toledo, Delphos and Burlington Railroad Company, and not to Ballou nor to the Toledo and Grand Rapids Railroad Company, so that we have these facts before us: First, the title to the larger portion of the terminal facilities passed directly to the mortgagor, the Toledo, Delphos and Burlington Railroad Company. Second, all that part whose title was taken in the name of Ballou was paid for by the funds of the Toledo, Delphos and Burlington Railroad Company, and, therefore, it had the full equitable title, and he had only the naked legal title in trust for its benefit. Third, the incumbrance which he placed upon it in the tripartite agreement was not security for an independent lien, but simply additional security for the ter-

minal trust bonds issued by the Toledo, Delphos and Burlington Railroad Company. Fourth, the mortgage given by the Toledo and Grand Rapids Railroad Company, which was generally of its right of way and terminal facilities, was not to secure an independent debt, but the already issued terminal trust bonds of the Toledo, Delphos and Burlington Railroad Company. Fifth, all the indebtedness of the Toledo, and Grand Rapids Railroad Company was assumed and paid by the Toledo, Delphos and Burlington Railroad Company, as a consideration of the appropriation by the latter of all the franchises and property of the former. Whatever, therefore, may be said as to the scheme and plan of the parties who in the spring of 1880 were in control of the Toledo, Delphos and Burlington Railroad Company, the fact remains undisputed that its mortgage of January 17, 1880, covered, in terms, all subsequently acquired terminal facilities in the city of Toledo; that purchasers of bonds secured thereby were invited to invest, on the strength of representations by the company that it covered the terminal facilities; that the title to the larger portion of these terminal facilities passed directly and unencumbered by any one to the Toledo, Delphos and Burlington Railroad Company; that as to those portions whose title passed to Ballou and the Toledo and Grand Rapids Railroad Company, the purchase price was paid by the Toledo, Delphos and Burlington Railroad Company; and that the mortgages which they respectively executed to the Central Trust Company were not given to secure independent debts, but simply as collateral to the terminal trust bonds.

We do not question the proposition invoked by counsel for appellant, that a mortgage with an "after-acquired property" clause creates a lien upon property subsequently acquired only when it is acquired, and in the condition in which it is acquired, and subject to all existing liens; nor the other proposition, that the ownership by one corporation of the stock of another will not of itself prevent the creation of a new and independent lien upon the property of the latter, as adjudged in the case of *Williamson* v. *The New Jersey Southern Railroad Co.*, (28 N. J. Eq. 277; 29 N. J. Eq. 316). Yet we think those

propositions are not decisive of the case here presented. The mortgagor in the two mortgages of January and June, 1880, held the legal title to a large portion of the terminal facilities, and was the equitable owner of substantially the rest. Its first mortgage, its expressed purpose, was a lien upon those terminal facilities. No lien was ever placed by the holders of the legal title on that portion of the right of way and terminal facilities which did not stand in the name of the Toledo, Delphos and Burlington Railroad Company, to secure any new and independent obligation. These collateral and subsequent mortgages were in terms only to strengthen the security already given by the terminal trust mortgage. If they had never been executed, can there be a doubt that on a foreclosure the trustee in either the mortgage of January 17, 1880, or the terminal trust mortgage, could have subjected to its lien all property in fact a part of the right of way and terminal facilities, whether the title of the company thereto was either legal or equitable? They, therefore, only put into writing that which was already and in equity the obligations resting on the property. So, whatever may have been the secret thought and scheme of the parties controlling the management of these railroad companies, we are of opinion that the various properties included in the right of way and terminal facilities became in fact subjected to the lien of the two mortgages of January and June, 1880, executed by the Toledo, Delphos and Burlington Railroad Company. At least, that is true of all properties whose title passed to the Toledo, Delphos and Burlington Railroad Company. Certain properties whose title did not thus pass were by the decree exempted from the operation of this lien.

We think there was no error in the ruling of the Circuit Court, and its decree is

Affirmed.

RUSSELL *v.* POST.

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

No. 126. Argued January 5, 1891. — Decided March 2, 1891.

When, in the trial of a civil action charging a conspiracy to defraud, it appears in evidence that a loan, charged to have been an instrument in the conspiracy, was not an ordinary business transaction; that the compensation paid for it to the lender was so excessive as to be suspicious; that the purpose on the part of the borrower in taking the loan was the accomplishment of an act criminal in itself and made criminal by statute; and when the surrounding circumstances proved in the case tend to charge the lender with knowledge of the wrongful purpose of the borrower, the case should not be withdrawn from the jury, but it should be submitted in order that they may determine whether the loan was made with intent to consummate the wrong, and whether the lender knowingly assisted in accomplishing it.

AT LAW. The case is stated in the opinion.

Mr. Talcott H. Russell and *Mr. Simeon E. Baldwin* for plaintiff in error.

Mr. William G. Choate and *Mr. L. Laflin Kellogg* for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court.

The plaintiff here, plaintiff below, is the receiver of the American National Life and Trust Company of New Haven. This action, originally commenced in the Supreme Court of the city and county of New York, and thence removed to the Circuit Court for the Southern District of New York, is one to recover damages resulting from certain alleged fraudulent acts by the defendant Post, who alone answered, in conjunction with other parties, by which a large quantity of valuable assets were abstracted from the possession of the American National Life and Trust Company and wholly lost to it.

The company was an insurance company, organized under

the laws of the State of Connecticut. Proceedings were duly instituted for winding up its affairs and annulling its charter, and under these proceedings the plaintiff was appointed receiver and authorized to maintain this action. This appointment was made on November 8, 1878. Some time before his appointment a large bulk of the assets of the corporation were transferred to the National Capital Insurance Company of Washington, D. C., and wholly lost to the Connecticut corporation, as well as to the parties having policies in such company.

The contention of plaintiff is, that this transfer and loss of assets of the Connecticut corporation was brought about by a conspiracy, and through the fraudulent acts of defendant Post, with others. The case was tried before a jury; and at the close of the testimony the judge, ruling that the plaintiff had made out no case, and proved nothing which justified any submission of matters of fact to the jury, directed a verdict for the defendant. The record, therefore, transmitted here by proper proceedings in error, presents the question, not whether the plaintiff was entitled to recover all the damages he claimed, not what was the measure of damages, if he was entitled to recover, not even whether upon the facts the jury was bound to return a verdict in his favor, but whether there was sufficient testimony to require a submission of the questions to the determination of a jury. We are of the opinion that there was such sufficient evidence, and that, therefore, the judgment must be reversed, and the case remanded for a new trial.

We premise what we have to say with the remark that we express no opinion as to the extent of the recovery which should be had, if any, or the measure of damages, nor do we wish to be understood as asserting that the verdict ought to have been in favor of the plaintiff. We simply hold, for reasons hereafter stated, that there was presented by the testimony matters of fact vital to the controversy, upon which the plaintiff had a right to the opinion of the jury, and which it was error for the court to withdraw from its judgment. It is necessary for the just disposition of this case that a fuller statement of the disputed and undisputed facts should be made.

In the fall of 1875, Benjamin Noyes, of New Haven, and Henry D. Walker, of Boston, were officers of the Connecticut company, which was then in failing circumstances, though possessed of assets amounting to several hundred thousand dollars. Personal liability was supposed to attach to these gentlemen, but whether this was so or not in fact, is immaterial. The condition of the company was known to defendant Post; at least, he was fully advised of suspicion and charges, because, on an inquiry instituted by the insurance commissioner of the State of Connecticut, he had been called as a witness as to the value of certain securities held by it. On or about December 5, 1875, Noyes and Walker, with others, bought the franchises of the National Capital Insurance Company of Washington, D. C., a company without property or business, and paid four thousand dollars for the purchase. Conspiring to secure themselves from liability, and to wreck for their own benefit the Connecticut company, a scheme was devised for the reinsurance of the risks of the Connecticut company with the National Insurance Company. A reinsurance was possible only on satisfactory representations to the Connecticut company of the possession by the Washington company of abundant assets. Such satisfactory evidence was furnished to the directors of the Connecticut company, the reinsurance was accomplished, and a large amount of the assets of the Connecticut company was transferred to the Washington company. The outcome of this was that the Connecticut company lost its assets, and, somehow or other, the same assets transferred to the Washington company disappeared. At least, for the purposes of this case, these facts must be considered as proved, in view of the allegations in the complaint, and the time at which the court interposed in the trial and directed a verdict for defendant. The contention of plaintiff is, that such transfer of assets was brought about by fraudulent representations made to the Connecticut company by the Washington company, and that the representations were accomplished through the agency of the defendant Post, and under such circumstances that knowledge of a fraudulent intention is imputed to him. Walker and Noyes were officers of the

Connecticut company; Walker became treasurer of the Washington company. It was necessary to satisfy the Connecticut company that the Washington company should be possessed of large properties. It in fact had nothing. The possession of properties by the Washington company must, therefore, be evidenced to the Connecticut company, before reinsurance was possible. With other transactions having the same objects in view, Walker arranged with defendant Post that he should put fifty thousand dollars in bonds into his, Walker's, possession as treasurer of the new company. Thereupon, fifty thousand four hundred dollars of negotiable securities were placed in the Continental National Bank by Post, and a receipt given to Walker, by the assistant cashier of that bank, in these words: "Received of Henry D. Walker, the following securities as special deposit, without risk in case of robbery." Following these words was a list of the securities, and the receipt was signed "W. J. Harris, Ass't Cashier." When this and other like deposits had been accomplished, the Connecticut company was advised that the Washington company was possessed of one hundred and fifty thousand dollars of property, and sought a reinsurance of the risks of the Connecticut company. One of the directors of the Connecticut company, Joseph A. Smith, was appointed a committee to ascertain the character and value of the assets of the Washington company. In obedience to that duty, he went to New York and was shown by Walker, the treasurer of the Washington company, the securities thus deposited in his name in the Continental Bank, as well as others similarly deposited, and reported to the Connecticut company that the treasurer of the Washington company had in his possession, as assets of the latter company, more than one hundred and fifty thousand dollars of municipal and other securities. Thereupon, the reinsurance was effected, and the assets of the Connecticut company, in the main, were transferred to the Washington company.

It is undisputed that the Washington company had no assets, and that this show of assets was made by reason of the transfer of apparent title by the defendant Post and others to Walker, the treasurer of the Washington company. It is in

evidence that Post received from one thousand to fifteen hundred dollars, the exact amount not being clearly shown, for this temporary transfer of apparent title. The transfer, as arranged between Walker and Post, was only for fifteen days, so that for perhaps fifteen hundred dollars Post permitted Walker to appear as the owner of fifty thousand dollars of municipal securities for half a month. According to Post's own testimony, he arranged with the Continental Bank, which was the bank with which he did business, that these securities were not to be passed from its possession, and that all that Walker could do was to show them as deposited in his name. The face value of the securities was fifty thousand four hundred dollars — their real value was perhaps not over thirty thousand dollars. No transfer of their actual possession was provided for; no right given to remove them from the bank; Post considered himself all the while the owner and in possession, having given simply permission to make a show of title, a permission to close at the end of fifteen days. Surely such a transaction is outside the ordinary lines of business. It must have carried notice to Post of some scheme, and of a design to accomplish something which ordinary business transactions would not justify.

Outside of these matters, in respect to which there is no dispute, are others in which the testimony is contradictory. A. G. Fay, who was attorney of the Washington company, testifies that he called with Walker twice on Post, and in one of those interviews Post asked him "if he was going to be connected with the company;" and he replied, "that he didn't know anything about it;" that "there was not any company as yet." The testimony of the president of the Continental Bank and Post is conflicting as to what was said with respect to the deposit of the bonds. The president also testified that after the commencement of this suit Post said to him, "the less we remember about that, it is an old thing, we had better let it go — it is one of those old things that it is best to be forgotten, or something like that." There are also other circumstances, perhaps in themselves of a trifling nature, and yet are such as a jury would be apt to consider and justly too, to

indicate knowledge on the part of defendant. The main point is that which we have referred to, a scheme on the part of Walker and others to transfer from the Connecticut company to the Washington company, the latter company being wholly without property, the assets of the former; that to accomplish such a transfer a show of assets in the Washington company was essential; that such show of assets was accomplished through the means of Post, and through a transaction which, to say the least, was not an ordinary business transaction — a transaction which secured enormous pecuniary gain to Post for a temporary and well-guarded placing of the apparent title of securities in the name of Walker. We do not question the proposition that a man may loan money or bonds and not be responsible for the improper use of the money or securities by the parties to whom the loan is made; and we do not mean to say that Post is necessarily responsible for any improper use made by Walker of the securities, the title to which he apparently parted with; but we do hold that, where the loan is not an ordinary business transaction; where the compensation paid for the loan is excessive, so excessive as to be suspicious; where the purpose on the part of the borrower is the accomplishment of an act not merely *malum prohibitum* but *malum in se*, an act criminal by statute and criminal in itself; and where there are surrounding circumstances, trivial, it may be, separately considered, and the testimony in respect thereto contradictory, but the tendency of which is to charge the lender with knowledge of the wrongful purpose of the borrower, although there may be no direct and positive evidence of guilty knowledge; a jury may be justified in holding that the loan was made with intent to consummate the wrong, and that the lender must share in the responsibility for the result of the wrong contemplated and accomplished, and which, knowingly, he assisted in accomplishing.

We think, therefore, there was error in withdrawing the case from the jury; and that there was testimony justly demanding its consideration, as to whether the defendant Post was not knowingly aiding a fraudulent transaction. Even if he did not know the full nature and terms of the conspiracy,

but only knew in a general way that a scheme existed by which the funds of the Connecticut company were to be withdrawn wrongfully from its control, and lent his aid, for large consideration, to the accomplishing of such fraudulent transaction, we do not think he can avoid his liability by proof that the exact nature and full details of the scheme were not communicated to him.

The judgment will be reversed and the case remanded for a new trial.

Mr. Justice Bradley dissents.

CASE MANUFACTURING COMPANY *v.* SOXMAN.

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

No. 150. Argued January 16, 19, 1891. — Decided March 2, 1891.

In this case the plaintiff having accepted notes of a limited liability company in settlement, set up that the acceptance was made through a misunderstanding. *Held,* that evidence tending to show knowledge that the plaintiff at the time of the acceptance was a limited liability company was admissible.

When in a case in which the facts are found by the court instead of a jury, there is any evidence tending to support the finding, this court will not review it.

It appearing from the evidence of one of the plaintiff's witnesses that during the dates of these transactions he was acting as its financial manager, his acts in that capacity cannot be repudiated.

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

The Case Manufacturing Company, plaintiff in error, is a corporation located at the city of Columbus, State of Ohio, and engaged in the manufacture and sale of flour milling machinery. On the 8th of December, 1883, an order was sent to its home office, received and approved on the 11th of December, which order, omitting immaterial matters, was, with the acceptance, as follows:

Statement of the Case.

"(*Form No. 2.*)

"This form to be used where machines are ordered for changing over a mill, but where the millwright work is not done by the Case Manufacturing Co. Fill up three of these blanks; one for the purchaser, one for the Case Manufacturing Co., and one for the salesman. Fill up blanks carefully. This contract to be binding only when signed by the Case Manufacturing Company, at its home office at Columbus, Ohio.

"LATROBE, *Dec. 8th*, 1883.

"The Case Manufacturing Co., Columbus, O.

"Please ship the undersigned, as near the first day of February, 1883, as possible, the following machinery at and for the price of eight thousand dollars. . . . We agree to receive and pay freight on the same and place them in our mill according to your directions; to supply the necessary power and appliances and other machinery required to obtain the best results, using proper diligence in placing and starting the same. After starting them we are to have thirty days' running time in which to test them, when, if found up to your guarantee, we will settle for the same by paying 2000 dollars cash, 2000 dollars by note due 12 months after accepting of the machinery, and 4000 dollars by note due 18 months, at 6 per cent interest.

"You to guarantee that, with necessary power and proper management, the machines shall have capacity for from 100 to 110 barrels of flour in twenty-four hours; that they shall perform the work they are intended to do as well as any machines now in use for the same purpose, and the results to be equal to those obtained from any of the roller or other modern systems of milling now in use in this country using the same grades of wheat and an equivalent line of machinery. We agree to be responsible for any damage or loss by fire or otherwise to said machines after they reach us, and agree to make no claims for damages on account of delays incident to starting up said mill.

"The title to said machines shall remain in and not pass from you until the same are paid for, and until all the notes

given therefor are fully paid; and in default of payment as above agreed, you or your agent may take possession of and remove said machines without legal process.

"LATROBE MILLING CO.
"P. H. SOXMAN, Pres.
"H. C. BEST, Sec'y.
"D. J. SOXMAN, Treas.

"P. O. address, Latrobe, county of Westmoreland, State of Pennsylvania.

"Shipping address, Latrobe, county of Westmoreland, State of Pennsylvania.

"We accept the above order upon the conditions named, and hereby make the guaranty above set forth this 11th day of December, 1883, at Columbus, Ohio.

"CASE MANUFACTURING CO.,
"By O. WATSON, P't.

"All settlements must be made with and all notes given and moneys paid direct to the Case Manufacturing Co."

On the 20th of October, 1884, the machinery having all been furnished and the mill started, a settlement was made by the purchasers with the same agent of plaintiff, Davis, who had negotiated the sale in the first instance. Having already paid one thousand dollars, a check was given for one thousand more, which was paid; and two notes, one for two thousand dollars, due in one year, and one for four thousand, due in eighteen months. These notes were not signed with the name of the Latrobe Milling Company, but were signed "P. H. Soxman, Pres't; H. C. Best, Sec'y," with the seal bearing the name "Latrobe Milling Company, Limited," impressed upon it. The agent brought these notes and money back to Columbus, and turned them over to Mr. Shough, then acting manager, (Mr. Watson, the president, being ill). The contract was made when Mr. Watson was both president and the active manager of the affairs of the company. On receiving these notes Mr. Shough, dissatisfied with their form, wrote this letter:

Statement of the Case.

"COLUMBUS, OHIO, *October* 29, 1884.

"Latrobe Milling Company, Latrobe, Pa.

"DEAR SIRS: Mr. Davis has handed us your settlement, which is all satisfactory, with the exception that the notes are not properly signed. They are only signed by the president and secretary. They should be signed 'The Latrobe Milling Company, Limited,' by P. H. Soxman, president, and H. C. Best, secretary, and your seal attached. If you are willing to put them in proper shape, we will send you the notes with new ones filled out for you to sign and return; otherwise your settlement is very satisfactory, and we are glad to place you among our long list of friends. We are obliged to you for your good letter, as well as your settlement, and we shall endeavor to use it when it will do us all good. According to the laws of your State, a corporation is only liable to the extent of the property they hold, there being no individual responsibility outside of the property, and, believing that you are willing to do what is just and right, we will ask you to assign your insurance policies to us. The notes run for a long time, and there being no other security on them, we ask you to do this for us. Should your mill burn, as it is liable to do, then it would be optional with you whether you pay us or not. You will recognize that this is business, and, while we have all the confidence in you and have very flattering reports about you, at the same time you will understand that it is the business way of doing, and we have no doubt but what you will be willing to grant our request.

"Awaiting your early reply and with best wishes, we are, etc., yours truly, THE CASE MANUFACTURING CO.,

"By SHOUGH."

Subsequently, the Milling Company sent the following letter:

"LATROBE, PA., *December* 2, 1884.

"Case Manufacturing Company.

"DEAR SIR: Enclosed find note corrected as requested; also, the insurance policy for $6000, which you will return to me; will please pardon, as secretary has been on the road and is

not at home yet, and I thought it my duty, after getting his signature, to send to you. The mill is running right along, only we have a hard time to compete with Mr. Chambers, across the way, as he has reduced the price to nothing, viz., $4.25 per barrel of flour, but the race belongs to the one that has the most sand to stand up to it.

"Yours respectfully, LATROBE MILLING CO.,
"D. J. S."

To which letter the plaintiff returned this reply:

"COLUMBUS, OHIO, *December* 4, 1884.

"Latrobe Milling Company, Latrobe, Pa.

"DEAR SIRS: We are in receipt of the notes, which are all 'O. K.;' also the insurance policies, which we will have the transfer made on and returned to you to be signed, and have your agent there endorse the transfer. At the price Chambers is selling flour there surely is a loss in it, and we hope it won't take him long to see his folly, and restore the price, so that you can both make some money.

"Yours truly, THE CASE MANUFACTURING CO.,
"By SHOUGH.

"P. S. — Accept thanks for fixing our matters up in proper shape.

At the time the original order was signed no corporation defendant existed. The parties were contemplating the formation of a corporation or association, and on May 5, 1884, they did form, under authority of the general law of the State of Pennsylvania, an association known under the name "Latrobe Milling Company, Limited," by which the liability of the parties interested in the new association was limited to the amount of the capital stock, and the notes given in the settlement were the notes of this limited liability company. Mr. Watson, the president of the plaintiff corporation, died in the winter of 1884–1885. Thereafter, John F. Oglevee became its secretary and treasurer and general manager of its affairs. The first note not being paid when due, in the fall of 1885, Oglevee visited Latrobe to look after its payment. Subse-

quently, examining the records in the county-seat of Westmoreland County, in which Latrobe lies, he found judgments against the Milling Company and mortgages upon its property. Shortly after this discovery he returned to Columbus, and thereupon the plaintiff company returned the two notes which it had received, alleging that they did not conform to the contract, and demanded payment of the first note, two thousand dollars and interest, and in lieu of the second, a new note, executed by the Latrobe Milling Company, and not by the limited liability company. The defendants refused to comply with this demand, and returned the notes to the plaintiff. Thereafter this suit was brought. To this suit the defendants pleaded that it was understood at the time of the original contract that they were to organize a corporation with limited liability, and that its notes were to be the notes to be given for deferred payments. Secondly, that after the organization, and after the delivery of the machinery, the plaintiff, with knowledge of the facts, accepted the notes in full payment and satisfaction of the debt. When the case came on for trial a jury was waived. Findings of fact were made, and a judgment entered thereon in favor of defendants, to review which these proceedings in error have been brought to this court.

Mr. Charles E. Burr and *Mr. James S. Moorhead* for plaintiff in error. *Mr. James Watson* was on the brief.

Mr. Paul H. Gaither for defendants in error. *Mr. W. H. Young* and *Mr. J. A. Marchand* were on the brief.

Mr. Justice Brewer delivered the opinion of the court.

The first question is as to the admission of the testimony of H. C. Best, a witness for and one of the defendants, as to conversations between them and the plaintiff's agent Davis, at the time the original contract was signed. The scope of this testimony was substantially that they proposed to organize a corporation, with limited liability, that the purchase was to be made in the interest of such corporation, and that its obligations were to be given for the deferred payments. The con-

tention is, that this testimony varied the original contract, and was, therefore, inadmissible.

The first and obvious reply is, that it makes against the contention of plaintiff that its acceptance of the notes of the limited liability company was through a misunderstanding. Whatever obligations may have been assumed by the original contract, the fact that the plaintiff knew that the contemplation of the purchasing parties was a limited liability company, and that on the delivery of the machinery it accepted the notes of such company, is evidence strong, if not convincing, that its acceptance of such notes was not through a mistake, but from a recognition of the understanding between the parties at the time of the original contract. How can the plaintiff, knowing that the expressed understanding of the purchasers at the time of the original contract was the creation of a limited liability company, and the giving of its notes in satisfaction of the deferred payments, now be permitted to say that the written contract spoke of no such limited liability company, and that it took the notes of such a company through misunderstanding and mistake? Whatever other significance and value such testimony may have, it is certainly significant and competent upon the question whether the acceptance of the notes of this limited liability company was intentional or through mistake.

Further than that, the original contract upon its face suggested corporate rather than personal liability. The signatures were "Latrobe Milling Company. P. H. Soxman, Pres't. H. C. Best, Sec'y. D. J. Soxman, Treas." While if there were no corporation such signatures might impose personal liability; yet the purport and notice of such signatures was corporate, and not individual, liability. When to that is added the knowledge of the plaintiff as to the character of the proposed corporation, and its acceptance of the notes of the corporation in fact organized, can it be doubted that the plaintiff knew the significance of these signatures, or that it was knowingly dealing with a contemplated corporation, and knowingly accepted the notes of such corporation as a fulfilment of all the contract obligations assumed by this instrument? The idea that the

plaintiff supposed it was dealing with individuals, and contemplated personal liability, is also negatived by the letter of October 29, 1884, which shows that it understood that it was dealing with a corporation, and that, by the laws of Pennsylvania, corporate liability extended not beyond the assets of the corporation, and cast no burden upon the individual stockholders. The parol testimony thus admitted was not to contradict the language of the written contract, but to explain any doubt as to its meaning, and to fortify the claim of the defendants that the subsequent acceptance of the notes of the limited liability company was no departure from the thought of the original contract, but a well understood and intentional recognition of its real meaning. We see no error in the admission of this testimony.

The second and third assignments of error may be considered together. They present the proposition that the court erred in finding that the notes of the limited liability company of October 20, 1884, were accepted as payment and satisfaction of the original liability under the contract. Here we face the proposition that we are not triers of fact. And if there were evidence upon which such a finding might properly rest, we should accept the finding as conclusive, and inquire no further into the testimony than we should into its sufficiency to sustain the verdict of a jury. Surely the facts that we have already referred to, the correspondence between the parties, is some, if not satisfactory and conclusive evidence that these notes were accepted as closing out the original contract. The conduct of the plaintiff tends to support this view. It took the check of the limited liability company for one thousand dollars and received from it certain notes; and then, stating that it was aware that no liability attached beyond the amount of the property of the corporation, it requested and received a change of notes into the supposed proper form of obligations of the limited liability company, and also insurance policies on the property, and then using one of these notes by way of discount, treated the matter as closed for more than a year. Supposing this first note discounted by the plaintiff had been paid by the Milling Company, could the plaintiff then be

heard to say that these notes were not received in payment? While, in fact, it was not paid, yet the plaintiff treated it as its property and negotiated it. Can it now be heard to say that such note was simply evidence of the amount due, when it received and used it as its property? It is unnecessary to affirm that these matters show conclusively that the obligations assumed by the original contract were satisfied and discharged by the settlement and notes of October, 1884. It is enough to affirm that there is in these matters testimony from which such a conclusion might be drawn; and, therefore, the findings of the trial court in this respect cannot by this court be ignored.

The fourth allegation of error is, that notwithstanding the acts of Mr. Shough may have apparently been such as to bind the company plaintiff, he had, in fact, no authority to bind the company by such acts. It is sufficient to say in respect to this matter, that his own testimony, corroborated by that of other members of the company, is that during the dates of these transactions he was acting as its financial manager, and, therefore, it cannot now repudiate its liability for his actions.

These are the only errors alleged, and in them we see nothing to justify us in disturbing the rulings of the trial court. The judgment is, therefore,

Affirmed.

SIMMONS *v.* SAUL.

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

No. 1585. Submitted January 9, 1891. — Decided March 2, 1891.

The constitutional provision that full faith and credit shall be given in each State to the judicial proceedings of other States does not preclude inquiry into the jurisdiction of the court in which a judgment is rendered over the subject matter or the parties affected by it, nor into the facts necessary to give such jurisdiction.

In 1872 parish courts in Louisiana were vested with original and exclusive jurisdiction over the administration of vacant and intestate successions.

Counsel for Parties.

The general principles of probate jurisdiction and practice as settled by a long series of decisions in the State courts and in the courts of the United States, are applicable to the powers and proceedings of the parish courts of Louisiana.

The order of the parish court in Louisiana granting letters of administration was a judicial determination of the existence of the necessary facts preliminary to them.

The parish court had unquestionable jurisdiction of the intestate estate or succession of Simmons.

The court directed an inventory of the estate, and appointed an administrator, in the same order, and the inventory was filed upon the following day. *Held*, that this was a sufficient compliance with the requirements of the Louisiana Code, Art. 1190.

Whether the person appointed administrator by the parish court was or was not the public administrator, who, under the law of Louisiana then in force, was the only person to whom such administration could be committed, was a matter to be considered by the court making the appointment, and its judgment thereon cannot be impeached collaterally.

Comstock v. *Crawford*, 3 Wall. 396, and *McNitt* v. *Turner*, 16 Wall. 352, affirmed and applied.

It was the intent of the legislature of Louisiana in enacting article 1190 of the code that small successions should be granted without previous notice, and that the settlement of them should be done in as summary a manner as possible.

It is settled in Louisiana that the purchaser at a sale under the order of a probate court, which is a judicial sale, is not bound to look beyond the decree recognizing its necessity: the jurisdiction of the court may be inquired into, but the truth of the record concerning matters within its jurisdiction cannot be disputed.

The judgment of a parish court in Louisiana, within the sphere of its jurisdiction, is binding upon the courts of the several States and of the United States.

A court of equity will not entertain jurisdiction to set aside the granting of letters of administration upon a succession in Louisiana on the ground of fraud, and will not give relief by charging purchasers at a sale made by the administrator under order of the court, and those deriving title from them, as trustees in favor of alleged heirs or representatives of the deceased.

In equity. Decree dismissing the bill. Complainants appealed. The case is stated in the opinion.

Mr. S. Davis Page for appellants.

Mr. John Douglass Brown, Jr., and *Mr. J. LeRoy Wolfe* for appellee.

Opinion of the Court.

MR. JUSTICE LAMAR delivered the opinion of the court.

This was a suit in equity, brought in the Circuit Court of the United States for the Eastern District of Pennsylvania, by ten citizens of Louisiana, two of Mississippi and four of Texas, in their own behalf and in behalf of certain other persons whose names are not known, all of whom claim to be the legal descendants of Robert M. Simmons, late a citizen of Louisiana, against Harry R. Saul, a citizen of Pennsylvania. Its object was to charge the defendant, as the former owner of a tract of land in Wisconsin, as the trustee for complainants, with respect to said ownership, and have him account for the value of the lands, for all their rents and profits received by him and his grantees, and for all loss and damages resulting to the property by reason of the cutting of timber thereon by the defendant and his grantees, and for any other loss occasioned by the defendant's acts.

The amended bill filed December 23, 1890, contained, substantially, the following material averments: In or about the year 1830, Robert M. Simmons died unmarried and intestate in Washington parish, Louisiana, seized and possessed of an inchoate land claim in St. Tammany parish, for 640 acres, founded upon the purchase of a settlement right, which claim was entered as No. 930, in the report of Commissioner James O. Cosby, dated June 7, 1812, and, with others, was confirmed by the act of Congress of March 3, 1813.

These complainants are the collateral heirs of Robert M. Simmons, being the lineal descendants of his brothers and sisters, and are all named specifically, excepting the descendants of one sister, who are alleged to be about seventy in number, and so widely scattered that it would be inconvenient to make all of them parties to the suit, wherefore it was asked that the suit might be maintained for the benefit of all of the complainants who were named, and for the unnamed complainants who might afterwards intervene and become parties to it.

By the law of Louisiana in force at the date of the death of Robert M. Simmons, and ever since, the heirs of a decedent

become seized and possessed of his whole estate, both real and personal, immediately upon his death, subject only to their right to renounce said succession, or to the right of creditors to require an administration thereof in case of non-action by the heirs. Such renunciation is not presumed, but must be made by formal act before a notary, but such acceptance may be evidenced by any act of the heirs indicating their intention to exercise ownership over the ancestor's property, and is always presumed unless the contrary appear. After an acceptance by the heirs or any of them of the succession of their ancestor no administrator can lawfully be appointed to administer thereon.

For reasons not involving fault on the part of Robert M. Simmons, or any of his heirs, the said land claim remained unlocated and unsatisfied until Congress passed the act of June 2, 1858, 11 Stat. 294, c. 81, the third and fourth sections of which provided as follows:

"SEC. 3. That in all cases of confirmation by this act, or where any private land claim has been confirmed by Congress, and the same, in whole or in part, has not been located or satisfied, either for want of a specific location prior to such confirmation, or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor general of the district in which such claim was situated, upon satisfactory proof that such claim has been so confirmed, and that the same, in whole or in part, remains unsatisfied, to issue to the claimant, or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied; which certificate may be located upon any of the public lands of the United States subject to sale at private entry, at a price not exceeding one dollar and twenty-five cents per acre: *Provided*, That such location shall conform to legal divisions and subdivisions.

"SEC. 4. That the register of the proper land office, upon the location of such certificate, shall issue to the person entitled thereto a certificate of entry, upon which, if it shall appear to the satisfaction of the commissioner of the general

land office that such certificate has been fairly obtained, according to the true intent and meaning of this act, a patent shall issue as in other cases."

No limit of time was fixed for the presentation of claims under that act for certificates of location therein provided for. During the lapse of time between the origin of said inchoate claim, its confirmation, and the passage of the act of Congress for its satisfaction, many of those interested in it had died, and their heirs, or legal representatives, many of whom were minors, had become widely scattered, and by reason of such delay had lost all hope of satisfaction of the claim. Neither the complainants nor any other persons interested in the claim, who were alive at the time the act was passed, knew of the existence of the claim, of the passage of that act, or of their rights thereunder, until within a year before the commencement of this suit; none of the surveyors general for the district of Louisiana, since the passage of the act, ever took any steps to apprise them of their rights, it being the practice to issue certificates of location under the act only upon application therefor; and none of the persons lawfully interested in the claim ever applied for or received any certificates of location in satisfaction of any part of the claim.

Notwithstanding the above facts and provisions of law, one Daniel J. Wedge, on the 8th of May, 1872, induced the district attorney *pro tempore*, one David Magee, of Washington parish, Louisiana, to file his petition in the parish court of that parish, by the said Daniel J. Wedge, as attorney, alleging that the estate of Robert M. Simmons was vacant, and that it consisted of the confirmed but unsatisfied land claim hereinbefore referred to, which was less than $500 in value, and praying to be appointed administrator thereof, and for an inventory and sale of the same under the laws of Louisiana regulating the administration of vacant estates of less than $500 of value; that such proceedings were had that, on the 8th day of May, 1872, the judge of the parish court, in pursuance of said petition, issued an order purporting to appoint said David Magee administrator of said estate, and to direct an inventory of the same to be made, and a sale of the prop-

erty, which might be found to belong thereto, to pay debts; that said inventory was returned on the 9th day of May, 1872, and, on the 22d of the same month, a pretended sale of the claim was made in accordance with the aforesaid order, at which sale one Addison G. Foster pretended to purchase it for the sum of $30, which sum was wholly used and expended in the payment of the costs and expenses of such pretended administration, no other debts than those created thereby existing or being shown to exist. A copy of all those proceedings in the parish court was annexed to the bill and made a part of it, and will be referred to more in detail as we proceed.

At the time the pretended administration proceedings in the parish court were had, the parish court of Washington parish was a court of limited, special and statutory jurisdiction, and in the matter of said proceedings pretended to act under special statutory authority, which is set out with some degree of particularity.

Afterwards said Addison G. Foster, claiming to be the legal representative of Robert M. Simmons, by virtue of the aforesaid proceedings in the parish court, applied to Everett W. Foster, the surveyor general of the United States for the district of Louisiana, (who, it seems, was the brother of applicant,) for the delivery to him, as such legal representative, of the certificates of location in satisfaction of the aforesaid land claim, under the act of 1858, and the surveyor general, on or about the 31st day of August, 1872, prepared certificates of location for the whole claim, and forwarded them to the commissioner of the general land office, who authenticated them, and afterwards delivered them to Chipman, Hosmer & Co., of Washington, D.C., as the agents for Foster. A copy of one of the certificates of location with the form of the authentication by the commissioner, and the following certificate of the surveyor general for the district of Louisiana, is set out in full in the bill:

"I certify that from evidence filed in this office, A. G. Foster is the legal representative of Robert M. Simmons, and as such is entitled to locate the within strip.

"E. W. Foster, *Surveyor General.*"

The evidence referred to in that endorsement consisted solely of the pretended act of sale under the administration proceedings before mentioned.

Thereafter certain of those certificates were located by Addison G. Foster, or his agents, upon certain described lands in Wisconsin, and a patent for those lands was issued by the United States in the name of Robert M. Simmons, or his legal representatives, which patent recited the provisions of the third and fourth sections of the act of June 2, 1858, above set forth, the issue of the certificates of location by the surveyor general of Louisiana, the name of the commissioner who originally reported the claim, the date of the confirming act, the number of the certificate by virtue of which the land was located, and that the location of the tract was "in part satisfaction of the aforesaid claim of Robert M. Simmons."

Thereafter the defendant herein pretended to purchase those lands from said Addison G. Foster, through his attorney-in-fact, by quitclaim deed, which deed together with the patent was recorded in the office of the register of deeds of Chippewa County, Wisconsin, on the 13th of January, 1875. By several mesne conveyances the land passed to one Charles Saul, who gave to the defendant a power of attorney to convey the lands, which was recorded June 9, 1883. The whereabouts of all the grantees in those conveyances are unknown to complainants, but are believed to be not within the jurisdiction of the court. In 1878, while defendant was in possession of the lands in question, claiming title thereto, he removed therefrom certain timber and other valuable products, and sold the same for large sums of money, and received large rents and profits from the lands, but neglected to pay taxes lawfully assessed thereon; so that in 1880 they were conveyed for the unpaid taxes, whereby the right of complainants to recover the same has been wholly lost and unlawfully defeated. The value of the timber and other products cut and removed from the land, and the value of the lands themselves, largely exceeded $10,000, the precise amount being impossible to state.

The aforesaid administration proceedings in the matter of

the succession of Robert M. Simmons, the sale of the land claim, the application for and delivery of the certificates of location, the location of them upon the lands in question, and the issue of certificates of entry and patents therefor, were done, had and contrived in pursuance of certain agreements, entered into about the 16th of August, 1869, between Everett W. Foster, surveyor general of Louisiana, said Addison G. Foster, and certain other named persons, residents of Washington, D. C., New York and Louisiana, for the purpose of securing for their own use and benefit, and in fraud and disregard of the rights of the persons justly entitled thereto, certificates of location authorized by the said act of Congress of 1858, by means of pretended administration sales of confirmed claims, as part of the property of the successions of the original confirmees or owners thereof, in Louisiana, which successions were administered in various parishes of Louisiana, in large numbers, under alleged authority of the provisions of Louisiana law relating to the administration of vacant estates of less than $500 in value. All the papers in those proceedings were made out upon printed forms furnished by the parties to those agreements. All of the proceedings in relation to the claim in suit, the cutting of the timber aforesaid, and all other acts in anywise connected with the claim or land, were done and had without the knowledge of complainants, or of any person interested in the claim; and not until within a year last past did they ascertain anything in relation thereto.

The bill then avers that all of the aforesaid proceedings in relation to the issue of certificates of location in satisfaction of the claim, the location of them upon lands in Wisconsin, the issue of patents, etc., and all other acts in anywise connected therewith, or with respect to the land, were done and had in fraud of the rights of complainants, and those interested in the claim.

The prayer of the bill was that complainants might be adjudged and decreed to be the true legal representatives of said Robert M. Simmons; that the aforesaid proceedings in the parish court in relation to the sale of the land claim might be adjudged null and void; that an account might be taken,

by and under the direction and decree of the court, of the timber and other products removed from the land by the defendant, or with his permission or authority, and of the value of the timber and products and land lost by reason of the same having been sold and conveyed for taxes; that the defendant might be decreed to pay unto complainants the value of the timber and products so removed, with interest from the date of such removal; that the defendant might be decreed to pay to them the highest value of the lands since the date of the assessment of the taxes for which the land was sold as aforesaid; and for other and further general relief, etc.

Certified copies of all the papers, orders, judgment, etc., of the parish court of Washington parish, Louisiana, in the matter of the succession sale aforesaid, also of the certificates of location, the patent and the aforesaid agreement in the matter of Louisiana land claims, were attached to the bill, as exhibits.

The defendant demurred to the bill, setting up fifteen grounds in support of the demurrer; and on January 6, 1891, the court below sustained the demurrer, and entered a decree dismissing the bill. An appeal from that decree brings the case here.

The first and main ground of the demurrer in this case is, that the facts stated in the complaint show that the relief claimed by the complainants is barred by the judgment or decree of a court of competent jurisdiction, rendered in proceedings regular on their face, and which have not been attacked by any proceeding in that court, or in any appellate court. The bill alleged that the court which rendered that judgment was without jurisdiction; that its proceedings in the matter did not conform to the statute under the authority of which it assumed to act; that the judgment itself was obtained by a fraud upon the court; and that necessarily the pretended succession sale had in pursuance thereof, from which the appellee derived title to the lands with respect to which he committed the wrongs complained of, was illegal and void as to complainants, who, as heirs of Robert M. Simmons, deceased, are the equitable owners of said property. The pleadings, therefore, at the outset, present to us these two questions:

(1) The validity of the judgment of the parish court of Washington parish ordering the succession sale of the unlocated land claim of Robert M. Simmons, deceased, and the legality of the sale thereunder, irrespective of any question of fraud. (2) As to the fraud by which it is alleged the judgment in question was procured.

It is the settled doctrine of this court that the constitutional provision that full faith and credit shall be given in each State to the judicial proceedings of other States, does not preclude inquiry into the jurisdiction of the court in which a judgment is rendered over the subject matter or the parties affected by it, nor into the facts necessary to give such jurisdiction. *Thompson* v. *Whitman*, 18 Wall. 457; *Cole* v. *Cunningham*, 133 U. S. 107.

This leads to the consideration of the powers of the parish courts in Louisiana in 1872, especially with regard to their jurisdiction in probate and succession matters. The constitution of the State, adopted in 1868, under which the judicial proceedings in 1872 took place, provided in Art. 73 that "The judicial power shall be vested in a Supreme Court, in district courts, in parish courts and in justices of the peace." In Art. 87, that "All successions shall be opened and settled in the parish courts; and all suits in which a succession is either plaintiff or defendant may be brought either in the parish or district court, according to the amount involved." And in Art. 88, that "In all probate matters, where the amount in dispute shall exceed five hundred dollars, exclusive of interest, the appeal shall be directly from the parish to the Supreme Court."

The laws of Louisiana, in force when the proceedings in the parish court occurred, relating to the subject under consideration, provide that (Rev. Stat. 1870) "The parish courts of this State shall have jurisdiction . . . of all the matters provided for and embraced in title three (3), part second, of the 'Code of Practice,' which treats of proceedings in the courts of probate."

Art. 921, Code of Practice: "Courts of probate are specially established to appoint legal representatives for minors,

orphans, insane and absent persons, and to superintend the administration of vacant successions."

Art. 923. "The parish judges are *ex officio* judges of the courts of probate, in their respective parishes."

Art. 924. "Courts of probate have the exclusive power: . . . 4. To appoint curators to vacant estates and absent heirs. 5. To grant orders to make the inventories and sales of the property of successions, which are administered by curators or testamentary executors, or in which the heir prays for the benefit of inventory."

Art. 872, Civil Code of 1870: "Succession signifies also the estates, rights and charges which a person leaves after his death, whether the property exceeds the charges or the charges exceed the property, or whether he has only left charges without any property."

Art. 873. "The succession not only includes the rights and obligations of the deceased, as they exist at the time of his death, but all that has accrued thereto since the opening of the succession, as also the new charges to which it becomes subject."

Art. 1095. "A succession is called vacant when no one claims it, or when all the heirs are unknown, or when all the known heirs to it have renounced it."

Art. 1097. "Vacant successions are managed by administrators appointed by courts, under the name of curators of vacant successions."

Art. 934. "The succession, either testamentary or legal, or irregular, becomes open by death or by presumption of death caused by long absence, in the cases established by law."

Art. 935. "The place of the opening of successions is fixed as follows: In the parish where the deceased resided, if he had a fixed domicil or residence in this State."

Art. 929, Code of Practice: "The place in which a succession is opened is, and in future shall be held to be, as follows, notwithstanding any former law to the contrary: In the parish where the deceased resided, if he had a domicil or fixed place of residence in the State."

Art. 946, Civil Code: "Though the succession be acquired

by the heir from the moment of the death of the deceased, his right is in suspense, until he decide whether he accepts or rejects it."

Art. 988. "The simple acceptance may be either express or tacit. It is express when the heir assumes the quality of heir in an unqualified manner, in some authentic or private instrument, or in some judicial proceeding. It is tacit when some act is done by the heir which necessarily supposes his intention to accept, and which he could have no right to do but in his quality of heir."

Art. 1190. "If a succession is so small or is so much in debt that no one will accept the curatorship of it, the judge of the place where the succession is opened, after having ordered an inventory of the effects composing it, shall appoint the district attorney of the district or the district attorney *pro tempore* of the parish, curator of said succession, who shall cause the effects to be sold, and the proceeds to be applied to the payment of its debts; the whole to be done in as summary a manner as possible to diminish costs; provided, that this article is not to apply to successions amounting to more than five hundred dollars."

Art. 611 of the Code of Practice provides that where no appeal has been taken within the delay prescribed by law, the nullity of the judgment may be demanded by means of an action brought before the court which has rendered the same within a time prescribed. And Art. 607 provides that a definitive judgment may be annulled in all cases where it appears that it has been obtained through fraud or through ill practices on the part of the party in whose favor it was rendered.

The provisions of the law abundantly show, we think, that the parish courts were vested with original and exclusive jurisdiction over the administration of vacant and intestate successions, such as the allegations of the bill show this to have been. They do not differ very materially from the laws of most of the States regulating probate matters. The general principles of probate jurisdiction and practice, as settled by a long series of decisions in the state courts and in the courts of the United States, are applicable to the powers and proceedings of the par-

ish courts of Louisiana, and have been recognized and enforced by the Supreme Court of that State. They also show that, under the averments of the bill, the parish court of Washington parish had jurisdiction of the succession of Robert M. Simmons. The succession had been open for over forty years, and no one had claimed it; nor did any of the complainants as heirs accept it either expressly in writing or by judicial proceeding; nor tacitly by doing any act which necessarily supposed their intention to accept. It was very properly adjudicated to be vacant, and was administered as such. Washington parish was the one in which the deceased was domiciled at the date of his death, and the succession, being less than $500 in value, was administered under section 1190 of the code. The petition, in reciting that "Robert M. Simmons departed this life in said parish many years since, . . . leaving some property consisting of an old deferred unlocated purchase land claim," and that the same was less than $500 in value, and praying for an inventory, appraisement and sale to pay debts, etc., set forth the necessary jurisdictional facts to warrant the court in proceeding to administer the estate. The court, therefore, had before it in the petition the death of Simmons within the parish, his intestacy, the possession of property and the smallness of the estate. The order granting letters of administration was a judicial determination of the existence of all those facts. Admitting all the facts well pleaded in the complaint to be true, as we are bound to do on demurrer, it is our opinion that the parish court of Washington parish had a clear and unquestionable jurisdiction of the intestate estate or succession of Robert M. Simmons.

But it is contended that the irregularities and failures to comply with the law in the probate proceedings ousted the court of its jurisdiction, and rendered the decree of sale and the sale itself invalid. We will proceed to consider these alleged failures, so far as they affect the jurisdiction, in the order in which they are stated in counsel's brief. The first is, that the proceeding is void, because the appointment of an administrator was made before the inventory of the estate was ordered, contrary to Art. 1190 of the Louisiana Code,

which permits such appointment to be made only after an inventory is ordered. The answer to this is, that the court directed an inventory and appointed an administrator in the same order, and that on the next day the inventory was filed, upon which the court based its order, directing the sale to be made. This was, in effect, a compliance with the statute, and the objection is more technical than substantial. The next point relied on to show the invalidity of the proceedings is, that the administrator appointed by the court was not the public administrator, who, under the law of Louisiana then in force, was the only person to whom such administration could be committed. This point has been considered in two cases before this court, and in each was held to be without merit. *Comstock* v. *Crawford*, 3 Wall. 396, 403; *McNitt* v. *Turner*, 16 Wall. 352, 363. In the former of these cases the question before the court was as to the validity of an administrator's sale in the Territory of Wisconsin. The statute of the Territory provided that there should be appointed by the governor, in and for each county, a person known as "the public administrator" therein; and it further required that the administration of a non-resident intestate shall be granted to such public administrator of the county in which the non-resident intestate died. It was contended in that case, as it is here, that the sale was invalid, because the administrator appointed by the probate court was not the public administrator. The court, in answer to this contention, said, Mr. Justice Field delivering the opinion: "It is well settled that when the jurisdiction of a court of limited and special authority appears upon the face of its proceedings, its action cannot be collaterally attacked for mere error or irregularity. The jurisdiction appearing, the same presumption of law arises that it was rightly exercised as prevails with reference to the action of a court of superior and general authority. . . . Whether there was a widow of the deceased, or any next of kin, or creditor, who was a proper person to receive letters, if he had applied for them, or whether there was any public administrator in office authorized or fit to take charge of the estate, or to which of these several parties it was meet that the administration should

be intrusted, were matters for the consideration and determination of the court; and its action respecting them, however irregular, cannot be impeached collaterally." In the case of *McNitt* v. *Turner*, *supra*, the same question under a similar statute was presented and decided in the same way.

Another ground is that Art. 1115 of the Louisiana Code required ten days' public notice before the appointment of an administrator; that, according to the allegations of the bill, no notice of the appointment in the proceedings under consideration was given; and that under Art. 1167 of the same code property belonging to vacant successions could only be sold at public auction after ten days' advertisement for movables and thirty days' for immovables. We do not think that the requirements in Arts. 1115 and 1167, as to advertisements, apply to the proceedings in question, which were instituted under Art. 1190. That article, as we have seen, provides as follows:

"Art. 1190. If a succession is so small or is so much in debt that no one will accept the curatorship of it, the judge of the place where the succession is opened, after having ordered an inventory of the effects composing it, shall appoint the district attorney of the district or the district attorney *pro tempore* of the parish, curator of said succession, who shall cause the effects to be sold, and the proceeds to be applied to the payment of its debts; the whole to be done in as summary a manner as possible to diminish costs; provided, that this article is not to apply to successions amounting to more than five hundred dollars."

The history of this provision leads to the conclusion that it was the intention of the legislature that the administration of such small successions should be granted without previous notice, and that the settlement of them should be done in as summary a manner as possible. But even if it be conceded that the requirements referred to do apply, we are of the opinion that, the jurisdiction over the subject matter having attached, any informalities as to notices, advertisements, etc., in the subsequent proceedings of the court, cannot oust that jurisdiction. They are, at most, errors which could be cor-

rected on appeal, or avoided in a direct action of annulment, as expressly provided in the articles of the code above cited, but cannot be made the grounds on which the decree of the court can be collaterally assailed.

Our conclusion on this branch of the case is fully borne out by many decisions of this court, two of which are cited above. In *McNitt* v. *Turner*, 16 Wall. 366, Mr. Justice Swayne, speaking for the court, said: "Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceeding being *coram judice*, can be impeached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error." *Grignon's Lessee* v. *Astor*, 2 How. 319, 337, 340, 341, was, like this, a case of a sale by an administrator. The court, in its opinion, said: "The whole merits of the controversy depend on one single question: had the county court of Brown County jurisdiction of the subject on which they acted? . . . Nor is it necessary that a full or perfect account should appear in the records of the contents of papers on file, or the judgment of the court on matters preliminary to a final order; it is enough that there be something of record which shows the subject matter before the court, and their action upon it, that their judicial power arose and was exercised by a definitive order, sentence or decree. . . . The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. . . . The court having power to make the decree, it can be impeached only by fraud in the party who obtains it. 6 Pet. 729. A purchaser under it is not bound to look beyond the decree; if there is error in it, of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected

as if the adjudication would stand the test of a writ of error." The following authorities are strong in support of the general proposition under consideration; *Thompson* v. *Tolmie*, 2 Pet. 157; *Mohr* v. *Manierre*, 101 U. S. 417; *Comstock* v. *Crawford*, *supra*; *Florentine* v. *Barton*, 2 Wall. 210; *Thaw* v. *Ritchie*, 136 U. S. 519.

The adjudications of the Supreme Court of Louisiana are in entire harmony with those decisions. It has long been a fundamental principle of law in that State that "the purchaser at a sale under the order of a probate court, which is a judicial sale, is not bound to look beyond the decree recognizing its necessity. He must look to the jurisdiction of the court; but the truth of the record concerning matters within its jurisdiction cannot be disputed." 2 Hen. Dig. 1494, par. 5, citing a long list of authorities.

One of the leading cases is *Lalanne's Heirs* v. *Moreau*, 13 La. 433, 436. In that case the heirs brought an action of ejectment in the district court against the purchasers at a sale made by order of the probate court of the real estate of their ancestor, and recovered judgment. Upon appeal the Supreme Court of the State reversed that judgment, thus upholding the title acquired at the succession sale. In its opinion the court said: "We place our decision on the broad ground that sales directed or authorized by the courts of probate are judicial sales to all legal intents and purposes. It was so decided by this court in the cases already alluded to, and the principle is recognized in that of *Pintard* v. *Deyris*, 3 Martin, N. S. 32. Art. 114, p. 366, of the old Civil Code, also seems to recognize it, and it is a textual provision of the Louisiana Code, included in Art. 1863. The necessity and wisdom for such a rule of property has long been felt and acknowledged in the most important States of the Union, and none is better settled by the decisions of their courts. They all maintain . . . that a judgment, decree, sentence or order passed by a competent jurisdiction, which creates or changes a title or any interest in an estate, is not only final as to the parties themselves and all claiming under them, but furnishes conclusive evidence to all mankind that the right or interest belongs to the party to whom the court adjudged it."

In *Valdere* v. *Bird*, 10 Rob. La. 396, 398, the court said: "It is now well settled that where there is a formal decree of the court of probates, recognizing the necessity of selling the property inherited by minors for the payment of debts of the succession, and giving an opportunity to the attorney of the absent heirs to show that in fact no such necessity existed, the purchaser is not bound to look beyond the decree. . . . The want of a sufficient time for advertising between the rendition of the judgment of the court of probates and the sale is a defect which the act of 1834 relative to advertisements, was expressly made to remedy. The plea of prescription [five years] must prevail as to that."

In *Beale* v. *Walden*, 11 Rob. 67, 72, the court said: "The whole controversy turns upon the first two questions here presented, to wit, the jurisdiction of the court of probates of the parish of Jefferson, and, if it had such jurisdiction, whether Walden was a purchaser at a judicial sale; for if that court had jurisdiction, we will not go behind its judgment to inquire whether there was legal evidence of a debt, or, in other words, a necessity for the sale, etc."

In *Michel's Heirs* v. *Michel's Curator*, 11 La. 154, the court held that the purchaser is not bound to look beyond the decree of the court of probates recognizing the necessity of the sale. See also *McCullough* v. *Minor*, 2 La. Ann. 466; *Wright* v. *Cummings*, 19 La. Ann. 353; *Sizemore* v. *Wedge*, 20 La. Ann. 124; *Wisdom* v. *Buckner*, 31 La. Ann. 52; *Graham's Heirs* v. *Gibson*, 14 La. Ann. 149; *Ball's Adm'r* v. *Ball*, 15 La. 173, 182; *Rhodes* v. *Union Bank*, 7 Rob. La. 63, 65, 66.

A case of great importance, in this connection, is *Duson* v. *Dupré*, 32 La. Ann. 896. That was a petitory action in a district court, by the curator of the succession of one Louis Blanc and the attorney for the absent heirs of the same succession, to recover a tract of land which they alleged was the property of that succession. The defence was, that the plaintiffs were incapacitated to sue, because their appointment by the parish court of St. Landry was an absolute nullity, for the following reasons: First. That Louis Blanc having died in the parish of Orleans, where he resided, the probate court of

St. Landry had no jurisdiction over his succession. Second. That Louis Blanc having left heirs residing in the State, the probate court could not treat and administer his succession as a vacant estate. The case was tried on those exceptions, and the district court held them sufficient, and thereupon dismissed the action. Upon appeal the Supreme Court reversed that judgment, and held: "In our opinion the district judge erred in allowing this *collateral* attack on the judgment of the probate court. . . . The late parish court of St. Landry had probate jurisdiction, and was exclusively competent to grant and issue letters of administration in all successions properly opened in that court. Defendants contend that this succession was not properly opened in that court, for the reasons urged in their exceptions. This denial presents a question of fact; that the deceased was not a resident of this parish, and that, having left heirs who were residents of this State, his succession was not vacant so as to necessitate or justify the appointment of a curator. . . . These questions can be looked into and adjudicated upon only in a direct action before the same court, or before the tribunal now vested with original probate jurisdiction in the parish of St. Landry. No principle of our jurisprudence is more firmly established than the following: 'Letters of administration make full proof of the party's capacity until they be revoked. They must have their effect, and the regularity of the proceedings on which they issued cannot be examined collaterally.' This rule was laid down in the early days of our jurisprudence, and has been sanctioned, confirmed and consecrated by an unbroken line of decisions of this court down to the present day;" citing a long list of authorities.

The cases cited by counsel for appellants, instead of militating against the doctrine of the cases above referred to, are in reality in harmony with them. Many of them were cases in which the judgment of the probate court was attacked directly by appeal or by an action of nullity, and not collaterally; while others were legal actions of revendication to try a title held under a will alleged to be invalid, which, under the code, are expressly authorized to be brought in the district court.

Having reached the conclusion that a judgment of a parish court of Louisiana, rendered within the sphere of its jurisdiction, is binding upon the courts of the several States and of the United States, the next question for our consideration relates to the averments of fraud in connection with the succession sale. These averments, divested of the usual epithets of fraud, in such cases, and considered apart from the allegations of a lack of jurisdiction in the court, and of jurisdictional defects in the subsequent proceedings, are meagre and indefinite as to any particular acts of fraud upon the court or upon the appellants. They do not state any falsehood, imposition or undue influence upon the court or any of its officers. They are to the effect, when sifted, that a large number of persons, including the United States surveyor general for Louisiana and his brother, Addison G. Foster, the purchaser of this claim, in 1872, had entered into agreements to purchase a great number of confirmed private land claims in Louisiana, at succession sales, and then have them satisfied by certificates of location under the act of 1858; and that this sale was a consummation of a part of this agreement. It may be proper here to observe that the instrument attached to the bill as an exhibit, and referred to as reciting one of these alleged agreements, says nothing whatever in relation to administration of vacant successions, or sales thereunder, as set forth in the bill, and to that extent negatives its averments. Nor do they mention any fact connected with such alleged agreement which in any way affected the judicial proceedings that were taken in this administration or tended to influence the sale thereunder.

But waiving everything as to the sufficiency of the allegations of fraud, the question arises, do they furnish any grounds for the annulment by a court of equity of the probate proceedings under consideration, for the purpose of charging the defendant as a trustee for the benefit of complainants? We think not, and in this view we are sustained by a number of decisions of this court, to some of which we now refer. *Christmas* v. *Russell*, 5 Wall. 290, was an action of debt brought in the United States Circuit Court for the Southern District of

Mississippi, on a judgment obtained against the defendant in Kentucky. The defendant pleaded that the judgment had been obtained by the fraud of the plaintiff. A demurrer to the plea having been sustained by that court, the case was brought here and the judgment below affirmed, upon the ground that fraud could not be pleaded to an action in one State upon a judgment obtained in another.

In *Maxwell* v. *Stewart*, 22 Wall. 77, 81, the very same question was presented to this court, in a similar case, upon the same plea, and this principle was reaffirmed.

In *Hanley* v. *Donoghue*, 116 U. S. 1, 4, the court said, Mr. Justice Gray delivering the opinion: "Judgments recovered in one State of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being reëxaminable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties;" citing *Buckner* v. *Finley*, 2 Pet. 592; *M'Elmoyle* v. *Cohen*, 13 Pet. 312, 324; *D'Arcy* v. *Ketchum*, 11 How. 165, 176; *Christmas* v. *Russell*, 5 Wall. 290, 305; *Thompson* v. *Whitman*, 18 Wall. 457.

The case of *Broderick's Will*, 21 Wall. 503, upon this point is absolutely conclusive against the appellants. That was a bill in equity brought by the alleged heirs-at-law of Broderick to set aside and annul the probate of his will in the probate court of California, and to recover the property belonging to his estate, or to have the purchasers at the executor's sale thereof, and those deriving title from them, charged as trustees for the benefit of complainants. The bill alleged that the will was forged; that the grant of letters testamentary and the orders for the sale of the property were obtained by fraud, all of which proceedings, as well as the death of the decedent, were unknown to the complainants until within three years before the filing of the bill. A demurrer to the bill was overruled and the case was appealed to this court. It was held, Mr. Justice Bradley delivering the opinion, that a court of equity will not entertain jurisdiction to set aside the probate of a will, on the ground of fraud, mistake or forgery, this

being within the exclusive jurisdiction of the probate court; and that it will not give relief by charging the purchasers at the executor's sale, under the orders of the probate court, and those deriving title from them, as trustees, in favor of a third person, alleged to be defrauded by the forged or fraudulent will, where the court of probate could afford relief, in whole or in part.

With the single exception that that case was brought to set aside the probate of a will, and this was brought to set aside the granting of letters of administration upon a succession, the two cases are as much alike as two photographs of the same person, the lineaments of the alleged fraud being more distinctly brought out in the bill in the case of *Broderick's Will*, than in the bill in this case. Both were bills in equity, brought by the alleged heirs-at-law of a decedent, to set aside and annul a decree of a court of probate, and all the subsequent proceedings, including the order of sale and the sale itself. Both alleged fraud in the procurement of the respective decrees, and knowledge of the fraud by the defendants — actual knowledge in the *Broderick Case*, and constructive knowledge in this case. Both showed a long period of delay — nine years in the *Broderick Case*, and eighteen in this case, and both set up ignorance of the facts as the excuse for laches ; and in both cases, according to the averments of the bill in each, the probate court had adequate power to afford relief. See also *Ellis* v. *Davis*, 109 U. S. 485. We think the decision in that case is applicable to the whole of this case upon the question of fraud, and thus obviates the necessity of adverting any further to the question of the establishment of a trust, as against the defendant, in favor of the complainants.

Decree affirmed.

In re GRAHAM, Petitioner.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 1332. Argued January 29, 1891. — Decided March 2, 1891.

When the highest court of a State holds that a judgment of one of its inferior courts, imposing punishment in a criminal case in excess of that allowed by the statutes of the State, is valid and binding to the extent to which the law of the State authorized the punishment, and only void for the excess, there is no principle of federal law invaded in such ruling.

This was a writ of error to the Supreme Court of Wisconsin to review a judgment of that court refusing to issue a writ of *habeas corpus* for the discharge of the plaintiff in error, the petitioner for the writ.

A law of Wisconsin declared that "any person who shall assault another and shall feloniously rob, steal or take from his person any money or other property which may be the subject of larceny, such robber being armed with a dangerous weapon, with intent if resisted to kill or maim the person robbed, or, being so armed, who shall wound or strike the person robbed, shall be punished by imprisonment in the state prison not more than ten years nor less than three years." The petitioner in the court below, John Graham, and one Samuel McDonald, were charged with feloniously making an assault upon one Alf. McDonald, putting him in bodily fear and danger of life and feloniously robbing him of two hundred dollars in money, the parties being armed at the time with a loaded revolver, and wounding and striking the said Alf. McDonald. In June, 1889, the parties were tried in the Circuit Court for Ashland County, Wisconsin, and were convicted as charged in the information, and were sentenced to confinement in the state prison at hard labor, one for the period of thirteen years and the other for the period of fourteen years. As the law only authorized punishment by imprisonment not exceeding ten years, and the parties were serving under a sentence much longer than that period, they applied to the court below for a writ of *habeas corpus*, alleging that the judgment was void as being in excess of the authority vested

in the court by which it was rendered. The court below held that the judgment was not void in the sense of being an absolute nullity, but only erroneous, and that the remedy of the parties was by a writ of error and not by a writ of *habeas corpus*. *In re Graham* and *In re McDonald*, 74 Wisconsin, 450. The writ was therefore refused. Subsequently one of the parties applied again to the Supreme Court of Wisconsin for the writ, and it was again refused. To review this last judgment the case was brought to this court.

Mr. Rublee A. Cole began argument for the petitioner; but, on the statement of the case, the court declined to hear further argument.

Mr. J. L. O'Connor, Attorney General of the State of Wisconsin, and *Mr. Robert M. La Follette* filed a brief in opposition.

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

It is undoubtedly the general rule that a judgment rendered by a court in a criminal case must conform strictly to the statute, and that any variation from its provisions, either in the character or the extent of punishment inflicted, renders the judgment absolutely void; but it seems that under the law of Wisconsin a judgment in a criminal case which merely exceeds in the time of punishment prescribed by the sentence that which is authorized by law, is not absolutely void, but only erroneous, and that the error must be corrected on appeal and cannot be corrected by a writ of *habeas corpus*. It would seem that a distinction is there made between those cases in which the judgment is irregular, as being in excess of the time prescribed, and those in which it is void as changing the nature of the punishment from that authorized by the law; and that in the former class, until the time is reached which is prescribed by statute as the limit of the power of the court to punish the prisoner, he has no remedy by *habeas corpus*.

If such be the law of the State, as would appear by this decision and the argument of counsel, we do not see that we

have any right to interfere. That the prisoner should not have been sentenced for any time in excess of ten years, is very evident. When the ten years have expired it is probable the court will order the prisoner's discharge, but until then he has no right to ask the annulment of the entire judgment. Such being the ruling of the State court, and there being nothing in it repugnant to any principle of natural justice, we think that the reason given for a refusal of the writ of *habeas corpus* in the court below at the present time was a sound one.

Nor is the doctrine of the Wisconsin court peculiar to the courts of that State. In New York it has been held that a judgment in a criminal case, which in the punishment it imposed exceeded that prescribed by statute, was not void except for the excess, where such excess could be omitted in the execution of the judgment. Thus in *The People* v. *Baker*, 89 N. Y. 460, 467, the relator was tried and convicted of a crime for which he was sentenced to be imprisoned in the penitentiary for one year, and to pay a fine of $500, and to stand committed until the fine was paid. Contending that the offence, of which he was convicted, was shown by the minutes of the court to have been merely an assault and battery for which he could have been at most sentenced to be imprisoned for one year and to pay a fine of $250 only, he applied to a judge of the Superior Court of Buffalo for a writ of *habeas corpus* to be discharged from imprisonment. That court refused to discharge him, and the general term of the court having affirmed the ruling, the case was taken to the Court of Appeals of the State. In sustaining the decision that court held that if the relator was only convicted of a simple assault and battery he would not be entitled to his discharge, for then the sentence to imprisonment for one year was authorized and legal, observing that this was a separate portion of the sentence, complete in itself, and the remainder of the sentence could be held void and disregarded; and that the whole sentence was not illegal and void because of the excess, adding that such was the settled law of the State.

But were the general doctrine of other States against that held by the highest court of Wisconsin, it is not perceived how

we could interfere with the imprisonment of the plaintiff in error. When the highest court of a State holds that a judgment of one of its inferior courts imposing punishment in a criminal case is valid and binding to the extent in which the law of the State authorized the punishment, and only void for the excess, we cannot treat it as wholly void, there being no principle of federal law invaded in such ruling.

Judgment affirmed.

CLAY *v.* FIELD.
FREEMAN *v.* CLAY.
FIELD *v.* CLAY.

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

Nos. 895, 1085, 1091. Submitted October 27, 1890. — Decided March 2, 1891.

The surviving partner in the management of a plantation in Tennessee which belonged to the deceased partner, retained possession of it after his partner's death, and of the slaves upon it, and continued to operate the plantation in good faith, and for what he thought were the best interests of the estate of the deceased as well as his own. When the war came, the plantation was in the theatre of the conflict, and at its close the slaves became free. *Held*, that, under the circumstances, the surviving partner in a general settlement was not accountable for the value of the slaves, but was accountable for the fair rental value of the property, including that of the slaves while they were slaves.

An action for dower is not exempt from, or excepted out of, the act fixing the jurisdictional amount necessary for an appeal to this court.

If several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdiction by appeal, but each must stand or fall by itself alone.

The words "received on settlement to this date," where there was a partnership account running through years, may refer to a settlement for the year, or a settlement for the whole period of the partnership; and this ambiguity, being a latent one, may be explained by evidence *aliunde*.

Opinion of the Court.

In equity. The case is stated in the opinion.

Mr. W. L. Nugent for Mr. and Mrs. Clay.

Mr. Edward Mayes for Mrs. Freeman.

Mr. J. E. McKeighan and *Mr. Frank Johnston* for Field.

Mr. Justice Bradley delivered the opinion of the court.

This case was before us in October term, 1885, upon a decree dismissing the bill on demurrer. See *Clay* v. *Freeman*, 118 U. S. 97. We reversed that decree, and remanded the cause with instructions to enter a decree in conformity with the opinion of this court, which was done. After various subsequent proceedings in the court below, a decree was finally made on the 15th of August, 1889, from which both complainants and defendants have appealed. Before adverting to the subsequent proceedings, it will be necessary briefly to review the case as stated in the bill, and as it appeared before us on the former appeal.

In 1855, Christopher I. Field and his brother, David I. Field, purchased a plantation in Bolivar County, Mississippi, called the Content place, for the purpose of working the same in raising cotton and other crops as partners, the arrangement being that David should occupy and manage the plantation and all the affairs of the partnership, and that each should share equally in the profits and losses. In the course of the business, Christopher I. Field, who had a plantation adjoining the Content place, and was a man of large means, made sundry advances to the firm to pay for land purchased and other things required in carrying on the business, for which his brother David executed, on behalf of the firm, several notes or acknowledgments of indebtedness; one dated 23d of December, 1856, payable 1st of January, 1858, for the sum of $7385.31, with six per cent interest from maturity; another dated 20th of March, 1857, for the sum of $5666\frac{2}{3}$, to be paid with interest at six per cent from date; a third dated 5th of June, 1858, for the sum of $1100; and a fourth dated 30th of June, 1859, for the sum of $1389.29; in all, $15,541.27.

David I. Field died on the 11th of September, 1859, leaving

his widow, Lucy C. Field, (who afterwards married one C. L. Freeman,) and an infant son, David I. Field, Jr., who are the defendants in this suit. At the time of David I. Field's death his widow was in Kentucky, and did not return to Mississippi.

Of course the care of the plantation and partnership property devolved upon Christopher I. Field, as surviving partner; but soon after the death of David letters of administration upon his estate were taken out by another brother, Ezekiel H. Field, who went into possession of the plantation and continued to carry it on in the place and stead of his deceased brother, for the benefit of the partnership, during the year 1860 and part of the year 1861. He left in the summer of the latter year, when the disturbances occasioned by the civil war rendered it hazardous, if not impracticable, to cultivate the plantation or to secure any crops. It is charged in the bill that the year 1859 was an unprofitable year, in consequence of the overflow of the river, and that during the year 1860 the crop raised was appropriated to keeping up the plantation, ditching and making other improvements, and that the crop of the year of 1861 was destroyed by the soldiers of the Confederate States under military orders. It is also alleged that no part of the crops ever came into the hands of Christopher I. Field, but all the proceeds that were realized were applied to the payment of current expenses and debts of the partnership, other than the debt due to Christopher I. Field, which, it is alleged, has never been paid. During the war Christopher I. Field, to prevent the capture of the slaves by the fleets of the United States descending the river, removed them to the State of Texas, and kept them there until the surrender, but realized nothing from their labor in Texas beyond sufficient to pay for their maintenance and support. After the surrender he had them brought back from Texas at considerable expense, for the purpose of cultivating the plantation again, but most of them, claiming their freedom, abandoned it, and he was obliged to rent the plantation for what he could get, and did rent it for a time to different persons, but never received therefrom any results beyond the expenses incidental thereto. Ezekiel H. Field, after quitting the plan-

tation in 1861, performed no further acts in the administration of the estate, and resigned his position in May, 1866, and some time in that year Christopher I. Field was appointed his successor. Christopher died on the 18th of July, 1867, leaving as his only heir at law the appellant, Pattie A. Field, now Pattie A. Clay by intermarriage with Brutus J. Clay the younger. After the death of Christopher I. Field, and in October, 1867, Brutus J. Clay, the elder, was appointed administrator both of his (Christopher's) estate and of the estate of David I. Field, the plantation being at that time under rent to Martin and Childress. During 1868 it was rented by Brutus J. Clay, the administrator, to one Holloway; and in 1869 to the said Holloway and another person by the name of Clay, but very little rent was collected which was not required to make repairs consequent upon breaks in the levees, etc. In March, 1868, Brutus J. Clay filed his accounts as administrator of Christopher I. Field, in the probate court of Bolivar County, Mississippi, and also commenced proceedings to have the interest of David I. Field in the Content plantation sold for the purpose of paying his half of the promissory notes given by the firm of D. I. Field & Company to Christopher I. Field, before mentioned. These proceedings are stated in the former report of the case, before referred to. The probate court made a decree declaring the estate of D. I. Field insolvent, and authorizing the administrator to sell the lands described in the petition; and accordingly a sale of D. I. Field's half interest in the plantation was made at auction on the 20th of December, 1869, and it was struck off to the appellant, Pattie A. Field, by her attorney or some other person acting in her behalf, (she then being a minor, and ignorant of the matter,) for the sum of $6000, and she received a deed therefor, and a receipt for that amount was given as a credit on the said notes. Pattie A. Field then went into the possession of the property, and remained in possession until the bringing of the present suit, except as to such part as was set off to the widow, Lucy C. Freeman, for her dower, in November, 1879. [The said sale, however, has been held void because of the abolishment of the probate court by the constitution

adopted on December 1, 1869.] The bill states that the result of the working of the plantation whilst in possession of the plaintiffs from 1870 to the time of the filing of the bill was without profit, and that the complainant, Pattie A. Clay, incurred a loss of $2500 or $3000 by keeping possession of the property and making repairs rendered necessary by the dilapidations arising from the war, the overflowing of the river, and other causes for which she was not responsible. The bill sets forth in detail a large amount of expenditures incurred by the complainant for taxes and other expenses, and for necessary repairs made by her.

In April, 1873, Lucy C. Field, the widow, filed a petition in the chancery court of Bolivar County for her dower in one undivided half of the Content plantation; and in 1875 a decree for allotment of her dower was made, and was affirmed by the Supreme Court of Mississippi in 1876, so far as the affirmation of her right of dower was concerned. In 1879 she further applied to the said chancery court to have her said dower set off to her in severalty, and a decree for that purpose was made and carried into execution, and she has ever since had possession of the portion set off to her. In September, 1880, the said Lucy commenced a suit, in the same court, against the appellant, Pattie A. Clay, and her husband, to recover the rental value of her dower, whilst in possession of the said Pattie. This suit was removed into the Circuit Court of the United States for the Northern District of Mississippi, before the commencement of the present suit, and evidence was taken therein and sundry proceedings were had, and it stood ready for trial when the bill in the present case was filed. In November, 1880, David I. Field, the son and heir of David I. Field, deceased, having attained his majority, brought an action of ejectment in the United States Circuit Court aforesaid against the said Pattie A. Clay and her husband for the undivided half of the Content plantation, also demanding $20,000 for the use and occupation of the premises from and including the year 1870. Pattie A. Clay and her husband filed a plea in said suit, and the action was pending when the present suit was brought. The bill in the present case was

filed for the purpose of enjoining the prosecution of the said two last-mentioned suits, and for the settlement of the partnership accounts of D. I. Field & Company, and payment out of the partnership property remaining, (consisting only of said plantation,) of the amount due to the estate of Christopher I. Field, upon the four notes before mentioned. The complainants offered in the bill to account for all rents and profits received by them, claiming credit for all expenditures, taxes, and repairs made on account of the property, and prayed that the assets of the partnership might be marshalled and sold for such balance as might be found due to the said Pattie as representative of her father's estate.

This bill was demurred to by the defendants, and the court below sustained the demurrer as to so much of the bill as prayed for a settlement of the partnership accounts, but overruled it so far as it related to an account of the rents and profits due either to Lucy C. Freeman, in respect to her dower, or to David I. Field in respect to his undivided half of the plantation; thus in effect turning it into a suit against the complainants instead of a suit by them. Thereupon evidence was taken on the part of Lucy C. Freeman in support of her claim for rents and profits upon her dower. David I. Field, in March, 1884, filed an answer, stating that he had recovered a judgment in his ejectment suit for one undivided half of the plantation, and praying an account of rents and profits for that half, to be taken in the present suit.

At this stage of the proceedings the complainants objected to having the suit proceed for the purpose of merely taking an account of rents and profits against them, and thereupon, on the 6th of March, 1884, the court made the following decree, to wit:

"Pattie A. Clay et al.)
vs. } 288.
"Lucy C. Freeman et al.)

"Be it remembered that this day came on to be heard the above entitled cause; and, the parties appearing in open court, by consent the account herein filed by the master is with-

drawn, and the decree of reference hereinbefore rendered is set aside; and counsel for complainants declining to avail himself of the offer of the court to retain the bill for the purpose of stating an account, it is ordered, adjudged and decreed that said bill be, and the same is hereby, dismissed, and that complainants pay the cost, for which let execution issue; and thereupon complainants prayed an appeal to the Supreme Court of the United States, which is granted upon their entering into bond in the penalty of one thousand dollars, with two sureties, conditioned according to law."

The complainants then appealed to this court, and the decree of the Circuit Court was reversed as appears by the report of the case before referred to (118 U. S. 97).

In conformity with the mandate of this court, a decree was made by the court below in June, 1886, ordering, amongst other things, as follows, to wit:

"1. That the demurrers of defendants to complainants' bill heretofore filed be, and the same are hereby, overruled, and that the defendants answer within sixty days as of the present term of the court."

"3. That the defendant, David I. Field, be, and he is hereby, enjoined from the further prosecution of his ejectment suit against complainants and from suing out final process for the enforcement of his judgment for rent therein, but may retain the possession of the lands secured in said ejectment suit, subject to the rights of complainants under the judgment of the said Supreme Court, to be hereafter determined and fixed."

The complainants, then, by leave of the court, filed a supplemental bill, stating as follows, to wit:

"1. After and notwithstanding the filing of the bill in this cause, the defendant, Lucy C. Freeman, prosecuted her suit in this court against your orators for arrearages in rent upon and for her dower interest in the Content plantation as shown in the pleadings, and on the 12th day of June, 1884, after her demurrer and exception to your orator's original bill had been sustained, recovered a final decree against your orator, Pattie A. Clay, for $3092.34 and costs. On the 14th day of June, 1884, on motion, this judgment or decree was reduced to

$2200.15. The same, with the costs in the cause, amounting to $165, your orator well and truly paid, and so performed the said judgment and decree of the said District Court, from which there was no appeal, as by the record of said cause doth appear.

"2. That said recovery and payment was not according to right and justice, as appears from the opinion of the Supreme Court of the United States on your orator's appeal from the above decree of this court in this cause, and the said Lucy C. Freeman ought in this cause to be decreed and adjudged to restore the said sum and costs to your orator or be compelled to accept it as a charge against her in any accounting hereafter to be had in the cause.

"The premises considered, your orators pray as prayed in the original bill, and that the said Lucy C. Freeman be adjudged to restore to them the money so wrongfully secured by her in the said cause, or for general relief."

The defendants, David I. Field and Lucy C. Freeman, then filed separate answers to the bill in the present case, alleging in effect that David I. Field, deceased, was not in debt to the partnership firm at the time of his death, nor the firm to Christopher I. Field; that the latter controlled and managed the property after his brother's death, though nominally in the hands of Ezekiel H. Field as administrator, and that for his neglect to sell the same before the war (which it is alleged he could have done at a great advantage) he was answerable for and should be charged with the whole appraised value of the personal estate of the firm, (which was $33,663,) and such further sum as the evidence might show it to have been worth at the date of David's death, and that the complainants should also be charged with the reasonable rental value of said partnership real estate from the said date down to the date of the accounting. This was the general purport of the defence.

A large amount of evidence was taken in the cause, and in March, 1888, the district judge holding the Circuit Court, upon final hearing, delivered an opinion on the merits of the controversy, (34 Fed. Rep. 375,) and in June following made a decree settling the rights of the parties and the principles upon which an account should be taken between them.

The case as developed by the evidence is very different from what it appeared on the mere statements of the bill. By those statements it was to be inferred that E. H. Field, the administrator of David I. Field's estate, in carrying on the plantation in concurrence with the views of Christopher I. Field, acted as an independent representative of the estate, and with a view to its best interests under all the circumstances of the case, and free from any control on the part of said C. I. Field. In such a case, as held by us in *Hoyt* v. *Sprague*, 103 U. S. 613, the representative waived the peculiar rights which he might enforce in regard to the partnership property; and it follows, as a matter of course, that the surviving partner is subject to no such extra liability as he incurs when he continues to use the partnership property in the business without the consent of the representative of the deceased partner. The evidence, however, shows very clearly that Ezekiel H. Field was appointed administrator of the estate of D. I. Field at the instance of C. I. Field, and was altogether governed by him in the management of the estate. In a letter from C. I. Field to David's widow, the said Lucy, dated January 12, 1860, he said: "I have no desire to do anything that will prove an injury to David's estate. I sometimes fear it will take too long to pay the debts from crops with the present force on the place. I had Ezekiel appointed administrator because I was the largest creditor and did not wish to settle with myself. I put him on the place to live, thinking the negroes would be better contented, and would be managed with more ease and less whipping. True, I have the control and management of the whole, but it is done through him. I am well satisfied it was for the best, and shall wish him to remain there, if he will do so, as long as I have any interest in the property. Don't understand me to think that you disapprove of it, for I do not think so." It is apparent from this language that C. I. Field, whose plantation was next adjoining the Content place, and who was, therefore, at hand to see all that was done on the latter, exercised general control over the partnership property after his brother's death, without the sanction of a responsible and

independent representative of his estate. This aspect of the case raises questions with regard to the principle on which the partnership accounts should be adjusted, and the degree of liability of C. I. Field as surviving partner, which were not before us when the case was here formerly.

Then we only decided that the complainants, as representing C. I. Field, were entitled to have an accounting of the partnership estate for the purpose of securing the payment of the amount due to C. I. Field, if anything, out of the partnership property. The court below had decided that they were barred by lapse of time. We held otherwise, on the ground that the complainants and their ancestor, C. I. Field, having been in possession of the property, lapse of time, or the statute of limitations, did not run against them. The question now is as to the principles on which the settlement should be made.

There is no doubt that C. I. Field, after his brother's death, acted in entire good faith and for what he supposed the best interests of the concern, including his brother's interest as well as his own. He did not nor did any one then anticipate the great civil convulsion which soon took place and destroyed the entire value of slave property, and very largely the value of all other property, in the Southern States. The case in this respect was an exceptional one, and it may be a question whether ordinary rules can be strictly applied to it. C. I. Field undoubtedly supposed that it would be more for the interest of his brother's widow and infant child that the plantation should be continued in operation until a good purchaser could be found, than that everything should be immediately sold, which could not have been done without sacrifice; and there is some evidence that the widow and her friends acquiesced in this view of the case, although she asserts that she was anxious for an immediate sale. The general principle of law undoubtedly is, that on the dissolution of the firm by the death of one of the partners, it is the survivor's duty to settle up the partnership affairs within a reasonable time, and pay over to the representatives of the deceased partner the amount due to them; and if he takes the responsibility of continuing

the business of the firm, and using the property of the partnership, he becomes liable for losses that may occur, and it is in the option of the representatives of the deceased partner either to insist upon a division of the profits, which may be made in thus carrying on the business, or upon being paid the amount of the deceased's share in the capital, with lawful interest thereon, after deducting his indebtedness to the firm. (See Lindley on Part., Book III, chap. 10, pages 976 to 1046, 1047, 4th ed.) The application of the rule in this case would, strictly speaking, entitle the representatives of D. I. Field to call for an account of his share in the capital of the concern at the time of his death, with lawful interest. This is what they do demand as regards the personal property, which was appraised at $33,663, one-half of which, with the interest thereon, they claim should be accredited to the estate of D. I. Field. But this personal property consisted almost wholly of the slaves on the plantation; and the court below charged C. I. Field and his estate with the value of their service as long as they continued slaves, as well as with reasonable rent for the real estate during the whole period from the death of D. I. Field, except the years 1863, 1864 and 1865, when the war was flagrant.

Under such anomalous circumstances and such unexpected events, it seems hardly just to visit upon a surviving partner, acting in good faith and with a view to the best interests of all concerned, the strict consequences of the rule. In our view, equity, when called upon to settle the mutual rights of the parties, may very properly mitigate the hardships of the rule, especially when, as in this case, the loss has occurred by public war. The remarks made by this court, through Justice Swayne, in *Tate* v. *Norton*, 94 U. S. 746, 747, (which was the case of an administrator,) are somewhat apposite to the case now before us: "The intestate," said the court, "had been largely engaged in raising cotton. The administrator put himself, as it were, in the place of the deceased. Everything was carried on and conducted as before his death. Payments were made to the widow from time to time, the children were supported and educated, the taxes were paid, crops were raised,

the cotton was sold, and the debts were discharged as fast as the circumstances permitted. . . . The commencement of the war was the beginning of the troubles of the trust. The State was a battlefield. Troops on both sides were there. The slaves were sent to Texas for safety. The mules and other live-stock were swept away by the advancing and receding tides of the conflict. The lands hardly paid the expenses of cultivating them. Finally the slaves as property were stricken out of existence. This involved a loss to the estate, according to the original inventory, of more than $113,000 of the assets. The administrator became wholly unable to pay this debt. The answer avers that, but for the war, he could, by the year 1863, have extinguished this demand also, and have then handed over to the heirs a large and unencumbered estate for distribution among them. The record shows that this was not an over-sanguine calculation. The calamity was unforeseen, and one for which the administrator was not responsible."

Concurring in the views here expressed, we think with the court below that it would be a very hard application of the general rule relating to a dissolution of partnership by the death of one of the partners, to compel C. I. Field or his estate, under the circumstances of this case, to account for the value of those slaves, which in a few months were entirely freed from bondage by operation of law, and no longer articles of property.

Whilst it is true that C. I. Field, after his brother's death, might have sold the slaves and other property on terms which, in the light of subsequent events, would have been greatly to the advantage of his brother's estate, yet it seems clear from the evidence that the reason he did not sell was that no opportunity offered of effecting a sale of the plantation at what he deemed an adequate price. The sale of the slaves without selling the lands would have rendered the latter entirely unproductive and a dead weight in his hands. We think, therefore, with the court below, that C. I. Field, as surviving partner, had some excuse for not selling the slaves until by the progress of events it became too late to sell them at all. But in assuming the responsibility of continuing the business of the partnership, by carrying on the plantation, he became charge-

able with the fair rental value of the property, whether he succeeded in realizing it or not, and took the hazard of such losses as might occasionally occur. We think, therefore, on the whole, that the judge presiding in the court below adopted the proper course in disallowing the claim for the value of the slaves, and charging C. I. Field and his estate with the fair rental value of the property, including that of the slaves as long as they were slaves, and crediting them with the taxes paid and the permanent improvements. He could not do more without making the law an engine of hardship and severity; he could not do less without disregarding its plain principles. An extract from his opinion will more fully show the grounds on which his conclusion was based. After giving a general history of the case and the making of the four notes claimed to be still due and unpaid, he proceeded as follows:

"It is insisted upon the part of the defendants that if these obligations were not paid at the death of D. I. Field they were cancelled by the negligence of C. I. Field, as surviving partner, to sell so much of the personal property, including, if necessary, the slaves, to pay off this indebtedness, which it is insisted should have been done during the year 1860, when such property brought a high price and before its destruction; that this personal property was then of much larger value than the amount due on these obligations and all other indebtedness of the firm. I am satisfied from the proof that this indebtedness did exist against the firm, but not against D. I. Field individually, and that all the attempted proceeding to collect the same against the estate of D. I. Field by a sale of the lands was based upon a mistaken theory and without authority, and are consequently void. Upon the death of D. I. Field the title to all the personal property, including the slaves, belonging to the firm, vested in C. I. Field, as surviving partner, whose duty it was to have sold so much of it within a reasonable time to pay off this and all other indebtedness against the firm. . . . The question is, did C. I. Field by this neglect render himself liable for the loss of this personal property and the value of the slaves as to the interest of defendants therein, or estop himself from setting up the claim here made?

"Considering the relationship of the parties and all the circumstances, it would, perhaps, be inequitable to hold so strict a rule; but I am satisfied that he had no power to continue the operation of the plantation with the firm slaves, mules and other property belonging to the firm, as a continuation of the firm business, during the years 1861, 1862 and 1863, and that he was liable for a reasonable rent for the land and the hire of the slaves, stock and other property used in the cultivation of the plantation during the years 1861 and 1862, to be applied to the payment of these obligations — no other indebtedness is shown now to exist — and that as C. I. Field and his administrator, Brutus J. Clay, and the complainant, since her attempted purchase, has been in the possession of all the lands, with the exception of Mrs. Freeman's dower, since its assignment, the complainant must be charged with a reasonable rent for the lands and the hire of the slaves, mules and other property used in making the crops of 1861 and 1862, and for a reasonable rent of the lands since the 1st of January, 1866, omitting the years 1863, 1864 and 1865; that such rents and those for 1861 and 1862, be credited upon the amount due upon the obligations given to said C. I. Field, with interest up to the 1st of January, 1863, and that the rents accruing commencing with the 1st of January, 1866, with interest for 1866, on the 1st of January, 1867, and so on from year to year up to the present time, the rents and hire to be estimated at what would be a fair and reasonable rent or hire to a solvent tenant for cash, taking the plantation and property as a whole, and crediting the complainant with the amounts paid for taxes and for such improvements as were necessary to rent the lands at a reasonable price; also for the value of such improvements as may have added to the permanent value of the lands — not what they cost, but the value that they permanently may have added to the lands.

"It is insisted that the complainant should be considered as a mortgagee in possession, and only chargeable with the rents actually received.

"I am of opinion that as C. I. Field neglected to sell the personal property when he should have done so, and by which

neglect it was wholly lost to the defendants, the complainant is not entitled to be considered as a mortgagee in possession, and only liable for the rent received. The cause must be referred to a master to take and state an account under the rules stated and report the same to the next term of court. As C. I. Field was chargeable with the rents and hire for 1861 and 1862, he was entitled to the crops for those years; and, being sole owner, the loss, as a matter of course, was his alone."

A decree was made in substantial conformity with this opinion, and an extended inquiry was had before the master for the purpose of ascertaining the rental value of the plantation, stock and slaves during the years 1861 and 1862, and of the plantation and stock from and including the year 1866, no account being taken for the years 1863, 1864 and 1865; and the estate of C. I. Field was charged with the rents thus ascertained, year by year. On the other hand, the said estate was credited with the four notes in question and interest thereon year by year, except for the years 1863, 1864 and 1865; and with the taxes paid on the property, and the expenditures made for improvements that were necessary or which added permanent value to the estate. In August, 1889, the master made his report, showing, as the result of the account, a balance due from the estate of C. I. Field to that of D. I. Field, on the 1st of January, 1889, of $3281.40. He also found $3747.11 due from Lucy C. Freeman to the complainants for the amount which they had paid to her for the rents and profits of her dower, in satisfaction of the judgment obtained by her against them in her suit. Both parties filed exceptions to the report, which were fully discussed before the court below; the result being a readjustment of the amounts due as follows:

Due from complainant to D. I. Field	$4708 78
Due from Lucy C. Freeman to complainant . . .	2667 28

A decree for these amounts was made accordingly, and the injunction against D. I. Field from proceeding to collect the rents and profits recovered by him in his action of ejectment

was made perpetual, but it was decreed that he be let into possession of the undivided half of the Content plantation. Other proper directions were made in the decree. All the parties appealed, — the complainants and the two defendants, Mrs. Freeman and David I. Field separately.

A question has been raised as to the jurisdiction of this court to entertain the appeal of Mrs. Freeman. The decree against her is only for the sum of $2667.28, but little more than half the amount necessary for an appeal to this court. Her case is a distinct one, and her appeal is a distinct and separate appeal. We do not see how it can be so connected with that of D. I. Field, the other defendant, as to be an incident of his, or ancillary thereto. Her estate of dower was a distinct estate, and she prosecuted her supposed rights thereto in a distinct and separate proceeding. The decree against her is that she refund the amount above named to the complainant from whom she had recovered it in a separate action by way of damages, or rents and profits in dower. Unless the action of dower is exempt from, or excepted out of, the act fixing the jurisdictional amount necessary for an appeal, we have no jurisdiction in this case. We are not aware of any ground on which such an exemption or exception can be placed. It seems to us that the case comes clearly within the principle which has governed the decisions of this court in a large number of cases, in one of the latest of which (*Gibson* v. *Shufeldt*, 122 U. S. 27) the previous cases are reviewed and classified. We refer particularly to the cases of *Henderson* v. *Wadsworth*, 115 U. S. 264; *Stewart* v. *Dunham*, 115 U. S. 61; *Hawley* v. *Fairbanks*, 108 U. S. 543; *Farmers' Loan & Trust Co.* v. *Waterman*, 106 U. S. 265; *Russell* v. *Stansell*, 105 U. S. 303; and *Seaver* v. *Bigelows*, 5 Wall. 208. Many other cases stand in the same category, but they are referred to and commented on in the cases cited. The general principle observed in all is, that if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of con-

venience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdiction by appeal, but each must stand or fall by itself alone. The principal cases in which the interest has been deemed common and undivided, and appeals have been sustained, are *Shields* v. *Thomas*, 17 How. 3; *Market Co.* v. *Hoffman*, 101 U. S. 112; *The Connemara*, 103 U. S. 754; *The Mamie*, 105 U. S. 773; *Davies* v. *Corbin*, 112 U. S. 36; *Estes* v. *Gunter*, 121 U. S. 183; and *Handley* v. *Stutz*, 137 U. S. 366. Mrs. Freeman's case does not come within the principle of any of these cases. As before stated, the estate of dower claimed by her was a distinct estate, and she sued for it in a separate proceeding. She and her son are joined in this suit because they claim interests in the same land, namely, D. I. Field's undivided half of the Content plantation, which the complainant seeks to have subjected to the partnership liabilities; but the interests severally claimed by them in said land are entirely distinct and separate from each other. Mrs. Freeman's appeal, therefore, will have to be dismissed.

As we have already expressed our views with regard to the main point involved in the case, and in reference to the general view taken by the court below, it will not need an extended discussion to dispose of the particular questions raised on the exceptions to the master's report, and assigned for error here. It is contended by D. I. Field that the due bill given to C. I. Field on the settlement of June 13, 1859, was a settlement and adjustment of the whole partnership accounts up to that date. We do not think that this is implied from the terms of the note. The most that can be said is that the words, "Received on settlement to this date," are ambiguous, and may refer to a settlement for the year, or a settlement for the whole period of partnership. This ambiguity, being a latent one, is removed by the evidence in the case. Settlements seem to have been made each year. The other notes were given at nearly annual periods previously. The last previous note for

$1100 was given just a year before this; and the one before that a little over another year. The continued possession of the notes by C. I. Field, uncancelled, is presumptive evidence that they had not been paid. Ezekiel H. Field, the brother and administrator of D. I. Field, testified that D. I. Field owed his brother $12,000; that he understood this from both of them. His evidence is a little confused, as he speaks of a single note for that amount; but afterwards he says there were several notes, and that he saw them in his brother C. I. Field's possession, and that they were signed by D. I. Field. C. F. Clay, a nephew, and intimate with the parties, testifies to his understanding that D. I. Field was indebted to his brother, and he had seen the notes in the latter's hands.

On the whole, we are satisfied that the note referred to, namely, that given on the 13th of June, 1859, was not given in settlement of the entire partnership account, but only of the operations of the year immediately preceding. It seems evident to us, from all the evidence on the subject, that at the time of giving the last note (which was only a short time prior to the death of D. I. Field) there was no unsettled matter between the partners except the partnership notes which had been given to C. I. Field.

The next assignment of error made by D. I. Field is that the surviving partner should have been charged with the value of the slaves and personal property, and with the depreciation of the real estate. This point is involved and discussed in the former part of this opinion, and requires no further observation on our part.

The remaining assignment relates to the accounts taken before the master, respecting which D. I. Field complains (1st) that the rents were placed by the commissioner at too low a rate for the years 1861 and 1862; (2d) that David I. Field's estate should have credit for $5579 paid by him on the Kirk note; (3d) that the allowance for improvements was much too great. After a careful examination of the evidence on these points, we are satisfied that these exceptions are not well taken, and that, at least, no injustice was done to the estate of D. I. Field.

The complainant, on the other hand, contends that the rents for 1861 and 1862, as allowed by the commissioner, were too high, and that a sufficient amount was not allowed for improvements. The evidence on these points is conflicting, and as to the allowance for improvements we do not see any good reason for questioning the result reached by the commissioner and the court below. But as to the rents charged to C. I. Field for the years 1861 and 1862, it does seem to us that they are somewhat excessive, considering the state of the country at the time. Sheriff Carson testified that during those years the taking care of property, real or personal, was quite equal to its value; and another respectable witness for the complainant says that the arable land was worth five dollars per acre rent in 1861, though the crop was burnt; but that in 1862 and the following years it was worth nothing. Other witnesses say that it was worth ten dollars per acre; but in view of the uncertainty of keeping the crop from being destroyed, and of getting it out to a market, and of the general uncertainty of everything in that time of war, it seems to us that these estimates must be extravagant. The commissioner charged seven dollars per acre rent for the 400 acres of arable land for the year 1861, and three dollars and a half for the year 1862. We think that a rent of five dollars per acre for the year 1861 was at least as much as ought to have been charged. Of course it is a matter that does not admit of certain calculation; but it seems to us clear that the amount charged was too high for that year. This, with the interest for one year, would make a difference of $848 in the amount to be carried to the 1st of January, 1863, and from thence over to the 1st of January, 1866, according to the mode of making up the account; and with interest from thence to the 1st of January, 1889, it would make a difference in the result of $2018.24, being that amount to be deducted from the decree in favor of the defendant D. I. Field, and reducing said decree to the sum of $2690.54.

The complainant excepted to various other matters in the account and has assigned errors upon them here; but from the best consideration we have been able to give to them, we

are not satisfied that any error has been committed, assuming that the account should be made up in conformity with the directions of the decree. If it were necessary to go into a discussion of the different points in detail, we could not do better than to quote the final opinion of the court below in relation thereto. But no useful purpose could be thereby subserved.

Our conclusion is that the appeal of Lucy C. Freeman must be dismissed, and that the decree in favor of David I. Field should be reversed and a decree be rendered that the complainant, Pattie A. Clay, pay to said David I. Field the sum of $2690.54, with interest from the first day of January, 1889; and that each party pay his and her own costs on this appeal, except the cost of printing the record, which shall be paid one-half by the appellant, Pattie A. Clay, and one-half by the appellants, Lucy C. Freeman and David I. Field. And the cause is remanded with instructions to modify the decree in conformity with this opinion.

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

BUNT *v.* SIERRA BUTTE GOLD MINING COMPANY.

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

No. 168. Argued and submitted January 28, 1891. — Decided March 2, 1891.

The owners of a mine are not liable to an action for the falling of the roof of a tunnel upon a miner who, knowing that the roof is shattered and dangerous, voluntarily assists in removing a supporting timber, and, before another has been put in its place, sits down to rest at that spot.

The case is stated in the opinion.

Mr. S. F. Leib and *Mr. J. C. Black* for plaintiffs in error submitted on their brief.

Mr. W. W. Morrow for defendant in error. *Mr. Thomas B. Bishop* was with him on the brief.

Mr. Justice Gray delivered the opinion of the court.

This was an action brought against a corporation of Great Britain by the widow and daughter of William J. Bunt, citizens of California, to recover damages, under § 377 of the California Civil Code, for his death by the defendant's negligence while a workman in its mine. The answer alleged, among other things, that his death was caused by his own negligence, and not by any negligence on the part of the defendant.

At the trial, the only witnesses called by the plaintiffs (except in proof of their relationship to the deceased, and of his death) were the superintendent of the mine and a fellow workman of the deceased, whose testimony tended to prove the following facts: While Bunt and three others, all four experienced miners, were in a tunnel in the rock of the defendant's mine, thirty-five hundred feet from its mouth, the superintendent came in, and discovered, by looking at the roof of the tunnel, and by sounding it with a pick, that it had been shattered by blasting further in; and told the men to prop it up with timbers from that point to the end. There was already a post of timber at that point, which had been put there only to hold the "spiling" or pieces of wood extending along the sides of the tunnel to keep back the "gouge or selvage of the vein clay and slimy stuff." The superintendent told the men that they had better put a post by the side of this one; but, on one of the men suggesting that this should be taken out and another put in its place, left it optional with them to do so or not, saying, "If you think proper you can take out that post, but be careful of the roof, don't let it fall down on you, and be careful of the spiling." Bunt and the other workmen decided that it would be safe to take out the post, and did so, intending to go outside to get other timber. After the

removal of the post, Bunt sat down to rest under the shattered roof, and part of the rock fell upon and mortally injured him.

At the close of the plaintiffs' evidence, the defendant moved the court to direct a verdict for the defendant, because the evidence would not warrant a verdict for the plaintiffs. The Circuit Court granted the motion; and the plaintiffs excepted to the direction, and sued out this writ of error.

The reasons stated in the opinion of the court below, reported in 11 Sawyer, 178, are conclusive. Bunt participated in taking out the post, with full knowledge of the danger, and, after the post had been removed, and before another had been put in its place, sat down under the shattered roof. Recklessness could hardly go farther. The evidence would warrant no other conclusion than that he took the risks of the work in which he was employed, and that his negligence in the course of that work was the direct cause of his death. The court therefore rightly directed a verdict for the defendant. *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478; *Schofield* v. *Chicago, Milwaukee & St. Paul Railway*, 114 U. S. 615; *Gunther* v. *Liverpool &c. Ins. Co.*, 134 U. S. 110.

The suggestion that, because the only witnesses of the accident, and whom the plaintiffs were therefore compelled to call, were in the defendant's employ and might be prejudiced in its favor, the question how far they were so biased should have been submitted to the jury, is of no weight. Theirs being the only testimony on the point, disbelief of their testimony could not supply a want of proof.

Judgment affirmed.

HANNER *v.* MOULTON.

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

No. 171. Argued and submitted January 28, 29, 1891. — Decided March 2, 1891.

In this case it was held that a suit in equity, by persons claiming lands in Texas, under a will, to set aside deeds under which the defendants claimed title, through a sale by an administrator of the testator with the will annexed, was barred by the laches of the plaintiffs.

IN EQUITY. The case is stated in the opinion.

Mr. James D. Park for appellants.

Mr. Sawnie Robertson, for appellees, submitted on his brief.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a bill in equity, filed January 27, 1882, in the Circuit Court of the United States for the Northern District of Texas, by John W. Hanner, Jr., James D. Park, and John S. Park, Jr., against Lewman G. Moulton, M. C. Moulton, C. R. Beaty, Clement R. Johns, J. C. Kerby, Flavius Everett, W. Von Rosenburg, and the corporation of C. R. Johns & Company, to establish the title of the plaintiffs to three several tracts of land in the State of Texas, one of 586 acres in Ellis County, one of 640 acres in Falls County, and one of 250 acres in Clay County. The bill prayed that the deeds under which the defendants claimed title to such land might be declared null and void. The plaintiffs asserted title to it as devisees under the will of Thomas Park, who died in the State of Tennessee, where he resided, on September 4, 1866, leaving a last will and testament, executed March 20, 1866, one clause of which was as follows: "I will to John W. Hanner, Junior, James Park, and John Park, Junior, my tract of land, containing near fifteen hundred acres first-rate land, lying, I believe, in Ellis County, Texas. My papers are in the hands of J. A. N.

Murray and William H. Gill, of Clarksville, Texas, who must account for all papers of mine found in the hands of William A. Park's widow at his death. All other lands I may own, and not disposed of by will, may be given to Dr. Jas. P. Hanner."

The testator did not own at any time any land in Ellis County, Texas, and the defendants insisted that he did not own any other land in Texas to which the devise referred or could refer; but at the time of his death he owned what was called a head-right certificate for one-third of a league, or 1476 acres, of land, issued by the Republic of Texas, May 3, 1838, to William H. Ewing, Ewing having conveyed to the testator, by deed dated April 9, 1846, all his right, title and interest to the land which had been or might be located and surveyed by virtue of such head-right certificate, the deed warranting to the grantee the peaceable possession of the land against all claims to be made under the grantor. By a codicil to his will, executed August 25, 1866, the testator appointed James P. Hanner his executor. The will was admitted to probate in the probate court in Tennessee, and letters testamentary thereon were issued to James P. Hanner.

Subsequently, and on July 8, 1867, at the instance of the Tennessee executor, Clement R. Johns, one of the defendants in this suit, applied to the county judge of Travis County, in the State of Texas, sitting as a probate court, praying that letters of administration might be issued to him o the estate of James Park, with the will annexed, and produced a certified copy of the will, with satisfactory evidence of the probate thereof in Tennessee; and it was admitted to probate in Texas, and letters of administration with the will annexed were granted to Johns, at the July term, 1867. At the same term, he presented to the probate court of Travis County an inventory of the estate, which did not include the 1476 acres, but stated that there were other lands in the State claimed by the heirs, which would be reported by him as soon as a knowledge of the same could be obtained by him sufficient to identify them. On January 1, 1869, Johns filed in the probate court a supplemental inventory, which stated that, since filing the original inventory, he had found a land certificate belonging

to the estate, for one-third of a league, or 1476 acres, granted to W. H. Ewing and transferred by the latter to James Park, and which was appraised January 1, 1869, by appraisers appointed by the court, at the value of $200; and that that was all the additional property to which title had been discovered. He further stated that, the certificate being lost, he had obtained a duplicate of it, and asked for an order to sell it, to pay the expenses of administration and the expenses of looking up the estate, which then amounted to over $100. The court thereupon made an order that he proceed to sell the land certificate, for cash, on the first Tuesday in February, 1869, after giving due notice. On the 26th of February, 1869, on the representation of the administrator to the court that by accidental omission the sale had not taken place, it made an order that he sell the certificate for cash on the first Tuesday in April, 1869, on giving due notice; and that he return an account of sale to the court. On the 3d of June, 1869, he reported to the court that on the first Tuesday in April, 1869, he had sold the certificate, as the property of the estate, to J. C. Kerby, the highest and best bidder, for 7½ cents per acre, making, for the 1476 acres, $110.70, which he stated he believed to be a fair price, under the circumstances connected with the title; and he recommended a confirmation of the sale. Thereupon, on the same day, the court made an order approving and confirming the sale, and directing the administrator to divest title out of the former owner and to vest it in the purchaser, after his compliance with the terms of sale.

In October, 1871, Johns, as administrator, presented to the county court of Travis County his account of debits and credits, showing, among other things, the receipt of the $110.70 for the "sale of one-third-league cert. doubtful title," and a balance on hand, belonging to the estate, of $11.38 in United States currency, and representing "that all the property of the said estate of James Park, except the land certificate which was found by the administrator, has been disposed of by the last will of the deceased," and asking to be discharged. No action appears to have been had by the court in regard to this account or to a discharge. Kerby, the pur-

chaser, afterwards located the certificate on the three tracts of land above mentioned.

On August 28, 1882, an amended and supplemental bill was filed by the plaintiffs, adding as defendants James P. Hanner, the Tennessee executor, Robert Smith, Thomas D. Johns, W. B. Blalock and A. J. P. Johnson. The gravamen of the two bills was, that the proceedings of Clement R. Johns, the Texas administrator, in the probate court of Travis County, by which he obtained the order for the sale of the certificate, and the sale itself, were fraudulent; that Kerby, the purchaser, had knowledge of and participated in the fraud; and that the other defendants, who were in possession of the three tracts of land, claiming title to them under Kerby, bought with notice of the fraud.

Answers to the bill were put in by James P. Hanner, Kerby, Clement R. Johns, Von Rosenburg, Everett, Beaty, the two Moultons, Smith, Blalock and Johnson. M. C. Moulton having died, the suit was revived against his devisees, legatees and executor. Thomas D. Johns, and the executor and devisees of M. C. Moulton, subsequently answered the bill. It was set up in the answer of Beaty, that the claim of the plaintiffs was barred by the laws of limitation of Texas before the commencement of the suit, and that the demand was stale; and in the answer of M. C. Moulton, that the claim of the plaintiffs, if any they ever had, was stale, on account of their laches and gross and inexcusable neglect to make known or assert their claim; and in the answers of Smith and Johnson, that the suit was barred by the statutes of limitation of Texas; and in the answer of Clement R. Johns, that the claim of the plaintiffs was stale and barred by reason of laches; and in the answer of Kerby, that the plaintiffs' demand was stale and barred by the law of limitations.

Replications having been filed to the various answers, proofs were taken, and the cause was heard before Mr. Justice Woods, and Judge McCormick, District Judge, and on the 10th of February, 1885, a decree was entered dismissing the bill. The opinion of Mr. Justice Woods is reported in 23 Fed. Rep. 5. He disposed of the case on the following ground, as stated in

his opinion: "Upon the trial of the case, the plaintiffs, conceding that the testator at his death owned no land in Ellis County, or elsewhere in Texas, to which said devise referred, to prevent the devise from being inoperative, and to prove their title to the lands in question, offered evidence tending to show that the testator, when he executed his will, and at the time of his death, believed that the Ewing head-right certificate had been located in Ellis County, making him the owner of the lands covered thereby; that it was the purpose of the testator, shown by his declarations to and conversations with the witnesses, to devise to the plaintiffs the Ewing certificate, if it should turn out that it had not been located; and that he was advised by the lawyer who drew his will that the devise above quoted would be effectual to carry out such purpose. The contention of the plaintiffs was, that if this evidence was admitted, it would show them to be the owners of the Ewing head-right certificate under the devise in the will of James Park, and establish their title to the lands located by Kerby under that certificate. It is evident that the title of the plaintiffs to the relief prayed by their bill depends upon the admissibility of this evidence. The defendants object to the testimony. I am of opinion that the objection is well taken, and that the evidence should be excluded." He further said: "I think this is a case for the enforcement of the rule which excludes parol evidence to alter or add to the terms of a will. I am, therefore, of opinion that the evidence offered should be excluded. Without its aid, the plaintiffs show no ground for the relief prayed in their bill. It must therefore be dismissed, at their costs; and it is so ordered."

We do not find it necessary to consider the case in the view in which the Circuit Court considered it; for we are of opinion that the claim of the plaintiffs must fail on the ground of laches.

Patents were issued by the State of Texas for the three tracts of land in question in the name of James Park, assignee of William H. Ewing, "his heirs or assigns forever," as follows: February 17, 1870, for the 586 acres in Ellis County; March 5,

1870, for the 640 acres in Falls County; and June 24, 1873, for the 250 acres in Clay County; and such patents were duly recorded in the respective counties. It was a custom in the land office of Texas not to issue patents to assignees who derived their title through a judicial sale, and therefore all these patents were issued in the name of James Park.

In 1876, the plaintiffs put a tenant in possession of a large part of the 586 acres in Ellis County, and L. G. Moulton, who claimed title to the land, brought an action of trespass to try title against the tenant, in the District Court of Ellis County, on March 27, 1879; which suit was removed into the Circuit Court of the United States for the Northern District of Texas. The plaintiffs in the present suit were made parties defendant to that suit, and part of the prayer of the bill in the present suit is to enjoin such action at law of L. G. Moulton.

Kerby was the holder of the legal title to the certificate and the legal title to the land; and he and the defendants who derived their title from him became the owners of such legal title. This was so, even if the sale was fraudulent. If the certificate was by the will bequeathed to the plaintiffs, and even if the sale was fraudulent, the interest which the plaintiffs had, after the sale of the certificate, was not an interest of any kind, legal or equitable, in it or in the land, but only the right promptly to disaffirm the sale and institute a proceeding, in a reasonable time, to have it set aside, and thus reacquire the certificate or the land located under it. Perry on Trusts, § 602*w*; 2 Pomeroy's Equity, §§ 818, 917; 2 Story's Eq. Jur. § 1520; *Pearson* v. *Burditt*, 26 Texas, 157.

The sale in question was confirmed by a proper decree of the probate court of Travis County. Limitation of the right of review was two years after the date of the decree. Rev. Stat. of Texas, Article 1389, enacted in 1846.

Further, a bill to review a decree in equity was authorized by the act of February 5, 1841, (1 Paschal's Dig. p. 764, Article 4616,) if brought not more than two years after the decree should have been made final. This applies to proceedings in the probate court. *Kleinecke* v. *Woodward*, 42 Texas, 311; *Murchison* v. *White*, 54 Texas, 78, 86.

Since 1841, 1 Paschal's Dig. p. 758, Article 4604, the limitation of a suit in Texas to recover personal property, or damages for its conversion, has been two years; and by 1 Paschal's Digest, p. 766, Article 4622, three years bars a suit for land if the defendant has color of title. All of these defendants had color of title, within the meaning of that statute. By 1 Paschal's Digest, p. 767, Article 4623, a suit for land, if the defendant claims under a registered deed, is barred in five years. By the Revised Statutes of Texas, Article 3209, p. 465, a suit for the specific performance of a contract to convey real estate is barred in ten years, ten years being the longest period of limitation under the statutes of Texas.

In the present case, there is no question of minority or of any other disability. It is alleged, however, that the cause of action was concealed; but the order of sale, the report of sale, and the order confirming the sale, were of record in the probate court of Travis County. The plaintiffs knew, or had the means of knowing, of the granting of administration in Texas, and in what court the proceeding was pending. The administrator reported that Kerby was the purchaser. The connection of Kerby with C. R. Johns & Company was no secret. The records of the land office of the State showed, as early as March 23, 1870, that a certificate for the unlocated balance, which was afterwards located in Clay County, had been delivered to C. R. Johns & Company. On the information disclosed by those records, the plaintiffs in 1876 assumed to own the 586 acres of land in Ellis County, and sold part of it and leased the rest. This was done under a power of attorney executed by the three plaintiffs, on February 15, 1876, to Cyrus T. Hogan, a real estate agent of Ellis County, Texas, constituting him their agent to sell the 586 acres in that county, and to sign their names to transfers and releases necessary to confer the title to the land; and they executed a further power of attorney to Hogan, on September 25, 1876, authorizing him to sell and convey all their interest in the W. H. Ewing one-third league survey or certificate, wherever it might be located in the State of Texas, as having been willed to them by James Park, and to perform all legal acts in the

management of the certificate, or the land located by virtue of it, and to sign their names to conveyances of any nature or kind.

It is stated in the original bill that neither the plaintiffs nor the Tennessee executor ever heard of the settlement of October, 1871, by Johns, as administrator, in the probate court, in October, 1871, until about the year 1877 or the latter part of 1876, when the knowledge first came to them through information from their agent in Ellis County, Texas. That agent was Hogan. James D. Park, one of the plaintiffs, in his testimony, produces a letter from Hogan, dated September 20, 1876, to Doctor John S. Park, and states that he first learned through that letter that the firm of C. R. Johns & Company were claiming the land in Ellis County, and also the remainder of the land called for by the certificate, some of which was in Falls County. Doctor John S. Park was a witness in the case, and was a nephew of the testator, an uncle of the plaintiff John W. Hanner, Jr., and the father of the other two plaintiffs. In that letter, Hogan informed Doctor Park that C. R. Johns administered on the estate of James Park in 1869, and sold the W. H. Ewing certificate to J. C. Kerby; and that, on an examination of the record, he, Hogan, found a transfer from Johns, as administrator, to Kerby. On the 26th of September, 1876, Hogan wrote another letter to Doctor John S. Park, which is produced, stating that a lawyer, whom Hogan had consulted on the subject of the sale of the Ewing certificate by Johns, as administrator, said that it would not "stick at all," but advised action at once.

If the plaintiffs, in 1876, on the information disclosed by the records, assumed to own, to sell a part of, and to lease another part of, the 586 acres of land in Ellis County, thus acting on the view that the sale did not deprive them of their interest in the land, the same information was sufficient to demand and to justify a suit. The explanation of the delay may be connected with the fact, that the certificate, when it was sold, was valued at $200, while, when the bill in the present case was filed, the three tracts of land were worth, as is testified, from $8600 to $10,600.

Moreover, the evidence shows that in January, 1871, James D. Park, one of the plaintiffs, was in Austin, Texas, saw Clement R. Johns, went to the land office and looked at the record books, and found in one of them an entry that the balance of the Ewing claim, not patented, had been delivered to C. R. Johns & Company on the 23d of March, 1870; that he afterwards had an interview with Clement R. Johns on the subject and told him what he had seen at the land office, and asked him if he knew what had ever become of the Ewing certificate; and that he learned from Johns that a duplicate of it, for one-third of a league, had been sold at public auction in Austin, in 1868, by Johns, as administrator of James Park, to pay expenses, etc., of administration. James D. Park states in his testimony, that the transaction ought to have been investigated then and there, and gives as an excuse for not doing so, that Johns treated the matter very lightly, and as of little or no consequence, and also stated that he did not recollect who was the purchaser of the certificate. He also testifies, that, on returning to Tennessee, he mentioned to the Tennessee executor and to others of the family, what had occurred at Austin, and requested the executor to write to Mr. Green, a lawyer at Austin, to look into the sale of the Ewing certificate, and see if it could not be got back in some way or replaced by Johns; that the executor got letters from Mr. Green, promising to look into the matter, but nothing further or definite was done or reported to the executor, "the parties probably being too much engaged in other matters to give it proper attention;" that through Hogan he learned, in 1876 or 1875, that a portion of the Ewing certificate had been located in Ellis County, and that a patent was on record there to James Park and his heirs for 586 acres of the Ewing certificate; and that his father then wrote to Hogan to take possession of the land for the plaintiffs, and instructed Hogan to investigate the sources of the supposed title of C. R. Johns & Company to the lands, and report the results, after which Doctor John S. Park received from Hogan the letters of September 20 and September 26, 1876, followed soon afterwards by a paper sent by Hogan to the witness, which was a copy

obtained from the public records of Ellis County, and which is produced, showing that it was a copy of the conveyance made by Johns, as administrator, to Kerby, of the certificate, and which recited that he had sold the certificate, on the 6th of April, 1869, to Kerby, for $110.70, and that the sale had been confirmed by the court at the May term, 1869.

Even in 1876, when the plaintiffs knew all that they knew when they filed the bill in 1882, and had no title but only the right to go into a court of equity, they brought no suit, but contented themselves with assuming that they owned the 586 acres in Ellis County. Their assuming possession of that tract of land did not excuse them from prosecuting a suit. *Walet* v. *Haskins*, 68 Texas, 418; *Bullock* v. *Smith*, 72 Texas, 545, 549.

An interval of nearly thirteen years elapsed between the sale of the certificate and the filing of the bill in this suit. The value of the property has largely increased. Parties interested and witnesses have died, and the memory of those who survive has decayed. Not a person who is now interested in any of the land is implicated in the fraud charged in the bill. Under the facts above stated, the plaintiffs have been guilty of such laches that they cannot have any relief in a court of equity. *Speidel* v. *Henrici*, 120 U. S. 377, 387, and cases there cited; *Richards* v. *Mackall*, 124 U. S. 183, 187, 188.

Nor are the decisions of the courts of Texas inconsistent with the sustaining of this defence of laches. In *Fisher* v. *Wood*, 65 Texas, 199, it was held that a party would be relieved from the charge of laches, where facts were shown calculated to lull inquiry, and the fraud was not discovered until about three months before the suit was brought. In *Rowe* v. *Horton*, 65 Texas, 89, as against a claim to relief in equity against a deed where more than ten years had elapsed between the date of its execution and the bringing of the suit, it was held that the plaintiff might, by reasonable diligence, have sooner discovered the mistake which was the alleged ground of relief, although it was not in fact discovered by her until within a few months before the suit was brought; and the same doctrine was applied in *Parish* v. *Alston*, 65 Texas, 194.

Decree affirmed.

MISSOURI *v.* ANDRIANO.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 127. Submitted January 5, 1891. — Decided March 2, 1891.

When the decision of a state court is in favor of a right or privilege claimed under a statute of the United States, this court has no jurisdiction to review it.

THE controversy in this case arose from the conflicting claims of the relator and the respondent to the office of sheriff of Buchanan County, Missouri. The proceeding was originally instituted by an information in the nature of a *quo warranto*, filed by the prosecuting attorney, in the Circuit Court of Buchanan County, to test the right of respondent, Andriano, to assume the duties of sheriff. The information was filed upon the relation of John H. Carey, who had been holding the office and discharging its duties for the two preceding years, and who, under the state law, had a right to hold it until his successor should be duly elected, commissioned and qualified. It alleged, in substance, that while the relator was in office, having the right thereto, the respondent, without any legal warrant, ground or right whatever, entered into, and assumed to discharge part of the duties of such office; and further averred that he was to that extent, an unlawful usurper of the rights belonging to relator, as sheriff of such county. Waiving the issue of a writ, respondent appeared, and by his answer, which by agreement was treated as a return, set up that he had received at the general election in November, 1886, the majority of the votes cast thereat for the office of sheriff of said county, and thereupon the governor of the State had issued to him his commission, and he had given bond and duly qualified as such sheriff. He further alleged that at the time of such election he was, and ever since had been, a citizen of the United States, a resident of the said county, and duly qualified, under the constitution and laws of the State, to hold the office. To this answer or

return there was filed a reply, denying that respondent was, or ever had been, such citizen.

The case was tried upon the following stipulation of facts:

It was admitted by the parties, that Joseph Andriano, the respondent, was born in Heidelberg, Baden, now in the German Empire, in October, 1841; that he came to the United States with his father and mother in 1849, and the family settled in Buchanan County, Missouri, where respondent has ever since resided, and where his father and mother, who were, from a long time before respondent's birth, during their joint lives, husband and wife, resided up to the time of their deaths respectively; that his father and mother both lived until long after the year 1855; that respondent and his father and mother were born citizens of Baden, and so continued up to the time they came to the United States; and that Albert Andriano, the respondent's said father, was, by proper proceeding in the Circuit Court of the State of Missouri, within and for Buchanan County, duly naturalized under and pursuant to the laws of the United States, and thereby became a citizen of the United States, on the 4th day of October, A.D. 1854.

It was also admitted that all the statements contained in the information were true, and that respondent was guilty of the acts therein set forth, provided he (respondent) was not a citizen of the United States at the time of the general election, in November, 1886; but that if he were such citizen, then, while said acts were admitted to have been performed by respondent, they were not unlawfully but rightfully performed by him. It was also admitted that the respondent himself never took any steps or did anything toward becoming naturalized as a citizen of the United States.

Upon the issue thus formed by the pleadings and stipulation, the Circuit Court found the respondent guilty as charged in the information, and rendered a judgment ousting him from the office, so far as he had been exercising, or assuming to exercise the duties thereof. From this judgment respondent appealed to the Supreme Court of the State, wherein the case was heard and the judgment reversed, and respondent restored to all things which he had lost by reason of the said judgment.

To reverse this decision of the Supreme Court relator sued out this writ of error.

Mr. B. R. Vineyard and *Mr. Alexander Porter Morse*, for plaintiff in error, submitted on their brief.

No appearance for defendant in error.

Mr. Justice Brown delivered the opinion of the court.

We are confronted upon the threshold of this case with the inquiry whether there is a federal question involved; if not, the only disposition we can make of it is to dismiss it for want of jurisdiction. The object of the proceeding is to try the respective titles of the relator and the respondent to the office of sheriff of Buchanan County, Missouri. Respondent relies upon the fact that he received a majority of votes cast at a popular election for the office. Relator claims to have been in possession of the office since December 1, 1884, performing all the duties imposed upon him by law, and as to respondent's election, insists that the same is void under the constitution of Missouri, which declares (Art. 8, sec. 12) that "no person shall be elected or appointed to any office in this State, civil or military, who is not a citizen of the United States, and who shall not have resided in this State one year next preceding his election or appointment." He claims further, that under the laws of Missouri (Rev. Stats. sec. 3350) he is entitled to hold the office until a successor is duly elected, commissioned and qualified. In support of his claim that respondent is not a citizen he relies upon the fact that he was born in Germany and is, therefore, *prima facie*, an alien. To this, respondent replies, admitting his foreign birth, and also that he had never been naturalized under the laws of the United States, but claiming that under section 4 of the act of Congress of April 14, 1802, 2 Stat. 153, he became and was a citizen by the naturalization of his father. This act, which is reproduced in Rev. Stat. sec. 2172, provided "that the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law

upon that subject, by the government of the United States, may have become citizens of any one of the said States, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States, and the children of persons who now are or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens," etc. Here is clearly a right or privilege claimed by respondent under a statute of the United States within the meaning of Rev. Stat. sec. 709, and had the judgment of the Supreme Court of Missouri been adverse to his claim, there could be no doubt of his right to a writ of error from this court to review its ruling. It is insisted, however, that the relator has no right to a review of the ruling in favor of respondent, as he claimed no right or privilege personal to himself or to his own status as a citizen, from such statute. The question thus presented is, whether the right or privilege must necessarily be personal to the plaintiff in error, or whether he is not entitled to a review where such right or privilege is asserted by his opponent, and the decision is in favor of such opponent and adverse to himself. While there is some force in the argument that the right of review in cases involving the construction of a federal statute should be mutual, the act limits such right to cases where the state court has decided *against* the title, right, privilege or immunity set up or claimed under the statute. Now, the only claim made under the federal statute in this case is by the respondent. The difficulty with the position of the relator is that he asserts no right under the statute, but, to establish the alleged alienage of the respondent, relies solely upon the fact that the latter was born abroad. To this, respondent replies, admitting his foreign birth, but claiming that the statute makes him a citizen, and the state court has adopted his view.

The object of the present judiciary act was not to give a right of review wherever the validity of an act of Congress was drawn in question, but to prevent the courts of the several

States from impairing or frittering away the authority of the federal government, by giving a construction to its statutes adverse to such authority. Of course, if the construction given by the state court to the act under which the right is claimed be favorable to such right, no such reason exists for a review by this court. As stated by Chief Justice Taney in *The Commonwealth Bank* v. *Griffith*, 14 Pet. 56, 58, "the power given to the Supreme Court by this act of Congress was intended to protect the general government in the free and uninterrupted exercise of the powers conferred on it by the Constitution, and to prevent any serious impediment from being thrown in its way while acting within the sphere of its legitimate authority. The right was, therefore, given to this court to reëxamine the judgments of the state courts, where the relative powers of the general and state government had been in controversy, and the decision had been in favor of the latter."

The question is by no means a novel one in this court. The case of *Fulton* v. *McAffee*, 16 Pet. 149, was an action of ejectment, in which the lessor of the plaintiff made title under a certificate issued to him as assignee of Jefferson College, the trustees of which college were authorized by an act of Congress to relinquish certain lands which had been reserved for their use. Defendant offered testimony to show that the certificate was fraudulently obtained, that its authority had been denied by the commissioner of the land office, and consequently that it did not confer on the lessor of the plaintiff a valid legal title upon which he could recover in ejectment. These questions were decided by the state court in favor of the right claimed by the plaintiff, and the defendant took a writ of error from this court. It was held that, as the decision of the state court was in favor of the right claimed, this court had no jurisdiction.

The case of *Linton* v. *Stanton*, 12 How. 423, was an action upon certain promissory notes, to which the defendant pleaded a discharge under the bankruptcy law. Objections were taken to the validity of the discharge, but they were overruled by the court and judgment entered for the defendant. It was held the plaintiff had no right to a review in this court.

Statement of the Case.

"Undoubtedly," says Chief Justice Taney, "the defendant, in pleading his discharge under the bankrupt law, claimed a right or exemption under a law of Congress. But in order to give jurisdiction, something more is necessary; the judgment of the state court must be against the right claimed." Like rulings were made in *Gordon* v. *Caldcleugh*, 3 Cranch, 268; *Strader* v. *Baldwin*, 9 How. 261; *Burke* v. *Gaines*, 19 How. 388; *Hale* v. *Gaines*, 22 How. 144; *Reddall* v. *Bryan*, 24 How. 420; and *Ryan* v. *Thomas*, 4 Wall. 603.

None of the cases cited by the relator involve the question here presented, and the writ of error must be

Dismissed for the want of jurisdiction.

LOUISVILLE, EVANSVILLE AND ST. LOUIS RAILROAD COMPANY *v.* WILSON.

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

No. 153. Argued January 21, 1891.— Decided March 2, 1891.

Some months after the sale of a railroad under foreclosure, and its surrender by the receiver to the corporation organized to receive it, the sale being made with a provision that the purchaser should pay all debts adjudged to be superior in equity to the deeds of trust foreclosed, an order was made giving such priority to the appellee. *Held*, that an appeal lay in favor of the purchaser.

The term "wages of employés," as used in an order directing the payment of certain classes of debts out of the proceeds of the sale of a railroad under foreclosure, in preference to the secured liens, does not include the services of counsel employed for special purposes.

Services of an attorney in securing payment to the receiver of a railroad of rent due for property of the railroad company and the return of the property, are entitled to priority of payment over the secured liens on a sale of the road under foreclosure of a mortgage upon it.

The other claims of the appellee, not being rendered for the benefit of the security holders, are not entitled to such priority.

On the 30th day of December, 1884, Isaac T. Burr filed in the Circuit Court of the United States for the Southern Dis-

trict of Illinois his bill of complaint against the Louisville, Evansville and St. Louis Railway Company; the Mercantile Trust Company of New York, trustee; Noble C. Butler, trustee; and Robert A. Watts, trustee. The bill set forth the fact that the complainant was a judgment creditor of the railway company; and the others, trustees in deeds of trust given by the company. Subsequently, a cross-bill was filed by two of the trustees. The original bill prayed the appointment of a receiver, and on the 3d day of January, 1885, George F. Evans was appointed receiver and took possession of the railway property. In the order of appointment was this provision: "It is further ordered, adjudged and decreed that the said receiver, out of the income that shall come into his hands from the operation of the said railway or otherwise, do proceed to pay all just claims and accounts for labor, material, supplies, salaries of officers and wages of employés that may have been earned or furnished within six months prior to January 1, 1885, and all taxes." The outcome of the litigation was the sale of the road under a decree of foreclosure of the deeds of trust. This decree was entered April 23, 1886. A similar decree of sale was entered in the Circuit Court of the United States for the District of Indiana, in which court, also, foreclosure proceedings were had, the road extending through both districts. On the 9th of June, 1886, the property was sold in obedience to these decrees. On the 22d of July, 1886, this sale was confirmed. On the 8th of October, 1886, an order was entered in the Circuit Court in the Indiana District, directing the receiver to surrender the possession of the property sold to the Louisville, Evansville and St. Louis Railroad Company, a corporation organized by the parties interested in the purchase, and to which the purchasers had conveyed all their rights under their purchase. This order was not entered in the Illinois Circuit Court at that time; but, nevertheless, on the 11th of October, 1886, the receiver surrendered the entire property to the new corporation. In the order directing this surrender were provisions for the payment by the new corporation of all claims which might be adjudged superior in equity to the deeds of trust foreclosed, with the

right to retake possession of the property if payment was not made, and with the further right to the new corporation to appeal from any adjudication of such claims. Appellee intervened in the Illinois Circuit Court, and on the 10th day of August, 1887, an order was entered adjudging that he be allowed $7650. This order also provided: "And the court does further order, adjudge and decree that the receiver, George F. Evans, forthwith pay the same to the said petitioner, together with the costs of the proceedings, out of any money in his hands arising from the operation of the said railway as such receiver, and, if that is insufficient, then that the same be paid, prior to the bonded debt, out of the proceeds of the sale of the mortgaged premises." On the 29th of August, 1887, the order entered in the Indiana Circuit Court, on October 8, 1886, was, by the direction of the Circuit Judge, entered in the Illinois Circuit Court as of the date of October 8, 1886, and on the same day an order was entered reciting the appearance of the receiver; that he showed to the court that he had surrendered possession on the 11th of October, 1886; and, in addition, providing, "in consideration thereof, and of the decree herein entered on August 10, 1887, it is ordered, adjudged and decreed that the sum of seven thousand six hundred and fifty dollars, allowed the intervenor, Bluford Wilson, together with the costs incurred on his intervention, is a lien and charge upon the earnings of the said property while in the hands of the receiver, and upon the proceeds of sale of the mortgaged premises, prior and superior to the deeds of trust of June 1, 1881, and March 1, 1882, and it is thereupon adjudged, ordered and decreed that the Louisville, Evansville and St. Louis Railroad Company shall, within twenty days from this date, pay to the said intervenor or into court for him the said sum of seven thousand six hundred and fifty dollars, ($7650,) with interest from this day, and the costs of the said intervenor upon this intervention." The order also gave an appeal to the new corporation, and granted a supersedeas on the filing of a bond in the penalty of ten thousand dollars. This bond was filed, and the appeal perfected. The appeal was taken from the order of August 29.

Mr. Alexander P. Humphry for appellant. *Mr. J. E. Iglehart*, *Mr. Edwin Taylor* and *Mr. George M. Davie* were with him on the brief.

Mr. Bluford Wilson in person for appellee.

Mr. Justice Brewer delivered the opinion of the court.

We think the appeal was properly taken. At the time the order of August 10 was entered, the receiver was not in possession; he had surrendered the property more than nine months prior thereto. When he surrendered the property, he closed up his receivership. A decree against him was not personal, but official. It was not the contemplation of the court that any personal liability should be cast upon him. He not only had no railroad funds or property in his possession, out of which to pay this allowance, but he had no right to retake that which he had surrendered. The reservation made in the order entered in the Indiana court, of the right of the court to retake possession of the property surrendered, conferred no rights on the receiver; it was simply a reservation to the court, which might, under that reservation, by the old or a new receiver, at any time retake possession when its allowances within the scope of the order of surrender were not paid. So, the order of August 10 was a mistake. It neither bound the appellant nor the property which it had received. It was not a purchaser of the railroad property; and did not become, until August 29, a party to the record in the Illinois court. It is true that, on August 29, the Circuit Judge, directing the entry in the Illinois court of the order made nearly a year before in the Indiana court, directed that it should be entered as of August 8, 1886, the date of its entry in the Indiana Circuit Court; but such *nunc pro tunc* entry, while proper for the protection of the receiver, could not antedate the subjection of the new corporation to the orders and decrees of the Illinois Circuit Court. It could justly say, that it was not a party to the proceedings in that court until the entry of August 29, 1887. There was no misunderstanding, no misrepresentation, no deceit, in these matters. Immediately, on the

entry of this order of August 29, a transcript of the order from the Indiana Circuit Court, a new decree in favor of the intervenor was entered, a decree for the first time binding the appellant. This was not an order in execution, merely, of the former decree, such as those noticed in the case of *Trust Company* v. *Grant Locomotive Works*, 135 U. S. 207; but it was the first order against and binding the appellant. We are, therefore, compelled to notice the merits of this allowance.

The allowance to the appellant was for three matters. He does not sue for services as general counsel of the mortgagor company, or for salary as an officer of that company. With respect to the provision in the order of appointment, he claims to come under the descriptive words therein used, "wages of employés." If that fails him, then he appeals to the general equity powers of the court to compensate him as one whose services were beneficial to the security holders. On the meaning of the words "wages of employés," he cites the case of *Gurney* v. *Atlantic and Great Western Railway Company*, 58 N. Y. 358, in which an order directing the receiver of a railway company, thereby appointed, to pay debts "owing to the laborers and employés" for labor and services, was held broad enough to include a debt due to Hon. Jeremiah S. Black, for professional services as counsel. Without criticising that decision, or noticing the special circumstances which seemed in the judgment of that court to justify the inclusion of professional services within the descriptive words of the appointment, we are of the opinion that the term "wages of employés," as used in the order now under consideration, does not include the services of counsel employed for special purposes. *Vane* v. *Newcombe*, 132 U. S. 220, 237.

The terms "officers" and "employés" both, alike, refer to those in regular and continual service. Within the ordinary acceptation of the terms, one who is engaged to render service in a particular transaction is neither an officer nor an employé. They imply continuity of service, and exclude those employed for a special and single transaction. An attorney of an individual, retained for a single suit, is not his employé. It is true, he has engaged to render services; but his engagement is

rather that of a contractor than that of an employé. The services of appellee, therefore, did not come within the order appointing the receiver. We would not be understood as asserting, even by implication, that the terms of an order of appointment of a receiver vest in all claimants an absolute right as against the security holders. Such terms may be, and doubtless are, a protection to the receiver; and what he does and pays within those terms may be, thereafter, beyond the challenge of any party interested in the property. But when he has not acted, and the question is presented to the court as to the liability of the property for any claim, the court is not foreclosed by the order of appointment, but may consider and determine equitably the extent of liability of the property to such claim, and what its rights of priority may be. Hence, as the receiver did not pay this claim, the parties in interest may rightfully challenge its priority, even if it were within the very letter of the order of appointment of the receiver.

What were the services for which the appellee made his claim? and were they so beneficial to the security holders that a court of equity might justly give them priority? And the question, it will be borne in mind, is not, whether out of the earnings of the road such claims are payable, but whether, where there are no surplus earnings, they may be paid out of the corpus of the property in preference to secured liens.

The first matter is this: Prior to the appointment of a receiver the railway company leased to the Illinois Midland Railway Company certain engines. When the latter road passed into the hands of a receiver intervenor was employed to get the engines back, and rental for their use. In this service he secured an allowance against its receiver for $1500, upon which $1340.13 was paid, and paid after the receiver in this case was in possession. The only testimony as to the value of such service fixed it at $300. Part of such service was rendered more than six months prior to the appointment of a receiver in this case; but, apparently, the important part within such time. This recovery enured to the benefit of the security holders, as placing so much more money in the hands of the receiver for the purpose of discharging obligations

against the company payable before the bonds. We think it may fairly be held that the party who takes the benefit of such a service ought to pay for it; and that equity may properly decree payment therefor. As justly remarked by Lord Kenyon in *Read* v. *Dupper*, 6 T. R. 361, "the principle has long been settled that a party should not run away with the fruits of a cause without satisfying the legal demands of his attorney, by whose industry and expense these fruits were obtained." In *Renick* v. *Ludington*, 16 W. Virginia, 378, 392, it is said: "The lien (even in cases of *quantum meruit*) is in the nature of an equitable lien, (3 Cooper's Tenn. Ch. 23,) and is based on the natural equity that the plaintiff ought not to be allowed to appropriate the whole of a judgment in his favor without paying thereout for the services of his attorney in obtaining such judgment." See also *Mahone* v. *Southern Tel. Co.*, 33 Fed. Rep. 702, and *In re Paschal*, 10 Wall. 483. We think, therefore, there was no impropriety in allowing intervenor three hundred dollars for these services.

The second item of intervenor's claim is this: The railroad company was not paying operating expenses and interest; it was running behind. Certain parties interested in and officers of the road advanced moneys to continue its operation and prevent foreclosure proceedings. After advancing a considerable sum, they became anxious to secure their advances, and upon the intervenor's advice they took assignments of payrolls, so as to bring them within the scope of the rulings of this court, as to preferential payment of employés, and on foreclosure these claims, thus evidenced and secured, were recognized and given equality of right with the security holders in the reorganization scheme. One of the witnesses as to the value of these services testified that they were worth five thousand dollars, adding, "of course, I mean that such fees should be paid by the parties benefited." That states the true equities of the case. The parties who, acting under the intervenor's advice, took such steps as to secure their advances, and thereby obtained equality of interest with the lien holders, should pay him. They who are compelled to let third parties into an equality with themselves in the matter

of security, ought not to be compelled to pay counsel who brought about such equality. As happily said by counsel for appellant: "This is taking the funds belonging to a prior mortgagee to pay counsel to devise a scheme by which the subsequent lender of money is preferred before him."

The remaining matter is this: The Louisville, Evansville and St. Louis Railway Company was a corporation made up by the consolidation of the Louisville, New Albany and St. Louis Railroad Company and the Evansville, Rockport and Eastern Railway Company. At the time of the consolidation there was on the first-named property a deed of trust of three millions of dollars, and on the latter one of nine hundred thousand dollars. After consolidation a new deed of trust for one million of dollars was executed on the entire property. Fearing that the trustee in the deed of trust on the Evansville, Rockport and Eastern Railway Company might take possession of that division, intervenor was employed to prevent such action, and he commenced suits to enjoin the trustee therefrom. He also successfully negotiated with the bondholders, and thus preserved the unity of operation and control until the commencement of the proceedings in this suit, whereby the entire property was taken possession of and operated by a single receiver, and subsequently sold and passed into the new corporation. At the sale both divisions were sold. The Evansville division being sold subject to the deed of trust of nine hundred thousand dollars, brought only twenty thousand dollars, to be applied on the second lien — the one given by the consolidated company.

The services thus rendered were at the instance of the railroad company; and it is not perceived how services rendered at its instance to preserve control of that portion of its road not covered by the first lien, can be considered as services to the holders of bonds secured by that lien. The primary object of such services was the benefit of the railroad company. It was to enable it to retain the control and receive the earnings of as large an extent of the road as possible. As such services did not secure any additional interest to the lien holders — in fact, they advanced the moneys due for interest on the Evans-

ville first mortgage — it seems inequitable that they should be held responsible and be compelled to pay the party employed by the railroad company. It cannot be that security holders are liable, either in law or in equity, for the expenses incurred by their debtor in carrying into effect a scheme which the latter believes will enable it to pay its interest to them; but which, in fact, does not accomplish such result. It was the debtor's act; and if it failed of accomplishing hoped-for results, the party employed must look to his employer alone for compensation, and cannot charge the bondholders therefor, on the theory that it was believed that it might enure to their ultimate benefit. In this matter, also, the allowance to the intervenor as against the security holders, represented by the appellant, was unwarranted.

The decree, therefore, will be reversed, and the case remanded with instructions to allow the intervenor three hundred dollars. Costs in this court will be divided.

KNEELAND v. AMERICAN LOAN AND TRUST COMPANY.

KNEELAND v. BALLOU.

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

Nos. 1539, 1540. Argued January 29, 30, 1891. — Decided March 2, 1891.

The decree in this case in the court below, founded on the report of a master, awarded to the complainant the recovery of rental for five months, separately stated. In this respect the decree was sustained here, (136 U. S. 89,) but it was reversed and the cause remanded, in order to have the computation made, after inquiry into special subjects indicated in the mandate. The Circuit Court, after determining the special matters, regarded the matter of the time and amounts of the rental as settled by the former decree and as sustained by this court, and awarded interest on the amounts from the date of the former decree. *Held*, that there was no error in this; that the remanding of the cause did not reopen the whole subject of the accounts, but, on the contrary, contemplated no new investigation as to past matters.

Counsel should use respectful language, both in brief and in oral arguments.

In equity. The case is stated in the opinion.

Mr. John M. Butler for appellant.

Mr. Henry D. Hyde for appellee in No. 1539.

Mr. J. L. High for appellees in No. 1540.

Mr. Justice Brewer delivered the opinion of the court.

These cases, being appeals from two decrees of the Circuit Court of the United States for the District of Indiana, making allowances to certain intervenors in railroad foreclosure suits, by stipulation of parties are to be heard together and treated as one case. They were before the court a year ago. *Kneeland* v. *American Loan and Trust Co.* 136 U. S. 89.

The claims of the intervenors are for the rental of rolling stock, from the 1st of August, 1883, to the 1st of January, 1885. The road during that time was in the possession of a receiver. From the 1st of August, 1883, to the 1st of December 1883, the receivership was at the instance of a judgment creditor; the remainder of the time, at the instance of the bondholders, for whose benefit the appellant became the purchaser at the foreclosure sales. The only questions then determined which are important to the present controversy, were these: First, the time for which the property was responsible for the rental; and, second, the method of computing it. It was there adjudged that the bondholders, represented by the appellant, the beneficial owners of the property, could not be held liable for rental value prior to December 1, 1883, and during the time that the receivership was at the instance of a judgment creditor. It was also ruled, against the contention of the appellant, that the mileage basis was not the proper one for determining the compensation to be paid to the intervenors; but that they were entitled to recover a reasonable rental value, computed as ordinary rentals, by the month, and irrespective of the actual use of the rolling stock. That was the basis of computation pursued by the Circuit Court, in the decrees from which those appeals were taken; and, therefore,

in that respect its rulings were sustained. In those decrees the court had found the amounts due to the several intervenors, stating each separately and decreeing a recovery therefor.

These decrees were based upon and confirmed final reports made by the master. Back of these reports was an immense volume of testimony upon which they were founded. They stated the amounts due the intervenors, separately and for different periods. One, from August 1, 1883, to August 1, 1884, and the other from thence on to January 1, 1885. With these reports it was a simple matter of arithmetical computation to determine the amount due to each intervenor for the four months from August 1, 1883, to December 1, 1883, that being simply one-third of the year. The order which was entered by this court was that the decrees be "reversed, and the cases remanded with instructions to strike out all allowances for rental prior to December 1, 1883, the time when the receiver was appointed at the instance of the mortgagees, and to allow the rentals as fixed for the time subsequent." In other words, all that the court had to do was to deduct from the amount allowed to each intervenor one-third of the amount allowed for the year ending August 1, 1884. In each of the reports, as well as the decrees, the rentals due from August 1, 1884, to January 1, 1885, had been stated; and on receiving our mandates the Circuit Court interpreted them as in effect affirming so much of the decrees as allowed these amounts to the intervenors, and its new decrees awarded interest thereon from the date of the former decrees. This is the first ground of alleged error.

We think the ruling of the Circuit Court was correct. The amount of the allowances for these five months was separately stated, and such allowances were sustained by this court. While the former decrees were in terms reversed, and the cases remanded for the entering of new decrees, yet, the terms of those new decrees were specifically stated, and in so far as the separate and distinct matters embraced in the former decrees were ordered to be incorporated into the new, it is to be regarded as *pro tanto* an affirmance. Equity regards the

substance and not the form. The rights of parties are not to be sacrificed to the mere letter, and whether the language used was reversed, modified, or affirmed in part and reversed in part, is immaterial. Equity looks beyond these words of description to see what was in fact ordered to be done. *Illinois Central Railroad* v. *Turrill*, 110 U. S. 301. That the computations were not made by this court, and the separate amounts due each intervenor stated in the mandates to the trial court, was owing partly to a fact transpiring on the argument here, and which appears in the closing part of our order, as follows: "Counsel for the Grant claims expressly stated in open court, in his argument, that in case certain appeals from the Sixth Circuit were affirmed there might result a double allowance to his clients, which they did not insist upon. As the details and sum are not clearly presented, we can only say that this matter must be taken into account in the subsequent disposition of the cases." This was a matter not disclosed by the record, and of which we were informed simply by the oral statement of counsel. For this reason, as well as from the fact that there were several intervenors, we left the matter of computation to the trial court.

Another error alleged is this: After the mandates were filed in the Circuit Court the appellant moved that the matters be referred to a master, with instructions to investigate and report the correct and true amounts to be allowed to the claimants; also the exact time at which proceedings were commenced by the mortgagees for the foreclosure of the mortgage resting upon the St. Louis division; whether any receiver was ever appointed at the instance of the mortgagees in said St. Louis division mortgage; and, also, whether the receivership theretofore existing under the creditor's bill, known as "Braman's" bill, or under that brought by the mortgagees on the Toledo division, was ever extended to and made to embrace certain foreclosure suits named. In support, he filed an affidavit as to facts which he claimed to have ascertained since the decision in this court. This motion was denied, and the terms of the decrees were settled by the Circuit Court. This ruling is complained of, but it obviously was correct.

Counsel claims that under the reversal the whole matter of inquiry as to the accounts was opened. On the contrary, the clear language of our decision was to strike out certain specific items, and to allow others as already fixed. No new investigation was contemplated in respect to past matters. The only independent matter left for consideration was that in respect to double allowance, suggested by counsel on oral argument.

A final matter of objection, which applies only to case number 1539, and to the allowance in favor of the intervenor, the American Loan and Trust Company, is this: To that company, for the year ending August 1, 1884, there was, by the former decree, allowed $33,735.28; deducting one-third, leaves $22,490.19. The amount allowed in this decree for such period was $23,262.72, or $772.53 more than the two-thirds. Counsel for this intervenor seems to have gone back of the final reports of the master, into the testimony, to work out this result; but, as we have already stated, no such inquiry was intended to be left open by the former decision to one party more than to the other. In this respect, therefore, there was error, and the allowance to such intervenor must be reduced by that sum.

We regret to notice in the brief of appellees' counsel in No. 1540 aspersions on the conduct of opposing counsel. It is not pleasant to be compelled to remind counsel that language used in briefs, as well as that employed in oral argument, must be respectful.

The decree in number 1540 will be affirmed. In number 1539 it will be modified, and the case remanded with instructions to reduce the allowance to the American Loan and Trust Company by the sum of $772.53. The costs of that appeal will be equally divided between the appellant and the American Loan and Trust Company.

WILLIAMS *v.* UNITED STATES.

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

No. 157. Argued January 21, 22, 1891. — Decided March 2, 1891.

If, through inadvertence and mistake, a wrong description is placed in a conveyance of real estate by an individual, a court of equity would have jurisdiction to interfere and restore to the party the title which he never intended to convey; and it has a like jurisdiction, when a wrong description from a like cause gets into a patent of public land.

If the allegations of a bill point to fraud and wrong, and equally to inadvertence and mistake, and the latter be shown, the bill is sustainable, although the former charge may not be fully established.

The provision in the second section of the act of June 16, 1880, 21 Stat. 287, c. 245, requiring the approval of the Secretary of the Interior to the act of the state authorities of Nevada in selecting lands under the grant made by that act, while it did not vest in him an arbitrary authority, to be exercised at his discretion, empowered him to withhold his approval when it became necessary to do so, in order to prevent such a monstrous injustice as was sought to be accomplished by these proceedings.

On June 16, 1880, Congress passed an act, of which the following are the first two sections:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and are hereby, granted to the State of Nevada two million acres of land in said State in lieu of the sixteenth and thirty-sixth sections of land heretofore granted to the State of Nevada by the United States: *Provided*, That the title of the State and its grantees to such sixteenth and thirty-sixth sections as may have been sold or disposed of by said State prior to the passage of this act shall not be changed or vitiated in consequence of or by virtue of this act.

"Sec. 2. The lands herein granted shall be selected by the state authorities of said State from any unappropriated, nonmineral public land in said State, in quantities not less than the smallest legal subdivision; and when selected in conformity with the terms of this act, the same shall be duly certified to said State by the commissioner of the general

land office, and approved by the Secretary of the Interior." 21 Stat. 287, c. 245.

On May 3, 1883, the lands in controversy were certified to the State of Nevada under this act. This certification was based on an application by the State, formally executed July 29, 1882. On May 20, 1882, the appellant applied to the proper state officers to purchase these lands. On February 2, 1884, in pursuance of this application, a contract was entered into between the State and the appellant for the sale to him of the lands in controversy; he, at the time, paying one-fifth of the purchase money, and contracting to pay the balance in subsequent annual instalments. On December 18, 1884, this bill was filed by the United States in the Circuit Court for the District of Nevada against the appellant alone. Generally speaking, the scope of the allegations in the bill is that the lands were improperly certified to the State; that in equity it had no title, and its contract with the appellant transferred nothing to him; and the prayer was for the cancellation of the contract between the appellant and the State of Nevada, and an adjudication that the appellant had no title or interest in such lands. On November 26, 1886, a decree was entered (30 Fed. Rep. 309) by which the title of appellant in the lands was divested, and he directed to surrender up to the State of Nevada, for cancellation, all contracts or agreements he had with that State for these lands. From such decree appellant appealed to this court.

Mr. J. K. Redington, (with whom was *Mr. John H. Hickcox, Jr.* on the brief,) for appellant.

Mr. Assistant Attorney General Parker for appellees.

Mr. Justice Brewer delivered the opinion of the court.

The first contention of appellant is, that this action could not be maintained because the State of Nevada was not made party, it holding the legal title;

Second, that the Circuit Court erred in finding that there was fraud or wrong, by which the title was passed to the State of Nevada; and,

Third, that even if there were fraud or wrong in this matter, the outcome of the proceedings was the necessary one, and therefore the bill should not have been sustained.

With respect to the first contention: It cannot be doubted that the certification operated to transfer the legal title to the State, *Frasher* v. *O'Connor*, 115 U. S. 102, nor that the contract between the State and appellant passed to him the equitable title, the legal title being retained by the State, simply as security for the unpaid part of the purchase money. The proposition, therefore, is, that where there are outstanding two interests or titles, held by different parties, the real owner cannot proceed against either without joining the other; that only one action can be maintained to divest these parties of their separate titles; and that to that action both adverse holders must be parties. The proposition is not sound. A court of equity has jurisdiction to divest either one of the adverse holders of his title, in a separate action. Doubtless the court has power, when a separate action is instituted against one, to require that the other party be brought into the suit, if it appears necessary to prevent wrong and injury to either party, and to thus fully determine the title in one action; but such right does not oust the court of jurisdiction of the separate action against either. It has jurisdiction of separate actions against each of the adverse holders, and there is no legal compulsion, as a matter of jurisdictional necessity, to the joinder of both parties as defendants in one action. There are special reasons why this rule should be recognized in this case. It may be that the Circuit Court would not have jurisdiction of an action against the State; that an action against a State, on behalf of the United States, can be maintainable only in this court; and that when brought in this court no other party than the State can be made defendant. We do not decide that these things are so, but suggest the difficulty which must have presented itself to the counsel for the government, and which justifies a separate suit against the holder of the equitable title. The State of Nevada might have intervened. It did not; doubtless, because it felt it had no real interest. It was no intentional party to any wrong upon the

general government. If its agency had been used by the wrong-doer to obtain title from the general government; if, conscious of no wrong on its part, it had obtained from the general government the legal title and conveyed it away to the alleged wrong-doer, it might justly say that it had no interest in the controversy, and that it would leave to the determination of the courts the question of right between the government and the alleged wrong-doer, and conform its subsequent action to that determination. That certainly is the dignified and proper course to be pursued by a State, which is charged to have been the innocent instrumentality and agent by which a title to real estate has been wrongfully obtained from the general government. The jurisdiction of the Circuit Court over this bill was properly sustained.

The second contention is, that the court erred in finding that there was fraud or wrong by which the title was taken away from the general government. The allegations of the bill are of fraud and wrong, but they also show inadvertence and mistake in the certification to the State; and it cannot be doubted that inadvertence and mistake are, equally with fraud and wrong, grounds for judicial interference to divest a title acquired thereby. This is equally true, in transactions between individuals, and in those between the government and its patentee. If, through inadvertence and mistake, a wrong description is placed in a deed by an individual, and property not intended to be conveyed is conveyed, can there be any doubt of the jurisdiction of a court of equity to interfere and restore to the party the title which he never intended to convey? So of any other inadvertence and mistake, vital in its nature, by which a title is conveyed when it ought not to have been conveyed. The facts and proceedings attending this transfer of title are fully disclosed in the bill. They point to fraud and wrong, and equally to inadvertence and mistake; and if the latter be shown, the bill is sustainable, although the former charge against the defendant may not have been fully established.

For satisfactory answer to this inquiry, a fuller statement of facts is necessary: On May 19, 1879, defendant made in the

proper land office of the United States a desert-land entry for two hundred and forty acres, including therein the lands in controversy. 19 Stat. 377, c. 107. On July 26, 1879, he conveyed to the New Philadelphia Silver Mining Company, for the sum of five thousand dollars, eighty acres thereof, described as the east $\frac{1}{2}$ of southeast $\frac{1}{4}$, section 33, township 8, range 50 east, Nye County, Nevada. The conveyance was with this warranty: "And the party of the first part agrees to and with the party of the second part that he has full right and power to sell and convey the said premises and water rights, and that they are now free from all incumbrances, sales or mortgages." Within the succeeding year the grantee erected a ten-stamp quartz mill on the premises, at the expense of about fifty-eight thousand dollars. Becoming embarrassed, this eighty acres, with improvements, passed by sheriff's and receiver's deeds to Matthiessen and Ward, the title thus passing finally by the 16th of December, 1881. The consideration of five thousand dollars, named in the original deed, was paid to Williams. On May 20, 1882, he executed papers for the relinquishment to the government of his desert-land entry, and at the same time made application to the State for the purchase of these lands as agricultural lands. At his instance, the State, on July 29, 1882, applied to the government for a certification of these lands. On August 12, 1882, by letter from the Land Department, cancellation of the desert-land entry was made on the books of the local land office, and subsequently, as stated, in May, 1883, the lands were certified to the State, and thereafter the application of Williams for purchase from the State was accepted, and the contract entered into.

Further, it appears that on June 20, 1881, the receiver of the Philadelphia company wrote to the commissioner of the land office, giving notice of the company's interest in these lands, and asking instructions as to steps necessary to protect its title. This information was followed, on February 10, 1882, by interview and communication to the department from the counsel of Matthiessen and Ward. On April 14, 1882, the commissioner answered the inquiry of the receiver, informing

him that desert-land claims were not assignable. On May 23 he advised Ward that there was no evidence in his office showing a relinquishment by Williams of the desert-land entry. In August, 1882, the land register of Nevada, replying to an inquiry of Matthiessen and Ward, said: "Mr. Williams informed me that he would try and procure the cancellation of his desert-land entry; we have received no notice as yet of the cancellation of said entry." As weeks before Williams had filed relinquishment papers in that office, and the matter of cancellation, having been referred to Washington, was waiting response, this communication was obviously deceptive, and suggests conspiracy between the register and Williams. So obvious is this, that on September 11, 1882, the commissioner of the general land office wrote to the register for an explanation. In that letter, after referring to his information to the agent of Matthiessen and Ward, as above quoted, he adds: "Upon a cursory examination of the matter it would seem that the information, if furnished by you as aforesaid, was not in accordance with the facts in the case and misleading in result, and therefore calculated to create suspicion in the public mind as to the honest administration of your office in matters coming before you for official action. Large and valuable interests were affected by the relinquishment of Williams, and the company should have been notified when it was filed in your office, or, at all events, when it applied to you through its agent for information. Please explain the matter at once." On September 6, 1882, an application was made on behalf of Matthiessen and Ward for reinstatement of the desert-land entry, and a protest against embracing in the State's selection the eighty acres, heretofore referred to, conveyed by Williams to the Philadelphia company. This application for reinstatement of the desert-land entry was denied by the land commissioner on February 21, 1883. The application by the State for this land was at the instance of the appellant, and the application was included in a list known as "List Number 24." On January 8, 1883, Matthiessen and Ward made, in due form, an application for the five acres upon which the buildings were situated, as a mill-site. The application was

denied by the land office in Nevada on the ground that the land was embraced in the selection theretofore made by the State of Nevada. Appeal was made to the land office at Washington, and the appeal papers were received there January 18, 1883. On January 23, Curtis & Burdett, attorneys for Matthiessen and Ward, appeared in the land office at Washington and asked to be advised of any action. Immediately thereafter the officers in the Land Department noted, in pencil, within brackets, on list 24, against the land in controversy, these words, "mill-site." The effect of this annotation was to suspend action in respect to these lands until the adverse claim had been investigated and removed. Thereupon the controversy as to the right to select these lands proceeded in the department. While this controversy was pending in the department and undetermined, list 24 was presented for approval, and the annotation of the words "mill-site" having been by some person erased, and there appearing on the face of the list no controversy as to any of the lands, the certificate was made in May, as heretofore stated. The controversy proceeded in regular order until December, 1883, without any suspicion on the part of the commissioner of the land office that any certification of title had been made to any of these lands or that the controversy was not still open for adjudication. In December, 1883, on discovery of this mistake by the land commissioner, he telegraphed to the governor of Nevada to return the approved list, which application was declined, by telegram, on the advice of the attorney general of the State. On the 14th of December, 1883, the Secretary of the Interior telegraphed to the governor of Nevada, as follows:

"[Received at Carson, Dec. 14, 4:03 P.M. Dated Washington, D.C.—14, 1883.]

"To Governor of Nevada, *Carson City, Nev.:*

"Has land mentioned in dispatch of Commissioner, of 11th instant, been sold and deeded, or either? If so, to whom? Unless the list can be returned and corrected I desire to have proceedings commenced immediately to set aside the certification. "H. M. Teller, *Secretary.*"

On the same day the appellant telegraphed as follows:—

"[Received at Carson, December 14, 4:46 P.M. Dated Washington, December 14, 1883.]

"To Governor Jewett W. Adams or W. M. Garrard:

"Have deed for my State land claim executed immediately. Give Harry Day money if he has not got it; will remit from Hot Creek. Don't delay. Answer.

Jos. T. Williams."

On the 15th of December the Secretary of the Interior telegraphed to the State register as follows:

"Tract inadvertently certified while adverse claim was pending and undecided. Much embarrassment will result to department if list be not returned as requested."

On the same day he received this answer:

"Carson, Nev., *December* 15, 1883.

"To H. M. Teller, *Washington, D.C.:*

"The land referred to is applied for and contracted to J. T. Williams, but no patent is yet issued.

J. W. Adams, *Governor.*"

These facts make it clear that when list 24 was presented to the department, and it had received notice of an adverse claim as to these lands, the ordinary annotation was made on the list opposite to these lands, to indicate an adverse claim, and that pending the adjudication of the merits of that claim no certification would have been made; that by somebody's act, (and the record does not disclose the party,) this customary departmental entry of notice was rubbed out; and that thereafter the list, passing through the hands of the various officers of the department, with every mark of approval from the various subordinate officers, and not challenged as to this controversy, was inadvertently, unintentionally and through mistake, certified to the State of Nevada. Can there be any doubt that this land was certified through inadvertence and

mistake; and that the Land Department did not intend to certify it to the State, or approve the selection made by the State until after the determination of the pending controversy? Who made the erasure cannot be, from the testimony, determined. The defendant and his attorney in Washington city each testify that he did not make it or know of its being made; yet who would make such an erasure, save one interested in having the fact of the contest removed from notice? The suggestion made by counsel for appellant, that Matthiessen and Ward caused this to be done in order to lay the foundation for this bill, when in fact their controversy in the department had not been adjudicated as to the right of the State to make this selection, is so puerile as to intensify the suggestion against the appellant. That Williams had some information from within the department is evident from the fact that on the very day the Secretary telegraphed to the governor of Nevada he telegraphed insisting upon immediate execution of the deed from the State — a telegram received at the capital of the State forty-three minutes after that of the Secretary. We do not impugn the truthfulness of the appellant or his counsel, in the testimony given by each, "that he neither made nor knew of the making of this obliteration;" yet we cannot but be impressed with the conviction that there was some one in the department employed to look after appellant's interests in this controversy, and who, without special direction or authority, assumed to do that which he thought, and which would apparently, promote his employer's interests, to wit, the erasure from this list of any notice of contest or adverse claim. Of course, if fraud was done by one employed by appellant, he, though ignorant, must bear the consequences of that fraud. We do not doubt what the verdict of a jury would be, as to a charge of fraud, under these circumstances; but we do not care to place our decision upon this ground. We rest it upon the incontrovertible fact that through inadvertence and mistake this land was certified to the State.

This brings us to the final contention: That if there had been no erasure; that if the contest had been had, the lands must inevitably have been certified to the State of Nevada,

because they were, within the description of the act, "unappropriated, non-mineral, public land," selected by the State; that the desert-land entry by Williams, in 1879, gave to him no right which he could sell or transfer; that, therefore, the deed from him to the Philadelphia company passed nothing as against the government; that, having failed to reclaim the land within the time prescribed, his right in the land ceased, and his cancellation of his desert-land entry was a mere matter of form to clear the face of the record; that at the time of the selection and application by the State there was no legal adverse claim; that, therefore, the State had a right to select it; that having made such selection, it was the duty of the department to certify the land, and thus transmit the legal title; and that the government pays no attention to private disputes between parties who have transactions in respect to public lands before it parts with its title, and before any right is vested in either of the disputing parties.

In the main, we do not doubt these propositions of law; but there are certain equitable considerations which the department is authorized to recognize, and when recognized no court will ever disturb its action. Consider the facts in this light: Williams had made a desert-land entry; his proposition by that entry was to reclaim this land by irrigation; he conveyed by deed a portion of it to the Philadelphia company, warranting that he had perfect title and right to convey, and receiving five thousand dollars for this conveyance. On the faith of it the company expends fifty-eight thousand dollars in improvements. The time for reclamation passes, and he has failed in his implied duty to the government. With a view to secure to himself a title which he has once conveyed with warranty, he schemes to surrender his desert-land entry for cancellation, and induce the State to select and obtain title to the lands as agricultural, non-mineral lands, and then buy the title thus obtained by the State. When the department is advised of these facts, it declines to certify the title to the State. If all questions of jurisdiction and procedure were removed, would any court issue a mandamus to compel the officers of the Land Department to certify those lands to

the State? Would not the equity developed by these facts forbid the court to issue such an order? The certification after selection by the State is to be approved by the Secretary of the Interior. This is no mere formal act. It gives to him no mere arbitrary discretion, but it does give power to prevent such a monstrous injustice as was sought to be accomplished by these proceedings. It gives the power to the Secretary to deny this application of the State, and refuse to approve its selection, and hold the title in the general government until, within the limits of existing law or by special act of Congress, a party who, misinformed and misunderstanding its rights, has placed such large improvements on the property, shall be enabled to obtain title from the government.

We would not be misunderstood in respect to this matter. We do not mean to imply that any arbitrary discretion is vested in the Secretary; but we hold that the statute requiring approval by the Secretary of the Interior was intended to vest a discretion in him by which wrongs like this could be righted, and equitable considerations, so significant and impressive as this, given full force. It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.

The decision of the Circuit Court is right, and must be

Affirmed.

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

CRESSEY *v.* MEYER.

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

No. 145. Argued January 12, 1891. — Decided March 2, 1891.

The right of a sovereign to enforce all obligations due to it, without regard to statutes of limitation, or to the defence of laches, does not pass to its creditors; and its intervention and appearance in a suit, in the nature of a garnishee process, brought by one of its creditors as against its debtors, does not give to such creditor its sovereign exemptions from liability to such defences.

The Consolidated Association of the Planters of Louisiana was a banking corporation established by an act of the legislature of that State of date March 16, 1827, as amended by an act dated February 19, 1828. The capital, as fixed by the first of those acts, was two millions of dollars, which was to be raised by means of a loan obtained by the directors of the corporation. The act also provided, in section 2, for stock to the extent of five thousand shares of five hundred dollars each, or a total of two millions and a half of dollars. As security for their subscriptions to this stock, which could be taken only by planters and was transferable only to them, the subscribers were to give real estate mortgages, and, to obtain the capital as named, for the business of the institution, the corporation was to issue bonds payable, respectively, in five, ten and fifteen years. The thought and purpose were that the subscribers should not advance any money, but that the consolidation of their credit in one institution would enable it to secure an abundance of capital, and that the profits of that capital, used in the banking business, would be sufficient not only for the expenses of the corporation, but also to discharge the liabilities assumed by the stockholders by their mortgages to the institution. The amendment of the act of the succeeding year increased the authority to borrow, from two millions to two and a half millions of dollars, and the stock, from two and a half to three millions of dollars. It also provided that the

State should issue its bonds to the institution to the amount of two millions and a half of dollars; that it should take all the securities of the stock, with accompanying mortgages, and also receive a bonus of one million of dollars in stock. This scheme was carried out; the bonds of the State were issued; the stock was subscribed; and the corporation, possessed of capital, went into the banking business. The subscribers to the capital stock paid nothing, but simply gave their secured notes to the corporation. The State issued to the institution its own bonds for two and a half millions of dollars. In other words, the State furnished the capital and secured itself by individual obligations. The first series of state bonds were paid as they became due, but by authority of the act of March 31, 1835, for the remainder new bonds were issued, payable in 1848. The banking scheme was a failure. The bank continued in business until 1842, when, on November 17, its charter was declared forfeited for insolvency, at a suit of the State. In anticipation of this decree of forfeiture, the legislature of 1842 passed four acts: one, entitled an act to revive the charters of several banks located in the city of New Orleans, and for other purposes, approved February 5; another, to amend this act, approved March 7; another, approved March 11, relieving from the rule requiring the reinscription of mortgages at the date of ten years from registry the mortgages given by the stockholders to this bank; and fourth, of March 14, entitled an act to provide for the liquidation of banks. This last act provided forfeiture proceedings in the name of the State, and for the appointment by the governor of a board of managers to wind up its affairs. On April 5, 1843, another act was passed, declaring that the assets of this bank should remain in the possession and under the exclusive management of the State until the final payment of all bonds issued to it by the State. On April 6, 1847, an act was passed authorizing the managers of the bank to extend by endorsements the bonds in favor of the bank issued by the State to six, nine, twelve, fifteen and eighteen years, with a privilege to each stockholder to discharge his obligation to the bank and cancel his subscription by surrendering bonds of the State proportionate to

the amounts due from him by his subscription. It was further provided that the managers should require such annual or periodical payment by the stockholders as would finally pay the bonds due the State; and that the amount might be distributed through the succeeding seventeen years. This legislation, so far as any action on the part of the bank was necessary to give it force, was accepted. On examination, it was found that the deficiency of assets would be about $500,000; and that a contribution of one hundred and two dollars per share, payable in seventeen equal annual instalments, would be sufficient to pay off these bonds, and such an assessment was duly ordered.

This suit was commenced by the filing of a bill in the Circuit Court of the United States on December 12, 1883, by William Cressey, an alien, against the bank and its board of managers and directors; and afterwards, by an amended bill filed January 24, 1884, against a large number of stockholders, setting forth the plaintiff's ownership of certain bonds issued by the State under the act of 1847, portions of which had been paid, and seeking to charge these stockholders for the unpaid portion of the amounts due from them under the settlement of 1847, above referred to. Subsequently, the State of Louisiana intervened, and was admitted as a party *pro interesse suo*. On proofs and hearing, the defences of the stockholders were sustained, and the bill as to them dismissed.

Mr. George A. King and *Mr. Charles W. Hornor* for the State of Louisiana. *Mr. Walter H. Rogers*, Attorney General of that State, was with them on the brief. *Mr. Joseph P. Hornor* and *Mr. Guy M. Hornor* were on the brief as for Cressey.

Mr. J. D. Rouse, (with whom was *Mr. William Grant* on the brief,) for appellees.

Mr. Justice Brewer delivered the opinion of the court.

One proposition alone requires notice. This was an action by a creditor of the State not against his debtor, but against

its debtors, to secure an appropriation of their debts to it to the satisfaction of its obligations to him. It is a proceeding of a garnishee nature. The appearance of the State, voluntarily, its application to be made a party *pro interesse suo*, may avoid all questions as to the right of the plaintiff to maintain this suit. Conceding that such a suit is proper, it still remains in the nature of a personal action by one individual against another. As against such a suit, laches and limitations are in a court of equity sufficient defences. The settlement, which was practically between the State and its debtors, was made in 1847. Thirty-six years thereafter this bill is filed. If the time for full payment given by the settlement of 1847 is subtracted, this suit was commenced nineteen years after the time fixed by that settlement for the last payment had passed. Limitation and laches forbid that this suit should be sustained. It may be that, as against the sovereign, no statutes of limitation run; and it may be that, in the courts of Louisiana, the State may enforce all obligations due to it no matter what period of time may have intervened since they were assumed; but that right is personal to the sovereign; it does not pass to any of its creditors; and its intervention and appearance in a suit brought by a creditor, as against its debtors, does not give to such creditor its sovereign exemption from liability to the statute of limitation and the defence of laches. Whatever, therefore, might be true if the State of Louisiana were suing in its own courts, this suit must be treated in the federal courts as one by an individual against individuals; and, brought nineteen years after by the terms of settlement between the State and its creditors the last payment was due from them to it, must be adjudged a stale claim. The decisions of the Supreme Court of Louisiana are in accord with this conclusion. *Association* v. *Lord*, 35 La. Ann. 425. That case was the counterpart of this, and the final conclusion of that court was against the right to maintain the action and on the ground of the staleness of the claim. The fact that much litigation had intervened during these years, that bankruptcy proceedings were pending, avails nothing to this plaintiff, who was no party thereto.

The decree is affirmed.

BARNEY *v.* OELRICHS.

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

No. 177. Argued January 30, 1891. — Decided March 2, 1891.

The residence out of the State of New York which operated to suspend the running of the statute of limitations under section 100 of the Code of Civil Procedure of 1849, as originally framed, was a fixed abode, entered upon with the intention to remain permanently, at least for a time, for business or other purposes.

THE case is stated in the opinion.

Mr. Assistant Attorney General Maury for plaintiff in error.

Mr. Frederic D. McKenney for defendants in error.

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

This was an action brought against Hiram Barney to recover back money alleged to have been illegally exacted by him when collector of the port of New York, as duty on certain charges and commissions, and as fees for services rendered in the custom-house in connection with merchandise imported, and was commenced in the Superior Court of New York City by service of summons, dated March 27, 1868, on the defendant, April 16, 1868, and subsequently removed into the Circuit Court of the United States for the Southern District of New York.

The declaration consisted of the common counts, and, in addition to the general issue, defendant pleaded that the supposed several causes of action did not any of them accrue at any time within six years next before the commencement of the suit; to which the plaintiffs replied that, after the several causes of action had accrued, "defendant departed from and resided out of this State for several successive periods, amounting in the aggregate to twelve months, and this suit was brought within six years and twelve months after the said

several causes of action, and each and every one thereof accrued to these plaintiffs;" and defendant rejoined that, "before the commencement of this suit, he, the said defendant, did not depart from and reside out of this State for several successive periods, amounting in the aggregate to twelve months, in manner and form, etc.," concluding to the country.

As this and many other similar causes involved, as respected duties alleged to have been illegally exacted upon charges and commissions, the examination of long accounts, of numerous invoices, entries, and other documents and papers, and the taking of the testimony of various witnesses touching the same, the several causes were sent by the court, without objection, to a referee, who took evidence and reported thereon, and whose report in this case was considered upon exceptions, and the conclusions reached by him made the basis of instructions to the jury upon the trial, which took place January 18, 1886. As to the fees, the jury were instructed to find for the plaintiffs in the amount of $289.12, being $113.60 principal, and $175.52 interest; and as to the duties overpaid, in the amount of $1076.74, being $406.85 principal, and $669.89 interest; and a verdict was returned accordingly, making, with some further interest and costs, a total of $1586.14, for which sum judgment was rendered.

The case having been brought to this court, counsel for plaintiff in error asks for a reversal upon the ground that the Circuit Court erred in its ruling upon the statute of limitations, and as the argument was addressed to that point alone, our consideration of the record will take no wider scope.

The causes of action declared on accrued prior to the act of June 30, 1864, (13 Stat. 214, c. 171, § 14,) prescribing the time within which actions against collectors might be brought, and while the act of February 26, 1845, (5 Stat. 727, c. 22,) was in force, which preserved to parties paying duties under protest the right to maintain actions at law to test the validity of such duties. Whatever limitation existed was to be found in the State law, and in this instance, in sections 91 and 100 of the Code of Procedure of April 11, 1849, c. 438, of the statutes of New York. By section 91 the limitation of six years was

applied to "an action upon a contract, obligation or liability, express or implied, excepting those mentioned in section 90," exceptions not material here. Section 100 was as follows: "If, when the cause of action shall accrue against any person, he shall be out of the State, such action may be commenced within the terms herein respectively limited after the return of such person into this State; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this State, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action."

Included in the amount claimed for overpaid duties, and in the verdict and judgment, were certain items for payments made more than six years prior to the commencement of this suit. To sustain the contention that these items were not barred, plaintiffs put in evidence a letter of the defendant stating that during the seven years from April, 1861, to April, 1868, his absences from the city of New York were all temporary, and, though frequent, were for short periods, varying from one day to perhaps forty or fifty days; that there were probably only two or three as long as forty days, and not more than one as long as fifty days; that they consisted mainly of brief visits to Washington during the first four years, and visits to Iowa and Wisconsin and the South during the following years; and that he estimated that they averaged two months a year. Some evidence of failure in attempting to serve process was also adduced. Mr. Barney testified on his own behalf that he had resided in the State of New York nearly fifty, and in the city nearly forty, years, including from 1861 to 1870 inclusive, during which time he did not reside at any other place than Kingsbridge, now in the city, and never voted elsewhere than in the city except from 1842 to 1852, when he lived in Brooklyn; that he had always had an office in the city of New York; that his absences from the State were never with the intention of remaining away, except for the temporary purposes of pleasure or business; and that there was one absence in Iowa and Wisconsin on business which he thought was over fifty but less than ninety days.

The court held as matter of law that all the absences referred to should be accumulated and not taken as a part of the period of limitation, which being done, the statutory bar was not made out. The question is whether, under section 100, defendant was properly held to have departed from and resided out of the State of New York during these absences. If in the administration of his office he were called to Washington for twenty-four or forty-eight hours, or if he visited some seaside or mountain resort not in New York for a few days' recreation, or if business demanded his attention temporarily in other States, did defendant reside out of the State of New York within the intent and meaning of the statute? We do not think he did, and that the words "to reside out of the State" meant the taking up of an actual abode or dwelling place elsewhere, and not a mere temporary sojourn for transient purposes.

The inquiry is as to the meaning of the words as used. If "residence" were always synonymous with "domicil," or even with "inhabitancy," there would seem to be no room for contention; but if the language here was intended to express something less than domicil or inhabitancy, then the proper definition must be arrived at in view of that intention and the subject matter to which the words were applied, and we are of opinion that "to reside out of the State" comprehended something more than alighting at a place in travel or in pursuit of temporary objects, and such we understand to be the result of decision by the courts of New York.

In *Penfield* v. *Chesapeake &c. Railroad*, 134 U. S. 351, we had occasion to consider when a person might be properly held to be a resident of the State of New York and entitled to bring an action which would have otherwise been barred by the laws of the defendant's residence, and this involved an examination of the decisions in that State in the construction of the words "resident" and "residence," as contained in its statutes. The cases of *In re Thompson*, 1 Wend. 43; *Frost* v. *Brisbin*, 19 Wend. 11; *Haggart* v. *Morgan*, 1 Selden (5 N. Y.) 422; and *Weitkamp* v. *Loehr*, 53 N. Y. Superior Ct. 79, were cited and quoted from as showing that within the meaning of

the statutes regulating attachments against the property of debtors, and arrest on civil process for debts, it was the actual residence of the defendant and not his domicil that determined the rights of the parties; while *Burroughs* v. *Bloomer*, 5 Denio, 532; *Ford* v. *Babcock*, 2 Sandf. (N. Y.) 518; *Cole* v. *Jessup*, 10 N. Y. 96; *Satterthwaite* v. *Abercrombie*, 23 Blatchford, 308; and *Engel* v. *Fischer*, 102 N. Y. 400, were referred to as sustaining the conclusion that a like construction had been given to the words in that clause of the statute of limitations which provided that if, after the cause of action shall have accrued, the defendant shall "depart from and reside out of this State, the time of his absence" shall not be included in the period of limitation. And because it did not appear in the case that the plaintiff had taken up an actual residence in the State of New York, it was held that he could not avail himself of the statutes of that State in order to recover.

In *Wrigley's Case*, 4 Wend. 602; 8 Wend. 134, it was decided that a person whose legal domicil was England, but who had done business in New York for some years, then returned to England, and again to New York, remaining for a time, with the intention of settling in Canada, was not an inhabitant or resident within the meaning of the New York insolvent act of 1813, and in the Court of Errors, Chancellor Walworth remarked: "*Inhabitancy* and *residence* do not mean precisely the same thing as *domicil*, when the latter term is applied to succession to personal estate, but they mean a fixed and permanent abode or dwelling place for the time being, as contradistinguished from a *mere temporary locality* of existence."

Mr. Justice Nelson, then Chief Justice of New York, delivering the opinion of the court in *Frost* v. *Brisbin*, 19 Wend. 11, said that the word "inhabitant" implies a more fixed and permanent abode than the word "resident," and "frequently imports many privileges and duties which a mere resident cannot claim or be subject to," and that "the transient visit of a person for a time at a place, does not make him a resident while there; that something more is necessary to entitle him to that character. There must be a settled, fixed abode, an intention to remain permanently at least for a time, for busi-

ness or other purposes, to constitute a residence within the legal meaning of that term." The settled rule that a person may be a resident in one State and have his domicil in another was recognized, and the decision has been often cited with approval by the courts of New York as well as of many other States.

In *Bartlett* v. *The Mayor &c.*, 5 Sandf. (N. Y.) 44, the plaintiff sought an injunction against the collection of certain taxes on personal property for which he had been assessed in the city of New York, on the allegation that he resided in Westchester County, which was refused, on the ground that, while plaintiff's home was in Westchester County, his residence for a portion of the year was in the city of New York. *Frost* v. *Brisbin* was relied on, and the definition of "residence" in Webster's dictionary adopted, namely, "the dwelling in a place for some continuance of time." So in *Douglas* v. *Mayor &c.*, 2 Duer, 110, Douglas was held to be a resident of the city of New York and liable to be taxed as such, although his domicil was in Flushing. These cases were favorably commented on in *Bell* v. *Pierce*, 51 N. Y. 12, in support of a similar conclusion.

As to the statute of limitations, it will have been observed that there were two exceptions to its operation: (1) Where the debtor was absent from the State when the cause of action accrued: (2) Where the debtor, after the cause of action had accrued, departed from and resided out of the State. Under the first exception, absence was sufficient to avert the bar, because the statute did not commence to run until the return of the debtor into the State, and such return it was decided must be open and notorious, so that a creditor might with reasonable diligence find his debtor and serve him with process. *Engel* v. *Fischer*, 102 N. Y. 400. But to bring a case within the second exception something more than absence was essential to be shown. In *Wheeler* v. *Webster*, 1 E. D. Smith, 1, Judge Ingraham, speaking for the New York Court of Common Pleas, (then composed of Ingraham, Daly and Woodruff, JJ.,) said that "it was necessary to prove that the debtor departed from the State, and also that he resided out of the State. The evidence did not tend to show this. For

aught that is in proof before us, the absence may have been merely temporary; excursions for pleasure or business, with a return to this State as the residence of the debtor. . . . The plaintiff should have proven that the defendant was a resident of some other place than the State of New York, or should have shown a residence for some time elsewhere." In *Harden* v. *Palmer*, 2 E. D. Smith, 172, it appeared in an action for goods sold, to which the statute was pleaded, that the defendant had been absent in Europe after the sale, at one time for eight months and at another for two months, which absences, if deducted in the computation of time, brought the commencement of the suit within six years; but there was no evidence that the debtor had any domicil in the State, and the Common Pleas (composed of the same judges) held that the absences were properly deducted by the trial court. The opinion of Judge Daly inclined to the view that absence, whether permanent or temporary, might be equivalent to residing out of the State; but Judge Woodruff, in a separate opinion, put the decision on the ground that there was no evidence that the defendant had any domicil in the State, and "if not, he, of course, resided out of the State when he went to Europe," and, therefore, the periods of absence were properly excluded. In *Burroughs* v. *Bloomer*, 5 Denio, 532, 535, the court say: "The expressions, 'and reside out of the State' and 'the time of his absence,' have the same meaning; they are correlative expressions. So that while the defendant in this case resided out of, he was absent from the State." But this was said in respect of the contention that a person who had resided in New York and had moved to and was actually residing in New Jersey, had resumed his residence in New York because he visited and transacted business there. Although the cause of action accrued before the defendant removed to New Jersey, the distinction between the return into the State referred to in the first clause of the section, and departures and returns under the second clause, is carefully pointed out. Under the former, when standing alone, the time commenced running on the first return and continued to run without reduction; and hence the latter was introduced

by way of amendment, in order that removal and residence abroad after the statute commenced to run might suspend its operation during the continuance of an absence or absences so occasioned. But mere presence was not tantamount to residence under the statute, nor mere absence equivalent to residence elsewhere. And the occasional absences of a resident of the State continuing to reside therein were not to be deducted in computing the statutory term. *Ford* v. *Babcock*, 2 Sandf. (N. Y.) 518, 529.

Apparently, because this was obviously so, the legislature of New York, by an act passed April 25, 1867, (Laws N. Y. 1867, p. 1921,) amended section 100 by adding after the words "and reside out of this State" the following, "or remain continuously absent therefrom for the space of one year or more." Absence for the time specified was thus provided to be deducted from the time limited for the commencement of actions, so that, whether the defendant resided out of the State or not, such absence would suspend the running of the statute.

We hold that the residence out of the State which operated to suspend the running of the statute under section 100 as originally framed, was a fixed abode entered upon with the intention to remain permanently, at least for a time, for business or other purposes, and as there was no evidence tending to establish such a state of fact here, the judgment must be reversed. The same conclusion has been reached in effect by many of the state courts, and reference to decisions in Massachusetts, Maine, Vermont and New Hampshire will be found in the well-considered opinion of the Supreme Court of Illinois in *Pells* v. *Snell*, 130 Illinois, 379, where the terms of the statute were nearly identical with those of that of New York, and the court approved the definition of "residence" as given in *Matter of Wrigley*, 8 Wend. 134; *Frost* v. *Brisbin*, 19 Wend. 11; and *Boardman* v. *House*, 18 Wend. 512.

The judgment is reversed and the cause remanded, with instructions to proceed in conformity with this opinion.

LAWRENCE MANUFACTURING COMPANY *v.* TENNESSEE MANUFACTURING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 101. Argued December 3, 1890. — Decided March 2, 1891.

An exclusive right to the use of words, letters or symbols, to indicate merely the quality of the goods to which they are affixed, cannot be acquired.

If the primary object of a trademark be to indicate origin or ownership, the mere fact that the article has obtained such a wide sale that it has also become indicative of quality, is not of itself sufficient to make it the common property of the trade, and thus debar the owner from protection; but, if the device or signal was not adopted for the purpose of indicating origin, manufacture or ownership, but was placed upon the article to denote class, grade, style or quality, it cannot be upheld as technically a trademark.

Unfair and fraudulent competition against the business of another, with intent on the part of the offender to avail himself of the reputation of the other, in order to palm off his goods as the goods of the other, would, in a proper case, constitute ground for relief in equity; but the deceitful representation or perfidious dealing must be made out or be clearly inferable from the circumstances.

Canal Company v. *Clark*, 13 Wall. 311, quoted, approved and applied.

This was a bill of complaint filed by the Lawrence Manufacturing Company, a corporation of Massachusetts, against the Tennessee Manufacturing Company, a corporation of Tennessee, in the Circuit Court of the United States for the Middle District of Tennessee, alleging that plaintiff had been, and was, engaged in the manufacture and sale of sheetings; that in said trade several standards or classes of goods were generally recognized, the first of which included sheetings of such weight that two and eighty-five one-hundredths yards thereof would weigh a pound; the second, sheetings of such weight that three yards would weigh a pound; and the third, sheetings of such weight that four yards would weigh a pound; that prior to the year 1870 the plaintiff "adopted and there-

upon became duly vested with the exclusive right to use a label or trademark for all goods of its manufacture coming within said third class, to distinguish sheetings of its manufacture from sheetings of the same general class manufactured by others, the substantive, distinctive and chief feature of which label was, and is, an arbitrary sign or symbol, consisting of the capital letters 'LL' prominently and separately appearing upon such label or stamp; that said trademark, with certain environments, which have been changed from time to time, has been so used by complainant since said date of adoption, and, to wit, for more than fifteen years, and has been imprinted upon each and every piece or bolt of such sheetings of said third general class made and sold by complainant during said period;" that said trademark was so adopted by plaintiff for the purpose of distinguishing sheetings of its manufacture of the third general class from similar goods manufactured by others; that in connection with the trademark, or substantive element of said label, under and in connection with which the trade reputation of plaintiff had been established, plaintiff had used the words "Lawrence Mills," and the word "Sheetings," in different juxtapositions, and also at times a picture or representation of a bull's head, and at other times a picture or representation of a "bull rampant," and in connection therewith and underneath the same, and in a separate position, has always used said capital letters "LL" as and for the purpose aforesaid; that plaintiff had earned and acquired a trade reputation of great value as manufacturers of sheetings under its trademark, with the result that sheetings of the third general class of plaintiff's manufacture had come to be universally known as "LL sheetings," "and sheetings so known, named and called for, import the excellent raw material, the method and care of manufacture, and the general guaranty of excellence and lasting quality for which your orator has a long, valuable and thoroughly established reputation as to all goods of its manufacture;" that since plaintiff became vested with the exclusive right to the use of the trademark, namely, from the first of January, 1884, to the present time, the defendant had been manufacturing and selling large quantities

of sheetings of said third general class, upon which, and for the purpose of taking advantage of plaintiff's trade label, trademark and trade reputation, defendant had placed a stamp or label in imitation of the stamp or label of plaintiff, and so in imitation thereof as to tend to deceive the public, and had upon its said stamp or label on its sheetings printed or stamped the capital letters "LL" prominently and separately from the other parts of its label; that the acts and doings of the defendant tended to deceive the public and to constitute a fraud upon them as well as upon the plaintiff; and that the appropriation and wrongful use of the letters "LL" was for the purpose and with the tendency and effect of appropriating a part, at least, of the good will and trade-reputation of the plaintiff; wherefore plaintiff prayed for an injunction and for an account of all gains and profits realized by defendant and for damages.

The answer admitted that in the trade of sheetings there were several recognized classes based upon the difference in weight of the goods per yard, and among them four classes running two and $\frac{85}{100}$, three, four and five yards to the pound; and that the products of different manufacturers, though coinciding in the standard of weight, differed in texture and durability. Defendant denied that either prior to 1870, or at any other time, plaintiff adopted and thereupon became duly vested with the exclusive right to use a label or trademark upon all goods of its manufacture coming within the third class, having as its substantive, distinctive and chief feature, a symbol consisting of the capital letters "LL" prominently and separately appearing on such label or stamp; and denied that at the time alleged or before or since plaintiff adopted or had used such symbol for the purpose of distinguishing sheetings of its manufacture from similar goods manufactured by others. Defendant admitted that plaintiff had used the letters "LL" upon sheetings of the third class, and had also impressed upon the goods "Lawrence Mills" and the word "Sheetings," and at times the representation of a bull rampant, but charged that the words "Lawrence Mills" were used to designate that the goods were made by plaintiff and

to distinguish its manufacture from sheetings of the third class made by others, and that the representation of the bull and the words "Lawrence Mills" constituted plaintiff's trademark, if it had any, and that the letters "LL" were used solely to denote the class or grade of sheetings upon which they were impressed. Defendant denied that sheetings of the third class of plaintiff's manufacture were universally known as "LL sheetings," but asserted that it was generally understood in the trade and by consumers that the capital letters "LL" are placed on sheetings weighing one-fourth of a pound to the yard to designate those of that class, and that they are thus used in common by all manufacturers of sheetings of this weight; that plaintiff's sheetings thus stamped are known in the trade as "Lawrence LL sheetings," and defendant's are known as "Cumberland LL sheetings," and that the same class of goods of other well-known makers in the United States are marked LL and recognized and distinguished according to their respective trademarks denoting origin, as "Aurora LL," "Buckeye LL," "Beaver Dam LL," and many others; that plaintiff manufactures besides the Lawrence LL sheetings sheetings of the same weight and class, but of a different quality, and brands them "Shawmut," with the addition of the capital letters "LL," so that purchasers buying LL sheetings, made by plaintiff, are forced to designate the quality desired by ordering "Lawrence LL" or "Shawmut LL," as the case may be. Defendant admitted that since April, 1885, it had stamped upon its cotton goods weighing one-fourth of a pound to the yard the words "Cumberland" and "Sheetings" in horizontal lines, with the figures "4–4" beneath them, and with the capital letters "LL" below the figures "4–4;" that the word "Cumberland," from the river near which its works are located, was used to designate its manufacture and as a trademark; the word, "Sheetings," to signify the general character of the goods; that the letters "LL" were used to denote the class to which the sheetings belonged, and the figures "4–4" to indicate that the goods were one yard wide; but denied that for the purpose of taking advantage of plaintiff's trade, it had placed on the said goods a stamp or label in

imitation of plaintiff's stamp or label, with intent to and with the effect of deceiving the public; and denied that its stamp or label bore any resemblance to that of the plaintiff or that even the most casual observer would take the one for the other; and denied that it had sold with the stamp or label designated goods of less weight than it claims the said letters indicate, with the qualification that there may exist slight variations above or below the standard, mathematical exactness not being uniformly attainable by any manufacturer, and such variations existing in plaintiff's goods. Defendant averred that plaintiff could not lawfully set up any claim to the exclusive use of the capital letters LL as a trademark, for they did not indicate any ownership of the goods upon which they are impressed, and did not have the characteristics for making them a lawful trademark, and standing alone conveyed no meaning, while the words "Lawrence Mills," used on plaintiff's labels, indicated the origin of said goods and plainly advertised that they were made by plaintiff. Defendant further stated, that before plaintiff used the letters "LL," they were stamped and used by the Atlantic Mills, in the United States, on a grade of sheetings manufactured by them, and said letters had never been by the trade and general public accepted as a trademark of plaintiff or as forming an element of the same, but their accepted signification was that they represented a class of goods and not origin or ownership.

Replication having been filed, the cause came on for hearing April 28, 1887, before Judge Jackson, upon the pleadings and voluminous depositions taken by the respective parties, and resulted in a decree dismissing the bill. The opinion of the Circuit Court will be found in 31 Fed. Rep. 776.

In a painstaking review of the evidence, the Circuit Court stated the facts to be, that, prior to 1867, plaintiff branded its four-yard sheetings with a picture of a bull in a rampant position in connection with the words "Lawrence Mills," and the single capital letter "L;" that in 1867, plaintiff added another capital letter "L," at which time plaintiff was a well-known manufacturing company and had manufactured and sold large

quantities of four-yard goods; that in 1883, plaintiff substituted for the bull rampant, the bull's head; that, since 1867, plaintiff had put upon the market, continuously, a sheeting of the same weight as its third class goods of first quality, but inferior and of less value than the former, which it branded "Shawmut LL sheetings," and that it made two other kinds of brown sheetings graded according to weight, one of which it stamped "XX," and the other "XXX," to denote distinction in grade; that plaintiff had for many years advertised its sheetings in a well-known dry goods advertising periodical, heading its advertisement with the picture of a bull's head, the words "Lawrence Mills" and the letters "XX," "XXX" and "LL;" that plaintiff made flannels and denims on which it used the picture of a bull's head and the words "Lawrence Mills" as on the four-yard sheetings, but not the letters "LL;" that letters of the alphabet have for many years been employed by manufacturers to designate grades and qualities of goods, and almost the entire alphabet is so used, and it is understood generally, in the cotton goods trade, that letters are thus used to designate grade, class or quality; that it was also generally understood in the trade that "LL," as stamped on plaintiff's sheetings, meant four-yard goods, and that the words, "Lawrence Mills," in connection with the bull's head, were used to indicate the maker; that these goods were always invoiced by plaintiff as "Lawrence" or "Lawrence Mills" LL, and were thus generally known in the trade, except that in some instances persons who have been more familiar with them, or have handled them exclusively, called them simply "LLs," thereby meaning the sheetings made by the Lawrence Company, but usually said sheetings were described as "Lawrence LL" or "Lawrence Mills LL," just as other sheetings stamped with "LL" were generally known in the trade and spoken of as "Beaver Dam LL," "Badger State LL," "Aurora LL," "Cumberland LL," etc.; that the signification of the letters "LL" stamped upon cotton sheetings, as indicative of grade, class and quality, was generally understood in the trade when defendant commenced the use of said letters in 1885; that the Atlantic Mills of Lawrence, Massachusetts, stamped the letters

"LL" upon brown sheetings of its manufacture in the years 1860, 1862, 1864 and 1865, and from 1872 down to the present time; that there were cessations in the manufacture of said goods by the Atlantic Mills, from time to time, between 1860 and 1865, and between 1865 and 1872 none were thus stamped; that the weight of the Atlantic goods made in 1860 and stamped with the letters "LL" was 4.19 yards to the pound; that in 1862 the goods so stamped weighed 4.36 yards to the pound, and in 1863, 1864 and 1865, their weight was 4.56 yards to the pound; that in 1872, when the Atlantic Mills had again commenced placing the "LL" on its sheetings, they weighed, and ever since have weighed, five yards to the pound; that the Atlantic Mills, in 1860, made a grade of brown sheetings that weighed 3.89 yards to the pound, and which it stamped with the single "L;" that the Atlantic Mills employed said letters to distinguish between different grades of goods, and has continued to use letters for that purpose; that it is fairly deducible from the evidence that the Atlantic "LL" cotton sheetings were in the market in 1867; that the Atlantic goods were and are of the same general character and class as those upon which plaintiff stamps "LL," and they are so nearly alike to the "Lawrence LL" that ordinary buyers and even experts cannot by looking at them distinguish them from each other; that they are both used for the same general purpose and compete with each other; that looking only at the letters "LL" purchasers would as readily mistake "Shawmut LL" for "Lawrence LL" sheetings as they would "Cumberland LL" sheetings; that John V. Farwell & Co. have for several years been using a private brand for sheetings known in the trade as "Albany LL," and in 1884, and with full knowledge of this fact, plaintiffs stamped for Farwell & Co. four-yard sheetings with the label "Albany LL," the stamp being furnished by Farwell & Co., and returned to them with the goods, which were sold in the market as John V. Farwell & Co.'s "Albany LL sheetings;" that plaintiff had all the while known of the Atlantic Mills using the "LL" on its goods, and for more than six years before the commencement of this suit had been aware of the fact that numerous other

manufacturers had been stamping said letters on their four-yard cotton sheetings, and that it never objected until about the time of the bringing of this suit and one of a like character against the Aurora Cotton Mills at Chicago; that it did not appear that the brand of defendant had ever been mistaken for that of the plaintiff; that it was not shown that plaintiff, when it commenced using the letters "LL" on its third-class goods, adopted them for the purpose of making them its trademark or any substantial or material part thereof, nor that the single L, used prior to 1867, constituted in whole or in part its trademark; that the Atlantic Mills were using the single L on one grade or class of goods merely to indicate quality, from 1862 up to 1868; that under the proof it was clear that the purpose and design of the change from L to LL was not to indicate origin or ownership or to distinguish the sheetings on which said letters were stamped from similar goods manufactured by others, but that its primary object was to denote its class, quality or grade, and to represent it to the public as being different goods in class and quality from those primarily sold by plaintiff under the single L stamp.

The Circuit Court quoted from the evidence of plaintiff's agent that the "LL" was adopted "because it was a time when cotton goods were depreciating. We had made considerable sales of the single L; but a party who had bought a large lot was underselling us at a price lower than we could afford to meet, and I suggested that in order to keep them out of this competition the mills should change the fold of the single L from a narrow to a wide fold, and put on a double L."

The court held that the letters were not only originally used by plaintiff to indicate the grade of the sheetings on which they were stamped, but to convey the impression that they were different goods from those it had previously sold, and that they could not constitute a valid trademark, such as would give plaintiff the exclusive right to use them on third-class sheetings, weighing one-quarter of a pound to the yard; that it might well be doubted whether letters by themselves

or in combination could be employed to represent both the grade and quality of goods and their origin, thus performing at the same time the double office of a trademark and a description or classification of the article to which they were affixed, and be sustained as affording an exclusive right to the use of the device as a trademark, which would come into collision with the right of the public to use the letters in their other meaning; but that question was left undetermined, since the court concluded that the letters only indicated grade, class or quality, and not origin, ownership or manufacture. The court also held that the Atlantic Company so used the letters before their adoption by plaintiff, as to preclude the latter from acquiring a valid trademark therein; and that the putting upon the market of an inferior quality of cotton sheeting weighing four yards to the pound and branded "Shawmut LL," equally warranted the use of the letters by the defendant, and prevented plaintiff from claiming injury to its trade by such use. The court found further that the plaintiff was not entitled to relief on the ground that its label, or a distinctive part thereof, was being simulated by defendant so as to impose its goods upon the public as those of the plaintiff, since defendant had been guilty of no fraudulent intent, and had in no way either deceived the public or defrauded the plaintiff.

Mr. J. H. Raymond and *Mr. W. B. Hornblower* for appellant.

Mr. A. J. Hopkins and *Mr. J. M. Dickinson* for appellee.

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

After a careful examination of the evidence in this record, we are satisfied that the conclusions of the Circuit Court upon the facts are substantially correct. While there may be a conflict in some particulars, we regard the defendant's contention upon all points material to the disposition of the case as clearly sustained by the weight of the evidence, which we do not feel called upon to recapitulate.

In *Canal Company* v. *Clark*, 13 Wall. 311, 322, it was said by Mr. Justice Strong, speaking for the court, that "the office of a trademark is to point out distinctively the origin or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer. This may, in many cases, be done by a name, a mark or a device well known, but not previously applied to the same article. But though it is not necessary that the word adopted as a trade name should be a new creation, never before known or used, there are some limits to the right of selection. This will be manifest when it is considered that in all cases where rights to the exclusive use of a trademark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all the authorities. Hence the trademark must either by itself, or by association, point distinctively to the origin or ownership of the article to which it is applied. The reason of this is that unless it does, neither can he who first adopted it be injured by any appropriation or imitation of it by others, nor can the public be deceived. The first appropriator of a name or device pointing to his ownership, or which, by being associated with articles of trade, has acquired an understood reference to the originator, or manufacturer of the articles, is injured whenever another adopts the same name or device for similar articles, because such adoption is in effect representing falsely that the productions of the latter are those of the former. Thus the custom and advantages to which the enterprise and skill of the first appropriator had given him a just right are abstracted for another's use, and this is done by deceiving the public, by inducing the public to purchase the goods and manufactures of one person supposing them to be those of another. The trademark must therefore be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association. And there are two rules which are not to be overlooked. No one can claim protection for the exclusive

use of a trademark or trade name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients or characteristics, be employed as a trademark and the exclusive use of it be entitled to legal protection. As was said in the well-considered case of *The Amoskeag Manufacturing Company* v. *Spear*, (2 Sandf. Superior Ct. 599,) 'the owner of an original trademark has an undoubted right to be protected in the exclusive use of all the marks, forms or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures or symbols, which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or a symbol, which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose.'"

We quote thus at length, because the decision is a leading one, which has been repeatedly referred to and approved as presenting the philosophy of the law applicable to trademarks in a clear and satisfactory manner, as should also, indeed, be said of Judge Duer's noted opinion in the case therein cited. *Manufacturing Co.* v. *Trainer*, 101 U. S. 51; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218; *Goodyear Glove Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598; *Corbin* v. *Gould*, 133 U. S. 308.

Nothing is better settled than that an exclusive right to the use of words, letters or symbols, to indicate merely the quality of the goods to which they are affixed, cannot be acquired. And while if the primary object of the mark be to indicate origin or ownership, the mere fact that the article has obtained such a wide sale that it has also become indicative of quality, is not of itself sufficient to debar the owner from protection, and make it the common property of the trade, (*Burton* v.

Stratton, 12 Fed. Rep. 696,) yet if the device or symbol was not adopted for the purpose of indicating origin, manufacture or ownership, but was placed upon the article to denote class, grade, style or quality, it cannot be upheld as technically a trademark.

Manufacturing Co. v. *Trainer*, *supra*, which involved the use of the letters "A. C. A." in connection with a general device constituting a trademark, is very much in point, and the discussion by Mr. Justice Field, who delivered the opinion of the court, leaves little, if anything, to be added here. In that case as in this, there was some evidence tending to show that it was understood that the letters were used to indicate origin as well as quality, but it was considered to be entirely overborne by the disclosure of the name of the manufacturer in full and the history of the adoption of the letters to designate quality only, as narrated by complainant.

We held in *Menendez* v. *Holt*, 128 U. S. 514, 520, that the words "La Favorita" were so used as to indicate the origin of a special selection and classification of certain flour, requiring skill, judgment and expert knowledge, and which gave value and reputation to the flour. The name was purely arbitrary — a fancy name and in a foreign language — and did not in itself indicate quality. The legality of the trademark as such, (and it had been duly registered under the act of Congress,) was conceded by the answer, though it was contended in the argument that it was not valid because indicative only of quality; but we were of opinion that the primary object of its adoption was to symbolize the exercise of the judgment, skill and particular knowledge of the firm which adopted and used it, and that the phrase covered the wish to buy and the power to sell from that origin.

Since we are satisfied from the evidence that plaintiff failed to establish the existence of a trademark in the letters "LL," or that they constituted a material element in its trademark, relief cannot be accorded upon the ground of an infringement by defendant of an exclusive right in the plaintiff to use the letters as against all the world. The jurisdiction to restrain the use of a trademark rests upon the ground of the plaintiff's

property in it, and of the defendant's unlawful use thereof. *Boston Diatite Co.* v. *Florence Manufacturing Co.*, 114 Mass. 69. If the absolute right belonged to plaintiff, then if an infringement were clearly shown, the fraudulent intent would be inferred, and if allowed to be rebutted in exemption of damages, the further violation of the right of property would nevertheless be restrained. *McLean* v. *Fleming*, 96 U. S. 245; *Menendez* v. *Holt*, 128 U. S. 514.

It seems, however, to be contended that plaintiff was entitled at least to an injunction, upon the principles applicable to cases analogous to trademarks, that is to say, on the ground of fraud on the public and on the plaintiff, perpetrated by defendant by intentionally and fraudulently selling its goods as those of the plaintiff. Undoubtedly an unfair and fraudulent competition against the business of the plaintiff — conducted with the intent, on the part of the defendant, to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's — would, in a proper case, constitute ground for relief.

In *Putnam Nail Co.* v. *Bennett*, 43 Fed. Rep. 800, where the bill alleged that the defendants had imitated plaintiff's method of bronzing horse-shoe nails, which plaintiff used as a trademark, with the intention of deceiving the public into buying their goods instead of plaintiff's, and the question came up on demurrer, Mr. Justice Bradley, after stating certain averments of the bill, said orally: "There is here a substantial fact stated, that the public and customers have been, by the alleged conduct of the defendants, deceived and misled into buying the defendants' nails for the complainant's. That averment is amplified in paragraph four of the bill. Now a trademark, clearly such, is in itself evidence, when wrongfully used by a third party, of an illegal act. It is of itself evidence that the party intended to defraud, and to palm off his goods as another's. Whether this is in itself a good trademark or not, it is a style of goods adopted by the complainant which the defendants have imitated for the purpose of deceiving, and have deceived the public thereby, and induced them to buy their goods as the goods of the complainant. This is fraud.

We think the case should not be decided on this demurrer, but that the demurrer should be overruled, and the defendants have the usual time to answer. The allegation that the complainant's peculiar style of goods is a trademark may be regarded as a matter of inducement to the charge of fraud. The latter is the substantial charge which we think the defendants should be required to answer." And see *New York &c. Cement Co.* v. *Coplay Cement Co.*, 44 Fed. Rep. 277.

In *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508, the plaintiffs had manufactured starch at Glenfield, which had become known as "Glenfield starch." They removed from Glenfield, but continued to call their starch by the same name. The defendant, though his place of business was at Paisley, commenced manufacturing starch at Glenfield, and selling the same in Scotland with the words "Glenfield starch" printed on the sale labels. This was interdicted by the Court of Session, but he continued to sell in England under a label of which "Glenfield" in larger or darker letters than any other on the packets was the pronounced feature, and the House of Lords held that he was putting the word Glenfield on his labels fraudulently and with the intention of making out that his starch was the starch of the plaintiff, who had by user acquired the right to the name of Glenfield starch, and enjoined him from so doing.

In *Thompson* v. *Montgomery*, 41 Ch. D. 35, 50, the plaintiffs and their predecessors had for a hundred years carried on a brewery at Stone, and their ale had become known as "Stone ale." They had registered several trademarks which contained the words "Stone ale" in combination with some device or name of their firm, and in 1888 they registered as an additional trademark the words "Stone ale" alone. The defendant built a brewery at Stone, over which he placed the words "Montgomery's Stone Brewery," with a device containing the words "Stone ale," and a monogram somewhat resembling the plaintiffs' trademark. It was held that the plaintiffs could not register "Stone ale" as a trademark under the act of Parliament in that behalf, but that they had acquired by user the right to the use of the words "Stone ale;" and that

the conduct of the defendant being, in the opinion of the court, calculated to deceive the public into supposing that his ales were brewed by plaintiffs, they were entitled to an injunction. Lord Justice Lindley remarked that, although the plaintiffs had no exclusive right to the use of the words "Stone ale" alone as against the world, or any right to prevent the defendant selling his goods as having been made at Stone, yet, "as against a particular defendant who is fraudulently using, or going to fraudulently use the words with the express purpose of passing off his goods as the goods of the plaintiffs, it appears to me that the plaintiffs may have rights which they may not have against other traders. In regard to that proposition, it appears to me that the Glenfield starch case has an extremely important bearing upon this case. The evidence in this case convinces me that any ale which may be sold by this particular defendant as 'Stone ale' will be intended by him to be passed off as the plaintiffs' ale. I am satisfied that he does not use the words 'Stone ale' for any honest purpose whatever, but according to the evidence with a distinctly fraudulent purpose. Is there any reason, then, why the court should not deal with him accordingly, and prevent him from carrying out such intention by restraining him from using the words which he will only use for that purpose? In my opinion the Glenfield starch case warrants us in going that length as against this particular defendant."

But the deceitful representation or perfidious dealing must be made out or be clearly inferable from the circumstances. If, in this case, the letters LL formed an important part of plaintiff's label, and the defendant had used them in such a way and under such circumstances as to amount to a false representation, which enabled it to sell and it did sell its goods as those of the plaintiff, and this without plaintiff's consent or acquiescence, then plaintiff might obtain relief within the principle of the cases just cited. But there is no such state of facts here. The brands are entirely dissimilar in appearance, and the letters have for years been understood generally as signifying grade or quality, and been so used by different manufacturers, and there is no proof justifying the inference of fraudulent

intent, or of deception practiced on the plaintiff or on the public.

The decree is, therefore, affirmed.

MR. JUSTICE BLATCHFORD did not sit in this case or take any part in its decision; nor did MR. JUSTICE BROWN, who was not a member of the court when the case was argued.

LAWRENCE MANUFACTURING COMPANY *v.* JANESVILLE COTTON MILLS.

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

No. 102. Argued December 2, 3, 1890. — Decided March 2, 1891.

When a party returns to a court of chancery to obtain its aid in executing a former decree of that court, the court is at liberty to inquire whether the decree was or was not erroneous, and if it be of opinion that it was erroneous, it may refuse to execute it.

When a decree in chancery is the result of the consent of the parties, and not of the judgment of the court, the court may, if its aid in enforcing it is asked by a subsequent bill, refuse to be constrained by the consent decree to decree contrary to what it finds to be the right of the cause.

THE Lawrence Manufacturing Company filed its bill against the Janesville Cotton Mills on the first day of June, 1886, in the United States Circuit Court for the Western District of Wisconsin, claiming that the letters "LL" upon sheetings of the third-class, running four yards to the pound, belonged to it as a trademark, and averring that defendant had been recently organized, and was in law and in fact the successor of the Janesville Cotton Manufacturing Company, having succeeded to and having acquired all the assets and property and good will of the latter; and that the defendant was owned and officered (with one exception) by the same persons as the Cotton Manufacturing Company, and that the defendant had advertised itself to the public as the successor in all respects of the

Cotton Manufacturing Company. That early in 1886, appellant exhibited in the same court a bill of complaint containing the allegations set forth in this bill in respect to the use of the letters "LL," against the Cotton Manufacturing Company, and that thereafterwards the appellant and the Cotton Manufacturing Company entered into a stipulation in the case, bearing date March 30, 1886: "That the said Lawrence Manufacturing Company hereby consents that the suit commenced in the Circuit Court of the United States for the Western District of Wisconsin against said Janesville Cotton Manufacturing Company be dismissed without costs to said Janesville Cotton Manufacturing Company, and also hereby waives all claims to damages against the said Janesville Cotton Manufacturing Company; and the said Janesville Cotton Manufacturing Company hereby agrees not to use the label or trademark 'LL' on any goods of its manufacture after the first day of July, A.D. 1886; and it is further stipulated that a consent decree discontinuing said suit without the right of appeal shall be entered in accordance with the terms thereof."

The bill further alleged that with the stipulation there was submitted to the Cotton Manufacturing Company a release proposed to be executed by appellant to said Company, and also an agreement proposed to be executed and delivered by the company to appellant, which agreement bound the Cotton Manufacturing Company and its successors in said corporation and in said business and its assigns, not to use the label or trademark "LL" on any goods of its manufacture after the first day of July, 1886; and that the stipulation, release, and agreement were adopted by the board of directors of the Cotton Manufacturing Company on the third of April, 1886, and appellant was so notified by defendant, and, pursuant to the action of the board of directors and the agreement, stipulation and contract, a consent decree was entered in that cause in the words and figures following, to wit:

"This cause coming on to be heard, Messrs. Raymond & Rainey appearing for the complainant, and Mr. George G. Sutherland appearing for the defendant, and confessing the said bill of complaint and consenting to this final finding and

decree, the court doth order, adjudge and decree as follows, the same being in accordance with the stipulation of the parties heretofore herein filed, to wit:

"First. That the total cost heretofore and now incurred herein shall be paid by the complainant.

"Second. That a perpetual injunction issuing out of and under the seal of this court against the said defendant, the Janesville Cotton Manufacturing Company, commanding it and each and every of its officers, agents, servants and employés that from and after the first day of July, A.D. 1886, they and each of them shall desist and refrain from, directly or indirectly, using said letters 'LL' upon any sheetings of their manufacture, as in said bill of complaint is mentioned."

To which was attached the following signed by counsel for the respective parties:

"We hereby assent to the foregoing form of decree, the same being in accordance with the terms of a stipulation of the parties thereto, heretofore filed herein."

That, notwithstanding the premises, the defendant being the successor in law and in business of the Cotton Manufacturing Company, issued the circular letter attached, a part of which, under the heading of "Dissolution and Reorganization" is as follows:

"The corporation known as the Janesville Cotton Manufacturing Company has been dissolved by mutual consent of the stockholders, and all of its property, consisting of two thoroughly equipped cotton mills, together with its franchises and good will, has been sold and transferred to the Janesville Cotton Mills, a new corporation organized for the purpose of continuing the manufacture and sale of the justly celebrated 'Badger State sheetings.'

"The new corporation purpose to make the three grades of sheeting known to the trade as Badger State, R, R R, and L L, under a distinct trademark and stamp of their own, consisting of a diagonal bar across the letters R & L, with or without the word 'double,' to wit: Badger State, R, Dou R ble, Dou L ble."

That appellant demanded at once that defendant should withdraw the circular letter and cease preparations to use the capital letter "L" with the word double written across it, and should not use the same; but defendant declined to comply with the demand, and threatened and proposed to use the capital letter "L" with the word double written across it as its stamp upon sheetings of the third general class, on and after July 1, 1886. Plaintiff averred that such a use would be a fraud upon the public and a fraud upon itself, and a violation of the stipulation of the contract and of the consent decree, and of the injunction ordered in the prior suit, and would cause irreparable injury. Plaintiff therefore prayed for answer, for a temporary injunction, and for general relief. Affidavits were filed with the bill and a restraining order entered, and a day assigned for a hearing of the motion for a preliminary injunction.

The defendant answered, denying that plaintiff had the exclusive right to use the letters "LL," and admitting that it was organized in April, 1886, but denying that it was the successor of the Cotton Manufacturing Company in any other sense than that it purchased the property of that company, and some of its stockholders and officers were the same as those of the Cotton Manufacturing Company. The answer admitted that in the month of February, 1886, the plaintiff exhibited the bill of complaint set forth in the bill in this case, and that the Cotton Manufacturing Company did not defend against that bill, but entered into the stipulation set forth in this bill, and that the decree therein set forth was entered; but defendant averred that that decree was not in accordance with the stipulation, which provided that the suit should be discontinued without the right of appeal; and defendant denied, upon information and belief, that the Cotton Manufacturing Company executed or agreed to execute the agreement mentioned and referred to in the bill of complaint. The answer further alleged that the Cotton Manufacturing Company at the time of the stipulation and agreement was about to go into liquidation and wind up its affairs, and would have no further occasion to use the letters "LL" after July 1, 1886;

that it had since disposed of all its property rights, and privileges to defendant, and abandoned the business of manufacturing cotton sheetings; had wound up its affairs and been dissolved; and that defendant was a wholly distinct and separate corporation from the Cotton Manufacturing Company; was not a party to the prior suit, and was not bound by the stipulation or decree, or by any other stipulation, agreement or obligation entered into or assumed by the Cotton Manufacturing Company. Upon hearing upon the pleadings and proofs, a decree was entered dismissing plaintiff's bill of complaint with costs, and thereupon the cause was brought to this court by appeal.

The evidence established that on the 30th of March, 1886, the stipulation above given was made out and signed by the Lawrence Manufacturing Company, and, with duplicates, handed to the attorney for the Cotton Manufacturing Company, together with copies of an agreement to be executed under the authority of the board of directors of the Cotton Manufacturing Company by the president and secretary, and under the seal of the company, and a letter of plaintiff's solicitor reciting these facts, and stating that he had no doubt that the Lawrence Company would authorize the settlement, and if so, would be glad to have the agreement duly executed and returned, and that if the Cotton Manufacturing Company desired it, a formal release from the Lawrence Company, duly executed, of all claims for damages, etc., would be obtained, although "the agreement of the Janesville Company made in consideration of that release, and the whole matter being of record in court, would not necessitate such a formal release from the Lawrence Company." The agreement to be executed by the Cotton Manufacturing Company was as follows:

"For and in consideration of the discontinuance by the Lawrence Manufacturing Company, of Lowell, Massachusetts, of a suit now pending in the United States Circuit Court for the Western District of Wisconsin against the Janesville Cotton Manufacturing Company, and in consideration of a release of all claims for damages for the infringement of the trademark of said Lawrence Manufacturing Company for brown

sheetings by the use of the letters 'LL,' all in accordance with the stipulation in the case now made and executed, the said Janesville Cotton Manufacturing Company does hereby, for itself, its successors, both in said corporation and in said business, and for its assigns, covenant and agree to and with the said Lawrence Manufacturing Company, its successors and assigns as aforesaid, not to use the label or trademark 'LL' on any goods of its manufacture after the first day of July, A.D. 1886."

On the third of April, 1886, the following proceedings were had by the Cotton Manufacturing Company, as shown by its records:

"Matters pertaining to the suit brought against our company by the Lawrence Manufacturing Company for infringement of their right in the use of the stamp LL on our sheetings were explained by Mr. Sutherland, and, on motion of Mr. Eldred, Mr. Sutherland was authorized and instructed, as our attorney, to sign the stipulations agreed upon by the attorneys of the Lawrence Manufacturing Company and Mr. Sutherland in behalf of the Janesville Cotton Manufacturing Company.

"On motion, Mr. Sutherland was instructed to notify the attorneys of the Lawrence Manufacturing Company that the president and secretary of the Janesville Cotton Manufacturing Company will execute, under the authority of its board of directors, the agreement to discontinue the use of said LL stamp whenever the Lawrence Manufacturing Company shall sign a formal release, duly executed, of all claims for damages, etc., against the Janesville Cotton Manufacturing Company for the use of said LL stamp."

Whereupon and on the same date the attorney of the Cotton Manufacturing Company wrote from Janesville to plaintiff's solicitor at Chicago, as follows:

"I was unable to get a meeting of the directors of the Janesville Cotton M'f'g Co. until this afternoon.

"They have just authorized me to sign the stipulations as drawn, and they further authorized the president and secretary to sign the agreement drawn by you, on receiving the release mentioned in your letter from the Lawrence M'f'g Co.

"I have sent the original stipulation to the clerk of the court at Madison, and inclose you a duplicate."

The release by plaintiff was executed, delivered to and accepted by the Cotton Manufacturing Company, and the consent decree was entered May 11, 1886.

It also appeared that the Cotton Manufacturing Company was at the time of the suit against it in embarrassed circumstances, and on the 10th of March, 1886, a resolution to dissolve the corporation, sell its property and wind up its affairs was adopted by the board of directors, which recited that it was contemplated by the stockholders of the company that some of them should immediately proceed to organize another corporation for the same purposes of manufacturing and selling cotton cloth, with a capital stock of $150,000, to be paid in cash or indebtedness of the company by the subscribers, and that each of the present stockholders of the Cotton Manufacturing Company should have the privilege of subscribing for the capital stock of the new company *pro rata*, share and share alike, in proportion to the amount of the stock of the Cotton Manufacturing Company owned by them, respectively, and upon the 11th of March this resolution was ratified at a meeting of the stockholders, and an agreement was made as to subscribing for shares in the new company, provided the project should be carried out by the sale of the property of the Cotton Manufacturing Company and the conveyance of the same to the new corporation.

On the 21st of April, 1886, the defendant, the Janesville Cotton Mills, was organized under the laws of Wisconsin by articles of association filed with the Secretary of State, and to it the Cotton Manufacturing Company conveyed its property in consideration of one dollar, "and for the further consideration that the said party of the second part assumes and agrees to pay all the indebtedness of said party of the first part due or to become due upon its promissory notes or other written contracts, which are not secured by a lien upon its property." The articles of association of the new company were signed by officers and stockholders of the old one, and were dated March 12, 1886, and provided that the new company was,

upon acquiring title to the property of the Cotton Manufacturing Company, "to assume and pay all indebtedness of said Janesville Cotton Manufacturing Company due or to become due upon its promissory notes or other written contracts which are not secured by lien upon its property, but is not to assume any indebtedness or liability secured by lien upon such property or evidenced otherwise than as above stated." The officers and stockholders of the old company were in the main the officers and stockholders of the new one.

The new company went on with the same business, and continued to use the books of the old company and substantially the same brands, except that "LL" was changed to "L," with the word double across it. There was no evidence that the agreement not to use the "LL" mark on sheetings was ever signed by the president and secretary, and the seal affixed, of the Cotton Manufacturing Company, although they were authorized to execute it as soon as the formal release should be signed, which was done. The failure to obtain the formally executed agreement was explained by one of the plaintiff's attorneys, who testified that as the stipulation was filed and decree entered and he believed the matter fully settled in good faith and the parties sufficiently and fully protected, he neglected to ask for the formal evidence of the agreement executed under the seal of the Cotton Manufacturing Company, until he was informed of the dissolution thereof by the circular letter of the defendant.

Upon the question of trademark, evidence from other cases seems to have been stipulated into this, and it was agreed by counsel that the printed record in the case mentioned below might be used if the court would permit.

Mr. J. H. Raymond and *Mr. W. B. Hornblower* for appellant.

Mr. I. C. Sloan and *Mr. J. C. Sloan* for appellee.

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

We have already held in *Lawrence Manufacturing Company* v. *Tennessee Manufacturing Company*, *ante*, 537, that

plaintiff is not entitled to the exclusive right to use the letters "LL" as a trademark on sheetings running four yards to the pound, and that no case was made there for relief on the ground of actual fraud; and that decision is controlling here so far as those questions can be considered as involved. But it is insisted that the appellee, by virtue of a contract with and decree against the Janesville Cotton Manufacturing Company, is estopped from the use of the letters "LL," or any imitation thereof, and that a decree accordingly should go against it. The bill is not framed upon the theory, nor do we understand counsel so to contend, that plaintiff is entitled to relief upon the agreement alone, but that it is to be taken with the decree which was entered perpetually enjoining the Cotton Manufacturing Company from the use of the letters "LL" after July 1, 1886. Defendant denied, and it was not shown that the written agreement was ever executed by the president and secretary of the Cotton Manufacturing Company, although this was authorized to be done as soon as the release from damages was furnished, as it afterwards was, but only as part of a settlement of the pending suit, under which that suit was to be dismissed without costs to the company.

This proposed agreement provided that in consideration of the discontinuance of the plaintiff's suit, then pending, and of a release of all claims for damages, in accordance with the stipulation in the cause then made, the Cotton Manufacturing Company covenanted and agreed "for itself, its successors, both in said corporation and in said business, and for its assigns," "not to use the label or trademark 'LL' on any goods of its manufacture after the first day of July, A.D. 1886." By the consent decree subsequently entered, the case was not discontinued, but, on the contrary, a perpetual injunction was decreed against the Cotton Manufacturing Company, its officers, agents, servants and employés, restraining them and each of them, after July 1, 1886, from, directly or indirectly, using the letters "LL" upon any sheetings of their manufacture as mentioned in the bill of complaint. It was, however, provided that the total costs of the suit should be paid by the plaintiff; and no damages were awarded. This

decree, then, was in accordance with the stipulation in respect of damages and costs, but not as to the discontinuance, in place of which an affirmative decree in plaintiff's favor was substituted. And this change, made with the written assent of counsel for the respective parties as the record shows, dispensed with the occasion for a covenant on the part of the Cotton Manufacturing Company not to use the letters "LL" on goods of its manufacture after July 1, 1886, for such was the restraint decreed. But the decree did not in terms enjoin the successors of the Cotton Manufacturing Company, as a corporation and in business, and its assigns, according to the letter of the proposed agreement.

This, in plaintiff's view, left that decree incomplete, and therefore it seeks in substance to have it pieced out and then enforced under the prayer for general relief. There is no prayer in the bill that the preliminary injunction be made perpetual, but that would result if plaintiff succeeded, by a decree under the general prayer, in subjecting this defendant to the operation of the prior decree. But where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill. Hence, even if it be assumed upon the evidence that the decree against the old corporation bound the new one, yet this being in effect, in one of the two aspects, and, perhaps, the sole aspect, in which it is framed, a bill to carry the former consent decree into execution, the Circuit Court was not obliged to do so if it believed that decree erroneous; and that it was erroneous we have already decided. Inasmuch as plaintiff came into a court of equity to have the benefit of the former decree, the court was at liberty to inquire whether circumstances justified the relief. Mitf. Ch. Pl. 96. Indeed, it would seem to have devolved upon it to show that the decree was a right decree. Such is the language of Lord Redesdale in *Hamilton* v. *Houghton*, 2 Bligh, 169, 193, and of Lord Chancellor Sugden in *O'Connell* v. *McNamara*, 3 Dr. & War. 411, 412. The same principle was announced as early as 1700 by the Lord Keeper in *Johnson* v. *Northey*, Finch's Precedents in Chancery, 134.

See also *Lawrence* v. *Berney*, 2 Rep. in Ch. *127; Adams Eq. *416; 2 Dan. Ch. Pr. (4th ed.) 1586. This rule was much considered and applied in *Wadhams* v. *Gay*, 73 Illinois, 415, and approved by this court in *Gay* v. *Parpart*, 106 U. S. 679. The prior decree was the consequence of the consent and not of the judgment of the court, and this being so, the court had the right to decline to treat it as *res adjudicata*; *Wadhams* v. *Gay*, *Gay* v. *Parpart*, *supra*; *Jenkins* v. *Robertson*, L. R. 1 Sc. App. 117; *Brownsville* v. *Loague*, 129 U. S. 493, 505; *Texas & Pacific Railway* v. *Southern Pacific Co.*, 137 U. S. 48, 56; *Edgerton* v. *Muse*, 2 Hill Eq. (So. Car.) 51; *Lamb* v. *Gatlin*, 2 Dev. & Batt. Eq. 37; *Bean* v. *Smith*, 2 Mason, 252.

As, therefore, if the old company had defended the suit against it, it would have prevailed, the decree of the Circuit Court, being correct upon the merits, is also correct in that the court refused to be constrained by the previous erroneous consent decree, to decree contrary to the right of the cause.

Affirmed.

Mr. Justice Blatchford did not sit in this case or take any part in its decision; nor did Mr. Justice Brown, who was not a member of the court when the case was argued.

SCHELL'S EXECUTORS *v.* FAUCHÉ.

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

No. 690. Argued January 28, 1891. — Decided March 2, 1891.

It appearing that at the date of the transactions in controversy, more than thirty years ago, it was the custom for importers to pass in protests with the entries, the court may presume that the usual course was pursued in respect of a protest produced under subpœna at the trial from the proper repository, where it had been lying for a long time, and that it was made and served at its date, and before the payment of duties.

Two papers attached together by a wafer, and signed on the bottom of the lower one, which when read together make a protest against two exactions of duties, are to be treated as a unit.

Statement of the Case.

A protest against the exaction of duties is sufficient if it indicates to an intelligent man the ground of the importer's objection to the duty levied upon the articles, and it should not be discarded because of the brevity with which the objection is stated.

When such a protest is in proper form and attached to the invoice, the omission of date is immaterial.

The failure of a collector of customs to conform to a treasury regulation requiring him to record protests ought not to prejudice the rights of the importer.

A protest, otherwise valid and correct in form, against an exaction of excessive duties upon an importation of goods, which concludes "you are hereby notified that we desire and intend this protest to apply to all future similar importations made by us," having been long and consistently held by the court below to be a sufficient and valid protest against prospective importations, so that that doctrine has become the settled law of that court, and the general practice prevailing in the port of New York, this court accepts it as the settled law of this court.

In all cases of ambiguity the contemporaneous construction not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is controlling.

This was a consolidation of six actions originally begun between September 1, 1857, and March 1, 1860, in the state courts of New York, and removed to the Circuit Court of the United States. The actions were brought against the collector of customs for the port of New York to recover back duties alleged to have been illegally exacted upon certain importations of mousselines de laine made by the copartnership of which the defendants in error are the survivors. The consolidated suit was tried in October, 1887, and a verdict found for the plaintiffs under the direction of the court for $50,563.44. Judgment having been entered against the executors of Augustus Schell, deceased, late collector of the port, a writ of error was sued out from this court. The real question at issue was whether mousselines de laine were under the act of March 3, 1857, (11 Stat. 192,) subject to a duty of 19 or 24 per cent. That question, however, was excluded from this case under a stipulation "by and between the respective parties to this action that mousselines de laine, composed of worsted, or worsted with a satin stripe, were, under the tariff acts of 1857, subject to a duty of 19 per cent as claimed by the plaintiffs." As the duty exacted and paid was 24 per cent, judgment was

rendered for the difference, and the only questions argued by counsel in this court arose upon the admissibility of testimony, and the form, sufficiency and service of protests accompanying the several entries of merchandise, which are set forth and considered in the opinion of the court.

Mr. Assistant Attorney General Parker for plaintiff in error.

Mr. Samuel Field Phillips, with whom was *Mr. Frederic D. McKenney*, for defendant in error.

Mr. Justice Brown delivered the opinion of the court.

Apparently in consequence of the decision of this court in *Cary* v. *Curtis*, 3 How. 236, to the effect that under the act of March 3, 1839, an action for money had and received would not lie against a collector of customs for duties paid under protest, Congress on February 26, 1845, enacted (5 Stat. 727) that nothing contained in the act of 1839 should be construed to take away or impair the right of any person who may have paid duties under protest, to maintain an action at law against a collector to ascertain the legality of such payment; "nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." The questions presented by the record in this case turn upon the proper construction of this proviso, and upon the proper practice to be pursued in making and serving such protest.

1. Defendants objected to the receipt of Exhibit 5 and twenty-six other exhibits standing in like position, with the protests attached thereto. These exhibits were all entries of merchandise imported by plaintiffs in various ships, to which were appended the usual consignee's oath, and a specific protest duly signed by plaintiff's firm was also attached to each one by a wafer. Objection was made to the admission of such documents upon the ground that it did not appear that such

protests had been served upon the collector as required by the act of 1845; and second, that if so served, it did not appear that they had been served at or before the payment of the duty sought to be recovered, as required by the same act.

The act of 1845 requires, first, that the protest shall be in writing; second, that it shall be signed by the claimant; third, that it shall be made at or before the payment of the duties; and fourth, that it shall set forth distinctly and specifically the grounds of objection to the payment of such duties. But so far as respects the manner, or the person upon whom protest shall be served, the statute is silent, and we can only infer that from the nature of the proceedings it must be served upon the collector or his subordinate officer, or the person who receives the entry or the payment of the duties. In this silence of the statute, and in the absence of any treasury regulation upon the subject, it would probably be competent for the collector to receive such protest personally, or delegate his authority to one of his deputies. It is not at all singular that after the lapse of more than thirty years, it should be impossible to prove upon whom the service was made; but we are informed by the testimony of a custom of passing protests in with the entry, which seems to have prevailed for some time prior to the date of these transactions, and to have continued until the treasury regulations of 1857 were adopted. Now, as these protests were produced under subpœna at the trial from the proper repository where they appeared to have been lying for a long time, it is not unreasonable to infer that the usual course was pursued and the protests served according to the custom of the office. With regard to the conduct of a public office the presumption is that everything is done properly and according to the ordinary course of business, or, as expressed in the maxim, *omnia præsumuntur rite esse acta.* 1 Greenleaf Ev. sec. 38. The same presumption would justify us in inferring that the protest was made and served at its date, which, in the case of Exhibit 5, was January 30, 1858, and before the payment of duties, which appears upon the face of the entries to have been made February 1, or two days after the protest was signed.

2. Objection was also made to Exhibits 6, 11 and 13, upon the grounds we have already held to be insufficient, and upon the further ground that the protest consisted of two forms of protest, one printed on white, like exhibit No. 5, but unsigned, and the other on blue paper, the latter being pasted to the former and signed by the plaintiffs' firm. The two papers thus pasted together and signed, as aforesaid, were attached to the entry by a wafer and, read together, made a protest against two exactions, viz.: first, an excessive duty upon the mousselines de laine; and second, the exaction of a duty upon two and one-half or three per cent commissions, when, as claimed, such goods were liable only to duty upon two per cent commission. This consolidated protest was dated "New York, Feb. 10th," and addressed, immediately following the date, to "Augustus Schell, Esq., Collector of Customs," and signed at the bottom by Lachaise, Fauché & Co., the importers. Had it not been for the repetition of the word "Sir" at the beginning of each section of the protest, and the further fact that the protest was on two pieces of paper, there would be nothing to indicate that the plaintiffs did not intend in one communication to protest against the two exactions, viz.: the excessive duty on the mousselines de laine, and the duty on the commissions. While the protest is signed only at the end of the second piece of paper, no one would be misled into supposing that the signature, and the final clause applying the protest to all future similar imports, were not intended to apply as well to the protest against the duty assessed upon the mousselines de laine, as upon the commissions. And it is evident from the protest books of the custom-house in New York, that the entire paper was understood by the official who recorded it, as a single protest against two illegal exactions. Authorities are plentiful to the effect that papers attached together even by a pin are to be treated as a unit constituting one entire contract or memorandum. Thus in *Tallman* v. *Franklin*, 14 N. Y. 584, it was held that, where an auctioneer *pinned* a letter to him from the owner of certain real estate to be sold, which stated the terms of sale, on a page of his sales' book, and then made the residue of the

entries requisite to constitute a memorandum of the contract of sale on the same page of the book, and subscribed his name to it, the letter was to be taken as a part of the memorandum subscribed by the auctioneer, and was sufficient to take it out of the Statute of Frauds. To the same effect are *Hutcheon* v. *Johnson*, 33 Barb. 392, 395, where certain papers which had been *pasted* together were construed as a single memorandum; *Ginder* v. *Farnum*, 10 Penn. St. 98, where the sheets of a will were fastened together by a *string;* and *Martin* v. *Hamlin*, 4 Strobhart Law, 188. If, however, the papers are not connected together in fact, they are not considered as connected in law, unless, at least, the paper signed refers in some way to the other, which may then be construed as forming a part of it. *Hinde* v. *Whitehouse*, 7 East, 558; *Kenworthy* v. *Schofield*, 2 B. & C. 945. The proper test is, whether a person reading these papers would be deceived or misled as to the actual intention of the writer. We think there can be but one answer to this, and we hold the objection was not well taken.

3. The objections to the admission of Exhibits 1 and 2 are also untenable. These protests were in the following form: "New York, July 25, (27,) 1857. Augustus Schell, Esq., Collector of the Port of New York. Sir: We hereby protest against the payment of a duty of 24 per cent, charged by you on worsted stuff goods, claiming that under existing laws said goods are only liable to a duty of 19 per cent as a manufacture of worsted. We pay the amount exacted to obtain possession of the goods, claiming to have the difference refunded. Lachaise, Fauché & Co." Objection was made to these protests upon the ground that neither of them distinctly and specifically set forth the ground or grounds of objection to the payment of the duties exacted on any of the importations mentioned therein, as required by the act of 1845. In *Greely's Administrator* v. *Burgess*, 18 Howard, 413, 416, the protest was objected to upon the ground that it stated only "that the goods were not fairly and faithfully examined by the appraisers," and the proof offered was, that the appraisers did not examine any of the original packages, and only saw samples which had been taken several weeks before, and

which would not afford a true criterion by which to judge of the importation. Mr. Justice Campbell observed "This statute was designed for practical use by men engaged in active commercial pursuits, and was intended to superinduce a prompt and amicable settlement of differences between the government and the importer. The officers of the government on the one part, and the importer or his agent on the other, are brought into communication and intercourse by the act of entry of the import, and opportunities for explanation easily occur for every difference that may arise. We are not, therefore, disposed to exact any nice precision, nor to apply any strict rule of construction upon the notices required under this statute. It is sufficient if the importer indicates distinctly and definitely the source of his complaint, and his design to make it the foundation for a claim against the government." The protest was held to be sufficient. So, in *Arthur* v. *Morgan*, 112 U. S. 495, it was held that a protest against paying a certain duty upon a carriage, which stated that the carriage was "personal effects," and had been used over a year, and that, under the Revised Statutes, "personal effects in actual use" are free from duty, was sufficient, upon which the amount paid for duty could be recovered back on the ground that the carriage was free from duty as "household effects" under the same statute. It was said by Mr. Justice Blatchford: "The protest is not required to be made with technical precision, but is sufficient if it shows fairly that the objection afterwards made at the trial was in the mind of the party and was brought to the knowledge of the collector, so as to secure to the government the practical advantage which the statute was designed to secure." In the case under consideration, the importer claimed in substance in his protest, that the duty of 24 per cent was excessive, and that the goods were liable only to a duty of 19 per cent "as a manufacture of worsted." His insistence upon classifying them as a manufacture of worsted indicated clearly that the objection made was substantially to their classification as "de laines." We think the collector upon reading this protest could have no doubt in his mind that the intention of the importer was to

object to the failure to classify the goods as a manufacture of worsted. Some allowance must be made for the magnitude of business done at a large port, and the hurry and confusion necessarily incident to its transaction, as well as for the proneness of commercial men to look at the substance of things, rather than at the form in which their ideas are expressed. A protest which indicates to an intelligent man the ground of the importer's objection to the duty levied upon the articles should not be discarded because of the brevity with which the objection is stated.

4. Exhibits 14 and 41 contain protests which are without date, and objection was made to them upon that ground. But as it appeared that these protests were in proper form, the same form as No. 5, and were attached to the invoice of merchandise mentioned therein, and duly signed by the plaintiff's firm, we regard the omission of the date as quite immaterial.

5. Objection was also made to the admission of twenty-two protests upon the ground that there was no evidence that these had been copied in the record kept for that purpose. Treasury Regulation No. 387 provided that "whenever duties are paid under protest, collectors of customs will have the protest carefully and accurately copied at length in a record to be kept for that purpose, properly compared, verified and certified as a correct copy by the officer or officers making such comparison, the number and date of entry, name of importer, vessel and description of merchandise in regard to which the protest is made, to be duly stated on the record for the purpose of identification. This precaution is deemed necessary as well for the protection of the importer as the United States in the event of the loss of the original protest by accident or otherwise." The object of this regulation is thus stated to be in terms to supply secondary evidence in case of the loss of the original protest. If the original be produced, the record is of no value, and in any event, the failure of the collector to conform to the treasury regulation ought not to prejudice the rights of the importer. The latter would be powerless to require such record to be made, and the omission

to make it in a particular case should not be imputed to him. We have already held that the production of the protest from its proper custody was sufficient evidence that it had been served according to law.

6. The only remaining question to be considered is that of prospective protests, and this is really the main question in the case. In twenty-seven entries there are no protests to be found, nor is there any record nor any reference in the protest books of the custom-house indicating that any protest was served in the cases of such entries. These, however, are claimed by the plaintiffs to be covered by the concluding clause of the double protest number 6, which is in the following words: "You are hereby notified that we desire and intend this protest to apply to all future similar importations made by us." The same clause is found in the protest accompanying entries number 11 and 13, but in none others. Exhibit Number 14 is a specific protest attached to the entry. As no claim was made that any specific protest, however served, had any prospective effect, it follows that the claim for a repayment of duties on the twenty-four exhibits after number 13, is based upon the prospective clauses appearing in the charges and commission form of the pasted papers of Exhibits Number 6, 11 and 13, or is based on such clause or clauses, of one or more of these three exhibits. We attach no significance to the fact that the prospective clause of the protest is found at the end of the double protest, following the protest against the duty upon the commission, and is not found attached to that portion of the protest against the duty upon the mousselines de laine. As we have already held that the two protests constitute one paper, it necessarily follows that the concluding clause regarding the prospective protests should be applied to the entire paper, and to the protest against the duty upon the goods, as well as upon the commissions.

The objection to the admission of these papers raised distinctly the question as to the validity of prospective protests. It is admitted that the doctrine held by the court below upon the trial of this suit, that the prospective protests set forth

in the clauses attached to the special protests are sufficient as to all similar importations made by the same importer, is now, and has been for a long time, the settled law of that court, and the general practice prevailing in the port of New York. Such practice is claimed to be authorized by the case of *Marriott* v. *Brune*, 9 How. 619, decided in 1850. This was also an action for duties illegally exacted, in which the question was made as to the validity of a certain protest, which was somewhat vague in its terms, but was construed by the court as applying prospectively to all importations of "sugar and molasses." After this prospective protest the plaintiffs made a special protest in each of six several importations, but there were thirteen other importations made after the general protest, respecting which they relied upon the efficacy of the general protest. The court held that as the subsequent entries "all depended on a like principle, — as from the circulars of the department some doubt existed whether the excess of duties would not voluntarily be refunded — as the amounts in each importation were small, and both parties thus became fully aware that the excess in all such cases was intended to be put in controversy, and reclaimed, — we are inclined to think this written protest may fairly be regarded as applying to all subsequent cases of a like character, belonging to the same parties." This case was in affirmance of the opinion in *Brune* v. *Marriott*, Taney Dec. 132, in which Chief Justice Taney said that "a particular protest in each case is not required by the law. The object of the protest is merely to give notice to the officer of the government, that the importer means to claim the reduction, and to make known to the collector the grounds upon which he makes the claim. In these receipts this protest is sufficiently explicit, and covers all the cargoes upon which the duties had not been finally assessed and adjusted by the collector." It was said of this case in *Davies* v. *Miller*, 130 U. S. 284, 287, that "though criticised in *Warren* v. *Peaslee*, 2 Curtis, 231, it was generally regarded and acted on as laying down a general rule establishing the validity of prospective protests," citing *Steegman* v. *Maxwell*, 3 Blatchford, 365; *Hutton* v. *Schell*, 6 Blatchford, 48; and *Fowler* v. *Redfield*,

there cited; *Wetter* v. *Schell*, 11 Blatchford, 193; and *Choteau* v. *Redfield*, there cited. But as this case has been generally accepted as settling the law for this court, and the practice has grown up throughout the country of paying duties under such protests, — a practice to which eminent judges have lent their sanction, we think it too late for us to be called upon to overrule it. It is an acknowledged principle of law, that if rights have been acquired under a judicial interpretation of a statute which has been acquiesced in by the public, such rights ought not to be impaired or disturbed by a different construction, and if, notwithstanding Treasury Regulation Number 384, requiring protests to be special in each case, a practice has grown up in the different ports of entry of receiving prospective protests, the annulment of such practice might entail serious consequences upon importers who had acted upon the faith of its validity. As early as 1803, it was held by this court, in *Stuart* v. *Laird*, 1 Cranch, 299, 309, that a practical construction of the Constitution that the justices of the Supreme Court had a right to sit as circuit judges, although not appointed as such, was not open to objection. "It is sufficient to observe," says the court, "that practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed." In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling. *McKeen* v. *DeLancy's Lessee*, 5 Cranch, 22; *Edwards' Lessee* v. *Darby*, 12 Wheat. 206; *United States* v. *Alexander*, 12 Wall. 177; *Peabody* v. *Stark*, 16 Wall. 240; *Hahn* v. *United States*, 107 U. S. 402; *Rogers* v. *Goodwin*, 2 Mass. 475; Endlich on Stats. sec. 357. Nor do we think the fact that in some cases specific protests were filed after the general prospective protest, necessarily shows an intention to abandon

any future claim under the prospective clause. If it were any evidence at all of such intent, it might properly be submitted to a jury, but defendants had no right to a peremptory instruction in their favor.

This disposes of all the material questions involved, and it results that the judgment of the court below must be

Affirmed.

HEATH v. WALLACE.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 528. Submitted January 9, 1891. — Decided March 2, 1891.

The question whether or not lands returned as "subject to periodical overflow" are "swamp and overflowed lands" is a question of fact, properly determinable by the Land Department, whose decisions, on matters of fact, within its jurisdiction, are, in the absence of fraud or imposition, conclusive and binding on the courts of the country, and not subject to review here.

Whether or not a survey made by an officer of the State of California is a "segregation survey" as defined by the act of the legislature of that State, approved May 13, 1861, is question on which this court will follow the decision of the highest court of that State.

THE federal question is stated in the opinion of the court.

Mr. A. T. Britton and *Mr. A. B. Browne* for plaintiff in error.

Mr. James K. Reddington and *Mr William J. Johnston* for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

This was an action of ejectment in one of the state courts of California, to recover the possession of a tract of one hundred and sixty acres of land in San Joaquin County in that State, particularly described as the northwest quarter of section 23, township 3 north, range 7 east, Mount Diablo base and meridian.

The plaintiff below, who is also the plaintiff in error, set up a title derived from the State, claiming that the land was a part of its swamp land grant, under the act of September 28, 1850, as confirmed by the act of July 23, 1866. The defendant filed a general denial, and claimed title in himself, under the preëmption laws of the United States; and in a supplemental answer alleged that, since the commencement of the action, to wit, on the 1st day of June, 1882, he had received a patent to the land from the United States.

A jury having been waived, the case was tried by the court, which made a special finding of facts, and rendered judgment in favor of the defendant. That judgment having been affirmed by the Supreme Court of the State, 71 California, 50, this writ of error was sued out.

The material facts of the case, as found by the trial court, are substantially as follows: The United States subdivisional survey of the township in which the land in dispute is situated was made by deputy United States surveyor John Wallace, in the year 1865, and the survey, with the field-notes and plat thereof, was duly approved and the approval certified by the United States surveyor general for California on the 23d of August of that year. The official plat of the survey was filed in the United States land office at Stockton (that being the land district in which the land was situated) on the 18th of October, 1865, and a certified copy of the field and descriptive notes of the survey was filed in that land office on or about June 17, 1881.

A considerable part of the plat, including section 23, was colored blue, to distinguish it from the other portions of it, and thereon was written "Land subject to periodical overflow." The field-notes of the survey state that in running the east line of this section the surveyor crossed three sloughs having a westerly course, one 30, one 50, and the other 80 links wide; and that in running the west line two sloughs, each 50 links wide and having the same general course, were crossed. And the descriptive notes made mention that the section was first-rate, level land, subject in some places to "overflow from slough." These designations represented that the land colored

blue was subject to inundation by the overflow of the Calaveras River and its branches, and was thus rendered incapable of being cultivated for the raising of crops, except by means of banks and levees which had been erected to prevent the overflow of the water during the winter and spring months.

In April, 1865, H. T. Hartwell made an application, under the laws of California, to purchase the tract in dispute from the State, as swamp and overflowed enuring to it under the swamp land grant, and on the 28th of that month the county surveyor of San Joaquin County made a survey, and recorded a plat and field-notes thereof, in accordance with the law of the State and the instructions of the State surveyor general, which plat and field-notes showed the survey of the county surveyor to be in accordance with the United States survey of the township, and the land to be swamp and overflowed. This plat and the field-notes accompanying it were filed with the State surveyor general on the 22d day of October, 1865, and were duly approved by him on the 23d of November following.

It does not appear that any further action was taken on this application. In April, 1869, Hartwell made another application to purchase the tract from the State, under the act of the California legislature, approved March 28, 1868. A survey thereof was accordingly made by the county surveyor, which made the same showing as the former one, and, together with the field-notes thereof, was filed with the State surveyor general on the 4th of May, 1869, and approved by him November 12, 1869. On the 19th of April, 1870, the State of California issued and delivered to Hartwell a certificate of purchase of the land in suit, founded on the last application and survey, which certificate set forth that Hartwell had made part payment of the purchase price and was the purchaser of the land, and that, on making full payment and surrendering the certificate, he should receive a patent of the State for the same. On the 1st of April, 1871, Hartwell sold this certificate to the plaintiff, to whom a patent of the State was issued on the 21st of July, 1876, in accordance with the provisions of the laws of the State relating to swamp and overflowed lands.

Prior to this, however, January 10, 1866, Hartwell filed a preëmption declaratory statement for the land, alleging settlement thereon September 20, 1862, which was formally relinquished October 29, 1873, and cancelled December 8 of that year. No other claim was ever made to the land, under any of the laws of the United States relating to the disposition of the public lands, until the 24th of July, 1876, when the defendant Wallace presented a preëmption declaratory statement therefor to the register of the land office at Stockton, alleging settlement on the 25th of April preceding, which that officer refused to file, endorsing thereon, as his reason for such refusal, that the land had been returned as subject to periodical overflow. Wallace appealed to the commissioner of the general land office, and on the 5th of September, 1876, that officer wrote the register and receiver of the Stockton land office, saying that the land in question was claimed by the State under the first section of the act of July 23, 1866, as having been sold, in good faith, as swamp land, prior to that date, and directing those officers to give notice to the State authorities, to Wallace, and to all other parties in interest, and hold an investigation to determine the said claim of the State. That investigation having been held, the local land officers, on the 8th of February, 1877, decided that the State had no valid claim to the land under the first section of the act of July 23, 1866. The commissioner of the general land office affirmed that decision on the 19th of May, 1877, and further adjudged that the State was not entitled to show the character of the land as swamp and overflowed, under the 4th clause of the 4th section of that act. The State appealed to the Secretary of the Interior, who, on the 28th of December, 1877, overruled the commissioner in that behalf, and directed a hearing to be given to the State on the question of the character of the land, by virtue of the 4th clause of the 4th section of the act.

Pursuant to the decision of the Secretary of the Interior, after notice to all parties in interest, the United States surveyor general held an investigation as to the character of the land, and decided that the land was not in fact swamp and overflowed on the 28th of September, 1850, the date of the

general swamp land act. The decision of the surveyor general was affirmed by the Secretary of the Interior on the 25th of February, 1881, who also adjudged that the land was subject to disposal under the preëmption laws, and that Wallace should be allowed to perfect his preëmption claim thereto. Wallace afterwards complied with the provisions of the preemption law, and in June, 1882, received a patent to the land from the United States.

After this patent was issued, the State of California applied to the Interior Department to have the land certified over to her, by virtue of the provisions of the first and second clauses of the 4th section of the act of July 23, 1866, and the first and second clauses of section 2488, together with section 2479, of the Revised Statutes. This application was denied by the commissioner of the general land office, April 26, 1883, upon the ground that a patent having been issued to Wallace for the tract, the department had no further jurisdiction over the matter. That decision was affirmed by the Secretary of the Interior, March 3, 1884, upon the same ground.

There is no record in the United States Land Department showing a selection of this land by the State, as swamp and overflowed land, or any certification thereof to the State by the United States, except in so far as the foregoing proceedings show a selection.

The plaintiff insisted in the court below that the land passed to the State of California, as swamp and overflowed land, either under the first clause of section 4 of the act of July 23, 1866, 14 Stat. 218, 219, c. 219, or under the second clause of the same section, both of which clauses are substantially embodied in section 2488 of the Revised Statutes; and that, therefore, by virtue of his patent from the State, he had acquired whatever right the State possessed under either or both of those clauses of the statute. They provide as follows:

"That in all cases where township surveys have been, or shall hereafter be, made under authority of the United States, and the plats thereof approved, it shall be the duty of the commissioner of the general land office to certify over to the State of California, as swamp and overflowed, all the lands

represented as such, upon such approved plats, within one year from the passage of this act, or within one year from the return and approval of such township plats.

"The commissioner shall direct the United States surveyor general for the State of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said State; and where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly, and forward to the general land office for approval."

The Supreme Court of California held that the State never acquired any title to the tract under the first clause of said section 4, because the land was not represented upon the approved township plat as swamp and overflowed, within the meaning of the swamp land acts, the designation "subject to periodical overflow" not being identical with, or equivalent to, the description of lands enuring to the State under those acts; and that the State did not acquire any title under the second clause of the section for the following reasons: "We are of opinion that the surveys and plats made, as in this case, under the acts of 1863 and 1868, on the application of a party desiring to purchase the tract sought to be purchased, are not the segregation maps and surveys referred to in the act of Congress of July 23, 1866, and the section of the Revised Statutes above referred to. Granting the survey and plat made on the application of Hartwell to purchase a specific tract of land (the northwest quarter in controversy) was a segregation map and survey, such as is embraced within the above-quoted clause from the act of 1866, it does not appear that the commissioner gave any direction to the United States surveyor general for this State, as required by the act, or that if such order was given it was complied with, or that any township plat was made under this order, or, if made, that it was approved at the general land office."

It is to these two rulings that error is assigned and argument is principally directed. The first question presented for our consideration, therefore, is this: Was this land represented upon the approved township plat, or did the approved town-

ship survey and plat, including the field and descriptive notes of the survey, represent it as swamp and overflowed land, within the meaning of the act of July 23, 1866? If it was so represented, then, under the first clause of said section 4, it was confirmed to the State, without any certification thereof by the commissioner of the general land office, after one year from the date of the act. *Wright* v. *Roseberry*, 121 U. S. 488; *Tubbs* v. *Wilhoit*, *ante*, 134.

As held in *Tubbs* v. *Wilhoit*, *supra*, this section of the statute established rules or methods for the identification of swamp and overflowed lands in California which superseded all previous rules or methods for that purpose. The several rules or methods provided for were intended to meet any emergency that might arise, and thus give to the State all the swamp and overflowed lands within her limits. The method provided in the first clause was but one of several specified in the section. But one thing was required to be shown under this clause — only one kind of evidence as to the character of the lands was necessary — in order to give to the State the right to demand the certification of them over to her as swamp and overflowed lands; and that evidence the United States furnished in the plat of the survey of the township in which the lands were situated. An inspection of the township plat would show whether or not any lands in the township were returned as swamp and overflowed. If they were, that designation was sufficient and conclusive evidence, under the first clause of section 4 of the act, to establish the title of the State to them. But as that particular designation was but one of several methods of identification prescribed by the act, it should not be unnecessarily extended beyond its plain and obvious import. For if lands which, in fact, were swamp and overflowed, were not so designated on the approved plat of the township, the State was not precluded from claiming them as swamp and overflowed, and having them identified by one of the other methods provided by the act. She still had recourse to the methods of identification provided by the second and fourth clauses of the section, and if the lands were in fact swamp could not fail to get them. On the other hand,

the United States were bound by the action of the surveyor if he noted on his survey that the lands were swamp and overflowed, and that survey was approved. We think, therefore, that while the act of July 23, 1866, may be called remedial in its character, yet the particular clause of the statute, operating as it does in the nature of an estoppel against the grantor and not so against the grantee, should not be construed as embracing more than its terms will fairly warrant. In other words, this designation, operating as an estoppel against the United States, should have a strict construction. No lands should be considered as embraced within the terms "swamp and overflowed" by mere implication, simply because they may have been described in other terms which, in some instances, might be equivalent to the terms prescribed by the act. If, in any instance, terms claimed to be equivalent to those prescribed by the first clause of the fourth section of the act of 1866 can be shown by evidence to have reference to lands not contemplated by the swamp land grant, as enuring to the State under that grant, then such terms cannot be considered as equivalent to the terms "swamp and overflowed."

The question before us thus resolves itself into one of the definition of words or terms, rather than one of the interpretation of a statute. To arrive at a proper determination of the question, therefore, it will be useful to refer to some of the adjudications of the Interior Department upon the subject; for the survey of the public lands, being confided to certain officers of that department, the meaning of the descriptive terms used by those officers in performing that duty is best known there. In one sense, the language of the survey is technical, and it should, therefore, be taken according to the acceptation of those most familiar with its use and significance.

In *Wallace* v. *State of California*, 2 Copp's Pub. Land Laws, (1882) 1057, 1058, involving the same land here in controversy, (the decision referred to above as having been made by the Secretary of the Interior on the 28th of December, 1877,) Mr. Secretary Schurz said: "The first clause of the said 4th section of the act of 1866 provides, that in cases where the townships had been surveyed by the United States, and the plats

approved, the lands returned as swamp and overflowed were to be certified to the State without further action; hence, no hearing as to the character of the land is necessary. In the case under consideration, however, the township was surveyed by the United States prior to July 23, 1866, and the land is returned by the surveyor general as subject to 'periodical overflow,' and not as 'swamp and overflowed,' as provided in the statute; hence, it is not subject to certification to the State by virtue of the return of the surveyor general. The State, however, claims the land as swamp. A question is thus raised as to the correctness of the return of the officer, and a hearing is requested, that the facts in the case may be ascertained. I find nothing in either the act of September 28, 1850, or July 23, 1866, which debars the State of this right; on the contrary, it is expressly guaranteed in the 4th clause of the 4th section above quoted."

In *California* v. *United States*, decided May 1, 1885, 3 Land Dec. 521, 524, involving part of section 27, in the same township, it was said: "Again, the approved plat of survey of this township and the return of the deputy have been passed upon by this department in the case of *Wallace* v. *State of California*, involving the northwest ¼ of section 23, which corners upon the section embracing the land in controversy. In that case, it was held that 'the township was surveyed by the United States prior to July 23, 1866,' and the land is returned by the surveyor general as subject 'to periodical overflow,' and not as 'swamp and overflowed,' as provided in the statute; hence, it is not subject to certification to the State by virtue of the return of the surveyor general; and also that where a question is raised as to the correctness of the return of the officer, a hearing should be ordered in accordance with the provisions of the fourth clause of the fourth section of the act of July 23, 1866."

Upon review of the same case, February 5, 1886, 4 Land Dec. 371, it was said: "There can be no question that the returns of the surveyor general did not represent said land as swamp and overflowed within the meaning of the act of September 28, 1850. In addition to the adjudication of this de-

partment in the case of *Wallace* v. *The State of California*, in which it was expressly held that the land in said township was not subject to certification to the State, by virtue of the return of the surveyor general, United States Deputy Surveyor Wallace testified at the hearing as follows: 'Q. Did you consider this land in question swamp land at the time you made that survey? A. No. I considered those distinct from swamp lands; if they had been swamp lands I should have entered it so in my notes.'"

In *California* v. *Fleming*, decided August 7, 1886, 5 Land Dec. 37, 38, involving, among other lands, part of the same quarter section here in dispute, it was said: "The lands in controversy were returned by the surveyor general as 'lands subject to periodical overflow,' and hence were not subject to certification to the State by virtue of the return of the surveyor general."

Those adjudications, covering a consecutive period of nearly nine years, and, so far as can be gathered from the printed reports of the decisions of that department relating to public lands, being the only ones bearing upon the subject, ought to be taken as showing conclusively the meaning attached to the phrase "land subject to periodical overflow," by the officers of the department whose duty it is, and has been, to administer the swamp land grant.

Moreover, if the question be considered in a somewhat different light, viz. as the contemporaneous construction of a statute by those officers of the government whose duty it is to administer it, then the case would seem to be brought within the rule announced at a very early day in this court, and reiterated in a very large number of cases, that the construction given to a statute by those charged with the execution of it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. For, as said in *United States* v. *Moore*, 95 U. S. 760, 763, "the officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret." See *Hastings &c. Railroad Co.* v. *Whitney*, 132 U. S. 357, 366, and cases there cited; *Schell* v. *Fauché*, *ante*, 562.

But we are not disposed to rest our judgment on this branch of the case upon the foregoing propositions alone. We are of opinion that the construction by the Interior Department of the clause of the act of July 23, 1866, which we are now considering, is the proper one. In this connection, we are not unmindful of the rule that the field and descriptive notes of a survey form a part of the survey, and are to be considered along with the plat of the townships to which they relate. *Cragin* v. *Powell*, 128 U. S. 691, 696. As already indicated, it is by reference to the plat, together with the field and descriptive notes of the survey, that it is to be determined whether or not the land will inure to the State, and be confirmed, by virtue of the first clause of section 4 of the act of 1866. An inspection of the field-notes of this section of land showed that, in six different places, in running the lines, the surveyor crossed "sloughs" ranging from 20 to 80 links in width, all having a westerly or northwesterly course. The descriptive notes showed the land to be level, first rate, "subject to overflow," or "subject to overflow from slough." As a conclusion from those data, the surveyor wrote across the face of that part of the plat embracing the land in controversy, "Land subject to periodical overflow." The third finding of fact states that those designations represented that the body of land to which they applied (and which was colored blue on the plat to distinguish it from other portions of the plat) was "subject to inundation by the overflow of the Calaveras River and its branches, and is thus rendered incapable of being cultivated for the raising of crops, except by means of banks and levees which have been erected to prevent the overflow of the water during the winter and spring months." This general description on the plat of the township must be read in the light of the field-notes of the boundary lines, and the annotations made upon the plat. The Secretary of the Interior in *California* v. *United States*, 3 Land Dec. 521, 523, referring to this same township plat, said: "Upon the margin appears this note, 'The lands represented upon this map as *subject to periodical overflow* can be cultivated and crops raised thereon, as returned by the deputy.'" And at another place he said

that the register "certifies that the only land designated on said official plat as swamp and overflowed land, is situated in the north half of section 5 of said township." Thus showing clearly that the department considered that a radical distinction existed between lands returned as "subject to periodical overflow" and those returned as "swamp and overflowed;" and showing also that these lands were not considered "swamp and overflowed" lands. We think we may take judicial notice of such official statements made by the head of one of the branches of the Executive Department, especially as they relate to the public records under his control. 1 Greenleaf on Ev. § 479; *Jones* v. *United States*, 137 U. S. 202, and authorities there cited.

Now, lands "subject to overflow," or "subject to overflow from slough," or "subject to periodical overflow," are not necessarily such as come within the descriptive terms of those enuring to the State under the swamp land grant. Whether the terms "swamp" and "overflowed" when connected by the particle "and" be taken together as a general term of description for the lands granted by the swamp land act, or whether those terms are separable and refer to two different qualities of lands thus granted, makes little or no difference in this consideration. If the former theory be the correct one, then manifestly the meaning of the phrase is entirely different from the phrase "subject to periodical overflow." And if the latter theory be adopted, still we think there is a marked distinction between the terms "overflowed" and "subject to periodical overflow." The term "overflowed" as thus used, has reference to a permanent condition of the lands to which it is applied. It has reference to those lands which *are* overflowed and will remain so without reclamation or drainage; while "subject to periodical overflow" has reference to a condition which may or may not exist, and which when it does exist is of a temporary character. It was never intended that all the public lands which perchance might be temporarily overflowed at the time of freshets and high waters, but which, for the greater portion of the year, were dry lands, should be granted to the several States as "swamp and over-

flowed" lands. At any rate, the question whether or not lands returned as "subject to periodical overflow" are within the descriptive terms of those granted by the swamp land act — that is, whether they are "swamp and overflowed," — is a question of fact properly determinable by the land department. It is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of that department upon matters of fact within its jurisdiction, are, in the absence of fraud or imposition, conclusive and binding on the courts of the country. *Johnson* v. *Towsley*, 13 Wall. 72; *Smelting Company* v. *Kemp*, 104 U. S. 636; *Steel* v. *Smelting Co.*, 106 U. S. 447; *United States* v. *Minor*, 114 U. S. 233; and many other cases. We are of opinion, therefore, that the decision of the land department on a question of the actual physical character of certain lands is not subject to review by the courts. And that consideration is sufficient to dispose of the first assignment of error against the plaintiff in error.

We do not think the second assignment of error can be sustained. The surveys and plats made upon the application of Hartwell to purchase the tract were not the segregation surveys referred to in the second clause of the fourth section of the act of July 23, 1866. As said in *Tubbs* v. *Wilhoit*, *supra*, 134, that clause "provided for the construction of township plats where none previously existed. It required the commissioner of the general land office to direct the United States surveyor general for California to examine the segregation maps and surveys of the swamp and overflowed lands made by the State, and directed that when he should find them to be in conformity with the system of surveys adopted by the United States he should construct and approve township plats accordingly, and forward them to the general land office for approval." See also *Wright* v. *Roseberry*, 121 U. S. 488, 513, 514. After the United States surveys had been made, there was no necessity for any further survey by the State in order to locate the swamp lands. In fact there could be no state survey after that date of any recognized force.

The segregation maps referred to in that clause were such as were directed by the act of the legislature of California

approved May 13, 1861. (Session Laws of 1861, c. 352, page 355.) That act provided, among other things, as follows:

"SEC. 19. The county surveyors of the several counties of this State shall, immediately after the organization of the board of commissioners, proceed to segregate the swamp and overflowed lands within their respective counties from the high lands in said counties, and make complete maps of all the swamp and overflowed lands within their respective counties, in legal subdivisions of sections and parts of sections, together with a tabular statement of all such lands as have been sold by the State, and under what act the same were sold, of all lands claimed and by whom claimed, and, as nearly as possible, by what title the same are held, and file the said tabular statement in the county recorder's office of their respective counties, and also transmit duplicates of said maps to the surveyor general of the State: *Provided, however*, That it shall be discretionary with the board of commissioners whether land already surveyed and segregated under a former act for the sale and reclamation of swamp and overflowed lands shall be segregated or surveyed under this act."

"SEC. 21. The surveyor general shall compile a general map of the State in duplicate, showing all the swamp and overflowed lands of the State which shall have been returned by the county surveyors as the property of the State, together with the county boundary lines where crossing the same. He shall also enter thereon the number corresponding with the affidavit; he shall also compile from the testimony received, and on file in his office, a general schedule of the swamp lands in the State by their description. He shall also distinguish on said map the lands already sold by the State as swamp and overflowed; he shall prepare a report showing any case in which the swamp lands have been infringed upon by the United States government surveys."

No survey such as described in those sections of the laws of California was ever made of the land in dispute. The surveys that were made upon the application of Hartwell to purchase the tract do not come within that description. They were, in reality, mere private surveys. Moreover, the phrase "seg-

regation surveys," as used in the act of 1866, means such segregation surveys as are defined and described by the aforesaid act of the legislature of the State, and are made by state officers; and it would seem, therefore, that whether or not a survey made by an officer of the State is a segregation survey, as defined by the act of the state legislature, is one on which this court will follow the decision of the state court. It is in reality a construction of a state statute. The Supreme Court of the State has invariably held such maps or plats not to be the segregation maps referred to in the act of July 23, 1866. *Sutton* v. *Fassett*, 51 California, 12; *People* v. *Cowell*, 60 California, 400. For these reasons we hold that the second specification of error cannot be sustained.

There are no other features of the case that call for further consideration or even special mention. We see no error in the decision of the Supreme Court of California prejudicial to the plaintiff in error, and its judgment is

Affirmed.

DUCIE *v.* FORD.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

No. 777. Submitted January 8, 1891. — Decided March 2, 1891.

A trust may result to him who pays the consideration for real estate where the title is taken out in the name of another, which is not within the statute of frauds, and it may be shown, by parol testimony, whose money was actually paid for it; but such trust must have arisen at the time the purchase was made, and the whole consideration must have been paid or secured at the time of, or prior to, the purchase, and a bill in equity to enforce it must show without ambiguity or equivocation that the whole of the consideration appropriate to that share of the land which the plaintiff claims by virtue of such payment, was paid before the deed was taken.

Two parties had located and claimed a lode. Plaintiffs were preparing to contest defendant's application for a patent when it was agreed orally that they should relinquish to him such possession as they had, in consideration of his agreeing to purchase the land upon their joint account.

Statement of the Case.

He took out a patent and worked the lode. In an action to have him decreed to hold one-half as trustee for the plaintiffs, *Held*, that such taking possession was not part performance of the contract so as to take it out of the statute of frauds.

THIS was an appeal from a decree of the Supreme Court of the Territory of Montana sustaining a demurrer to a complaint originally filed in the Second Judicial District of such Territory. The complaint set forth in substance that the plaintiffs on September 18, 1888, "became possessed of and owned" certain premises upon which they had discovered a vein or lode of valuable quartz; that they "duly located" such lode "as a mining claim" under the laws of the United States, "and posted a notice of such location," and established by posts and corners, boundaries thereto, designating it as the "Figi" lode; and further claimed to have possessed and owned said premises up to the 15th of March, 1881, when the defendant was about to procure a patent to himself for the same premises "under a pretended location and claim designated by him as the 'Odin' lode." The plaintiffs apprised the defendant of their claim and notified him that they "would adverse and contest" his application for a patent. Thereupon they "entered into a mutual and verbal agreement" by which it was understood that in consideration of the plaintiffs' "promising and agreeing to relinquish and give up the possession of such premises" to the defendant, and to abstain from filing any adverse claim or protest against defendant's application for a patent, and to permit him to proceed and procure a patent, the defendant agreed that he would be tenant in common of the plaintiffs in an undivided half of the premises; that plaintiffs and defendant should purchase the premises jointly, but in defendant's name, defendant acting as "purchasing agent and as trustee of the plaintiffs," and that after the issuance of a patent, defendant would execute and deliver to plaintiffs a deed of an undivided half of the premises; that relying on defendant's honesty, the plaintiffs relinquished and delivered up possession to the defendant, withdrew all objections to defendant's claim, and permitted him to procure a patent, and "from time to time thereafter" paid him their

share of the purchase-money of the premises; and that a patent was subsequently issued to defendant in pursuance of such agreement, but he refused, and still refuses to convey their share to the plaintiffs.

The prayer was as follows: First, that defendant be declared to hold the legal title to an undivided half of said premises as trustee for the plaintiffs. Second, that he be directed to execute a deed of such undivided half to plaintiffs. Third, that he be required to account to them for the rents, issues and profits accrued from such undivided half. Defendant demurred upon the ground: First, that the complaint set forth a contract within the statute of frauds; that no part performance was averred, and that mere delivery of possession to another does not pass title and cannot be given in evidence as affecting the transfer of real estate. Second, that the complaint is ambiguous, uncertain and unintelligible in that it does not show how much or at what times plaintiffs were to pay to defendant any money, nor what amount of money they are willing to pay, and they make no tender. The demurrer was sustained, an appeal was taken to the Supreme Court of the Territory, and the judgment of the court below affirmed. Plaintiffs thereupon appealed from such affirmance to this court.

Mr. Walter H. Smith for appellants.

I. The case made in the complaint is one of a resulting trust, and, therefore, within the exception of the Statute of Frauds.

It is a resulting trust, because the purchase-money was paid to the defendant for one undivided half of the premises *before* the purchase from the government. I know that the court below assumed that it was paid *after* the purchase, but I take issue with it upon the fact. That depends upon the language and construction of the complaint. As I read it the court below was in error, and clearly in error. The complaint alleges that the plaintiffs were in possession on the 18th of September, 1878, and continued in possession until the 15th of

March, 1881; that in the month of February, 1881, the agreement was made by which the defendant was to be let into possession, and purchase the premises jointly, and that they "thereafter paid to defendant their share of the purchase-money of said premises, and that thereafter, to wit, on or about the 15th of May, 1881, the defendant, in pursuance of said agreement and of said trust, purchased from the United States of America, for the use and benefit of the plaintiffs, an undivided one-half of said premises, as well as another undivided one-half for his own use and benefit, and took from the register and receiver of said land office a certain final receipt for the purchase price of said premises."

Here is a specific allegation that plaintiff's share of the purchase-money was paid to the defendant before he purchased of the United States.

Such payment, by operation of law, created a resulting trust in the defendant for the benefit of the plaintiffs, and by all the authorities, and they are exceedingly numerous, took the case out of the statute. Browne on the Statute of Frauds, § 83. Story Eq. Jur. § 1201.

II. Taking possession under the contract is such part performance as takes the case out of the statute.

That such possession was taken is admitted by the demurrer. The complaint alleges that the plaintiffs were in possession when the contract was made, and that they agreed "to relinquish and give up the possession of said premises to said defendant," and "that, relying upon the good faith and honesty of the defendant, plaintiffs thereupon relinquished and delivered their possession of said premises to the defendant, and that the defendant then and there was admitted and went into possession of the same in compliance with and under said agreement and said trust."

If the defendant "went into possession" under said agreement he could not have been in possession before. To pretend that he was, is giving to the language used an entirely different signification from what would be generally understood, and is doing violence to the plain meaning of the words.

Mr. M. F. Morris for appellee.

Mr. Justice Brown delivered the opinion of the court.

By Rev. Stat. sec. 2319, all valuable mineral deposits in lands belonging to the United States are declared to be free and open to exploration and purchase "by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law." By sec. 2324, the miners of each mining district may make regulations not in conflict with the laws of the United States, or of the State or Territory, governing the location, manner of recording and amount of work necessary to hold possession of a mining claim, subject to the requirement, among others, that "upon each claim located after May 10, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year." By sec. 2325, a patent for any land so claimed and located may be obtained by filing in the proper land office an application, showing compliance with the terms of the act, together with the plat and field-notes, showing the boundaries of the claim, which shall be distinctly marked by monuments, and by posting a copy of such plat, with the notice of such application for a patent, in a conspicuous place on the land, etc. Sec. 2326 provides also for proceedings upon filing adverse claims, declaring that it shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment.

The sole question in this case is whether the contract between these parties is not within the Statute of Frauds. Sec. 217 of the compiled Statutes of Montana declares that "no estate or interest in lands . . . shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing," etc. To take the case out of the operation of the statute,

plaintiffs claim, first, that the transaction constitutes a trust by operation of law, and is, therefore, within the express exception of sec. 217: second, that there was such part performance, by taking possession under the contract, as takes it out of the statute.

1. While there is no doubt of the general proposition that a trust results to him who pays the consideration for an estate, where the title is taken in the name of another; that such trust is not within the statute, and that parol evidence is admissible to show whose money is actually paid for the property; it is equally clear that the trust must have arisen at the time the purchase was made, and that the whole consideration must have been paid or secured at the time of or prior to such purchase; *Olcott* v. *Bynum*, 17 Wall. 44; *White* v. *Carpenter*, 2 Paige, 217, 241; *Buck* v. *Swazey*, 35 Maine, 41; 1 Perry on Trusts, sec. 133; 2 Pom. Eq. Jur. sec. 1037. But, as before stated, parol evidence is competent to prove that the consideration actually moved from the *cestui que trust*. *Boyd* v. *McLean*, 1 Johns. Ch. 582; *Baker* v. *Vining*, 30 Maine, 121; *Whitmore* v. *Learned*, 70 Maine, 276; *Page* v. *Page*, 8 N. H. 187, 195; 2 Pomeroy Eq. Jur. sec. 1040. It follows that the bill or complaint should show, without ambiguity or equivocation, that the whole of the consideration appropriate to that share of the land which the plaintiffs claim by virtue of such payment, was paid before the deed was taken. Tested by these rules, we think the plaintiffs have failed to make out their case with that clearness which the law demands. They aver that after they had delivered up possession of the premises to the defendant, "they withdrew all objections, protest and adverse claims to or against the defendant's claim, and abstained from filing any adverse claim or protest in the United States Land Office against defendant's application, and thereby permitted and enabled the defendant to procure a patent for said premises, and *from time to time thereafter* paid to defendant their share of the purchase-money of said premises, and that *thereafter*, to wit, on or about the 15th day of May, 1881, the defendant, in pursuance of said agreement and of said trust, purchased from the

United States of America for the use and benefit of the plaintiffs, an undivided half of said premises," etc. And they further aver in a subsequent allegation that "if there be, or if defendant claims that there is, anything or any amount due by plaintiffs in connection with the procuring of said patent, or with said agreement, the plaintiffs are ready and willing and fully able to pay the same and offer to do so; that the defendant has refused to inform plaintiffs whether there was, or whether he claimed that there was, any money or thing due from the plaintiffs, although requested to do so, and that plaintiffs had many times offered to pay defendant whatever he might claim that there was due in said connection, and that defendant has refused, and that on account of said refusals of defendant plaintiffs are not informed in relation to said matter." Not only is there a failure to aver when and how much money was paid before the purchase was made, but the first allegation above quoted leaves a doubt whether the payment was made before or after the patent was taken. In one place they say that they thereby permitted and enabled the defendant to procure a patent for said premises, and *from time to time thereafter* paid the defendant, and immediately follow it by an averment that *thereafter*, to wit, on or about the fifteenth day of May, the defendant made the purchase. The subsequent allegation throws additional doubt upon the question, and, in fact, is susceptible of the implication that plaintiffs were by no means confident that they had paid any considerable amount, but were willing to pay their share upon being informed of the amount still due.

We think the contention of the plaintiffs that a trust is made out by operation of law is not sustained. The allegations amount to nothing more than that they made certain advances of money to defendant for the purchase of this interest; but when or in what form or at what time such advances were made is left entirely unanswered. As plaintiffs have chosen to stand upon their complaint without apparently asking leave to amend, which we cannot doubt would have been readily granted, we are constrained to hold the allegations insufficient to create a trust.

2. Was there a part performance of the parol contract with the defendant sufficient to take the case out of the statute? The only act alleged in that connection is the surrender of possession to the defendant; or in the language of the complaint, that "relying upon the good faith and honesty of the defendant, plaintiffs thereupon relinquished and delivered their possession of said premises to the defendant, and that the defendant then and there was admitted and went into possession of the same in compliance with and under said agreement and said trust." This, however, must be taken in connection with the prior allegation that the "defendant was about to proceed to procure a patent" to himself for the same premises, "under a pretended location and claim designated by him as the Odin lode;" whereupon plaintiffs apprised him that they "claimed, owned, and possessed said premises," and would adverse and contest his application. Now conceding that the surrender of possession to the defendant is a sufficient performance to take a case out of the statute, such surrender must be made in pursuance of the contract, and be referable to it. In short, it must be a new possession *under the contract*, and not merely the continuance of a former possession claimed under a different right or title. Pomeroy on Contracts, sec. 116, 123; *Morphett* v. *Jones*, 1 Swans. 172; *Wills* v. *Stradling*, 3 Vesey, Jr. 378; *Anderson* v. *Chick*, 1 Bailey's Eq. 118; *Smith* v. *Smith*, 1 Rich. Eq. 130; *Jacobs* v. *Peterborough & Shirley Railroad Co.*, 8 Cush. 223; *Jones* v. *Peterman*, 3 S. & R. 543; *Christy* v. *Barnhart*, 14 Penn. St. 260; *Johnston* v. *Glancy*, 4 Blackford, 94. As stated by Mr. Justice Grier in *Purcell* v. *Minor*, 4 Wall. 513, 518, delivery of possession "will not be satisfied by proof of a scrambling and litigious possession."

Taking the averments of the complaint together, it appears that both these parties had located and claimed this lode, and that plaintiffs were preparing to adverse and contest defendant's application for a patent when a bargain was made between them, by which it was agreed that plaintiffs should relinquish such possession as they had to defendant in consideration of the latter agreeing to purchase the land upon

their joint account. In *Clinan* v. *Cooke*, 1 Sch. & Lef. 22, 41, Lord Redesdale indicated, as a test, whether the party let into possession could have been treated as a trespasser in the absence of the parol agreement, and this has been accepted by many writers upon equity jurisprudence as a most satisfactory criterion. Now, it does not appear in this case that the antecedent relations of the defendant to this land were changed by reason of this contract, and it does appear that the only change that took place, in fact, arose from the plaintiffs' withdrawal in favor of the defendant, and from their refraining to prosecute an adverse claim which was never filed. This would clearly be insufficient to take the case out of the statute. If, in fact, plaintiffs had been in the exclusive possession of the lode in question, and defendant had never been in possession or exercised acts of ownership until the bargain was made between them, and the plaintiffs had surrendered possession in pursuance of the contract, it would have been easy to set forth such facts in unequivocal terms, and not have left them to be inferred from the ambiguous averments of this complaint.

There was no error in sustaining the demurrer, and the judgment of the court below must be

Affirmed.

NEW ORLEANS *v.* GAINES'S ADMINISTRATOR.
GAINES'S ADMINISTRATOR *v.* NEW ORLEANS.

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

Nos. 1293, 1320. Argued January 15, 16, 1891. — Decided March 2, 1891.

This suit was commenced in August, 1879, and was brought against the city of New Orleans to recover the rents, fruits, revenues and profits of 135 arpents of land, situated in the city, from the year 1837 to the time of the accounting sought. This land had been purchased by the city from one Evariste Blanc in 1834, and afterwards disposed of to various parties, except four or five blocks reserved for city purposes, which were not in question. The city was sought to be charged with all the rents, fruits and revenues of the land, whether in its own possession or in the possession of its grantees. In two previous suits brought

Syllabus.

by Mrs. Gaines against the parties in possession, one against P. H. Monsseaux and others, and the other against P. F. Agnelly and others, (said suits being in the nature of ejectments,) decrees were obtained for the recovery of the lands held by the defendants respectively, and references were made to a master to ascertain the amounts of rents and revenues due. The total of these rents and revenues found and reported by the master in the two suits was $517,049.34, which, with interest, calculated up to January 10, 1881, amounted to the sum of $576,707.92. The bill further sought recovery for other and larger amounts; but it was decided that the recovery must be limited to the claims so reported on by the Master, and the decree was reversed and the cause remanded for further proceedings in conformity with the opinion of the court. A decree was accordingly made and entered in the Circuit Court, by which it was referred to a master to take testimony and report as to whether the defendant (the city of New Orleans) was entitled to any, and if so, how much, reduction in the said decree of $576,707.92, by reason of any compromises and settlements of the judgments for rents in the said Agnelly and Monsseaux cases, made and entered into by the complainant and any of said defendants in said judgments for any less sums than the face thereof. The result of the inquiry was that settlements had been made, amounting to $220,213.16 which formed part of that gross amount, but that Mrs. Gaines had actually received only $15,394.50. The court below deducted this latter sum, and rendered a decree for $561,313.42. *Held:*

(1) That the right of Mrs. Gaines to pursue the city was an equitable right, arising and accruing to her on the basis of her own claims against the said defendants, and by subrogation to their equity to be protected and indemnified by the city;

(2) That the acts of settlement in this regard amounted to a declaration of the parties that Mrs. Gaines should exercise the equitable right which she possessed, and that the assignment was merely in aid of the equitable right, and might be available in a court of law;

(3) That the judgments were binding on the parties to them, and therefore were binding upon the city of New Orleans, which in most cases had assumed the defence of the suits, and had been represented by counsel therein; that it was right and proper to consider litigation as at an end in those suits; and that the judgments had passed into *res judicata;*

(4) That article 2452 of the Civil Code of Louisiana, which declares that "the sale of a thing belonging to another person is null; it may give rise to damages when the buyer knew not that the thing belonged to another person," does not affect the question here;

(5) That the grantees might be settled with so far as their personal liability was concerned, without discharging the city, or other warrantors, provided it was stipulated, or shown to be the intention of the parties, that the city, or other warrantors, should not be discharged, it being a general rule that discharge of a surety does not discharge a principal; and that rule being applicable here.

(6) That the death of a number of the defendants in the cases of Monsseaux and Agnelly who died before the remand of this cause from this court to the Circuit Court, on occasion of the former appeal, and before the decree of reference by the Circuit Court upon the mandate from this court without an attempt at revivor of the alleged decrees against the heirs or representatives of said deceased, cannot benefit the appellant;

(7) That the appellant cannot at this stage of the case raise the objection that one of the judgments for rent was obtained after the death of the defendant in the suit;

(8) That the claim for the price of the lands and the claim for the rents and revenues of them can be prosecuted separately;

(9) That the claimant should have been allowed the costs of the suits against Monsseaux and others and Agnelly and others.

Ordinary courtesy and temperance of language are due from members of the bar in discussions in this court.

In equity. The case is stated in the opinion.

Mr. Alfred Goldthwaite for Gaines's Administrator. *Mr. Thomas J. Semmes* was with him on the brief.

Mr. J. R. Beckwith for the city of New Orleans.

Mr. Justice Bradley delivered the opinion of the court.

This is the case which was before us in October term, 1888, and the decision in which will be found reported in 131 U. S. 191, under the name of *New Orleans* v. *Gaines's Administrator*. The suit was commenced in August, 1879, and was brought against the city of New Orleans to recover the rents, fruits, revenues and profits of 135 arpents of land, situated in the city, from the year 1837 to the time of the accounting sought. This land had been purchased by the city from one Evariste Blanc in 1834, and afterwards disposed of to various parties, except four or five blocks reserved for city purposes, which are not now in question. The city, however, is sought to be charged with all the rents, fruits and revenues of the land, whether in its own possession or in the possession of its grantees. In two previous suits brought by Mrs. Gaines against the parties in possession, one against P. H. Monsseaux and

others, and the other against P. F. Agnelly and others, (said suits being in the nature of ejectments,) decrees were obtained for the recovery of the lands held by the defendants respectively, and references were made to a master to ascertain the amounts of rents and revenues due. The total of these rents and revenues found and reported by the master in the two suits was $517,049.34, which, with interest, calculated up to January 10, 1881, amounted to the sum of $576,707.92. The bill in this case sought a recovery from the city of New Orleans not only of the said last-mentioned sum, but also of a large amount, exceeding $1,300,000, for the rents and revenues of unimproved property whilst in the possession and ownership of the city. A decree was rendered in the court below for both of these amounts, but for the reasons expressed in the opinion of this court, reported in 131 U. S., the latter amount was disallowed, and the decree was reversed. We held that the city was concluded by the proceedings against the tenants in possession in the two former suits referred to, and must respond for the amounts decreed against the tenants in those suits, subject to a reduction, however, in any of the individual cases in which compromises had been effected for a less amount than the sum adjudged. It was contended, indeed, by the complainant, that the city, by virtue of claiming title to the property, and conveying it to purchasers with a guarantee, was primarily liable for all rents and revenues to Mrs. Gaines and her representatives (the real owners of the property) without reference to the grantees, and that no settlement with the latter could affect such primary liability. We did not concur in that view, however, as will be seen by reference to the opinion before referred to. We held that the city was only liable to Mrs. Gaines, the true owner, in consequence of its engagements as vendor and warrantor to the persons to whom it had sold the property, through the equity which those persons and their grantees had to be protected from loss and damage by reason of defective title; and that Mrs. Gaines and her representatives could not hold the city liable beyond that. We held further that *as between the city and its grantees*, the city was the principal debtor, and was bound to protect them.

The primary obligations of the parties are based upon two articles of the Civil Code of Louisiana:

"Art. 502. The products of the thing do not belong to the simple possessor, and must be returned with the thing to the owner who claims the same, unless the possessor held it *bona fide*."

It having been decided that the holders of Mrs. Gaines's property under the sales of Relf and Chew (which is the case here) are possessors in bad faith, the above article makes them responsible to her for the products, or, in other words, the fruits or revenues.

"Art. 2506. When there is a promise of warranty, or when no stipulation was made on that subject, if the buyer be evicted, he has a right to claim against the seller:

"1. The restitution of the price.

"2. That of the fruits or revenues, when he is obliged to return them to the owner who evicts him.

"3. All the costs occasioned, either by the suit in warranty on the part of the buyer, or by that brought by the original plaintiff.

"4. The damages, when he has suffered any, besides the price that he has paid."

Our views with regard to the obligations of the city enforceable in the present suit were expressed in the former case in the following terms:

"As between the city and its grantee, the former, by reason of its guaranty of title, is really the principal debtor, and bound to protect the grantee as a principal is bound to protect his surety. Therefore the grantee is entitled to such remedies as a surety hath; and when fixed by judgment, if not before, may file a bill against his guarantor to protect him. Lord Redesdale says: 'A court of equity will also prevent injury in some cases by interposing before any actual injury has been suffered, by a bill which has been sometimes called a bill *quia timet*, in analogy to proceedings at the common law, where in some cases a writ may be maintained before any molestation, distress or impleading. Thus a surety may file a bill to compel the debtor on a bond in which he has joined to

pay the debt when due, whether the surety has been actually sued for it or not; and upon a covenant to save harmless, a bill may be filed to relieve the covenantee under similar circumstances.' [Cases cited.] In *Lee* v. *Rook*, [Mosely, 318,] the Master of the Rolls said: 'If I borrow money on a mortgage of my estate for another, I may come into equity (as every surety may against his principal) to have my estate disencumbered by him.'

"Then, if the grantees, who have been ousted, and who are condemned in judgment to pay to Mrs. Gaines the rents and revenues due to her, might have maintained a suit in equity against the city to compel it to indemnify them, why may not Mrs. Gaines be subrogated to the grantees' right and equally maintain a suit against the city? The claim is an equitable one. It is in proof that all the acts of sale of the city contained express agreements of guaranty, with right of subrogation; and an act of sale in Louisiana imports a guaranty whether it is expressed or not.

"But if the suit could not be maintained on purely equitable grounds alone, there is a principle of the civil law obtaining in Louisiana, by the aid of which there can be no doubt of its being maintainable. The Code Napoleon had an article (Art. 1166) expressly declaring that creditors may exercise all the rights and actions of their debtor, with the exception of those that are exclusively attached to the person. It is true that the Louisiana Code has no such article; but it is laid down by writers of authority that this principle prevails in French jurisprudence without the aid of any positive law. (43 Dalloz, 239, etc., title *Vente*, Arts. 932–935.) The decisions to the contrary seem to be greatly outweighed by other decisions and by sound doctrine. The right thus claimed for the creditor (the word creditor being used in its large sense, as in the civil law) may very properly be pursued in a suit in equity, since it could not be pursued in an action at law in the courts of the United States; and all existing rights in any State of the Union ought to be suable in some form in those courts.

"We think, therefore, that this part of the decree, amount-

ing to the sum of $576,707.92, with accruing interest, being for the amount of the judgments obtained in the other suits, ought to be allowed, unless subject to reduction for the cause hereafter referred to."

Our conclusion was subsequently, in the same opinion, expressed as follows:

"As to the residue of the decree, amounting to $576,707.92, founded on the judgments recovered against persons in possession of various portions of the property, claiming under sales made by the city of New Orleans, whilst those persons would have been proper parties to the suit, in order that it might appear that the sums recovered against them had not been released or compromised for less amounts than the face of the judgments, and that they might be bound by the decree, still, as the objection of want of parties was not specifically made, and as it would be a great hardship on all the parties concerned to have to begin this litigation over again, we do not think that the bill should be dismissed on that ground, but that the said sum of $576,707.92 should be allowed to the complainant, with interest thereon as provided in the decree of the Circuit Court, subject, however, to the qualification that, if the defendant can show that any of the said judgments have been compromised and settled for any less sums than the face thereof, with interest, the defendant should be entitled to the benefit of a corresponding reduction in the decree; and a reasonable time should be allowed for the purpose of showing that such compromises, if any, have been made. The result is that the decree of the Circuit Court must be reversed, and the cause remanded, with instructions to enter a decree in conformity with this opinion."

The mandate issued from this court, after reciting the former decree of the Circuit Court and reversing the same and awarding costs on the appeal, concluded as follows:

"And it is further ordered that this cause be and the same is hereby remanded to the said Circuit Court with directions to enter a decree in conformity with the opinion of this court."

In pursuance of this mandate, a decree was made and entered in the Circuit Court, by which it was referred to a master to

take testimony and report as to whether the defendant (the city of New Orleans) was entitled to any, and if so, how much, reduction in the said decree of $576,707.92, by reason of any compromises and settlements of the judgments for rents in the said Agnelly and Monsseaux cases, made and entered into by the complainant and any of said defendants in said judgments for any less sums than the face thereof.

An investigation was thereupon had, and evidence taken, and from the master's report it appears that fifty-one of the tenants had made settlements with Mrs. Gaines, or her representative; and that the aggregate of the judgments against the tenants making such settlements, with interest to the 10th of January, 1881, amounted to $220,213.16, forming part of the gross amount of $576,707.92. The amounts of money received by Mrs. Gaines on these settlements were small, not exceeding, in the aggregate, as found by the court below, the sum of $15,394.50. The master, in considering whether the settlements should have the effect to abate the amount of the decree under the opinion of this court, came to the conclusion that they should not. His views on the subject are expressed in brief as follows:

"The complainant has settled with the defendants in many cases where they were evicted by selling the land back to the defendants evicted and taking from said defendants their claims against the city in part for the price, and sometimes it constituted the entire consideration, but in every one of these cases she has expressly reserved to herself, where the subject matter of her judgment for rents and revenues is mentioned, the right to claim the amount of said judgments from the vendors of the defendant back to and including the city of New Orleans, and if it were not for the contention of counsel for the defendant that the legal effect of most, if not all, these compromises made by the complainant with the defendants had discharged the city from all obligation of warranty for rents and revenues I might close this report with the statement made above — that there was no evidence going to show that any sum had been received by the complainant on account of her judgments for rents and revenues or in any way to di-

minish the sum of five hundred and seventy-six thousand seven hundred and seven and ninety-two hundredths dollars ($576,707.92,) the sum of the judgment in favor of complainant as fixed by the Supreme Court."

After an examination of the objections to this view presented by the counsel of the city, the master concluded his report as follows:

"But I need not pursue this line of argument further, being satisfied that the Supreme Court, in its opinion, has settled the question of the right of Mrs. Gaines to be subrogated to the right of the grantees and maintain a suit against the city of New Orleans.

"The claim is equitable, and especially is this so under the law of Louisiana, where the warranty and the right of subrogation is part of the act of sale, whether or not it is expressed in the act of sale.

"I therefore report—

"1st. That the evidence discloses no case where Mrs. Gaines has received any sum or sums on account of her judgments for rents, revenues and values for use in the cases where compromises and agreements have been made between the complainant and the defendants.

"2d. I report that the legal effects of the acts of compromise do not diminish her judgments for rents or revenues in said Agnelly and Monsseaux cases, nor do they impair her right to recover the amounts awarded to her in her decree as fixed by the Supreme Court of the United States, say, five hundred and seventy-six thousand seven hundred and seven and ninety-two hundredths dollars ($576,707.92,) with five per cent interest, as provided in the decree of the Circuit Court, say, from January 10, 1881."

The first conclusion seems open to this criticism. Mrs. Gaines did, in some of the cases, receive money. It is true that the acts do not express on what account such money was received; but it is acknowledged to be in part consideration of the contract on Mrs. Gaines's part, which contract is usually a personal discharge of the tenant from any further claim for money, and an agreement to convey the land as soon as the

rents and revenues have been collected from the city, or otherwise. Thus, the act of settlement between Mrs. Gaines and Albin Rochereau, after reciting the recovery of two judgments against Rochereau in the Monsseaux suit, the first, establishing Mrs. Gaines's title, and the second decreeing to her for fruits, revenues and values for use the sum of $6885.50 and interest, and $2006.50 costs; and reciting the fact that Rochereau had an action of warranty against his vendor and previous vendors, including the city of New Orleans, as well for the price of the land, as for the amount of said judgment and costs: it was agreed —

First. That Rochereau transferred to Mrs. Gaines his said action of warranty for the price of the property.

Second. Rochereau requires his vendors, including the city, to pay to Mrs. Gaines the amount they were respectively bound for to him for fruits and revenues owing to said judgment therefor, and authorizing her to sue for the same.

The act then proceeds as follows:

"Third. And in consideration whereof and of the sum of eleven hundred dollars, receipt whereof is hereby acknowledged, the party of the first part hereby releases the party of the second part from personal liability for the said judgment for fruits, revenues and values for use of the property hereinbefore referred to, taking and accepting in lieu and place thereof the said indebtedness in warranty of said preceding vendors, including the city of New Orleans, to the said party of the second part.

"Fourth. And the party of the first part further agrees, upon her obtaining final judgment against or settlement with the city of New Orleans in said action in warranty for the price as set forth in article one of this agreement, to transfer and surrender unto the party of the second part all her right, title and interest in and to the property recovered by and described in the said final judgment of the 30th April, 1877, being the following." [Here describing the property.]

Here was an acknowledged receipt of eleven hundred dollars without specifying on what account, but manifestly as a consideration (in part) of Mrs. Gaines's contract and acquit-

tance. The same thing occurred in other cases, but generally the amounts received were small. When the report came up for consideration on exceptions, the court, whilst confirming it in other respects, was of opinion that the sums thus received by Mrs. Gaines ought to be deducted from the amount of the decree; and having evidence that the aggregate thereof was $15,394.50, that amount was deducted accordingly, reducing the decree from $576,707.92 to $561,313.42.

The counsel of the city of New Orleans filed a large number of exceptions to the report, all of which, except those relating to the credit claimed for the above receipts, were overruled, and some of which, as well as some portions of the brief filed on behalf of the city in this court, are obnoxious to animadversion for want of ordinary courtesy and temperance of language due from members of the bar. We trust we may not be called upon to repeat an observation of this kind.

So far as the exceptions filed to the report are made the basis of any of the assignments of error in this court, they will be noticed. Those assignments are twelve in number, and will now be considered.

The first assignment asserts that the Circuit Court had no jurisdiction over the cause and parties for compelling the city of New Orleans to pay to the appellees the decrees in the Monsseaux and Agnelly cases, because the defendants in those decrees were citizens of the same State with the appellant, the city of New Orleans, and could not themselves sue the city in the federal court, and the appellees have no better right in that respect than their assignors.

If the claim of Mrs. Gaines against the city depended upon an assignment by the defendants in the Monsseaux and Agnelly cases of their rights against the city, arising from their eviction, the position of the appellant would be well founded; but, as explained in our former opinion, this is not the case. The right of Mrs. Gaines to pursue the city was an equitable right, arising and accruing to her on the basis of her own claims against the said defendants, and by subrogation to their equity to be protected and indemnified by the city. Although a derived equity on the part of Mrs. Gaines, so far as

the city is concerned, yet it is not created by assignment, but by operation of law through the rules of equity. Hence the assignment of error is not well founded in point of fact. This may be more manifest by what will be said in relation to the next assignment.

The second assignment of error repeats the objection made in the first in cases where any assignment or convention has been made whereby any right has been assigned to Mrs. Gaines so as to modify in any respect the legal rights resulting from the situation of the parties. We do not see that this specification has any greater force than the first. The written conventions between Mrs. Gaines and the tenants or grantees had the effect, not to confer upon Mrs. Gaines a right of suit in equity, but rather to indicate the intention of the parties as to her exercise of that right. The acts of settlement in this regard amounted to a declaration of the parties that Mrs. Gaines should exercise the equitable right which she possessed. In terms, the several acts may indicate more. They may indicate the actual assignment of rights; but as Mrs. Gaines had the right of prosecution by way of subrogation, independent of any such assignment, the assignment did not destroy it or take it away. It was merely in aid of the equitable right, and might be available in a court of law.

Subrogation is not assignment. The most that can be said is, that the subrogated creditor by operation of law represents the person to whose right he is subrogated. But we have repeatedly held that representatives may stand upon their own citizenship in the federal courts irrespectively of the citizenship of the persons whom they represent, — such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law was intended to obviate was the voluntary creation of federal jurisdiction by simulated assignments. But assignments by operation of law, creating legal representatives, are not within the mischief or reason of the law. Persons subrogated to the rights of others by the rules of equity are within this principle. When, however, the State or the governor of a State is a mere figure-head, or nominal party, in a suit on a sheriff's or administrator's bond, the rule does not apply.

There the real party in interest is taken into account on the question of citizenship. Spear's Fed. Jud. 150, 152, and cases there cited; *Coal Co.* v. *Blatchford*, 11 Wall. 172; *Rice* v. *Houston*, 13 Wall. 66; *Browne* v. *Strode*, 5 Cranch, 303; *Irvine* v. *Lowry*, 14 Pet. 293; *McNutt* v. *Bland*, 2 How. 9; *Huff* v. *Hutchinson*, 14 How. 586.

The third assignment of error complains that the Circuit Court erred in supposing that, by the decree of this court, the complainant was entitled to a definitive decree for the amount of the judgments in the suits against Monsseaux and Agnelly, subject only to diminution by such amounts as Mrs. Gaines may have received in compromising with the several defendants; whereas the appellant contends that the said judgments were open for examination as to any defence against them which might be shown to exist, such as corrections to be made for mistakes in the calculation of interest, and errors in entering the judgments after the decease of the parties, or for other equally valid reasons. Upon an examination of the record, however, we do not perceive that the court below misunderstood or departed, in this respect, from the terms of the decree made by this court. The judgments were binding on the parties to them, and therefore were binding upon the city of New Orleans, which in most cases had assumed the defence of the suits, and had been represented by counsel therein. We supposed that it was right and proper to consider litigation as at an end in those suits, and that the judgments had passed into *res adjudicata*. If any fraud could have been shown and proved in the entry of the judgments, the case might have been different, provided the objection had been taken at the proper time; but, although hints and charges of fraud are loosely made in argument, we have not found that any fraud was proved; and it is too late at this time to search for errors in the proceedings in those cases, or to review the judgments for the purpose of discovering error. The time for that has gone by; and, besides, mere matters of error cannot be inquired of in this collateral way. This is not an appeal from those judgments, and they cannot be questioned on the ground of mere error. If any of them were absolutely void, it would

be another matter. We do not think that the assignment of error in question, or the fourth assignment, which raises the question of erroneous computation of interest, can be sustained.

The fifth assignment of error is based upon the supposition that the defendants in the cases of Monsseaux and Agnelly had been adjudged to be fraudulent purchasers of the property, with knowledge that it did not belong to their pretended vendor, but that it did belong to Mrs. Gaines; that therefore the sales made to such persons were a nullity under Art. 2452 of the Civil Code of Louisiana, which declares that "the sale of a thing belonging to another person is null; it may give rise to damages when the buyer knew not that the thing belonged to another person." We are of opinion, however, that this article does not affect the question here. The defendants in those cases, being purchasers either from the city of New Orleans or its grantees, remote or immediate, are not adjudged to have had actual knowledge of the vice in the title of their grantors; and the grantors, having made express contracts of warranty, cannot set up such knowledge, even if it existed, to exonerate themselves from the ordinary obligations of their contract. If the position of the counsel for the city was correct, no possessor in bad faith, though merely such in law, and not in fact, could ever recover compensation from the author of his title, however solemn may have been the acts of sale and warranty by which the title was transferred. The article of the code referred to (Art. 2452) is the same as Art. 1599 of the French Code, and is derived from the old French law. Pothier says: "The knowledge of the buyer that the thing does not belong to the seller, or that it is hypothecated, does not prevent him from being received to demand a restitution of the price in case of eviction; neither does it prevent him from being received to demand the damages which he suffers beyond the price, if the warranty is expressly stipulated by the contract, for it is only in those cases when it is not stipulated that the buyer who has this knowledge is excluded from his demand in damages." Pothier on Sales, sec. 191.

Duranton, writing since the code was adopted, and com-

menting upon it, says: "As to the second question, whether the buyer who knows the danger of eviction, but has stipulated for a guaranty, has this right of guaranty, even for damages, we would decide according to the Roman law before cited in the affirmative." Cours de Droit Fr. suivant le Code Civil, vol. 16, No. 264. Troplong says: "According to this article, 1599, the buyer who knows that the thing sold to him belongs to another has no right to damages. But nothing prevents the parties from making a contract in derogation of this rule of law, and the stipulation for a guaranty places the parties beyond the operation of Art. 1599." Troplong Vente, vol. 1, No. 469.

The same doctrine is laid down by Laurent, vol. 24, No. 260.

In the present case there was an express warranty in all the acts of sale made by the city. There is, therefore, no foundation for this assignment of error.

The sixth assignment is as follows:

"The Circuit Court erred in passing into the account and decree any part or portion of any pretended decree or decrees in the Monsseaux and Agnelly ejectment bills, where the decrees against the evicted had been either released, cancelled, modified, compromised or discharged, either before or after the filing of the bill in this cause, particularly the decrees against the persons and defendants in the Monsseaux and Agnelly bills set forth in 'Appendix B' of this brief, made part of this assignment of error for certainty, being a tabulated list of evicted, the decrees against whom were formally discharged and released prior to the institution of this action."

The judgments referred to in this assignment are the fifty-one judgments before mentioned, in regard to which settlements were made between Mrs. Gaines and the defendants, and the assignment brings up the main question to be determined on this appeal; that question being whether, by these settlements, Mrs. Gaines, or her representatives, waived or discharged her claim against the city. The different acts of settlement were appended to the report, and form part of the record on this appeal. The form in which a number of them is conceived has already been given in the case of Albin Roche-

reau. Other acts were in a somewhat different form, but there was in no case an absolute discharge of the defendant or grantee without a reservation of right of subrogation against the city of New Orleans, and other warrantors. In most cases a small sum of money was received from the defendant, with a transfer by him to Mrs. Gaines of his right to proceed against his warrantors, including the city of New Orleans, followed by a personal discharge of such defendant from any further claim for fruits and revenues, with a contract to give him a title to the land in his possession as soon as a recovery should be had from the city. In other cases the defendant or grantee surrendered and gave up to Mrs. Gaines the possession of the land, and assigned to her all his rights against the city in consideration of a personal discharge from her claim for fruits and revenues. Still other forms were also adopted, but in all the right to prosecute the city was reserved. Under the peculiar law of Louisiana with regard to subrogation, as explained in our former opinion, we think that Mrs. Gaines might make settlements of this kind with the defendants or grantees without losing her claim against the city as warrantor and principal debtor. The city was not injured thereby, having no claim over against the defendant thus settled with. An absolute payment or compromise of her claim without any such reservation might have had a different effect, inasmuch as it would have shown that the intention of the parties was to extinguish the claim altogether. Such was our view in the former decree in providing for an abatement in regard to cases in which compromises may have been made. As stated in our former opinion, the city of New Orleans was the principal debtor as between it and its grantees, immediate or remote. This being so, such grantees might be settled with so far as their personal liability was concerned, without discharging the city, or other warrantors, provided it was stipulated, or shown to be the intention of the parties, that the city, or other warrantors, should not be discharged. It is a general rule that discharge of a surety does not discharge a principal; and the equity of that rule is applicable to the present case. The rule itself is so self-evident that it hardly needs authority for its support. It

is, however, directly asserted in the case of *Mortland* v. *Himes*, 8 Penn. St. 265, and is laid down in Pitman on Princ. and Surety, 176, 192 (Law Lib.). See also *Kirby* v. *Taylor*, 6 Johns. Ch. 242, 250, to the same effect. Art. 2205 of the Civil Code of Louisiana declares that "the remission or even conventional discharge granted to a principal debtor discharges the sureties. That granted to the sureties does not discharge the principal debtor. That granted to one of the sureties does not discharge the others."

In our opinion, therefore, this assignment cannot prevail.

The seventh assignment of error complains that a number of the defendants in the cases of Monsseaux and Agnelly died before the remand of this cause from this court to the Circuit Court, on occasion of the former appeal, and before the decree of reference by the Circuit Court upon the mandate from this court; and that there had been no attempt at revivor of the alleged decrees against the heirs or representatives of said deceased. We do not see how the facts referred to can benefit the appellant. The decree is not against those defendants who are said to be now deceased, but against the city of New Orleans; and no change by death or otherwise of the parties in said former suits could affect the rights of Mrs. Gaines or her representatives in the present suit. The prosecution of the city operated in relief of the obligations of the defendants in those suits, and if any of them die the prosecution of this case will operate in relief of their lawful heirs, whoever they be, or their successions, however represented. We think there is no force in the assignment. The same may be said with regard to the eighth assignment of error, which complains that the court below erred in charging the account against the city of New Orleans with the amount of a pretended decree against Albin Soulié, rendered, as alleged, five years after his death, for rents accruing after his death. The facts appearing in the record are, that Soulié resided in France, and was represented in this country by Bernard Soulié, his brother and agent, and that counsel were regularly employed to represent him in the controversy, said counsel being also the counsel of the city of New Orleans; and

that the suit was continued to its termination in the name of said Albin Soulié, without any mention of his death. The said Bernard, his brother, being his universal legatee, and recognized as such in the probate court, it would be a fraud upon the Circuit Court to set aside all those proceedings as absolutely null and void. A judgment rendered after a defendant's death, without the plaintiff's fault, is not void. The irregularity or error may be cured by entering it *nunc pro tunc* of a date prior to the defendant's death; and even this has been held not necessary in a collateral proceeding. Freeman on Judgments, §§ 57, 140, 153, and cases cited.

But it does not lie in the mouth of the city of New Orleans to raise the question, at the present stage of the case, after the decree passed by the Circuit Court and an appeal to this court, and a remand of the cause to the Circuit Court for further proceedings, during all which time this objection could have been made, but never was made until the matter came before the master on the last reference. We think that the appellant was estopped from raising the objection, and that it cannot be urged now.

The ninth assignment of error asserts that the court below erred in charging the city with the judgments against Amée Gautier, Jules Bermudez and others, who had been formally discharged by order of the court on motion of Mrs. Gaines, complainant, before the bill in this case was filed. We do not see how the discharge of the decrees against these defendants could have any greater effect in discharging the city of New Orleans from its obligation than the personal discharge of the defendants by the several acts of settlement. We have already considered the question, whether the city was discharged from its obligation by the personal discharge of the defendants in the other suits, and have expressed our conviction that it was not. As it was the intent of the parties not to discharge the city, and as one of the considerations of the agreements for settlement was, that Mrs. Gaines should pursue her remedy against the city, it seems to us that the manner in which the defendants were discharged is of no consequence. It might have been by acts or deeds passed before

a notary, or by a cancellation of the judgments against the parties, or in any other manner.

The tenth assignment of error is based on the fact alleged and appearing in evidence, that in thirty-three cases in which judgments had been rendered in the Monsseaux and Agnelly suits, the city had been sued upon the obligation of warranty for the recovery of the prices of the respective properties involved, and judgments had been recovered and satisfied; the aggregate amount being $65,500.59. The point of the assignment of error is that the prosecution of these suits upon the respective warranties therein propounded and the recovery of a part of the demands under the said warranties, namely, the prices of the lands, operated as a waiver and discharge of the other liabilities arising upon the same warranties, viz. the liabilities to restore the rents, revenues, etc.; that the contract of warranty is one and undividable; that although upon the breach of it a recovery may be had against the warrantor for the restitution of the price, for the fruits or revenues, for costs and other damages, yet only one suit can be maintained upon the contract, and not different suits for the different matters recoverable; and that the splitting of actions upon single demands is not allowed by the Code of Practice of Louisiana, the 156th article of which declares: "If one demand less than is due him, and do not amend his petition, in order to augment his demand, he shall lose the overplus."

The thirty-three judgments referred to were obtained against the city for the price of certain lands. The present suit is brought for the rents and revenues of the same and other lands. The thirty-three suits were brought in the names of the original defendants in the Monsseaux and Agnelly suits. The present suit is brought in the name of Mrs. Gaines, under her right of subrogation. There does not seem to be any good reason for saying that the claim for the price and the claim for rents and revenues may not be separated by the act of the parties. In some of the cases the defendants surrendered the land to Mrs. Gaines. In such cases there would have been no incongruity in their reserving to themselves the right of looking to the city for the price, and of giving to Mrs.

Gaines the right of looking to the city for the rents and revenues. The price might well belong to them, and the rents and revenues to her. Besides, the article of the Code of Practice referred to is a rule of practice, relating to the due order of proceeding to prevent an unnecessary multiplication of suits, and does not affect the equity and justice of the different portions of the plaintiff's demand; and therefore the benefit of the rule should be claimed, on the institution of a second and unnecessary action, at an early stage of the proceedings. This cause went to a decree; that decree was appealed to this court, the appeal was heard, and the amount of the judgments for rents and revenues was sustained, and the matter was referred back to the court below to make a single inquiry. It was then too late, as it seems to us, if the suits for price had been commenced before the present suit, to raise for the first time the objection now made. But the fact is, that those suits were commenced after the present suit, and the objection, if taken at all, was one to be taken in those suits, and not in this. We think, therefore, that this assignment of error is not tenable.

The eleventh assignment of error is that the complainant, Mrs. Gaines, had no right to recover the property in question in the suits against Monsseaux and Agnelly, because they acquired their title under Mary Clark, the grandmother of Mrs. Gaines, and the first warrantor of the spurious title, who falsely claimed ownership of the property under the first will of Daniel Clark, dated in 1811, which was revoked by the will of 1813 made in favor of Mrs. Gaines; and that therefore, as Mrs. Gaines was the direct heir at law of Mary Clark, as such she was estopped from claiming the lands which her grandmother had fraudulently conveyed and through whose conveyance the defendants held possession of the lands as purchasers thereof. If Mrs. Gaines had ever accepted the succession of her grandmother, Mary Clark, as unconditional heir, she would have been liable for Mary Clark's debts whether created by warranty or other cause. But not otherwise. No such acceptance has been alleged or proved. But it is obvious that this defence against the claim of Mrs. Gaines, if it was a defence

at all, should have been set up in the Monsseaux and Agnelly suits, and not in this collateral way. The assignment is clearly not well taken.

The remaining assignment is a general one which does not call for particular observation.

In concluding this part of the case, we have only to say that as far as the appeal of the city is concerned, we do not find any error in the decree of the court below.

The complainants, on their part, also appealed, and have brought to our attention two matters which they regard as errors to their prejudice. *First*, the allowance of the sum of $15,394.50 as an abatement of the amount due from the city on account of the sums received by Mrs. Gaines from the parties with whom she made settlements; *secondly*, the non-allowance to the complainant of the costs of the suits against Monsseaux and others, and Agnelly and others, which costs amounted to the sum of $34,000.

As to the first specification, the counsel of Mrs. Gaines rely upon a declaration of record made by the city of New Orleans, in the civil district court of New Orleans, division D, in a suit brought against the city for the price of four several lots recovered in the Monsseaux and Agnelly suits. The city in that case, by way of peremptory exception, pleaded that Mrs. Gaines had recovered against it, in the Supreme Court of the United States, $576,707.92, with interest, decreed to be due by the city on its warranty to said purchasers. It is contended by the counsel for Mrs. Gaines that this declaration is an estoppel against the city as to the amount of the decree in this court, and that no reduction of it can be made on account of the moneys received by Mrs. Gaines, or in any other way. But we do not consider that this declaration has the effect contended for by counsel. The city, in that case, simply pleaded the decree of this court, such as it was, the point being that a prosecution and recovery had already been had upon the same warranties which were sued upon in that case. The effect of the averment as an estoppel cannot properly be carried beyond the true purport and effect of the decree which was the subject of the averment, namely, the decree of this

court. This was evidently the intent with which the averment was made, and we think that the city was not precluded by the declaration in question from contending before the master that the amount of moneys actually received by Mrs. Gaines on the judgments included in the decree should be charged to her. Especially do we think so, in view of the terms of the said decree, which expressly allowed an inquiry into any settlements or compromises that had been made. We think the court below committed no error in allowing the said sum, and deducting it from the amount of the decree. The payments which it embraced were clearly intended as payments on the respective judgments. There was no other account to which they could be applied; and as there was no proof to the contrary, they must be presumed to have been made upon the money portion of said judgments.

As to the other point, the costs of the Monsseaux and Agnelly suits, we think they should have been allowed. There was nothing in the terms of our former decree which precluded such an allowance. The general effect of that decree was that the fictitious rents and revenues allowed for unimproved lands, amounting to over a million of dollars, were improperly allowed; but that the decree for the amount of the judgments recovered against the defendants in the Monsseaux and Agnelly suits was proper and right, unless it could be shown that those judgments had been compromised for less than the amounts due. The naming of the amount was for the purpose of identification. There was nothing in this general language that prevented the court below from including the costs of those suits in the decree. Our conclusion upon the whole case, therefore, is that the decree of the court below should be modified by adding to it the amount of said costs, to wit, $34,000, with interest as adjudged in the original decree of said court.

The cause is, therefore, remanded with instructions to the court below to modify its decree in accordance with this opinion.

Mr. Justice Brewer dissented.

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

Statement of the Case.

TROY LAUNDRY MACHINERY COMPANY *v.* DOLPH.

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

No. 149. Argued January 13, 14, 1891. — Decided March 2, 1891.

Dolph contracted to sell to the plaintiff in error standard Dolph washers at $110 a machine, and the company contracted to take at least 50 machines a year at that price, the contract to last for five years. There was a further clause by which Dolph was to have the option of manufacturing for the company any other machines sold by him at such price as might be bid for them in open competition. The company at the expiration of a year threw up the contract and repudiated its obligations, and Dolph sued to enforce them. *Held*, that the principal object of the contract was the sale and purchase of the Dolph machines; that the sale and purchase of the other machines were subordinate to it; and that the court should have instructed the jury that, as to the latter, there could be none other than a recovery of nominal damages.

In 1882 the parties hereto entered into the following contract:

"This agreement made this third day of January, 1882, between A. M. Dolph, of Cincinnati, O., of the first part, and the Troy Laundry Machinery Company, Limited, of Troy, N.Y., party of the second part, witnesseth:

"1st. That the said A. M. Dolph, party of the first part, in consideration of the covenants hereinafter named, made, and to be kept, shall furnish, crated or packed for shipment, delivered at depot in Cincinnati, O., to the order of said Troy Laundry Machine Company, Limited, and within a reasonable time after such order is received, certain washing machines of standard size of the style heretofore manufactured by the said A. M. Dolph as the hydraulic washer, and known and designated as the Standard Dolph washer, at the price of one hundred and ten dollars ($110) each, which shall be designated as the manufacturer's price for said Standard Dolph washer.

"2d. That the said Troy Laundry Machine —, Limited, party of the second part, in consideration of the covenants herein made and to be kept, agree to pay to the said A. M.

Dolph the sum of one hundred and ten dollars ($110.00) each for said Standard Dolph washer delivered as before mentioned, and to bind themselves herein and agree to take at least fifty (50) of said Standard Dolph washers each year.

"3d. That the said A. M. Dolph shall have the refusal or option of manufacturing any and all washing machines sold by the said A. M. Dolph and said Troy Laundry Machinery Company, Limited, or for them through their agents, at the price of one hundred and ten dollars ($110.00) each for the said Standard Dolph washer and at such price for other washing machines as may be bid for them in open competition for equal quality of goods by any responsible manufacturers other than said Dolph, and these prices shall constitute and be designated as the manufacturer's prices for these machines.

"4th. That the selling price of the said Standard Dolph washer is hereby fixed at two hundred dollars ($200.00) each, and that the selling price of washing machines that may be sold by either party hereunto other than the Standard Dolph washer shall be fixed at a price the same in proportion to the designated manufacturer's price thereof as the selling price of the Standard Dolph washer is to its manufacturer's price, provided that the selling price of any of the aforesaid washing machines may be changed by the mutual consent of the parties hereto.

"5th. That the said A. M. Dolph and the said Troy Laundry Machinery Company, Limited, do hereby agree together to equally divide between them, the said parties, the entire profits arising from the combined sales made by both parties or for them through their agents of any and all washing machines, and this profit shall be in all cases the entire margin between the designated manufacturer's price and the fixed selling price at the time the sale is made, provided that a discount or commission of twenty per cent of the selling price may be allowed by either party to their regular published agents other than a paid employé on sales actually made by said agent, which discount may be deducted from the profits before a division of the same is made.

"6th. Each party to this agreement shall furnish to the

other party annually a sworn statement of the number of each kind of washing machines sold by them; also the profits made above manufacturer's price on sales of washing machines other than the Standard Dolph washer, and the number of each kind of washing machine sold by their agents.

"7th. That the party of the second part agrees to pay to the party of the first part for all the goods ordered and delivered according to articles one and two to this agreement, within four months after the delivery of said goods.

"8th. That at the close of each year a division of profits shall be made according to articles five and six of this agreement, and any balance found to be due to either party shall be paid to that party within the first two months of the year following.

"9th. That on all washing machines furnished to the said Troy Laundry Machinery Company, Limited, shall be fixed a plate inscribed with the name and place of business of the said company.

"10th. This agreement shall be in force for the term of five years next ensuing.

"In witness whereof the parties hereunto have set their hand and seal the day and year first herein written.

"A. M. Dolph. [seal.]
"Delavan Peck, *Pres't.*
"Charles Angus, *Sec'y.*
"[Corporate Seal of the Company.]"

In February, 1884, Dolph, the defendant in error, commenced his action in the Circuit Court of the United States for the Northern District of New York, alleging breach of this contract by the defendant, now the plaintiff in error, and claiming damages in the sum of thirty thousand dollars. Trial being had, resulted in a verdict, March 26, 1886, in favor of plaintiff, for sixteen thousand dollars. That verdict having been set aside, (28 Fed. Rep. 553,) a new trial was had, which resulted in a verdict, March 26, 1887, in favor of plaintiff, for the sum of seven thousand two hundred and eight dollars. Judgment was entered on that verdict, of which the defendant

complains in this court, by proper proceedings in error, and asks a reversal.

Mr. Esek Cowen for plaintiff in error.

Mr. H. P. Lloyd for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

The defendant kept this contract for a year and then repudiated its obligations. The excuse made in its correspondence and alleged in its answer was, that the parol agreement between the parties, an agreement authorized by the directors of the defendant company, was a three years' contract; that the contract prepared by plaintiff was for five years; and that through inadvertence and mistake the contract thus prepared was signed by the officers of the defendant company. A change in the written agreement from five years to three was demanded and refused. As no testimony was offered to support this contention, it must, for the purposes of this suit, be taken as a mere pretence. The defendant, having made a five years' contract, at the end of one year repudiated it. The contract was not against public policy; simply a contract between a manufacturer and a dealer, with reference to the manufacture and sale of washing machines. Many errors are alleged in the trial of the case. We notice but one, for we are constrained to hold that the court erred in its ruling in that respect.

It will be observed that the contract had two phases. One for the manufacture and sale of the Dolph washer; the other, in paragraph three, in reference to the manufacture and sale of other washing machines. In reference to that, the contract provided that Dolph should have the option to manufacture for defendant any other machines, at such price "as may be bid for them in open competition, for equal quality of goods, by any responsible manufacturers other than said Dolph." In reference to this branch of the case the learned judge, charging the jury, said: "Regarding the machines other than the Dolph machines, it is wellnigh impossible to lay down any satisfactory

rule of damages. In attempting to do so difficulties and perplexities are encountered at every turn. At first I was inclined to withdraw this branch of the subject from your consideration entirely, for the reason that the evidence was so uncertain that no damage could properly and certainly be based upon the breach of the contract in this regard; but subsequent reflection has induced me to submit the facts for your consideration, with such instructions as will induce you, if you award anything, to give only such actual damages as you believe the plaintiff has suffered." And further on, quoting also from the opinion given on the motion for a new trial: "No option was given him the first year, and, as there is no way of ascertaining whether, if the option had been given thereafter, it would have been accepted, it is by no means easy to state what his rights in this respect are. The decision of the court before referred to says upon this branch of the case: 'As to the damages recoverable for the breach of that provision of the contract by which the plaintiff was to have the privilege of supplying the defendant with other washing machines at the lowest price bid by other manufacturers for supplying defendant with the same, it is not clear that the plaintiff could establish any loss of profits, unless it could be shown that there is some usual or average percentage of profit customarily realized by manufacturers of analogous articles, or some established manufacturer's price. The plaintiff might have been unwilling to act upon the option at prices which other manufacturers would have offered, and the extent of his prospective loss, if any, is largely a matter of speculation. The defendant may have been so situated that it could better afford to employ its own men and facilities, even although by doing so its machines would cost it more than to buy them of others, and in this view the difference between the actual cost of the machines to the defendant and the sum it would have cost the plaintiff to make and furnish them might not be the correct rule of damages.'" Obviously he appreciated the difficulty, but felt that the misconduct of defendant compelled an open door to some substantial recovery, even in respect to this branch of the contract.

No option was given to plaintiff, and none claimed by him; nor was there anything that could be fairly called open competition. True, the defendant made a contract with a neighbor to manufacture these machines. After awhile it abandoned that contract, and manufactured them itself. The plaintiff never exercised or sought the option conferred by this clause of the contract. The circumstances under which the contract was made with the neighboring manufacturer are not disclosed. It does not appear that his offer was made in thought of any competition. If the idea of open competition, as named in the contract, had been presented, who can say that he might not have been willing to have contracted for the machines at a less figure, and how can it be said, with this uncertainty, that the plaintiff would have exercised his option? The opinion of the Circuit Judge in sustaining the motion for a new trial, evidently was, that in the uncertainty surrounding the facts, recourse might be had to some usual or average percentage of profits customarily realized by manufacturers of analogous articles. His idea seemed to be, that when contract provisions fail, supposed equivalents may be resorted to. Possibly in some cases such ruling as that may be adopted; but we think it inapplicable here. Specific provisions as to the Dolph machines, which was obviously the real subject matter of the contract, were inserted, and the defendant agreed to take at least fifty of them each year. Other machines were subordinate, and the stipulations in respect to them were incidental rather than principal, and apparently more for supporting and giving force to the principal matter of the contract, the Dolph machines; hence, whatever of uncertainty attends those provisions. On breach of such a contract, the principal matter in respect to which provision was made is the one to be mainly regarded. If subordinate provisions are clear and definite, and damages for disregard thereof determinable by plain and obvious rules, of course such damages may be recovered; but if because they are subordinate the provisions in respect thereto are indefinite, then the court may not, with the idea of preventing injustice, attempt to substitute equivalents therefor. The main purpose of the contract must be

regarded, and its specific provisions in connection therewith enforced, and proper damages given for the breach thereof. A lack of certainty as to terms of contract obligations of either party, or measure of damages for breach, is simply the misfortune of him who seeks to recover in case of a breach thereof. The case practically is one of those in which, however reprehensible the conduct of the defendant may be in repudiating its contract obligations, the parties, having reference to one portion of the subject matter of the contract, made certain stipulations which determine the measure of damages in the case of breach; and on the breach the injured party has failed to bring himself within those stipulations. Such failure is his loss. The court should have charged the jury, that in reference to the machines other than the Dolph machines, there could be none other than a recovery of nominal damages. *Jackson* v. *Allen*, 120 Mass. 64, 80.

For this error the judgment is

Reversed, and the case remanded, with instructions to grant a new trial.

GORMLEY *v.* BUNYAN.

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

No. 574. Submitted January 9, 1891. — Decided March 2, 1891.

The granting or refusal of leave to file an additional plea, or to amend one already filed, is discretionary with the court below, and not reviewable by this court, except in a case of gross abuse of discretion.

C lent money to plaintiffs in error, taking their notes payable to their own order indorsed in blank. He held the notes at the time of his death, and they came into possession of his executors who filled in the blank indorsement with a direction to pay to the order of B and M, executors of C, and sued in assumpsit to recover on them. The declaration contained a special count on the notes describing them as having been indorsed and delivered to C, and the usual common counts in which the transactions were all alleged to have taken place with C. *Held*, that, as to the special count the variance could be cured by amendment, and as to

Statement of the Case.

the general counts the notes offered conformed in legal effect to the allegations set forth in them

The heading of a notice to take a deposition in this cause read: "United States of America, State of Illinois, County of Cook, *ss:* In the Circuit Court of the United States;" and the notice was that the deposition would be taken "before William G. Peckham, Esq., notary public, or some other officer authorized by law to take depositions." The deposition was in fact taken before another notary, so authorized. *Held,*

(1) That the heading, though not technically correct, was substantially so;

(2) That the taking of the deposition was perfectly regular.

In Illinois payments by the mortgagee for taxes and redemption of tax certificates made after the sale, may be taken out of the proceeds of the sale of the property.

The only way in which statutes of limitation are available as a defence is when they are, at the proper time, specially pleaded.

The courts of the United States take judicial notice of all the public statutes of the several States.

In an action brought by an executor to recover on a promissory note made by defendant to his testator, it is not error to exclude evidence offered by defendant to show that the notes were not inventoried by the executor as part of the testator's estate.

This was an action of assumpsit, brought on the 24th of December, 1886, by James Bunyan and James Meehan, executors of the last will and testament of Edward Clark, deceased, citizens of New York, against Michael Gormley and Morton Culver, citizens of Illinois, to recover a balance due on a certain promissory note dated at Chicago, May 15, 1877, and due in three years, with interest at 9 per cent per annum, payable semi-annually until due, and 10 per cent thereafter, at the Chemical Bank of New York, made and signed by the defendants, payable to their own order, and by them indorsed in blank, and also to recover the amount due on six coupon notes of the same date, of $450 each, representing the semi-annual interest on the principal note, all of which notes the plaintiffs claimed to own as such executors.

The declaration consisted of a special count on the notes, describing them as having been indorsed and delivered to Edward Clark by the defendants, alleging that the same were lost and could not, therefore, be produced in court, and stating that the coupon notes represented interest upon the

principal note; and also of the usual common counts in assumpsit of indebtedness for work and labor; materials; money lent and advanced; paid, laid out and expended; had and received; etc., to Edward Clark. Attached to the declaration were copies of the coupon notes, and what was intended to be a copy of the principal note, but which differed from it in some minor particulars hereafter referred to. The plaintiffs also made profert of the letters testamentary issued to them, as executors of the last will and testament of Edward Clark, deceased.

The defendants put in a plea of the general issue, and filed an affidavit of merits, March 10, 1887. On the 8th of December, 1887, the cause then being on the trial call of cases for that day, the defendants moved to be allowed to file *instanter* four additional pleas, viz.: (1) Plea of *non est factum;* (2) plea of the statutes of limitation of New York; (3) plea of the statutes of limitation of Illinois; and (4) plea of satisfaction. This motion was denied by the court, and the defendants excepted. Afterwards, on the 10th day of December, 1887, the case being still on the trial call of cases for that day, the defendants moved the court to be allowed to file *instanter* additional pleas of set-off, claiming as due them from the plaintiffs the sum of $50,000, and also former recovery. The court overruled this motion also, and the defendants excepted.

The case went to trial before Judge Dyer and a jury, on the 15th of December, 1887. At the trial the plaintiffs offered in evidence the original principal note for $10,000 and the six coupon notes, (which it was shown had been found a few days prior thereto,) all indorsed payable to the plaintiffs, and offered evidence to prove the execution of the notes by the defendants. The $10,000 note had a credit of $8848.50, indorsed as of September 10, 1878, and the coupon notes were marked "paid."

The defendants objected to the introduction of these notes, claiming (1) that they differed from the notes set out in the special count of the declaration; (2) that they were not admissible under the common counts, which charged an indebtedness to Edward Clark and not to the plaintiffs; (3) that the coupon notes were not described in the special count of the declara-

tion, and were not admissible under the common counts, because the common counts all ran to Edward Clark, and not to plaintiffs; and (4) because the coupon notes were marked "paid." The objections were overruled, and the defendants excepted.

The indorsements upon the notes were explained as follows: All of the notes had been secured by a deed of trust to Adolph Loeb, upon certain described property. This trust deed was foreclosed by Loeb, and on the 10th of September, 1878, the property was sold, under the power of sale contained in the deed, for $8848.50. Loeb thereupon made the indorsement on the note to represent the amount of money received by him as trustee. Loeb also testified that the coupon notes had been marked "paid" by his clerk, without any authority, and that such marking was incorrect.

It was further shown in evidence that the amount due on the notes at the time the sale was made was $11,027.79; and that Loeb, as trustee, deducted from the proceeds of the sale the following items: $374.09, for redeeming the property from tax sales, for the taxes of 1876 and 1877; $16.00, costs of advertising the sale of the property; and $200.00, as his fees for the sale of the property — in all $590.09, leaving a balance of $8257.91 to be applied on the note September 10, 1878, which left $2769.88, due on the note on that day. Interest was then computed on that amount, at nine per cent to the maturity of the note, and ten per cent thereafter, according to the terms of the note, and the total amount due at the trial was thus ascertained to be $5290.

Objection was made at the trial by the defendants to the allowance of the above items deducted by Loeb from the proceeds of the sale of the property, on the grounds that the items for advertising and for trustee's fees were grossly excessive, and that after the trustee's sale of the property September 10, 1878, the trustee had no authority to redeem the property from the tax sales.

The plaintiffs also offered in evidence the deposition of James Meehan, one of the executors, taken in New York City, before a notary public, to prove, among other minor matters,

that the note sued on had been in the possession of Edward Clark, before his death, and had never been disposed of by him in any manner. Objection was made to the introduction of this evidence on several grounds, chiefly that the notice of taking it was defective in several particulars, and was not served on the defendants; that it was not taken by the commissioner named in the commission, and did not show when or for what reason it was taken; and that other informalities and irregularities existed on the face of it. The court overruled the objections and admitted the deposition, and the defendants excepted.

The plaintiffs also offered in evidence certified copies of the will of Edward Clark and the probate proceedings had thereon. The defendants objected to this evidence generally, "and on the specific ground that where the seal ought to be there is nothing but the letters 'L. S.'" But the court overruled this objection and the defendants excepted.

The defendants sought to obtain credit on the note for a number of small items of charges made by Loeb at the time the original note and deed of trust were made and executed, which were disallowed by the court. They will be understood best, perhaps, from a recital of the following undisputed facts: The defendants, being indebted to the Travelers' Insurance Company in the sum of $10,000, with certain accrued interest, applied to Loeb, who was a loan agent in Chicago, through John Culver, a brother of one of the defendants, to secure a loan of $10,000 to pay off their debt to the insurance company. That debt was evidenced by a bond, and was secured by a deed of trust on the lands afterwards included in the Loeb trust deed and certain other lands, to Lyman Baird. Loeb made arrangements to procure the loan from Edward Clark, through Clark's agent in Chicago, one Bolton. For procuring this loan and clearing up the title of the lands included in his trust deed, Loeb made the following charges: $40.40, to pay certain taxes due on the property; $32.50, to pay a judgment against the defendant Culver; $12.90, for a continuation of the abstract of title; $37.50, for attorney's fees; $2.25 for recording fees; and $350 for his own services

in securing the loan. Accordingly, it was found that a loan of $10,000 was insufficient to satisfy the indebtedness of the defendants, and another loan of $1300 was effected, through Bolton, from Edward Clark. The money in these transactions was paid over by Bolton in the form of checks — one for $10,000, and the other for $1300 — of the Singer Sewing Machine Company, of which Clark was president, and Bolton an agent in Chicago. The minutiæ of this transaction need not be stated. It is sufficient for our purpose to state that the court held all those matters to be purely personal between Loeb and the defendants, and, therefore, having no connection with the debt due to the plaintiffs.

The defendants also sought to have a credit of $142.60 allowed on the first coupon note as of date April 10, 1878, but the court held that the evidence showed that they ought to be allowed a credit of but $100, at that time, the other $42.60 having been paid to Loeb to induce him to stop proceedings which he had commenced looking to the foreclosure of the trust deed.

The defendants attempted to show by the evidence of one witness that the property sold at the foreclosure sale was worth at least $40,000, and that, therefore, they had been greatly wronged in the transaction; but the court refused to allow the evidence to be introduced, and the defendants excepted.

The defendants also attempted to show that the notes sued on were never scheduled as a part of the estate of Edward Clark, deceased, as, they claimed, was required to be done by the laws of New York; but the court refused to allow such evidence to be introduced, and the defendants excepted.

At the close of the trial the court charged the jury: (1) That there was no issue of fact under the evidence for them to consider; (2) That the items, heretofore mentioned as having been deducted by Loeb from the proceeds of the sale of the property, were properly charged against the defendants; (3) That the other items of account above mentioned as having arisen about the time the loan was negotiated were purely personal between Loeb and the defendants, and in nowise concerned

the plaintiffs; (4) That the defendants should be allowed credits on the note only as above stated; (5) That it was immaterial how much the land was worth which was sold at the foreclosure sale; and (6) That the jury were instructed to find and return a verdict for $5290 in favor of the plaintiffs and against the defendants. The defendants objected to this charge of the court, but their objections were overruled and they excepted. The jury returned a verdict, as instructed by the court, for $5290, to which the defendants excepted, and made a motion to set it aside and for a new trial. This motion was overruled, and judgment was entered on the verdict for $5290. To reverse that judgment a writ of error was then prosecuted.

Mr. Morton Culver for plaintiffs in error.

I. The court should have allowed the plaintiffs in error to plead the several pleas offered by them of *non est factum*, statutes of limitations, satisfaction and of set-off. This proposition needs no extended argument; they were offered in apt time, ten days before the trial was begun, and copies of them served on defendants in error. These pleas are all allowable under the "Practice" Act of Illinois; they are favored, too, to stay stale claims. *Hyman* v. *Bayne*, 83 Illinois, 256; *Emory* v. *Keighan*, 88 Illinois, 482; *Bemis* v. *Stanley*, 93 Illinois, 230; *Leffingwell* v. *Warren*, 2 Black, 599; *Amy* v. *Dubuque*, 98 U. S. 470.

II. The notes were improperly admitted. (*a*) The $10,000 note, because it varies from the special count. No copy of it is attached to the declaration, nor is it admissible under the common counts for the same reasons, and for the additional reasons that the note is indorsed to Bunyan and Meehan, and not to Clark; and the common counts all declare an indebtedness to Clark, and not to Bunyan and Meehan; and the common counts allege that Culver and Gormley became indebted to Edward Clark on the 10th day of October, 1885, three years after his death; and for the same reasons the $450 notes were improperly admitted, and in addition thereto, there is not a count in the declaration on a single one of the coupon notes.

The statutes of Illinois provide in the Practice Act, c. 110, sec. 18, that plaintiff shall file with his declaration a copy of the instrument of writing or account on which the action is brought, in case same be brought on a written instrument or account, and sect. 32 provides the same mode in case of set-off, and sec. 34 provides that a defendant shall not deny on trial the execution of any instrument in writing on which any action may have been brought or which shall be pleaded or set up by way of defence or set-off, or is admissible under the pleadings when a copy is filed, unless the person so denying the same shall, if defendant, verify his plea by affidavit. *Streeter* v. *Streeter*, 43 Illinois, 155; *Wilson* v. *King*, 83 Illinois, 232; *Nauvoo* v. *Ritter*, 97 U. S. 389. (*b*) Meehan's deposition was improperly admitted, because it did not comply with the provisions of Rev. Stat. § 863. (*c*) The record of the will and probate proceedings of Clark's estate were improperly admitted. They are not under the seal of the court. Rev. Stat. §§ 905, 906. (*d*) Bunyan and Meehan's charges for moneys paid out for taxes and for redemption from tax sales after the date of sale under the trust deed were improperly allowed. *Webster* v. *Nichols*, 104 Illinois, 160, 172.

III. The court erred in excluding the statutes of limitations of New York and Illinois.

Mr. Charles E. Pope, *Mr. Alexander McCoy* and *Mr. Charles B. McCoy* for defendants in error.

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

The first three assignments of error cover the whole case, and are as follows:

The first is, that the court erred in refusing to allow the plaintiff in error to file the several pleas of *non est factum*, statutes of limitation, payment and set-off. The reply to this is, that as long ago as *Mandeville* v. *Wilson*, 5 Cranch, 15, 17, and as late as *Chapman* v. *Barney*, 129 U. S. 677, it has been held that the granting or refusal of leave to file an additional

plea, or to amend one already filed, is discretionary with the court below, and not reviewable by this court, except in a case of gross abuse of discretion.

The second assignment of error is, that the court erred in admitting incompetent and irrelevant evidence in behalf of the defendants in error. Under this assignment various objections are specified.

(1) The first is, that there was a fatal variance between the indorsement on the $10,000 note and that declared upon in the special count, and that for the same reason it and the coupon notes were inadmissible under the common counts.

The only variance between the declaration and the proof (and this manifestly arose from the fact that the notes were lost at the time of the filing of the declaration) was, that the indorsement on the note was, "Pay to the order of Bunyan and Meehan, executors of Edward Clark," instead of "Pay to the order of Edward Clark," as stated in the declaration; and in the common counts the *indebitatus* was laid to Edward Clark instead of to Bunyan and Meehan, his executors.

The proof was clear that Edward Clark lent the money to the plaintiffs in error; that they executed the notes, and made them payable to their own order, and put on them their blank indorsement; that Clark owned and had in his possession the note at the time of his death; and that Bunyan and Meehan were appointed as his executors, in which capacity they brought the suit.

Such a technical variance may be cured by amendment without introducing any other cause of action or affecting the merits of the case between the parties, and it was proper for the court to allow it. It appears that on the trial the indorsement on the note was amended by the counsel for the defendants in error to correspond with the declaration, with the court's acquiescence, and pursuant to what they considered its order. In the bill of exceptions is this statement of the judge:

"The minutes of the court made at the trial and the shorthand reporter's notes do not show that the court formally granted leave to the plaintiffs to change the indorsement on

the note in suit so that it should read, 'Pay to the order of Edward Clark;' but, from what was said by the court in its opinion on the subject, I am satisfied that the attorneys for the plaintiffs in good faith supposed or understood that they had leave to make such change, and that, accordingly, they had in fact changed the form of the indorsement on the note independently of the minutes of the trial. The court cannot say that leave was expressly granted, or that it said anything further on the subject than is expressed in the opinion hereunto annexed."

We think that all the notes offered, either with or without amendment, conformed in legal effect to the allegation of the common counts. This objection cannot therefore prevail.

(2) A second objection relied on under this assignment is, that the deposition of James Meehan was improperly admitted because not complying with the United States Revised Statutes (sec. 863) in that respect. The heading of the notice was not technically correct, perhaps, but it was substantially so. It was as follows: "United States of America, State of Illinois, County of Cook, *ss.:* In the Circuit Court of the United States." Then follows the title of this case, and everything else was regular. There could have been no mistake made by the defendants with reference to what case the notice applied. The proof showed that the notice was properly served, and that the deposition was taken at the place and time specified in the notice, but before a different notary public from the one specified in the notice. The notice read that the deposition would be taken "before William G. Peckham, Esq., notary public, *or some other officer authorized by law to take depositions,*" etc. The deposition was actually taken before Nicoll F. Elmendorf, a notary public, and an officer authorized by law to take depositions in such cases. That was perfectly regular, and cannot be objected to. The notice conformed to section 863 of the Revised Statutes. There is no merit in this objection.

(3) It is also objected that "the will and probate proceedings of the estate of Edward Clark were improperly admitted." This objection, as stated in the record, is wanting in precision;

but taking it as stated in the brief of counsel for plaintiffs in error it is that "the certificates of authenticity are not in accordance with the laws of the United States. They are not under the seal of the court." In this statement counsel are in error. An inspection of the record shows that the only "certificates of authenticity" to which counsel refer, are the certificates of exemplification of the Surrogate's Court. These are in proper form, and are under the seal of the court. The letters "L. S." appear on the copy of the original letters testamentary. This objection is therefore without merit.

Another objection urged under this assignment is, that the charges for taxes and redemption of tax certificates by Loeb, after the sale of the property under the trust deed, were improperly allowed. With reference to these charges the court said:

"Here was a covenant in this trust deed on the part of the makers of the deed to pay all taxes and assessments on the property. They had up to the last moment before the sale in which to do that. It was not done. In fact those taxes were not paid until after the sale by this trustee — that is, he took up these certificates, procured them to be cancelled, so that they were no longer a lien on the property. It is true that in this deed the language used is, that out of the proceeds of sale he may pay all moneys advanced — advanced for insurance, taxes and other liens or assessments; but it has seemed to me that the act of paying the taxes or taking up the certificates after the sale related back, in legal effect, to a period antedating the sale, and that it was equivalent to an advancement of money before the sale for the payment of the taxes and the clearing off of these tax liens and assessments. I understand from Judge Blodgett and am authorized to say that he has had this very question up in connection with trust deeds like this, and that he has taken the same view of the question, and has held that, although the amount necessary to pay off the taxes was not advanced before the sale, but was paid after the sale, it was an item which could be properly taken out of the proceeds of the sale of the property."

We see no objection to anything in that part of the court's

opinion or in that ruling. *Hall* v. *Gould*, 79 Illinois, 16; *Parsons* v. *Gas Light & Coke Co.*, 108 Illinois, 380.

Another objection is that the checks upon which the original loans were made were irrelevant and not counted on in the declaration, nor proof made of signatures. These were, in the view we take of the case, admissible as showing that the amount of money due on these notes was actually received from Edward Clark, as constituting part of the *res gestæ*.

One more objection remains under this second assignment, which is, that the statement of the account by McCoy should not have been received and adopted by the court as the basis of its judgment. It is not shown to our satisfaction that the account is wrong in any particular item or items. The objection is to the account as a whole. There is no ground for such an objection, if the principles upon which the account is stated are correct; and they are so in this case.

Under the third assignment of error, viz. that the court erred in excluding proper and competent testimony on behalf of the plaintiffs in error, the points relied on are that the court ruled out (1) proof of the moneys paid by plaintiffs in error to said Edward Clark; (2) the statutes of Illinois and New York concerning limitations, mortgages and estates; (3) evidence of the value of land sold by Loeb under the trust deed to and for Clark; (4) the evidence to show that the notes in suit were never scheduled in the Surrogate's Court of New York.

With reference to the moneys claimed to be paid by plaintiffs in error to Edward Clark, or his agents, and to the value of the land sold by Loeb at the foreclosure sale, the reply is, that there was no evidence going to show, nor do the defendants claim, that they ever paid money to any one but Loeb. Loeb was not the agent of Clark any more than of the defendants. He was a trustee for both parties to the contract. The moneys paid to Loeb by the defendants at the time they secured the loans were paid to him as their own agent. Bolton was Clark's agent in those transactions. We agree with the court below in holding those transactions to have been purely personal between Loeb and the defendants. So also with

regard to the sale of the property under the trust deed. If the defendants were wronged by that sale their remedy is against Loeb; and any loss they may have suffered cannot be pleaded to defeat the claim of the plaintiffs on the note.

There was no error in not allowing the statutes of limitation of New York and Illinois to be admitted in evidence, after the court had overruled the motion of the defendants to be allowed to plead them as a defence. The only way in which such statutes are available as a defence is when they are, at the proper time, specially pleaded. 1 Chitty on Pleading, 514, 515; Stephen on Pleading, 76, note; *Wilson* v. *King*, 83 Illinois, 232.

With respect to the refusal of the court to allow certain other public statutes to be introduced in evidence, it need only be said that the courts of the United States take judicial notice of all the public statutes of the several States.

Neither was there any error in excluding evidence offered to show that the notes sued on had never been inventoried as a part of the estate of Edward Clark, deceased. It was shown that the notes were his property at the time of his death, and by operation of law, in pursuance of his will, they passed to his executors, who possessed the right to sue for the amount due on them.

We see no error in the proceedings of the court below, and its judgment is *Affirmed.*

COOK COUNTY *v.* CALUMET & CHICAGO CANAL & DOCK COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 1406. Submitted January 9, 1891. — Decided March 2, 1891.

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 by 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.

De Saussure v. *Gaillard*, 127 U. S. 216; *Johnson* v. *Risk*, 137 U. S. 300, affirmed.

Statement of the Case.

Tested by this rule the writ of error cannot be sustained, as the judgment of the state court proceeded wholly upon the construction of the terms and conditions of the grant of the State to the county by the act of 1852, and as amended by the act of 1854, and the validity of those enactments was not drawn in question.

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; and here the validity of the authority was not primarily denied, and the denial made the subject of direct inquiry.

A decision by the highest court of a State that the land commissioner had no authority to vacate an entry, and that any order that he might have made did not affect the rights of the party making the entry, is not a decision against a title specially set up or claimed under an authority exercised under the United States, nor against the validity of such an authority.

The acts of the general assembly of the State of Illinois of June 22, 1852, and of March 4, 1854, with reference to swamp lands, were in entire harmony with the acts of Congress, and the intention of the legislation was, as the Supreme Court of Illinois held, to protect the title of purchasers from the United States, after the passage of the act of September 28, 1850, which took effect as a grant *in præsenti*, while it was sought by the Illinois acts to secure to the counties the right to receive the money paid for the lands, as well as to the purchasers the title of the State.

This was an action of ejectment brought by the county of Cook, in the Circuit Court of Cook County, Illinois, on the 31st of January, 1883, against the Calumet and Chicago Canal and Dock Company, to recover the S.W. $\frac{1}{4}$ of section 7, township 37 N., R. 15 E., of the third principal meridian, north of the Indian boundary line, containing $46\frac{48}{100}$ acres, except a strip of land held for a railroad right of way. Judgment passed for the defendant, and was affirmed by the Supreme Court of the State on error. The opinion, by Mr. Justice Craig, will be found reported in 131 Illinois, 505.

By the act of Congress of September 28, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the 'Swamp Lands' within their limits," Congress granted to the State of Illinois, as one of the other States, all the swamp and overflowed lands lying within its borders which then remained unsold, and provided for their segregation and the issue of patents therefor. 9 Stat. 519, c. 84.

Statement of the Case.

On the 22d of June, 1852, an act of the general assembly of the State of Illinois was approved, entitled "An act to dispose of the swamp and overflowed lands, and to pay the expenses of selecting and surveying the same," which provided that all the swamp and overflowed lands granted to the State of Illinois by the act of Congress were thereby granted to the counties respectively in which the same might lie or be situated, "for the purpose of constructing the necessary levees and drains to reclaim the same," etc., and the second section of which contained the following:

"Whenever it shall appear that any of the lands granted to the State by the aforesaid act of Congress shall have been sold by the United States since the passage of this act, it shall be lawful for the said counties to convey such lands to the purchasers thereof. The said deed of conveyance shall be made by the judges of the county court, as such, and countersigned by the clerk of said court, with the official seal thereof affixed; and on delivering said deed to the purchaser, the county judge shall take from him an assignment of all his rights in the premises, and as such assignees they shall be authorized to receive from the United States the purchase-money of said land; and whenever any lands embraced by the said act have been located by bounty land warrants since the passage thereof, it shall be lawful for such county in which the same are situated, to convey the same in manner aforesaid, to the person or persons who located said warrant, and to take an assignment of the same to them as county judges, who shall thereupon be considered as assignees of the State, and as such may locate said warrant on any of the public lands belonging to the United States within the limits of such county, or elsewhere." Sess. Laws Ill. 1852, p. 178.

By the third section the state auditor was directed to furnish each county with an abstract of the swamp lands which had been purchased from the United States, or which had been located by land warrants, or to which the right of preemption had attached since the passage of the swamp land act.

March 4, 1854, this act was amended by an act providing:

"That in all cases where any of the lands granted to the counties by the act to which this act is amendatory, have been sold by the United States since the passage of the act of Congress, entitled: 'An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits,' approved September 28, 1850, the county courts of the several counties in this State, shall by an order to be entered of record at any regular or special term, sitting for the transaction of county business, make all necessary orders for securing to the purchasers who have purchased swamp and overflowed lands situated in their respective counties, since the passage of the act of Congress as aforesaid, in pursuance and in the manner prescribed by the act of the general assembly of this State, to which this is an amendment: *Provided*, That the county courts may in their discretion, require the purchasers aforesaid to pay to the drainage commissioner, for the use of said county, the cash, at the rate they purchased the lands from the United States, within the time to be specified by said court, by an order entered of record as aforesaid, and on a failure on the part of all such purchasers to comply with the terms of said court, as specified by this act, the said swamp and overflowed lands purchased by the United States as aforesaid, may be sold by the county courts or drainage commissioners, as other swamp and overflowed lands are sold." Sess. Laws Ill. 1854, p. 19.

And at the same session it was enacted: "That the care and superintendence of so much of the swamp and overflowed lands granted to the State of Illinois by the act of Congress entitled: 'An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits,' approved September twenty-eight, one thousand eight hundred and fifty, as lies in the county of Cook, is hereby vested in the board of supervisors of said county, and the said board of supervisors are hereby vested with all the powers in relation thereto heretofore given to the county court, subject in all respects to the provisions of the act entitled: 'An act to dispose of the swamp and overflowed lands, and to pay the expenses of selecting and surveying the same,' approved June 22d, 1852." Sess. Laws Ill. 1854, p. 184.

Statement of the Case.

On March 2, 1855, Congress passed an act, entitled "An act for the relief of purchasers and locators of swamp and overflowed lands," which was as follows:

"That the President of the United States cause patents to be issued, as soon as practicable, to the purchaser or purchasers, locator or locators, who have made entries of the public lands, claimed as swamp lands, either with cash, or with land warrants, or with scrip, prior to the issue of patents to the State or States, as provided for by the second section of the act approved September twenty-eight, eighteen hundred and fifty, entitled 'An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits,' any decision of the Secretary of the Interior, or other officer of the government of the United States, to the contrary notwithstanding: *Provided*, That in all cases where any State, through its constituted authorities, may have sold or disposed of any tract or tracts of said land to any individual or individuals prior to the entry, sale or location of the same, under the preëmption or other laws of the United States, no patent shall be issued by the President for such tract or tracts of land, until such State, through its constituted authorities, shall release its claim thereto, in such form as shall be prescribed by the Secretary of the Interior: *And provided, further*, That if such State shall not, within ninety days from the passage of this act, through its constituted authorities, return to the general land office of the United States, a list of all the lands sold as aforesaid, together with the dates of such sales, and the names of the purchasers, the patents shall be issued immediately thereafter, as directed in the foregoing section.

"Sec. 2. *And be it further enacted*, That upon due proof, by the authorized agent of the State or States, before the commissioner of the general land office, that any of the lands purchased were swamp lands, within the true intent and meaning of the act aforesaid, the purchase-money shall be paid over to the said State or States; and where the lands have been located by warrant or scrip, the said State or States shall be authorized to locate a quantity of like amount, upon any of the public lands subject to entry, at one dollar and a quarter

per acre, or less, and patents shall issue therefor, upon the terms and conditions enumerated in the act aforesaid: *Provided, however*, That the said decisions of the commissioner of the general land office shall be approved by the Secretary of the Interior." 10 Stat. 634, c. 147.

On the third of March, 1857, an act of Congress was approved, reading thus:

"That the selection of swamp and overflowed lands granted to the several States by the act of Congress, approved September twenty-eight, eighteen hundred and fifty, entitled 'An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits,' and the act of the second of March, eighteen hundred and forty-nine, entitled 'An act to aid the State of Louisiana in draining the swamp lands therein,' heretofore made and reported to the commissioner of the general land office, so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States, be and the same are hereby confirmed, and shall be approved and patented to the said several States, in conformity with the provisions of the act aforesaid, as soon as may be practicable after the passage of this law: *Provided, however*, That nothing in this act contained shall interfere with the provisions of the act of Congress entitled 'An act for the relief of purchasers and locators of swamp and overflowed lands,' approved March the second, eighteen hundred and fifty-five, which shall be and is hereby continued in force, and extended to all entries and locations of lands claimed as swamp lands made since its passage." 11 Stat. 251, c. 117.

The cause coming on for trial, a jury was waived and the cause submitted to the court for its findings and judgment. The plaintiff introduced in evidence a certified copy of the certificate of the surveyor general of October 29, 1853, that this (with other) land was swamp or overflowed land within the meaning of the act of Congress of September 28, 1850; and also a certificate of the State auditor showing the segregation by the State of the land prior to the passage and approval of the confirmatory act of Congress of March 3,

1857; and the approval of the list of selections by the Secretary of the Interior, May 8, 1866, "subject to any valid legal rights that may exist to any of the tracts therein described;" and thereupon rested its case.

On the part of the defendant there was offered a certified copy of a certificate of the register and receiver of the United States land office at Chicago, Illinois, dated October 20, 1853, to William B. Egan, but not the indorsements made thereon or the entries upon the face thereof; to which evidence the plaintiff objected on the ground that if said paper was put in evidence the whole paper must go in, and also on the ground that such title was subsequent to the swamp land grant under which the plaintiff claimed, and also on the ground that said certificate showed upon its face that it was cancelled; but the court, holding that all of said paper, including the indorsements or entries upon its face, should be in evidence, subject to all objections, allowed the same to be read; to which rulings the plaintiff then and there excepted, and the defendant, excepting to the ruling upon the indorsements and writing on said certificate, read said copy of said certificate in evidence in words and figures as follows:

"Military bounty land act of March 22, 1852.

"*Land Warrant No.* 2495.

"Register and Receiver's No. 34.

"LAND OFFICE, *Oct.* 20, 1853.

"We hereby certify that the attached military bounty land warrant No. 2495 was on this day received at this office from William B. Egan, of Cook County, State of Illinois.

"JAMES LONG, *Register.*

"ELI B. WILLIAMS, *Receiver.*

"I, William B. Egan, of Cook County, State of Illinois, hereby apply to locate, and do locate the southwest fractional $\frac{1}{4}$, N. I. B. L., of section No. (7) seven, in township No. (37) thirty-seven, N. of range No. 15 E., in the district of lands subject to sale at the land office at Chicago, containing $46\frac{48}{100}$

acres, in satisfaction of the attached warrant, numbered 2495, issued under the act of 22d of March, 1852.

"[Written across the face:] Cancelled. See letter to R. R. at Springfield, Aug. 10, 1855. Binckly.

"[Written across the face in red ink:] Reinstated Feb. 15, 1883. W't 101,043, act of 1850, 40 a, substituted.

"Witness my hand this 20th day of October, A.D. 1853.

"WILLIAM B. EGAN.

"Attest: JAMES LONG, *Register.*

"ELI B. WILLIAMS, *Receiver.*

"I request the patent to be sent to —— ——.

"LAND OFFICE, CHICAGO, *Oct.* 20, 1853.

"We hereby certify that the above location is correct, being in accordance with law and instructions.

"JAMES LONG, *Register.*

"ELI B. WILLIAMS, *Receiver.*

"Endorsements: 40 acres. 2495. 40. Chicago, Ill. W't 101,043, act 18—, 40 acres, substituted for the above number Feb'y 15, 1883. Cancelled. See letter to reg'r, Springfield, Ill. Aug. 10, 1855. Binckly. Cancellation noted on tract book. 17 Nov'r, 1855. R. W. B. B. K. Reinstatement noted Feb'y 15, 1883. See cash entry No. 29,521, Springfield. Lawrence. Approved. —— ——, clerk. Patented ——. Recorded ——.

"This location is reinstated and warrant No. 101,043 for 40 acres, act of Sept. 28, 1850, substituted for w't No. 2495 for 40 acres, act of 1852, in div. K., February 15, 1883.

"E. KILPATRICK.

"Div. 'K.'

"See letter in div. 'K' to Cohrs, Dearborn & Shope, Chicago, Ills., Feb. 15, 1883.

"(*Memorandum.*)

"This entry is in conformity with Com. letter Sep. 13, 1883. The cash part was paid February 28, 1853.

"JAMES LONG, *Register.*

"W't susp., however, for erasure; party desires its location cancelled. See reg. (Chicago) letter of May 28, 1855, cancelled therefor, and party allowed to relocate with another wt' No. 101,043.

"Aug. 10, 1855."

It was admitted by the plaintiff that William B. Egan, in April, 1854, executed, acknowledged and delivered to H. S. Monroe a proper deed of conveyance of the land described in the certificate, conveying the same to said Monroe, which deed was duly recorded in January, 1855. And it was further admitted, that May 11, 1871, Monroe executed, acknowledged and delivered to Bowen a deed in due form conveying the land in suit in consideration of $1000 to said Bowen, which deed was recorded in the recorder's office of Cook County in May, 1871. The defendant offered in evidence a deed, properly executed and acknowledged by Bowen, dated January 21, 1872, and recorded June 21, 1872, conveying the land in controversy to the defendant. These deeds were objected to by the plaintiff as immaterial and irrelevant. It was also admitted that this land, together with other lands, was subdivided and platted into blocks and lots by the defendant on June 29, 1875, in accordance with the provisions of the statute of the State of Illinois in that behalf, and duly recorded in the recorder's office of Cook County; and that streets and alleys were, upon said plat, laid out across the land in suit, and the lines of said streets and of the blocks and lots were staked out on the land by defendant. It was shown by the defendant that the land had been taxed each year from 1870 to 1886 (except 1877) for county and State and other purposes, and that these taxes, amounting to nearly $8000, were from time to time paid by it; but this evidence was objected to by plaintiff, because it did not bring defendant within any section of the limitation laws concerning the payment of taxes; and plaintiff also objected to the showing of any taxes paid since the commencement of this suit. It was agreed that the property as described in the declaration, or as subdivided, was not assessed for taxes for the year 1877.

Statement of the Case.

It appeared that on May 24, 1870, John W. Bunn entered this land and received a certificate of entry from the register and receiver at the Springfield Land Office, which he assigned to Bowen, and that a patent issued on the 15th of November to Bowen, as Bunn's assignee.

It also appeared that the land was situated within six miles of the Illinois Central Railroad location, and, being part of an odd-numbered section, its minimum price was fixed at $2.50 per acre, under the act of Congress of September 20, 1850, (9 Stat. 466;) and that a reservation was made, by order of the President, of the land fifteen miles in width on each side of the location of that railroad, and specific directions were given on the 19th and 20th of September, 1850, by the commissioner of the general land office to the register and receiver to withhold certain lands, including that in question, from sale or entry of any kind until such lands should be again made subject to private entry by proclamation of the President; and that on the third of April, 1852, by the President's proclamation, the lands were restored to market, and thereafter those within the six-mile limit, not inuring to the State for railroad purposes, were offered by the government at public sale.

The Circuit Court was asked by the parties respectively to rule upon certain propositions of law, some of which were approved and some rejected, exceptions being taken accordingly. Its affirmative rulings were as follows:

"The lists of lands, including the tract of land in question, transmitted to the governor of Illinois under the act of Congress of September 28, 1850, by the Secretary of the Interior, a copy of which, duly certified by the state auditor, has been introduced in evidence, is sufficient evidence in this action to show *prima facie* title to the tract in question in the plaintiff under law.

"If the evidence shows that the land in question was listed as swamp land, and so certified by the Secretary of the Interior to the governor of the State of Illinois, then the effect of such listing and certification was to vest the title thereto in the State of Illinois on the 28th of September, 1850, irrespective of the question whether said tract was situate within six

miles of the line of the Illinois Central Railroad as located or not.

"As a matter of law, the fact that the premises in question were part of an odd-numbered section and lying within six miles of the line of the Illinois Central Railroad as finally located, would not prevent the title thereto passing to the State of Illinois under the swamp land act of Congress of September 28th, 1850, if it were in fact swamp and overflowed land within the meaning of that act at that date.

"If the land in question had in fact been selected as swamp and overflowed land under the swamp land act, approved September 28th, 1850, by the surveyor general of the United States for the States of Missouri and Illinois, and said tract was reported as such swamp land by said surveyor to the commissioner of the general land office on October 29th, 1853, and if the evidence shows that the same remained vacant and unappropriated and not interfered with by an actual settlement under any existing law of the United States on the 3d day of March, 1857, then the title to said tract of land was confirmed in the State of Illinois by the act of Congress approved March 3d, 1857, entitled 'An act to confirm to the several States the swamp and overflowed lands selected under the act of September 28th, 1850, and the act of the 2d of March, 1849.'

"If the land in question was in fact swamp land on the 28th day of September, 1850, the day of the passage of the swamp land grant, then the title passed to the State by virtue of said act irrespective of any acts of the officers of the Department of the Interior of the United States and irrespective of any subsequent confirmatory acts of Congress.

"Under the evidence in this cause the title to the land in controversy, it being swamp land, passed by the grant of September 28th, 1850, known as the swamp land act, to the State of Illinois and the title to the said land vested in the plaintiff, the county of Cook, by virtue of the act of the general assembly of Illinois entitled 'An act to dispose of the swamp and overflowed lands and to pay the expenses of selecting and surveying the same,' approved June 22d, 1852, without the execution of any deed therefor.

"The mere collection and payment of taxes under the township organization laws of Illinois do not work an estoppel to an action of ejectment for lands so taxed.

"That the entry of said land by William B. Egan on October 20, 1853, and the receipt and retention by the United States of the money and warrant delivered by said Egan in payment therefor was a sale by the United States of said land to said Egan, and an appropriation of said land by the United States within the intent and meaning of the confirmatory acts of Congress.

"That said William B. Egan was the owner in said lands in fee, and that the defendant in this case, as assignee of said Egan by regular conveyances, made prior to the commencement of this suit, was at the time of the commencement of this suit the owner of said land in fee and entitled to the possession thereof.

"That under the act of the legislature of Illinois of June 22, 1852, in relation to swamp lands, and under the act amendatory thereof, of the legislature of said State, of March 4, 1854, the county of Cook could not become the owner of said land as against said Egan or his grantees until said county of Cook should comply with the requirements of said acts as to the purchasers of swamp land from the United States subsequent to the enactment of the swamp land act of September 28, 1850, and that the burden was upon said county of Cook, plaintiff herein, to prove affirmatively such compliance.

"That under the law upon the facts shown upon the trial, the plaintiff cannot recover herein."

Among other rulings requested by plaintiff and refused, was this: "The cancellation of the Egan entry, August 10, 1855, by the Department of the Interior of the United States, in the absence of any facts or evidence showing the circumstances which led to this cancellation, must be presumed to have been based upon sufficient facts to authorize it."

The court thereupon found for the defendant and the plaintiff moved for a new trial, which motion being overruled, judgment for defendant was entered, and the cause taken by writ of error to the Supreme Court of the State, and the judgment affirmed.

Statement of the Case.

The Supreme Court held (131 Ill. 505) that, conceding the evidence introduced by the plaintiff was sufficient to establish *prima facie* a title upon which a recovery might be had if no evidence had been introduced by the defendant, yet that as Egan was a purchaser within the meaning and protection attached to this grant, no beneficial title passed to the county. The court said: "It will be observed that the land was entered by Egan after the passage of the act of Congress granting swamp lands to the State. But the entry was made nine days before the land was selected as swamp land; and in this connection it may be remarked, that the fact is well known to all who have given the subject any consideration, that after the passage of the swamp land act of 1850, the various land offices continued open, and lands were sold by the United States which were subsequently claimed by the States under the provisions of the swamp act. This condition of things, no doubt, led to some of the legislation by Congress and the State of Illinois after the act of 1850, which will be referred to hereafter." The court then considered the acts of Congress of September 28, 1850, March 2, 1855 and March 3, 1857, and the acts of the legislature of the State, of January 22, 1852, and March 4, 1854, and thus continued:

"It is thus manifest, from the legislation of Congress and the legislation of the State, that it has always been the intention, both of the general government and of the State, to protect the title of a purchaser of swamp lands. Congress, in making the grant to the State, had the right to impose such terms and conditions as it saw proper, and the State, in granting the lands to the counties, had the undoubted power to provide that purchasers who had bought and paid for the lands should be protected in their several purchases, as, in effect, it did. The county of Cook derived its title to the land under and by virtue of the act of 1852, as amended in 1854, and if the acts do not pass the title to the land in question, it is plain that Cook County could not recover. The first section of the act of 1852 is general in terms, granting all swamp lands which had been granted to the State, to the respective counties; but section two qualifies section one, and declares that

whenever it shall appear that any of the lands granted to the State shall have been sold, it shall be lawful for the said counties to convey such lands to the purchasers thereof. This was followed by an amendment, passed in 1854, requiring the county courts, by an order to be entered, to make all necessary orders for securing to purchasers of swamp lands their titles to such lands. Under this legislation it is manifest that the State of Illinois never intended to transfer to the counties lands that had been entered from the United States, but, on the other hand, the object was to protect the title of all purchasers. The language, 'it shall be lawful for the said counties to convey,' did not leave a discretion resting with the county to hold the land or convey, as it might think proper; but a positive duty was imposed to transfer such title as it acquired, to the purchaser from the United States, and a county could acquire no rights to the lands by a refusal to observe the requirements of the statute. Indeed, we think it a fair and reasonable construction of the acts of 1852 and 1854, when considered in connection with the acts of Congress, to hold that where lands have been bought, in good faith, from the United States, the title to such lands did not become vested in the county, but passed to the purchaser, under his entry.

"The copy of the certificate of entry procured from the land office at Washington, and read in evidence, contained a statement written across its face, that the entry had been cancelled, and also another statement that it had been reinstated. The commissioner of the general land office had no authority to vacate the entry, and any order that he may have made did not affect the rights of Egan. *Brill* v. *Stiles*, 35 Illinois, 305." *S. C.* 85 Am. Dec. 364.

A writ of error having been allowed by the Chief Justice of this court, and the record having been returned, errors were here assigned as follows: That the Supreme Court of the State of Illinois erred: (1) "In finding that the title to the land mentioned in the declaration was not good in Cook County under and by virtue of the act of Congress called the 'swamp land act,' in force September 28, 1850;" (2) "In not holding

that the title to said land was confirmed in said Cook County by the act of March 3, 1857;" (3) "Both upon the facts and upon the law in finding the title to said land to be in defendant in error and in entering judgment against the plaintiff in error for costs;" (4) "In refusing to decide said cause upon its legal merits and deciding it upon the supposed equities involved in said record;" (5) "In sustaining the trial court in its propositions of law refused for the plaintiff in error and in sustaining the propositions of law held for the defendant in error;" (6) "In sustaining the trial court in the admission of improper testimony, to wit, the register and receiver's certificate to the land in question, dated October 20, 1853, the same being illegal, and also because the same was cancelled August 10, 1855, the subsequent chain of defendant's title resting upon said cancelled certificate;" (7) "In sustaining the trial court in the introduction of improper evidence, the register and receiver's certificate of said land to John W. Bunn, May 24, 1870, and the patent to his assignee, James H. Bowen, November 15, 1873;" (8) "In sustaining the trial court in permitting evidence to show that the land was not swamp land on October 28, 1850, the same having been certified by the government surveyor general to be swamp land October 29, 1853."

Mr. Edgar Terhune, *Mr. William G. Ewing*, *Mr. Consider H. Willett* and *Mr. Charles B. Wood* for plaintiff in error.

I. The facts of the record give this court jurisdiction. *Crowell* v. *Randell*, 10 Pet. 368, 392; *Martin* v. *Hunter*, 1 Wheat. 304; *Chouteau* v. *Eckhart*, 2 How. 344; *Cunningham* v. *Ashley*, 14 How. 377; *Bell* v. *Hearne*, 19 How. 252; *Garland* v. *Wynn*, 20 How. 6; *Lytle* v. *Arkansas*, 22 How. 193; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116; *Reichart* v. *Felps*, 6 Wall. 160; *Silver* v. *Ladd*, 6 Wall. 440; *Railroad* v. *Smith*, 9 Wall. 95; *Martin* v. *Marks*, 97 U. S. 345; *Hartman* v. *Greenhow*, 102 U. S. 672; *Baldwin* v. *Stark*, 107 U. S. 463; *Wright* v. *Roseberry*, 121 U. S. 488; *Hoadley* v. *San Francisco*, 124 U. S. 639.

II. Legislative grants convey an absolute present title as of the date of their passage. Such was the swamp land grant conveying the land in question to the State of Illinois, September 28, 1850. So was the act of the legislature of Illinois conveying such land to Cook County, June 22, 1852. *Wright* v. *Roseberry*, 121 U. S. 488; *French* v. *Fyan*, 93 U. S. 169; *Railroad Co.* v. *Fremont County*, 9 Wall. 89; *Railroad* v. *Smith*, 9 Wall. 95; *Martin* v. *Marks*, 97 U. S. 345; *Supervisors* v. *State's Attorney*, 31 Illinois, 68; *Dart* v. *Hercules*, 34 Illinois, 395; *Smith* v. *Goodell*, 66 Illinois, 450; *Keller* v. *Brickey*, 78 Illinois, 133; *Bristol* v. *Carroll County*, 95 Illinois, 84; *Wabash & St. Louis Railway* v. *McDougal*, 113 Illinois, 603.

III. The certificate of the commissioner of the land office that the land had been selected as swamp land was evidence of title. *Martin* v. *Marks*, 97 U. S. 345.

IV. The list of swamp lands in the office of the State Auditor of the State of Illinois, was also sufficient evidence that the title to the land in question had become vested in the State of Illinois. *Dart* v. *Hercules*, 34 Illinois, 395; *County of Piatt* v. *Gumley*, 81 Illinois, 350; *Keller* v. *Brickey*, 78 Illinois, 133; *Bristol* v. *Carroll County*, 95 Illinois, 84; *French* v. *Fyan*, 93 U. S. 169. And a certified copy thereof is competent evidence. *Wabash & St. Louis Railway Co.* v. *McDougal*, 113 Illinois, 604.

V. The State of Illinois by act of Congress of September 28, 1850, became vested with the title to the land in question, and such title was granted to the county of Cook by the first section of the act of June 22, 1852, when the obligation of such grant was impaired by the act of March 4, 1854, which divested the plaintiff of such title and conveyed it to a subsequent entryman.

Mr. Charles M. Osborn and *Mr. Samuel A. Lynde* for defendant in error.

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

The rule is settled 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 by 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. *De Saussure* v. *Gaillard*, 127 U. S. 216; *Johnson* v. *Risk*, 137 U. S. 300. Tested by this rule this writ of error cannot be sustained.

The Supreme Court of Illinois held that title passed to that State by the act of Congress, and that the plaintiff established a *prima facie* right to recover, but that as the State, in granting the lands to the counties, had the undoubted power to provide that purchasers who had bought and paid for the lands should be protected in their several purchases, and had so provided by its act of 1852, and this land had been "sold by the United States" to Egan after September 28, 1850, within the meaning of that act, no title passed to the county. The judgment of the state court proceeded wholly upon the construction of the terms and conditions of the grant of the State to the county by the act of 1852, and as amended by the act of 1854, and the validity of those enactments was not drawn in question.

The effect claimed by counsel as attributable to the act of Congress of 1850, as operating as a grant *in præsenti* to the State of Illinois, was given to it by the Supreme Court, and the confirmatory act of Congress of March 3, 1857, did not enter into the decision of the case, because under the conclusion reached there was no title in plaintiff to be confirmed. There was no decision against a claim or title asserted under the United States, but simply that the county did not obtain title under the grant of the State; that the act of 1852 imposed a positive duty on the county to transfer such title as it acquired to the purchaser from the United States; and that where lands had been bought in good faith from the United States, the title to such lands did not become vested in the county but passed to the purchaser under his entry. This construction by the state court of the laws of the State is

controlling in the premises. *Gormley* v. *Clark*, 134 U. S. 338, 348, and cases cited.

It is said that as Cook County was under township organization law in 1852, and hence under the government of a board of supervisors and not of county courts, it had no special legislative authority to dispose of swamp lands until the passage of the act of March 4, 1854, (Sess. Laws, 1854, p. 184,) imparting that power, and that, therefore, the second section of the act of 1852 did not apply to that county. While this point does not seem to have been presented to the state court, yet, if the State did not intend to transfer title to the lands that had been entered from the United States, as was held by the court, the mere want of power to convey, which was at the next session of the general assembly supplied, would not require a different construction to the contrary of such intention.

As the acts of Congress referred to in the first and second errors assigned did not purport to vest title to swamp lands in Cook or any other county, and the court only passed upon the alleged grant by the State, we are unable to perceive that any federal question was, in this regard, necessarily or in fact decided.

It is further assigned for error that the Supreme Court sustained "the trial court in the admission of improper testimony, to wit, the register and receiver's certificate to the land in question, dated October 20, 1853, the same being illegal, and also because the same was cancelled August 10, 1855, the subsequent chain of defendant's title resting upon said cancelled certificate." And the argument is that the validity of an authority exercised under the United States, namely, the action of the Land Department, was drawn in question, and that the decision was against its validity because against the validity of the alleged cancellation.

The trial court was not requested to hold the entry void because of cancellation, and we think the plaintiff's objection to the admission of the certificate in evidence, and its request for a ruling that the Egan entry was cancelled, and that such cancellation, "in the absence of any facts or evidence showing

the circumstances which led to its cancellation, must be presumed to have been based upon sufficient facts to authorize it," did not draw the validity of the authority of the department in question within § 709 Rev. Stat. upon which section our jurisdiction rests.

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 the authority here was not primarily denied, and the denial made the subject of direct inquiry. *United States* v. *Lynch*, 137 U. S. 280; *Baltimore & Potomac Railroad* v. *Hopkins*, 130 U. S. 210.

The court may have concluded that the transaction as shown by the memoranda was a substitution by Egan, with the consent of the officers of the Land Department, of warrant No. 101,043 for the original warrant No. 2495, which, for some erasure, was suspended; and that the alleged cancellation was not a cancellation of the purchase and entry, but of the location under the suspended warrant, and that, although the official order of substitution was not made by the commissioner until 1883, yet it was manifest from the endorsements that it had been made, in fact, in 1855. At all events, it ruled that the entry by Egan, and the receipt and retention by the United States of the money and warrant delivered by him in payment therefor, was a sale by the United States of the land to Egan.

Certainly the plaintiff did not specially set up or claim any title by reason of the alleged cancellation, and the court rendered no decision against a title so specially set up or claimed. *Chappell* v. *Bradshaw*, 128 U. S. 132.

In *Neilson* v. *Lagow*, 7 How. 772, 775, the plaintiff claimed land under an authority exercised by the Secretary of the Treasury in behalf of the United States, and the decision was against the validity of the authority thus exercised, and such was the case in *Lytle* v. *Arkansas*, 22 How. 193.

The claim of title here was under the act of the legislature of Illinois, and the question arising on Egan's entry and pur-

chase of the land was as to whether the land had been sold by the United States within the intent and meaning of the act of June 22, 1852.

The Supreme Court did indeed say, in relation to this matter, that the commissioner had no authority to vacate the entry, and that any order that he might have made did not affect the rights of Egan, and cited to the proposition the case of *Brill* v. *Stiles*, 35 Illinois, 305, where it was held "that the mere fact that an entry has been declared void by the commissioner of the general land office does not have the effect of vacating the entry." In other words, the court was of opinion that the commissioner could not, without notice, and arbitrarily, deprive a person of land lawfully entered and paid for, as was ruled in *Cornelius* v. *Kessel*, 128 U. S. 456, 461.

But the expression of this view in construing the language of the state statute was not a decision against a title specially set up or claimed under an authority exercised under the United States, nor against the validity of such an authority.

It is, however, earnestly urged that the Supreme Court erred "in holding that, under the act of June 22, 1852, of said State, said land was conveyed to said Cook County, upon a condition, and not absolutely, the action of said court in holding that the act of March 4th, 1854, of said State, transferred said title of Cook County in said land to William B. Egan, and his assigns, impaired the obligation of the contract in said act of 1852, whereby said land was conveyed to said Cook County." This contention as we understand it, is, that although the county was merely a public corporation, and held the swamp lands for public purposes as an agency of the State, yet the act of 1852 was a contract between the State and the county, which the State could not by subsequent legislation change; and that the act of March 4, 1854, impaired the obligation of the grant to the plaintiff in the prior act. We cannot find that this question was raised in the trial court or in the Supreme Court, nor do we understand that the Supreme Court held, as asserted, that the act of 1854 transferred the title of Cook County to Egan. It was the act of 1852 that the court proceeded upon, and the act of 1854, relating to the

manner in which the conditions imposed by the act of 1852 should be given effect, added nothing to those conditions, and was not treated by the court as controlling the question of title. And it would be sufficient to dispose of the contention that no such point was raised in the state court.

As to the admission in evidence of the certificate to Bunn and the patent to Bowen, the trial court made no findings as to this entry, and the decision of the Supreme Court makes no reference to it; nor do the other assignments of error require any observations.

These swamp lands were granted to the several States in which they were situated for the purpose, expressed on the face of the act, of enabling them to construct the necessary levees and drains to reclaim them; and the language of the proviso to the second section was "that the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid." We have repeatedly held that the State had full power of disposition of the lands, and that the application of the proceeds to the purposes of the grant rested upon the good faith of the State, which might exercise its discretion as to their disposal. *Mills County* v. *Railroad Companies*, 107 U. S. 557, 566; *United States* v. *Louisiana*, 127 U. S. 182, 187.

The acts of the general assembly of the State of Illinois were in entire harmony with the acts of Congress, and the intention of the legislation was, as the Supreme Court of Illinois held, to protect the title of purchasers from the United States, after the passage of the act of September 28, 1850, which took effect as a grant *in præsenti*, while it was sought by the Illinois acts to secure to the counties the right to receive the consideration for the lands, as well as to the purchasers the title of the State.

We have carefully considered the record in the light of the elaborate arguments of counsel for plaintiff in error, but are constrained to hold that we have no jurisdiction to review the judgment of the state court, and the writ of error will, therefore, be

Dismissed.

SAN FRANCISCO CITY AND COUNTY *v.* LE ROY.

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

No. 878. Submitted January 19, 1891. — Decided March 2, 1891.

The attorney of the city and county of San Francisco has no authority to relinquish rights reserved for the benefit of the public by the Van Ness ordinance, the city and county having succeeded to the property and become subject to the liabilities of the city.

The confirmation of the pueblo lands to San Francisco was in trust for the benefit of lot-holders, under grants from the pueblo, town or city of San Francisco, or other competent authority, and, as to the residue, in trust for the benefit of the inhabitants of the city; and the title of the city rests upon the decree of the court, recognizing its title to the four square leagues and establishing their boundaries, and the confirmatory acts of Congress.

The exercise of this trust, as directed by the Van Ness ordinance, was authorized both by the legislature of the State and by act of the Congress of the United States.

That ordinance having reserved from the grant all lands then occupied or set apart for public squares, streets and sites for school houses, city hall and other buildings belonging to the corporation, a decree in a suit against the city and county to quiet a title derived through the ordinance should except from its operation the lands thus reserved, unless the fact that there were no such reservations be proved in the case by the public records of the city and county.

The swamp land act of 1850, 9 Stat. 519, c. 84, was not intended to apply to lands held by the United States, charged with equitable claims of others which the United States were bound by treaty to protect, and consequently does not affect the pueblo lands which were acquired by the pueblo before its passage.

It is doubtful whether there were any lands within the limits of the pueblo which could be considered to be tide-lands; but whether there were or not, the duty and the power of the United States under the treaty, to protect the claims of the city of San Francisco as successor to the pueblo, were superior to any subsequently acquired rights or claims of California over tide-lands.

The tide-lands which passed to California on its admission were not those occasionally affected by the tide, but those over which tide-water flowed so continuously as to prevent their use and occupation.

This was a suit in equity against the city and county of San Francisco, a municipal corporation of California, to quiet

the title of the plaintiffs below, the defendants in error here, to certain real property within the limits of that municipality, against the alleged claim of the corporation to an adverse estate therein. The plaintiffs were citizens of France. The defendant, as a corporation of California, must be treated, for purposes of jurisdiction, as a citizen of that State.

The bill alleged that the plaintiffs were seized and possessed in fee simple absolute of certain real property in the city and county of San Francisco, which was particularly described, and that they and their predecessors had been thus seized and possessed for more than ten years; that the defendant set up some claim of title to the property, or to some portion thereof, adversely to the plaintiffs, which claim was without right or justice and unfounded in law or equity, and had assumed to make surveys within the limits of the land; mark out lines of streets; subdivide a portion of the property into lots; and make a map thereof; and that it threatened to sell such subdivisions and lots and open such streets, and in divers other ways assumed to exercise acts of ownership over the property, to the slandering and disquieting of plaintiff's title, the depreciation of its market value, and the hindrance and prevention of its sale or use, to the manifest injury, loss and detriment of the plaintiffs.

They further averred that they deraigned title to all but a small portion of the property, by divers mesne conveyances from William J. Shaw, who, on the 28th of March, 1861, commenced a suit in the District Court of the Twelfth Judicial District in and for the said city and county of San Francisco, against the defendant herein, to quiet his title to the land described in his complaint in that suit; that the claim of the defendant might be determined and the title of the plaintiff therein (the said Shaw) be established and declared valid, and that it might be decided that the defendant had no title, claim and interest in the land; that the said defendant was served with summons and appeared by attorney, and such proceedings were afterwards had in the suit that on the 5th of February, 1862, the court entered its final judgment and decree therein, whereby it adjudged that the claim of the

defendant to the premises was invalid and void, that the title of the plaintiff therein was valid and sufficient as against the defendant and against all persons claiming through or under the defendant, and that all such persons should be forever barred and restrained from asserting any estate or title or interest in the premises or any part thereof; that the said judgment and decree in favor of Mr. Shaw still remained in full force, never having been appealed from, reversed or vacated; and they insisted that by it the defendant was estopped from claiming or pretending to any right, title or interest in the lands therein described.

The plaintiffs, therefore, prayed that the defendant might answer the bill and set forth whatever right, title or interest it might have in the real property in relation to which the bill was filed, or in any part thereof, to the end that the court might determine upon its validity and that it might be adjudged and decreed that the plaintiffs were the owners of the property and that the defendant had no right, title or interest therein either in law or equity.

The defendant appeared by its attorney and filed its answer, in which it denied upon information and belief the allegations of the bill, and averred in like manner that the defendant was and had been for more than ten years last past continuously the owner in fee and possessed of the described premises.

The answer also averred, in the same way, that the plaintiffs ought not to maintain the suit, because neither they nor their predecessor or grantors, or any of them, were seized or possessed of the premises or any part thereof within five years next before the filing of their bill; but, on the contrary, that the defendant had been during all that time in the complete, open and notorious possession of the premises, claiming title to them in good faith and adversely to the whole world.

A general replication to the answer having been filed, proofs were taken, and upon the pleadings and proofs a decree was passed for the plaintiffs, adjudging that the plaintiffs were then, and had been since the 26th of October, 1883, the day on which the bill was filed, the owners and seized in fee simple of the premises described in the complaint, and that

the defendant had no estate, right, title or interest therein, or to any part thereof, and adjudging that the defendant and all persons claiming under it be forever barred and enjoined from asserting any right or interest in the premises.

From this decree an appeal was taken to this court by the defendant. Before the decree was entered, one of the plaintiffs, Victor Le Roy, died, and his title and interest in the premises described in the bill of complaint passed to René de Tocqueville, who is a citizen of the Republic of France, and by consent of counsel he was substituted in the place of the deceased as a party plaintiff.

Mr. George Flournoy for appellant.

Mr. Evans S. Pillsbury and *Mr. Gordon Blanding* for appellees.

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

It was conceded in the court below that the premises, to remove the cloud from which the present bill is filed, were at the time "pueblo lands" of San Francisco; that is, that they were part of the lands claimed by the city as successor of a Mexican pueblo of that name; that they are within the limits of the city of San Francisco as prescribed by the charter of 1851, and are within the four square leagues described in the decree of the United States Circuit Court for the District of California, entered May 18, 1865, by which the claim of the city as such successor was confirmed and its boundaries established, and also within the lines of the patent of the United States for the pueblo lands, issued to the city in 1884.

It was also stipulated that the decree of the Circuit Court and the patent of the United States should be considered as in evidence, and that all the statutes of California and of the United States affecting the pueblo lands of San Francisco might be referred to, in the consideration of the case, as though formally introduced in evidence.

The plaintiffs in their bill rely principally upon the decree of the District Court for the Twelfth Judicial District of the State, in the case brought by William J. Shaw to quiet his title against the claim of the defendant herein, contending that the title of Shaw, through whom they deraign their interest, was thereby adjudged to be valid as against the defendant and parties deriving title under the defendant, and that they are estopped from asserting against that decree any title or interest in the premises. The decree was rendered upon a disclaimer of the city and county of San Francisco, by its attorney, that it had any right, title or interest in the premises described in the complaint, or any part thereof, at the commencement of the suit, and its consent that the plaintiff might take judgment therein in accordance with his prayer. Whatever authority the attorney of the city and county may have had to conduct its ordinary litigation, he had none to relinquish rights reserved for the benefit of the public by the Van Ness ordinance; and the property in that case was claimed, as will be afterwards seen, under that ordinance alone.[1] The city

[1] In the opinion of the court reference is made to an ordinance of the city and county of San Francisco, entitled "An Ordinance for the settlement and quieting of land titles in the city of San Francisco," approved June 20, 1855, which is generally known as the Van Ness Ordinance, from the name of its reputed author. Mr. Justice Field has been so kind as to furnish the reporter with a copy of the second, third and fourth sections of that ordinance, and other documents connected with the subject, which are as follows:

Van Ness Ordinance.

"SEC. 2. The city of San Francisco hereby relinquishes and grants all the right and claim of the city to the lands within the corporate limits, to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, A.D., 1855, and to their heirs and assigns forever; excepting the property known as the slip property, and bounded on the north by Clay Street, on the west by Davis Street, on the south by Sacramento Street, and on the east by the water-lot front. And excepting, also, any piece or parcel of land situated south, east, or north of the water-lot front of the city of San Francisco, as established by an act of the Legislature of March 26, 1851; *Provided*, such possession has been continued up to the time of the introduction of this ordinance in the common council; or, if interrupted by an intruder, or trespasser, has been, or may be, recovered by legal process; and it is hereby declared to be the true

and county of San Francisco had previously succeeded to all the rights of property, and become subject to all the liabilities, of

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intent and meaning of this ordinance, that when any of the said lands have been occupied and possessed under and by virtue of a lease or demise, they shall be deemed to have been in the possession of the landlord or lessor under whom they were so occupied or possessed; *Provided*, that all persons who hold title to lands within said limits by virtue of any grant made by any ayuntamiento, town council, alcalde or justice of the peace of the former pueblo of San Francisco, before the 7th day of July, 1846; or grants to lots of land lying east of Larkin Street and northeast of Johnston Street, made by any ayuntamiento, town council or alcalde, of said pueblo, since that date, and before the incorporation of the city of San Francisco by the State of California; and which grant, or the material portion thereof, was registered, or recorded in a proper book of record deposited in the office, or custody or control of the recorder of the county of San Francisco, on or before the 3d day of April, A.D., 1850; or by virtue of any conveyance duly made by the commissioners of the funded debt of the city of San Francisco, and recorded on or before the first day of January, 1855, shall, for all the purposes contemplated by this ordinance, be deemed to be the possessors of the land so granted, although the said lands may be in the actual occupancy of persons holding the same adverse to the said grantees.

"SEC. 3. The patent issued, or any grant made by the United States to the city, shall inure to the several use, benefit, and behoof of the said possessors, their heirs and assigns, mentioned in the preceding section, as fully and effectually, to all intents and purposes, as if it were issued or made directly to them individually and by name.

"SEC. 4. The city, however, as a consideration annexed to the next two preceding sections, reserves to itself all the lots which it now occupies, or has already set apart for public squares, streets, and sites for school-houses, city-hall, and other buildings belonging to the corporation; and also such lots and lands as may be selected and reserved for streets and other public purposes, under the provisions of the next succeeding sections."

This ordinance was ratified by the legislature of California on March 11, 1858, (Stat. of California of 1858, chap. 66, p. 52).

And on July 1, 1864, Congress passed an act, entitled "An act to expedite the settlement of titles to land in the State of California," by the fifth section of which all the right and title of the United States to the lands within the corporate limits of the city of San Francisco, as defined in its charter passed April 15, 1851, was relinquished and granted to the city and its successor for the uses and purposes specified in the ordinance, with some exceptions not necessary to be here mentioned. (13 Stat. chap. 194, sec. 5, p. 333.)

The following is the decree of the Circuit Court of the United States for the District of California, entered May 18, 1865, confirming the claim of the city of San Francisco to its pueblo lands:

the city. Act of April 19, 1856, consolidating the government of the city and county of San Francisco. Sess. Laws 1856, c. 125, p. 145.

THE CITY OF SAN FRANCISCO
vs.
THE UNITED STATES.

The appeal in this case, taken by the petitioner, the city of San Francisco, from the decree of the Board of Land Commissioners, to ascertain and settle private land claims in the State of California, entered on the twenty-first day of December, 1854, by which the claim of the petitioner was adjudged to be valid, and confirmed to lands within certain described limits, coming on to be heard upon the transcript of proceedings and decision of said board, and the papers and evidence upon which said decision was founded, and further evidence taken in the District Court of the United States for the Northern District of California pending said appeal — the said case having been transferred to this court by order of the said District Court, under the provisions of section four of the act entitled "An Act to expedite the settlement of titles to lands in the State of California," approved July 1st, 1864, — and counsel of the United States and for the petitioner having been heard, and due deliberation had, it is ordered, adjudged and decreed that the claim of the petitioner, the city of San Francisco, to the land hereinafter described is valid, and that the same be confirmed.

The land of which confirmation is made is a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula *above ordinary high-water mark* (as the same existed at the date of the conquest of the country, namely, the seventh day of July, A.D. 1846,) on which the city of San Francisco is situated as will contain an area of four square leagues; said tract being bounded on the north and east by the Bay of San Francisco; on the west by the Pacific Ocean; and on the south by a due east and west line drawn so as to include the area aforesaid, subject to the following deductions, namely: such lands as have been heretofore reserved or dedicated to public uses by the United States, and also such parcels of land as have been, by grants from lawful authority, vested in private ownership and have been finally confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals in proceedings now pending therein for that purpose; all of which said excepted parcels of land are included within the area of four square leagues above mentioned, but are excluded from the confirmation to the city. This confirmation is in trust for the benefit of the lot-holders under grants from the pueblo, town or city of San Francisco, or other competent authority, and as to any residue, in trust for the use and benefit of the inhabitants of the city.

FIELD,
Circuit Judge.

SAN FRANCISCO, *May 18th*, 1865.

The plaintiffs did not, however, on the hearing, rely principally, or to any great extent, upon any estoppel by that decree, but endeavored to establish their claim of title by conveyances from former occupants of different parcels of land, known as the "Kissling tract," and the "Thorne and Center tract," and of the rights enuring to the occupants under what is known, from its reputed author, as the Van Ness ordinance, the object of which was to settle and quiet the title of persons in possession of lands in the city of San Francisco; and under the act of the legislature of the State of California, passed in March, 1858, ratifying and confirming the ordinance; and under the act of Congress relinquishing and granting to the city all the interest of the United States to lands within the

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The following is the act of Congress of March 8, 1866, also confirming said claim, and relinquishing all interest in the lands covered by that decree of confirmation not relinquished by the act of 1864.

"An act to quiet the title to certain lands within the corporate limits of the city of San Francisco," approved March 8, 1866.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all the right and title of the United States to the land situated within the corporate limits of the city of San Francisco, in the State of California, confirmed to the city of San Francisco by the decree of the Circuit Court of the United States for the Northern District of California, entered on the eighteenth day of May, one thousand eight hundred and sixty-five, be, and the same are hereby, relinquished and granted to said city of San Francisco and its successors, and the claim of said city to said land is hereby confirmed, subject, however, to the reservations and exceptions designated in said decree, and upon the following trusts, namely: that all the said land, not heretofore granted to said city, shall be disposed of and conveyed by said city to parties in the *bona fide* actual possession thereof, by themselves or tenants, on the passage of this act, in such quantities and upon such terms and conditions as the legislature of the State of California may prescribe, except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses: *Provided, however*, That the relinquishment and grant by this act shall not interfere with or prejudice any valid adverse right or claim, if such exist, to said land or any part thereof, whether derived from Spain, Mexico, or the United States, or preclude a judicial examination and adjustment thereof." 14 Stat. 4.

The patent issued by the United States to the city of San Francisco upon the survey of her claim is dated June 20, 1884, and described the lands as bounded on the bay by ordinary high-water mark, as it existed July 7, 1846, the line of which crosses the mouth of all creeks entering the bay.

corporate limits of the act of 1851 in trust for the uses and purposes of that ordinance. They also claimed the benefit of a deed of the tide-land commissioners of the State to Eugene L. Sullivan, one of the grantors of William J. Shaw, dated December 3, 1870, which purported, for the consideration of $352.80, to release to the grantee the right, title and interest of the State of California to the premises therein described.

The testimony, documentary and otherwise, produced in the case, gives a very clear as well as accurate account of the origin, nature and extent of the title claimed by the city of San Francisco, or the city and county of San Francisco, to its municipal lands, as successors to the rights of the former pueblo. This history has been related in several cases in this court, notably in *Trenouth* v. *San Francisco*, 100 U. S. 251; *Palmer* v. *Low*, 98 U. S. 1; *Grisar* v. *McDowell*, 6 Wall. 363; and *Townsend* v. *Greeley*, 5 Wall. 326. A brief statement of the principal facts only will be necessary to an intelligent disposition of the questions presented for consideration.

When California was occupied by the forces of the United States in 1846 there was a Mexican pueblo at San Francisco, that is, a settlement or town under the Mexican government, with alcaldes and other officers, for the administration of its municipal affairs. It was the law of Mexico that pueblos or towns, when once recognized by public authority, became entitled, for their benefit and that of their inhabitants, to the use of lands constituting the site of such pueblos or towns, and adjoining territory, to the extent of four square leagues, to be measured off and assigned to them by officers of the government. *Townsend* v. *Greeley*, 5 Wall. 326, 336. Under those laws the pueblo of San Francisco asserted a claim to four square leagues, to be measured off from the northern portion of the peninsula on which the present city is situated. The alcaldes, or officers of the town, under the Mexican government, exercised the power of distributing the lands in small parcels to the inhabitants, for building, cultivation and other uses, the remainder being generally held for commons and other public purposes. When our forces took possession of San Francisco citizens of the United States were appointed by

the naval and military commanders to act in the place of the Mexican officers of the pueblo, and they exercised a like authority, which they supposed was invested in them, in making various grants of land in the city. Many persons then there, and many who subsequently settled in California, disputed such authority, and took up and occupied any land which they found vacant within the limits of the pueblo. The natural consequence followed — confusion and uncertainty in the titles in the city for some years after the acquisition of the country.

In April, 1850, San Francisco was incorporated by the state government as a city. She at once claimed the lands of the pueblo as its successor, and, after the Board of Land Commissioners to settle private land claims in California was created by act of Congress in March, 1851, prosecuted her claim to this land for confirmation. 9 Stat. c. 41, p. 631. In December, 1854, that board confirmed her claim to a portion of the four square leagues and denied it for the balance. The city appealed to the District Court of the United States from that decision, and the appeal remained there for some years undisposed of. In September, 1864, the case was transferred from that court to the Circuit Court of the United States, under the authority of the act of Congress to expedite the settling of titles to lands in the State of California, 13 Stat. 333, c. 194, § 4; and in October following its claim was confirmed to four square leagues, subject to certain reservations. The decree of final confirmation, in its present form, was not entered until the 18th of May, 1865. That decree confirmed the claim of the city to a tract of land embracing so much of the upper portion of the peninsula which is situated above the ordinary high-water mark of 1846, as would contain an area of four square leagues, the tract being bounded on the north and east by the bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line drawn so as to include the area designated, subject to certain deductions which it is unnecessary to mention here. The confirmation was to San Francisco in trust for the benefit of lot-holders under grants from the pueblo, town or city of San Francisco, or

other competent authority, and as to any residue in trust for the benefit of the inhabitants of the city.

In April, 1851, the charter of San Francisco was repealed and a new charter adopted. Pending the appeal of the pueblo claim in the United States District Court, the Van Ness ordinance, above mentioned, was passed by the common council of the city, by which the city relinquished and granted all its right and claim to land within its corporate limits as defined by its charter of 1851, with certain exceptions, to parties in the actual possession thereof by themselves or tenants on or before the first of January, 1855; provided such possession was continued up to the time of the introduction of the ordinance into the common council, which was in June, 1855, or, if interrupted by an intruder or trespasser, had been or might be recovered by legal process; and it declared that for the purposes contemplated by the ordinance persons should be deemed possessors who held titles to land within those limits by virtue of a grant made by any ayuntamiento, town council, alcalde or justice of the peace of the former pueblo before the 7th of July, 1846, or by virtue of a grant subsequently made by the authorities, within certain limits of the city previous to its incorporation by the State, provided the grant, or a material portion of it, had been recorded in a proper book of records in the control of the recorder of the county previous to April 3, 1851. The city among other things, reserved from the grant all the lots which it then occupied or had set apart for public squares, streets, and sites for school houses, city hall, and other buildings belonging to the corporation, but what lots or parcels were thus occupied or set apart does not appear.

Subsequently, in March, 1858, the legislature of the State ratified and confirmed this ordinance, (Stats. of Cal. of 1858, c. 66, p. 52,) and by the fifth section of the act of Congress to expedite the settlement of titles to lands in the State of California, the right and title of the United States to the lands claimed within the corporate limits of the charter of 1851 were relinquished and granted to the city and its successors for the uses and purposes specified in that ordinance. 13 Stat. 333, c. 194, § 5.

Notwithstanding the title to the lands within the limits of the charter of 1851 was thus settled, the appeal from the decree of the Board of Land Commissioners was prosecuted both by the city and the United States — by the city from so much of the decree as included in the estimate of the quantity of the land confirmed, the reservations made — and by the United States from the whole decree.

Whilst these appeals were pending, Congress passed the act of March 8, 1866, to quiet the title to the land within the city limits. 14 Stat. c. 13, p. 4. At that time the limits of the city were coincident with those of the county, and embraced the whole of the four square leagues confirmed. By that act all the right and title of the United States to the land covered by the decree of the Circuit Court were relinquished and granted to the city, and the claim to the land was confirmed, subject, however, to certain reservations and exceptions, and in trust that all land not previously granted to the city should be disposed of and conveyed by the city to the parties in the *bona fide* actual possession thereof, by themselves or tenants, on the passage of the act, in such quantities and on such terms and conditions as the legislature of the State of California might prescribe, excepting such parcels as might be reserved and set apart by ordinance of the city for public uses. In consequence of this act the appeals pending were dismissed. *Townsend* v. *Greeley*, 5 Wall. 326. The title of the city, therefore, rests upon the decree of the court recognizing its title to the four square leagues, and establishing the boundaries, and the confirmatory acts of Congress. *Grisar* v. *McDowell*, 6 Wall. 363.

The trust upon which the city held the municipal lands it had acquired as successor of the Mexican pueblo, as declared in the decree of confirmation, was a public and municipal trust, to be exercised chiefly in the distribution of the lands to occupants and settlers and in the use of the remainder for the public purposes of the city; and the exercise was subject to the supervision and control of the legislative authority either of the State or of the United States, and it does not matter which, inasmuch as its exercise, as directed by the Van Ness

ordinance, was authorized both by the legislature of the State and the act of the Congress of the United States. The purpose of the ordinance, as indicated in its title, as well as in its several provisions, was to settle and quiet titles to lands in the city of San Francisco. The settlement which it made was by a recognition of certain previous grants of the city or of its officers and the transfer of its title to those who had occupied the lands in good faith during certain periods. As held by the Supreme Court of California, in its elaborate and exhaustive examination of the law respecting the property rights of Mexican pueblos, in *Hart* v. *Burnett*, 15 California, 530, 612, the ordinance was justified by a policy which was analogous to the laws and purposes which gave existence to the rights of the pueblo. Section two of an order of the common council, passed on the 16th of October, 1856, which was ratified by the same legislative act of the State which confirmed the Van Ness ordinance, provides that the grant or relinquishment of title made by that ordinance in favor of the several possessors of the land should take effect as fully and completely for the purpose of transferring the city's interest, and for all other purposes whatsoever, as if deeds of release and quit-claim had been duly executed and delivered to the parties individually and by name, and that no further conveyance or act should be necessary to invest such possessors with the interest, title, rights and benefits which the ordinance intended or purported to transfer and convey.

The claims of the grantors of the plaintiffs to the title to the lands, through conveyances from Kissling, and from Thorne and Center, are fully sustained by the evidence. Kissling settled upon a parcel of the land in relation to which this suit is brought, in March, 1849. He was at the time a native of Denmark, but had declared his intention to become an American citizen, and in the notice which he recorded of his claim he represented it as a preëmption right to one hundred and sixty acres of land in the district of San Francisco. That claim of itself was of no value whatever, as the lands were not subject to preëmption, not being lands of the United States, nor would they have been even if owned by the United States,

except under the town-site act, because they were within the limits of what was then a town; but a large portion of the tract thus taken up was fenced in by Kissling, occupied by him, and a portion of it cultivated. His occupation was continuous during the whole period required by the ordinance to enable him to have the benefit of the transfer it made. He, therefore, acquired as complete a title in the interest which the city then held in the property as it was possible for the city to convey, under the Van Ness ordinance and the confirmatory legislation of the State and the United States.

The same may be said of the claim taken up by Thorne and Center on the 5th of August, 1850, and which purported to cover sixty acres. Of itself, it was, like the other, of no validity, and conferred no rights, for the land was not public land open to acquisition in that way. But these parties enclosed the land, occupied and cultivated it, and exercised acts of ownership over it, until the 15th of July, 1854, when they sold four and one-half acres of it to one Charles V. Stewart. They continued, however, to exercise ownership over the residue during all the period required by the Van Ness ordinance to obtain its benefits and the transfer of title from the city. As to the four and one-half acres sold, the grantee continued in the possession and use of that portion also, during the period required by the ordinance.

The title to the lands thus claimed by Kissling, and by Thorne and Center, and by Stewart as a purchaser from them of four and a half acres, became, by operation of that ordinance and the confirmatory legislation mentioned vested in those parties, and by their conveyance passed to William J. Shaw, and was by him conveyed to Eugene L. Sullivan, and thence to the plaintiffs in this suit. All the right, title, and interest which the city held, and which could be conveyed under the Van Ness ordinance, had therefore passed to Shaw when the suit to quiet his title was commenced and carried to judgment in the District Court of the Twelfth Judicial District Court of the State, and whatever benefit Shaw had acquired by that decree in his favor enured to the benefit of his grantees, the public rights reserved by the Van Ness ordinance

being necessarily excepted. One of those was a reservation, notwithstanding its grant, of lands then occupied or set apart for public squares, streets and sites for school houses, city hall, and other buildings belonging to the corporation; and the decree in this case should have excepted from its operation the lands thus reserved. An effort was made before the examiner, who took the evidence in the case, to do away with the reservation by the verbal statement of a witness that the premises described did not include "any school-lots, engine-lots, hospital-lots or property dedicated for street purposes or public squares;" but such testimony was objected to as incompetent, and as not being the best evidence the subject admitted of, and the objection was in our judgment well taken. If there were no reservations, as specified in the ordinance, the fact should have been established by the public records of the city and county. Its property reserved by statute from private ownership for public uses is not to be sacrificed or lost upon loose verbal testimony of the character offered.

We do not attach any importance, upon this question of reservation, to the deed of the tide-land commissioners, executed to Sullivan on the 3d of December, 1870, for the State did not at that time own any tide or marsh lands within the limits of the pueblo as finally established by the Land Department. All the marsh lands, so called, which the State of California ever owned, were granted to her by the act of Congress of September 28, 1850, known as the Swamp-land Act, by which the swamp and overflowed lands within the limits of certain States, thereby rendered unfit for cultivation, were granted to the States to enable them to construct the necessary levees and drains to reclaim them. 9 Stat. c. 84, p. 519. The interest of the pueblo in the lands within its limits goes back to the acquisition of the country, and precedes the the passage of that act of Congress. And that act was never intended to apply to lands held by the United States charged with any equitable claims of others, which they were bound by treaty to protect. As to tide-lands, although it may be stated as a general principle — and it was so held in *Weber* v. *Board of Harbor Commissioners*, 18 Wall. 57, 65, — that the

titles acquired by the United States to lands in California under tide-waters, from Mexico, were held in trust for the future State, so that their ownership and right of disposition passed to it upon its admission into the Union, that doctrine cannot apply to such lands as had been previously granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way. When the United States acquired California it was with the duty to protect all the rights and interests which were held by the pueblo of San Francisco under Mexico. The property rights of pueblos equally with those of individuals were entitled to protection, and provision was made by Congress in its legislation for their investigation and confirmation. *Townsend* v. *Greeley*, 5 Wall. 326, 337. The duty of the government and its power in the execution of its treaty obligations to protect the claims of all persons, natural and artificial, and of course of the city of San Francisco as successor to the pueblo, were superior to any subsequently acquired rights or claims of the State of California, or of individuals. The confirmation of the claim of the city necessarily took effect upon its title as it existed upon the acquisition of the country. In confirming it the United States through its tribunals recognized the validity of that title at the date of the treaty — at least, recognized the validity of the claim to the title as then existing, and in the execution of its treaty obligations no one could step in between the government of the United States and the city seeking their enforcement. It is a matter of doubt whether there were any lands within the limits of the pueblo, as defined and established by the Land Department, that could be considered tide-lands, which, independently of the pueblo, would vest in the State. The lands which passed to the State upon her admission to the Union were not those which were affected occasionally by the tide, but only those over which tide-water flowed so continuously as to prevent their use and occupation. To render lands tide-lands, which the State by virtue of her sovereignty could claim, there must have been such continuity of the flow of tide-water over them, or such regularity of the flow within every twenty-four hours,

as to render them unfit for cultivation, the growth of grasses, or other uses to which up-land is applied. But even if there were such lands, their existence could in no way affect the rights of the pueblo. Its rights were dependent upon Mexican laws, and when Mexico established those laws she was the owner of tide-lands as well as up-lands, and could have placed the boundaries of her pueblos wherever she thought proper. It was for the United States to ascertain those boundaries when fixing the limits of the claim of the city, and that was done after the most thorough and exhaustive examination ever given to the consideration of the boundaries of a claim of a pueblo under the Mexican government. After hearing all the testimony which could be adduced, and repeated arguments of counsel, elaborate reports were made on the subject by three Secretaries of the Interior. They held, and the patent follows their decision, that the boundary of the bay, which the decree of confirmation had fixed as that of ordinary high-water mark, as it existed on the 7th of July, 1846, crosses the mouth of all creeks entering the bay. There was, therefore, nothing in the deed of the tide-land commissioners which could by any possibility impair the right of the city to exercise the power reserved in the Van Ness ordinance over such portions of the lands conveyed to occupants under that ordinance as had been occupied or set apart for streets, squares and public buildings of the city. Such a reservation should have been embodied in the decree in this case.

The decree should therefore be modified by adding the declaration that nothing therein shall be deemed to impair in any respect the rights reserved in the Van Ness ordinance to the city of San Francisco, or to its successor, the city and county of San Francisco, over lands that had then been occupied or set apart for streets, squares and public buildings of the city, and as thus modified be affirmed; and it is so ordered.

MERRILL *v.* MONTICELLO.

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

No. 125. Argued December 19, 22, 1890. — Decided March 2, 1891.

The implied power of a municipal corporation to borrow money to enable it to execute the powers expressly conferred upon it by law, if it exists at all, does not authorize it to create and issue negotiable securities, to be sold in the market and to be taken by a purchaser freed from equities that might be set up by the maker.

To borrow money, and to give a bond or obligation therefor which may circulate in the market as a negotiable security freed from any equities that may be set up by the maker of it, are essentially different transactions in their nature and legal effect.

A municipal corporation in Indiana issued its negotiable bonds having ten years to run, to the amount of $20,000, the proceeds to be used to aid in the construction of a school house, and sold them in open market. When they matured, a new issue of like bonds to the amount of $21,000 was made, which were sold in open market, and a part of the proceeds converted by a trustee of the corporation to his own use. *Held*, that the new issue was void for want of authority, and that the municipality was not estopped from setting up that defence.

THIS was an action at law by Abner L. Merrill, a citizen of Massachusetts, against the town of Monticello, in the State of Indiana, upon certain bonds and coupons issued by the town and purchased by the plaintiff in open market.

The bonds and coupons were in form like the following:

"UNITED STATES OF AMERICA.

"No. 1. State of Indiana. $100.

"Funding Bond of the Town of Monticello.

"Ten years after date, the town of Monticello, in the county of White, State of Indiana, promises to pay to the bearer, at the Importers' and Traders' National Bank, New York, one hundred dollars in gold, with interest thereon at the rate of seven per cent per annum, payable annually, in gold, at the same place, upon presentation of the proper coupon hereto

attached, without any relief whatever from the valuation or appraisement laws of the State of Indiana. The principal of this bond shall be due and payable, at the option of the holder, on the non-payment, after due presentation, of any of said coupons, for ninety days after the maturity thereof. This bond is one of a series of $21,000, authorized by the said town by an ordinance passed by the board of trustees thereof, on the thirteenth day of May, 1878, for the purpose of funding the indebtedness of the said town.

"In witness whereof, the board of trustees of the town of Monticello have caused this bond and the coupons thereof to be signed by their president and clerk, and the seal of the town to be affixed hereto, at the said town of Monticello, this twentieth day of May, 1878.

"Attest: F. Bosinger, *Clerk.* R. W. Christy, *President.*

[Copy of coupon.]

"The town of Monticello, Indiana, will pay the bearer, in gold coin, seven dollars, without relief from valuation or appraisement laws of the State of Indiana, at the Importers' and Traders' National Bank, New York, on the twentieth day of May, 1880, being one year's interest on bond No. 1.

"Attest: F. Bosinger, *Clerk.* R. W. Christy, *President.*"

The coupons numbered 2, attached to each bond, having been presented for payment when due, at the place specified therein, and payment having been refused, the plaintiff, as the holder of 143 of the bonds with coupons attached, elected to declare the principal sum due, in accordance with the terms of the bonds, and, accordingly, on the 1st of July, 1881, brought this action to recover that amount.

A demurrer to the defendant's answer having been sustained, it filed an amended answer, in substance as follows: At the time the bonds in suit were issued the defendant was, and still is, a municipal corporation or town, duly organized under the laws of Indiana, in pursuance of a statute of that State passed June 11, 1852. On the 24th of June, 1869, a petition was presented to the board of trustees of the town by

the school trustees, praying for the issue of the bonds of the town to aid in building a school house; and on the same day the trustees of the town passed an ordinance directing that there be issued to the school trustees $20,000 worth of coupon bonds, of the denomination of $100 each, bearing 10 per cent interest, payable annually, which bonds, running ten years, were issued by the town May 1, 1869, and were afterwards sold in open market. The principal of them had not been paid, and they constituted the only indebtedness of the town, when, on the 11th of May, 1878, the following petition, signed by the owners of taxable property in the town, was presented to the town trustees:

"We, the undersigned, citizens of the town of Monticello, Indiana, and owners of the taxable property therein, respectfully petition that you, as trustees of said town, contract a loan for said town, for the purpose of paying the indebtedness thereof, in the sum of twenty-one thousand dollars."

On the same day the board of town trustees passed and entered of record the following ordinance:

"Be it ordained by the board of trustees of the town of Monticello, Indiana, That said town issue bonds in the sum of twenty-one thousand dollars, in denominations of one hundred dollars, bearing interest at the rate of seven per centum per annum, payable in gold, to provide the means with which to pay the indebtedness of said town. And be it further ordained, That when said bonds are issued they be placed in the hands of J. C. Wilson, a member of the board of trustees, for negotiation and sale. And be it further ordained, That said bonds shall not be sold at a price less than ninety-four cents on the dollar."

In pursuance of this ordinance, on the 20th of May, 1878, there were issued coupon bonds of the town to the amount of $21,000, bearing 7 per cent interest, payable annually, and due in ten years, being the same bonds a large amount of which are involved in this action. After the bonds were issued, they were delivered to said J. C. Wilson, who sold them and converted the proceeds thereof to his own use, the town not receiving any benefit therefrom.

Statement of the Case.

The answer further alleged that on the 20th of May, 1878, when these bonds were issued, there was no law of the State of Indiana which authorized the trustees of an incorporated town in that State to issue its bonds for the purpose of funding its indebtedness, or to issue its bonds for negotiation and sale, for the purpose of paying its indebtedness or of raising money to pay its indebtedness; and that, at the date last above mentioned, the defendant was an incorporated town, organized under the general law of the State, for the incorporation of towns having a population of twelve hundred inhabitants.

A general demurrer to the amended answer, as not stating facts sufficient to constitute a good defence to the complaint, was overruled by Judge Gresham, in December, 1882, (14 Fed. Rep. 628;) and the plaintiff then filed a reply, that part of it material to this consideration being, in substance, as follows: After admitting the main facts stated in the answer respecting the issue and sale of the bonds of 1869, and also as to the issue of the bonds of 1878, here in suit, it was alleged that the bonds in suit were legal, having been authorized by an act of the state legislature, passed March 3, 1873; that the town was without means to pay its indebtedness except by the issue of its bonds, the tax levies permitted by law being insufficient for that purpose; that J. C. Wilson, as the agent of the town, under and by virtue of the authority conferred upon him by the aforesaid ordinance, negotiated the bonds in open market, and received from their sale the sum of $19,680.17, a part of which sum, to wit, $6618.10, he deposited in a bank in that town, and absconded with the remainder; that the town, by suit instituted for that purpose, recovered the aforesaid amount which had been deposited in the bank, and appropriated it to its own use; and that the plaintiff, in July, 1878, purchased 143 of the bonds (those in suit) in open market in Boston, at par for cash, without any notice or knowledge on his part that Wilson had not accounted to the town for the money received by him from the sale of the bonds.

A demurrer to the reply was overruled by Judge Woods, holding the Circuit Court, 22 Fed. Rep. 589. The case was

then tried before Judges Gresham and Woods, upon the merits, under a written stipulation, waiving a jury, judgment being given in favor of the defendant.

Plaintiff afterwards made a motion for a new trial, which was overruled by Judge Woods at the November term of the court, 1886. At the same time plaintiff again made a motion for a new trial, setting up, in substance, the following: That he had prepared a bill of exceptions setting forth all the evidence in the case, all of which, it was alleged, tended to support the declaration and the reply; that he was desirous of bringing the case to this court by writ of error, but, under the rules and practice here and the statutes of the United States, he would not be able to present the questions involved to this court, without a special finding of facts upon the evidence adduced at the trial; that a manifest hardship and injustice had been done him in the case, which occurred in the manner following: The judge who heard the case on demurrer to the answer held the answer sufficient, while another judge of the court, who heard the case on demurrer to the reply, pronounced the reply sufficient, and at the final hearing plaintiff, relying upon the evidence which supported and proved his reply, did not require or ask a special finding of facts, supposing, of course, that his reply having been proved, there would be a certificate of division in opinion between the judges who tried the cause, or that, if not so, he would have saved to him by the record the questions of law in some other proper manner; that the entry of the judgment took him wholly by surprise, and he had not saved the legal questions as he should have done, by requesting beforehand a special finding of facts, because having had his replication sustained, he had no doubt of the final judgment of the court being favorable to him; and that he was fearful he would be remediless to present to this court the questions involved in the case, unless the judgment should be set aside and a special finding of facts made by the court.

This motion was sustained by Judge Woods, over the objection of the defendant, and a new trial was granted. The case was again tried by Judge Woods, without a jury, who, at plaintiff's request, made and filed the following finding of

facts, and entered judgment thereon in favor of the defendant:

"1st. At the time hereinafter mentioned the defendant was a municipal corporation organized and existing under and by virtue of the laws of the State of Indiana, and situate in the county of White, in the said State.

"2d. That upon the 24th day of January, 1869, a petition was presented to the board of trustees of said town by the school trustees thereof praying for the issue of the bonds of said town to aid in the building of a school house in said town, which said petition was granted, and in pursuance thereof the trustees of said town did pass and adopt an ordinance directing that there should be made and issued to the said school trustees of said town twenty thousand dollars of coupon bonds of said town of the denomination of one hundred dollars each, with interest at the rate of ten per cent per annum, payable annually; and afterwards, to wit, on the 1st day of May, 1869, the said town executed the said bonds under said ordinance to the amount of $20,000, maturing in ten years after the date thereof, which bonds were sold and delivered to certain persons, who then and there became the purchasers thereof, and which bonds at the times hereinafter mentioned were outstanding, unpaid and valid obligations of the said town.

"3d. On the 11th day of May, 1878, a petition was presented to the board of trustees of the defendant, signed by citizens, owners of taxable property in said town, praying for the issue of bonds of said town, to the amount of $21,000, which petition (omitting the names of the signers thereto) is in the words following, to wit:

[Then follows the petition as set out in the answer, and heretofore quoted.]

"4th. That upon the 20th day of May, 1878, in pursuance of the said petition and ordinance, the said defendant town made and executed its 210 coupon bonds, payable to bearer, of the denomination of $100 each, bearing interest at the rate of seven per centum per annum, which bonds and coupons are in the words and figures following, to wit:

[Then follows a copy of a bond and a coupon heretofore set out in full.]

"5th. That the said bonds were put in the hands of the said J. C. Wilson, in pursuance of said ordinance, for sale, and that $14,300 of the said bonds, being the same as those now in suit, were sold to Claypoole and Stoddard, of Indianapolis, Indiana, for which the said firm of Claypool and Stoddard paid to the said Wilson the sum of $12,918.40, which said last-named sum was paid to said Wilson in the following manner: On or about April 14, 1879, said Claypool and Stoddard, by the direction of said Wilson, paid a draft drawn by G. A. Ivers, of Chicago, for $6000; on the same day said Claypool and Stoddard paid said Wilson, by their check on the First National Bank of Indianapolis, the further sum of $5000; that on the 13th day of May, 1879, the said Claypool and Stoddard paid to said Wilson, by their check on the First National Bank of Indianapolis, the further sum of $1840.30, and within a few days after the last-named date said Claypool and Stoddard, for the balance of the said sum of $12,918.40, paid to him the sum of $78.17.

"6th. That the board of trustees of said town required and exacted from their said agent, J. C. Wilson, a bond, with sureties, to secure the money which he might realize from the sale of said bonds.

"7th. That the said Wilson, after the sale of said bonds, failed to turn over the proceeds thereof to the treasurer of the said town and fled the country.

"8th. That at the time the said Wilson fled the country he had a large sum of money on deposit in the First National Bank of Monticello, Indiana, to his credit as 'trustee'; that suit was instituted by the defendant town against said bank to recover the same, upon the ground that such money was the proceeds of the sale of said bonds so made by the said Wilson; that judgment was rendered in favor of said town and against said bank for the sum of $6988.43; that thereupon the receiver of the said bank appealed to the Supreme Court of Indiana, and thereupon said judgment was affirmed by said Supreme Court — *Bundy, Receiver, &c.* v. *Town of*

Counsel for Parties.

Monticello, 84 Indiana, 119 — and said town recovered the sum of $6988.43.

"9th. That the said town instituted a proceeding upon the bond so given by the said Wilson to the said town to secure the money which he might realize from the sale of said bonds, and in a court of competent jurisdiction recovered judgment against the sureties and the said Wilson on the said bond for the full amount of the proceeds arising from the sale of said bonds, and from which judgment an appeal was taken to the Supreme Court of Indiana, and reported in 85 Indiana Reports, at page 10, and which said judgment was reversed and remanded by said Supreme Court for another trial, and afterwards the said suit was dismissed by the said town, and that the said town has received nothing on account of said bond.

"10th. That at the time of the issuing of the bonds in suit there was in the town treasury $3047.85, and no more, received under the taxing act of the legislature of Indiana, under which the bonds were issued, as a special fund for the payment of the $20,000 ten per cent bonds then outstanding, and that under the laws of the State of Indiana a sum sufficient to pay said bonds could not have been raised before maturity of the same on the amount of taxable property in said town.

"11th. That the plaintiff is a resident of Newton, in the State of Massachusetts, and that he bought the bonds in suit in open market, in the city of Boston, as an investment, and paid therefor a valuable consideration, without any notice of any irregularity as to their issue or any claim to that effect.

"And the court further finds that the principal of the bonds sued on is wholly unpaid, and that the interest upon the same accrued is wholly unpaid from the 20th day of May, 1880.

"And the court further finds, as a conclusion of law upon the foregoing facts, for the defendant."

Mr. Addison C. Harris for plaintiff in error.

Mr. David Turpie and *Mr. William E. Uhl* for defendant in error.

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

The decisive question presented by the record in this case is, did the town of Monticello have authority, under the laws of Indiana, to issue for sale in open market negotiable securities in the forms of the bonds and coupons on which recovery is here sought? Chancellor Kent, in his Commentaries, vol. 2, 298, 299, referring to the strictness with which corporate powers are construed, irrespective of the distinction between public and private corporations, uses the following language: "The modern doctrine is, to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any other. The Supreme Court of the United States declared this obvious doctrine, and it has been repeated in the decisions of the state courts. . . . As corporations are the mere creatures of law, established for special purposes, and derive all their powers from the acts creating them, it is perfectly just and proper that they should be obliged strictly to show their authority for the business they assume, and be confined, in their operations, to the mode and manner and subject matter prescribed."

Judge Dillon, in his work on Municipal Corporations, § 89, says: "It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers and no others:* First, those granted in *express words;* second, those *necessarily or fairly implied* in or *incident to* the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation — not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."

In *Hopper* v. *Covington*, 118 U. S. 148, 151, this court, in passing upon the power of incorporated towns in Indiana, under laws which we will have to consider and pass upon in this case, said, Mr. Justice Gray delivering the opinion: "When

the law confers no authority to issue the bonds in question, the mere fact of their issue cannot bind the town to pay them, even to a purchaser before maturity and for value. *Marsh* v. *Fulton County*, 10 Wall. 676; *East Oakland* v. *Skinner*, 94 U. S. 255; *Buchanan* v. *Litchfield*, 102 U. S. 278; *Dixon County* v. *Field*, 111 U. S. 83; *Hayes* v. *Holly Springs*, 114 U. S. 120; *Davies County* v. *Dickinson*, 117 U. S. 657."

In *Gause* v. *Clarksville*, 5 Dillon, 165, the court, in an able discussion of the inherent and incidental authority of municipal corporations, holds, that whether a municipal corporation possesses the power to borrow money, and to issue negotiable securities therefor, depends upon a true construction of its charter and the legislation of the State applicable to it.

In order to determine the question before us, recourse must be had to the statutory enactments, applicable to the subject, that were in force at the time the bonds in this suit were issued, in May, 1878. These enactments are contained in sections 3333, 3342, 3344, 3345, 4488 and 4489 of the Revised Statutes of Indiana of 1881. Sec. 3333 is a section of the act of 1852 for the incorporation of towns in that State, and contains the usual grant of municipal powers. Sec. 3342, which was also section 27 of the same act of 1852, provides as follows: "No incorporated town under this act shall have power to borrow money or incur any debt or liability, unless the citizen-owners of five-eighths of the taxable property of such town, as evidenced by the assessment roll of the preceding year, petition the board of trustees to contract such debt or loan. And such petition shall have attached thereto an affidavit verifying the genuineness of the signatures to the same. And for any debt created thereby, the trustees shall add to the tax duplicate of each year, successively, a levy sufficient to pay the annual interest on such debt or loan, with an addition of not less than five cents on the hundred dollars, to create a sinking fund for the liquidation of the principal thereof."

The other sections contain the provisions of certain statutes passed in 1867, 1869 and 1873. It is only necessary to quote here sections 4488 and 4489, as they embody the provision of the act of 1873, which is itself the statute of 1869 rewritten

in order to extend to other purposes not material to this inquiry.

"SEC. 4488. Any city or incorporated town in this State which shall, by the action of its school trustees, have purchased any ground and building or buildings; or may hereafter purchase any ground and building or buildings; or has commenced, or may hereafter commence, the erection of any building or buildings for school purposes; or which shall have, by its school trustees, contracted any debts for the erection of such building or buildings, or the purchase of such ground and building or buildings; or such trustees shall not have the necessary means with which to complete such building or buildings, or to pay for the purchase of such ground and building or buildings, or pay such debt, — may, on the filing, by the school trustees of said city or town, of a report, under oath, with the common council of such city, or the board of trustees of such town, showing the estimated or actual cost of any such ground and building or buildings, or the amount required to complete such building or buildings, or purchase such ground and building or buildings, or the amount of such debt, on the passage of an ordinance authorizing the same by the common council of said city, or the board of trustees of such town, issue the bonds of such city or town to an amount not exceeding, in the aggregate, fifty thousand dollars, in denominations not less than one hundred nor more than one thousand dollars, and payable at any place that may be designated in the bonds (the principal in not less than one year nor more than twenty years after the date of such bonds, and the interest annually or semi-annually, as may be therein provided) to provide the means with which to complete such building or buildings, or to pay for the purchase of such ground and building or buildings, and to pay such debt. Such common council or board of trustees may, from time to time, negotiate and sell as many of such bonds as may be necessary for such purpose, in any place and for the best price that can be obtained therefor in cash: *Provided*, That such bonds shall not be sold at a price less than ninety-four cents on the dollar.

"SEC. 4489. The proceeds of the sales of such bonds shall

be paid to the said school trustees, to enable them to erect or complete such building or buildings and pay such debt. But before payment to them, such school trustees shall file with the county auditor a bond, payable to the State of Indiana, in a sum not less than the full amount of the said money so to be paid to them, and with security to be approved by said auditor, conditioned for the faithful and honest application of such money to the purpose for which the same was provided; and such trustees, and their surety or sureties, shall be liable to suit on such bond for any waste, misapplication or loss of such money, in the same manner as now provided for waste or loss of school revenue."

We have given these sections in full to show the entire legislation of the State in 1878, upon the subject of the power of towns to borrow money, contract loans, incur debts and issue bonds, so that it may be the more clearly determined whether it anywhere expressly confers upon incorporated towns of the State the general power of issuing, for sale in open market, negotiable securities, in the form of bonds and coupons, which, in the hands of *bona fide* purchasers before maturity, will be subject to no legal or equitable defences in favor of the maker. In our opinion no such express power is given by these sections, either for the purpose of raising money or funding a previous indebtedness. Obviously, it cannot be found in sections 4488 and 4489, for they relate specifically and exclusively to bonds for school buildings, school grounds and school debts, and prescribe the mode by which bonds may be issued by towns for those specified objects — a mode confessedly not followed, or even attempted to be followed, in issuing the bonds in this suit. We are confirmed in this conclusion by the view taken in *Hopper* v. *Covington*, *supra*: "The averment, that the defendant is a municipal corporation under the laws of Indiana, 'with full power and authority, pursuant to the laws of said State, to execute negotiable commercial paper,' if understood as alleging a general power to execute negotiable commercial paper, is inconsistent with the public laws of the State, of which the courts of the United States take judicial notice."

The laws of Indiana referred to are those we are now considering. The court also says: "The general statute of May 15, 1869, authorized towns to issue bonds for the purchase and erection of lands and buildings for school purposes only." But the bonds in suit were not issued for either of the purposes named, but to retire and pay off the bonds of 1869. The town had no power to pay off those bonds in this way, viz. by the issue of new bonds, or it could perpetuate a debt forever. Bonds once issued for a lawful purpose must be paid by taxation. This is manifest from the provision which requires a tax to be levied each year "sufficient to pay the annual interest, with an addition of *not less* than five cents on the hundred dollars to create a sinking fund for the liquidation of the principal." When bonds are once issued for a lawful purpose, the town is *functus officio* as to that matter. To argue that the old bonds are a *debt* for school purposes which may be liquidated by new bonds is a refinement of construction which the sound sense of the law rejects.

The plaintiff in error relies mainly upon the ground that the authority in question arises, by necessary implication, from the power to make certain expenditures; from the character of the objects to be accomplished by those authorized expenditures; from the necessity of providing the means for paying a previous indebtedness lawfully incurred in such expenditures; and from other powers expressly granted. The line of his counsel's argument, and that of the district judge to whose opinion our attention has been especially called, is this: Whilst section 3342 (the same as section 27 in the act of May, 1852) is not in itself a substantive grant of power, it clearly evinces the legislative intent and understanding that the right to borrow money or otherwise incur any debt or liability might be implied as incidental to the express power given in that or any subsequent act containing not inconsistent provisions, and includes a case like this, where the power is necessary to prevent a default of payment of a previous debt, which it was authorized to create. It is insisted farther that it is the settled doctrine in Indiana that corporations take, by implication, all the reasonable modes of executing their express or substantive

powers which a natural person may adopt; and that, in the absence of positive restrictions, a corporation has the power to borrow money as an incident to such power.

Section 119, Dillon on Munic. Corp. 3d ed., lays down the Indiana law, on this subject, substantially as is contended for by the plaintiff in error. That section is as follows: "In *Indiana*, the doctrine is that corporations, along with the express and substantive powers conferred by their charters, take by implication all the reasonable modes of executing such powers which a natural person may adopt. It is a power incident to corporations, in the absence of positive restriction, to borrow money as means of executing the power." A large number of cases from the Supreme Court of Indiana are cited in a note to support the doctrine of the text. We think the proposition that, under the laws of Indiana, a town has an implied authority to borrow money, or contract a loan, under the conditions, and in the manner expressly prescribed, cannot be controverted.

But this only brings us back to the question, Does the implied power to borrow money or contract a loan carry with it a farther implication of power to issue funding negotiable bonds, for that amount, and sell them in open market, as commercial paper? Let us see. Sec. 3342 is unquestionably a limitation upon the power to borrow money. Its very language is that of mandatory negation. "No incorporated town shall have the power to borrow money, or incur any debt," unless certain conditions precedent are complied with. The conditions which the statute prescribes the statute means to be performed. There can be no legal borrowing, unless the statute is strictly followed. What does it prescribe? That there must be first a petition to the town trustees, which shall be signed by the citizen-owners of at least five-eighths of the taxable property of the town, whose signatures shall be verified by an affidavit to the petition. The prayer of the petition is required to be that the board of trustees shall contract such debt or loan. The board could not depart, in its action, from this legally required prayer of the petition without transcending its authority, and acting *ultra vires*. But the board did

depart from the prayer, for it did not borrow money, nor contract a loan; but it ordained, in so many words, that the town issue bonds for negotiation and sale at not less than ninety-four cents on the dollar. We think the words of Chief Justice Marshall, in *Head* v. *Providence Ins. Co.*, 2 Cranch, 127, 169, aptly characterize this transaction, and bear upon the points which are the subject of this controversy. Speaking of bodies corporate which have only a legal existence, he said: "The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated." See also *New York Firemen's Ins. Co* v. *Ely*, 5 Connecticut, 560; *McCracken* v. *City of San Francisco*, 16 California, 591, 619.

It is admitted that the power to borrow money, or to incur indebtedness, carries with it the power to issue the usual evidences of indebtedness, by the corporation, to the lender or other creditor. Such evidences may be in the form of promissory notes, warrants and, perhaps, most generally, in that of a bond. But there is a marked legal difference between the power to give a note to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale, in open market, a bond, as a commercial security, with immunity, in the hands of a *bona fide* holder for value, from equitable defences. The plaintiff in error contends that there is no legal or substantial difference between the two; that the issuing and disposal of bonds in market, though in common parlance, and sometimes in legislative enactment, called a sale, is not so in fact; and that the so-called purchaser who takes the bond and advances his money for it is actually a lender, as much so as a person who takes a bond payable to him in his own name.

We think the case of *Police Jury* v. *Britton*, 15 Wall. 566, is directly and absolutely conclusive against the position of the plaintiff in error, on this point. It was an action upon coupons of certain bonds issued by the Police Jury of Tensas Parish, Louisiana, the validity of which the defendant denied,

upon the ground that they were issued without the authority of any law of that State. It appeared that the Police Jury had no express authority to issue the bonds in question; and, if they had any authority of the kind, it must be implied from the general powers of administration with which the said Police Jury was invested. The question, therefore, directly presented in that case was precisely the question directly presented in this case, viz. whether the trustees or representative officers of a parish, county or other local jurisdiction, invested with the usual powers of administration, in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have an implied authority to issue negotiable securities, payable in future, of such a character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money or funding a previous indebtedness.

The opinion of the court, delivered by Mr. Justice Bradley, clearly illustrated the fundamental distinction between issuing bonds merely as evidences of a debt or loan and issuing bonds for negotiation and sale generally, with respect to the powers of a municipal corporation. It said: "That a municipal corporation which is expressly authorized to make expenditures for certain purposes may, unless prohibited by law, make contracts for the accomplishment of the authorized purposes, and thereby incur indebtedness, and issue proper vouchers therefor, is not disputed. This is a necessary incident to the express power granted. But such contracts, as long as they remain executory, are always liable to any equitable considerations that may exist or arise between the parties, and to any modification, abatement or recission in whole or in part that may be just and proper in consequence of illegalities, or disregard or betrayal of the public interests. Such contracts are very different from those which are in controversy in this case. The bonds and coupons on which a recovery is now sought are commercial instruments, payable at a future day and transferable from hand to hand. . . . The power to issue such paper has been the means, in several cases which have recently been brought to our notice, of imposing upon counties and other local jurisdictions burdens of a most fraudulent

and iniquitous character, and of which they would have been summarily relieved had not the obligations been such as to protect them from question in the hands of *bona fide* holders. . . . It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justness and validity of which may always be inquired into. It is a power which ought not to be implied from the mere authority to make such improvements." pp. 570, 571.

The plaintiff in error quotes from the opinion in that case, to support his contention, the following: "We do not mean to be understood that it requires, in all cases, express authority for such bodies to issue negotiable paper. The power has frequently been implied from other express powers granted. Thus, it has been held that the power to borrow money, implies the power to issue the ordinary securities for its repayment, whether in the form of notes or bonds payable in future." We think the significance of these sentences, as applicable to the facts of this case, can be clearly discerned from the following concluding sentences of the paragraph: "But in our judgment these implications should not be encouraged or extended beyond the fair inferences to be gathered from the circumstances of each case. It would be an anomaly, justly to be deprecated, for all our limited territorial boards, charged with certain objects of necessary local administration, to become the fountains of commercial issues, capable of floating about in the financial whirlpools of our large cities."

The same doctrine is presented most forcibly in the case of *The Mayor* v. *Ray*, 19 Wall. 468. In *Claiborne County* v. *Brooks*, 111 U. S. 400, 406, it was held that the statutes of Tennessee, which conferred upon counties in that State the power to erect a court-house, jail and other necessary county buildings, did not authorize the issue of commercial paper as evidence of or security for a debt contracted for the construction of such a building. Referring to the view of the court below in that case, which held that, as the county had power to erect a court-house, that power implied the power to contract out the work, and to issue negotiable bonds of a commer-

cial character in payment thereof, Mr. Justice Bradley, who delivered the opinion of the court, said: "We cannot concur in this view. The erection of court-houses, jails and bridges is amongst the ordinary political or administrative duties of all counties; and from the doctrine of the charge it would necessarily follow that all counties have the incidental power, without any express legislative authority, to issue bonds, notes and other commercial paper in payment of county debts and charges; and if they have this power, then such obligations issued by the county authorities and passing into the hands of *bona fide* holders would preclude the county from showing that they were issued improperly, or without consideration, or for a debt already paid; and it would then be in the power of such authorities to utter any amount of such paper, and to fasten irretrievable burdens upon the county without any benefit received. Our opinion is, that mere political bodies, constituted as counties are for the purpose of local police and administration, and having the power of levying taxes to defray all public charges created, whether they are or are not formally invested with corporate capacity, have no power or authority to make or utter commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from some other power expressly given, which cannot be fairly exercised without it;" citing *Police Jury* v. *Britton*, 15 Wall. 566; *The Mayor* v. *Ray*, 19 Wall. 468.

In *Young* v. *Clarendon Township*, 132 U. S. 340, 347, many of the decisions bearing on this question were referred to, and the court said: "Even where there is authority to aid a railroad, and incur a debt in extending such aid, it is also settled that such power does not carry with it any authority to execute negotiable bonds, except subject to the restrictions and directions of the enabling act;" citing *Wells* v. *Supervisors*, 102 U. S. 625; *Claiborne County* v. *Brooks*, 111 U. S. 400; *Kelley* v. *Milan*, 127 U. S. 139.

In *Hill* v. *Memphis*, 134 U. S. 198, 203, it was held that the power conferred by statute on municipal corporations to subscribe for stock in a railway corporation did not include the

power to create a debt and issue negotiable bonds in order to pay for that subscription. In delivering the opinion of the court, Mr. Justice Field said: "Whilst a municipal corporation, authorized to subscribe for the stock of a railroad company, or to incur any other obligation, may give written evidence of such subscription or obligation, it is not thereby empowered to issue negotiable paper for the amount of indebtedness incurred by the subscription or obligation. Such papers in the hands of innocent parties for value cannot be enforced without reference to any defence on the part of the corporation, whether existing at the time or arising subsequently. Municipal corporations are established for purposes of local government, and in the absence of specific delegation of power cannot engage in any undertakings not directed immediately to the accomplishment of those purposes. Private corporations created for private purposes may contract debts in connection with their business, and issue evidence of them in such form as may best suit their convenience. The inability of municipal corporations to issue negotiable paper for their indebtedness, however incurred, unless authority for that purpose is expressly given or necessarily implied for the execution of other express powers, has been affirmed in repeated decisions of this court." All of the cases we have cited above were referred to in the opinion in that case as sustaining the doctrine therein laid down.

The logical result of the doctrines announced in the above cited cases, in our opinion, clearly shows that the bonds sued on in this case are invalid. It does not follow that, because the town of Monticello had the right to contract a loan, it had, therefore, the right to issue negotiable bonds and put them on the market as evidences of such loan. To borrow money, and to give a bond or obligation therefor which may circulate in the market as a negotiable security, freed from any equities that may be set up by the maker of it, are, in their nature and in their legal effect, essentially different transactions. In the present case all that can be contended for is, that the town had the power to contract a loan, under certain specified restrictions and limitations. Nowhere in the

statute is there any express power given to issue negotiable bonds as evidence of such loan. Nor can such power be implied, because the existence of it is not necessary to carry out any of the purposes of the municipality.

It is true that there is a considerable number of cases, many of which are cited in the brief of counsel for plaintiff in error, which hold a contrary doctrine. But the view taken by this court in the cases above cited and others seems to us more in keeping with the well recognized and settled principles of the law of municipal corporations. For, as is said in Dillon's Munic. Corp., (third ed.,) § 507: "The frauds which unscrupulous officers will be enabled successfully to practice, if an implied and unguarded power to issue negotiable securities is recognized, and which the corporation or the citizen will be helpless to prevent, is a strong argument against the judicial establishment of any such power. And the argument is unanswerable, when it is remembered that in ascertaining the extent of corporate powers there is no rule of safety, but the rule of *strict* construction, and that such an implied power is not necessary, however convenient it may be at times, to enable the corporation to exercise its ordinary and usual express powers, or to carry into effect the purposes for which the corporation is created. We regard as alike unsound and dangerous the doctrine that a public or municipal corporation possesses the *implied power* to borrow money for its ordinary purposes, and, *incidental* to that, the power to issue commercial securities. The cases on this subject are conflicting, but the tendency is towards the view above indicated. The opinion of Mr. Justice Bradley, in a case before referred to, (*The Mayor* v. *Ray*,) evinces a thorough comprehension of the whole question, and, in our judgment, is sound in every proposition it advances, and must become the law of this country. This view is confirmed by the almost invariable legislative practice in the States to confer, when it is deemed expedient, upon municipalities and public corporations, in *express* terms, the power to borrow money or to issue negotiable bonds or securities."

In the case before us the power in question is not, in our

opinion, indispensable to the exercise of the express or implied powers conferred upon the town by law. The utmost that can be said is, that it was deemed more convenient or expedient to issue the bonds in that form than in the mode prescribed.

We think that the fact that the legislature of the State of Indiana, by the acts of 1867, 1869 and 1873, above referred to, expressly authorized towns in the same class as the defendant in error to issue bonds for certain specified purposes, under proper safeguards and limitations, is indicative of the legislative understanding that, without some such express statutory provisions, no power existed in the town to issue negotiable bonds, and sell them in open market.

The same may be said of the act of the legislature of that State which took effect August 24, 1879, expressly conferring upon the towns in that State power to fund their indebtedness by issuing bonds and negotiating them for that purpose, under certain specified terms, restrictions and limitations.

We are not unmindful that in several of the cases in the Supreme Court of Indiana, cited by counsel for plaintiff in error, there may be found abstract propositions, susceptible of a construction in support of the position he seeks to maintain. But we think this case is distinguishable from them all, in essential features, which except it from those general propositions, and leaves the conclusion which we have reached in harmony with them.

It is contended that the bonds sued on were issued practically for the purpose of taking the place of the prior bonds outstanding and unpaid, which represented a debt for the erection of a school building, and were, therefore, authorized by section 4488. This position is untenable. It cannot be reasonably contended that the bonds were issued under any of the sections relating to the negotiation and sale of bonds for school purposes. It is not even pretended that they were issued in accordance with the clearly defined conditions and restrictions imposed by those sections.

Nor do we think the fact that the town actually received a portion of the money arising from the sale of the so-called bonds (or, in legal contemplation, perhaps all of it, as it was

paid to the agent of the town,) estops the corporation from pleading a want of authority in the municipality to issue the instruments sued on. The original act of issuing the bonds for sale was not only unauthorized by law, but in disregard of its requirements, and no subsequent act of the town trustees could make it valid. Whether it could be a circumstance in favor of the equitable right of the holders of the bonds to recover from the municipality the money which they represent is a question not here for consideration. The suit was upon the bonds themselves, and for the reasons above stated we hold that there can be no recovery upon them.

Judgment affirmed.

MR. JUSTICE BROWN was not a member of the court when this case was argued, and took no part in its decision.

THE CHIEF JUSTICE and MR. JUSTICE BREWER were not present at the argument, and took no part in the decision.

ANDERSON *v.* WATT.

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

No. 138. Argued January 8, 1891. — Decided March 2, 1891.

Since the passage of the act of March 3, 1875, 18 Stat. 470, if it appear from the pleadings and proofs, taken together, that the defendants are citizens of the United States, and reside, in the sense of having their permanent domicil, in the State of which the complainants are citizens, (or that each of the indispensable adverse parties is not competent to sue or liable to be sued therein,) the Circuit Court cannot maintain cognizance of the suit; and the inquiry is determined by the condition of the parties at the commencement of the suit.

The husband of a married woman is a necessary party in Florida to a suit in equity to foreclose a mortgage upon real estate owned by her there; and although he be not named in the bill as defendant he may appear at the hearing with the consent of all parties, and in this case the objection of want of consent cannot be taken.

Statement of the Case.

The place where a person lives is taken to be his domicil until facts adduced establish the contrary.

A domicil, once acquired, is presumed to continue until it is shown to have been changed.

The domicil of the husband is the domicil of his wife, although she may be residing in another place, and even when she may be living apart from her husband without sufficient cause.

THIS was a bill filed on the 25th day of August, 1885, by Gustavus W. Faber and James S. Watt, describing themselves as "both of the city and State of New York and citizens of the State of New York, executors of the last will of James Symington, deceased, late of the State of New York," as such executors, against "J. C. Anderson, of Orlando, Orange County, Florida, a citizen of the State of Florida, as the administrator of Edward J. Wilson, deceased, and Thomas Emmett Wilson and Sarah J. Davis, both of Sylvan Lake, Orange County, Florida, citizens of the State of Florida," for the foreclosure, by sale of the property, of a mortgage given by Edward J. Wilson to James Symington, August 28, 1875, and recorded May 3, 1876, on certain real estate in Orange County, Florida.

Anderson and Wilson demurred to the bill, and assigned as one of the causes of demurrer that the bill did not "sufficiently show the authority of complainants to bring this suit as the executors of James Symington, deceased." Mrs. Davis filed a verified plea, averring that the executors had been discharged, and also that she, "before and at the time of the filing of the said bill, was, and now is, under the coverture of one George W. Davis, who is still living, to wit, in the city and State of New York," and praying judgment, and to be hence dismissed.

December 26, the plea and demurrer were severally set down for hearing by the solicitors for the complainants. Copies of Symington's will, the proofs on its presentation for probate, the order admitting to probate, and the letters testamentary, duly exemplified, were subsequently filed, and the demurrer overruled. Defendants Anderson and Wilson answered March 15, 1886, setting up a homestead entry of the

land, possession, improvement, commutation and payment by one Earnest; the conveyance by him to E. J. Wilson by deed dated March 15, 1871, and recorded November 28, 1876; deed of E. J. Wilson of one-half for a valuable consideration, to Thomas E. Wilson, May 22, 1871, recorded September 11, 1875; actual possession by Thomas E. and his grantee from May 22, 1871, to the present time; issue of the patent April 10, 1875, to E. J. Wilson, recorded November 24, 1879; large advances by Thomas E. prior to the Symington mortgage, for the benefit of the land, in excess of his share; and valuable improvements made thereon by himself and his grantee.

The answer further averred that E. J. Wilson, who resided in New York, died there in April, 1876; that the taxes upon the undivided half interest belonging to E. J. Wilson's estate were not paid for the years 1876 and 1877; that the heirs and devisees would have nothing to do with the affairs of the estate, and Symington took no steps and made no sign; that the undivided half was sold January 8, 1878, for the taxes, and defendant Thomas E. became the purchaser and received a deed January 16, 1879, as by statute prescribed, which was duly recorded that day; that he and his grantee had remained in full, quiet and peaceable possession of said undivided half from thence hitherto, and no suit had been commenced to set aside said tax deed or recover possession; and that the statutory bar was complete.

It was further alleged that on the 13th of October, 1879, defendant Wilson sold the land to Sarah J. Davis, wife of George W. Davis, of the city of New York, for $8000, $2000 cash and $6000 on time, secured by a mortgage back, and conveyed it to her by warranty deed in fee simple, which deed was recorded November 24, 1879. Defendant Wilson further answered that Mrs. Davis immediately went into the actual possession of the land, and had continued in such possession from thence hitherto, and made improvements upon the property to the amount of over $20,000.

Certain assignments of the purchase-money mortgage to Mary F. Wilson, of New York, in January and June, 1884, and duly then recorded, were set forth, as well as a mortgage,

by Mr. and Mrs. Davis, to D. Appleton & Co., made and recorded in 1884.

May 3, 1886, an answer, sworn to by defendant Sarah J. Davis, entitled as "the answer of Sarah J. Davis and George W. Davis, her husband, two of the defendants above named, to the bill of complaint exhibited against them by the complainants," signed by "def'ts' sol's," and purporting throughout to be by "these defendants," was filed in the case. This set out the circumstances under which the purchase from Thomas E. Wilson was made, the consideration, the possession and improvement of the land, and that by virtue of the conveyance to her and her adverse possession she had acquired absolute title.

Replications were filed and proofs taken; and on December 20, 1886, the court ordered that the bill be amended by striking out from the address the words "Gustavus W. Faber and James S. Watt, both of the city and State of New York and citizens of the State of New York," and inserting therein as follows: "Gustavus W. Faber, of the city and State of New York and a citizen of the State of New York, and James S. Watt, a subject of the Kingdom of Great Britain, temporarily residing in the city of New York." It was further ordered that "it appearing to the court that letters testamentary on the estate of James Symington, deceased, heretofore issued to Gustavus W. Faber, deceased, one of the complainants herein suing as one of the executors of James Symington, deceased, have been revoked, as is shown by a duly exemplified copy of the records of the surrogate court of the county of New York, State of New York, filed herein, it is therefore ordered, adjudged and decreed, on motion of complainants herein, that this cause proceed in the name of the said James S. Watt, sole surviving executor of James Symington, deceased, and that it be discontinued as to said Gustavus W. Faber, suing as co-executor." The exemplified copy of the record referred to was filed in the court, with the amendment, December 21, and showed that on the 4th of May, 1886, Faber filed a petition in the office of the surrogate for the county of New York for a decree revoking the letters testamentary issued to him, and that the order of revocation was thereupon entered thereon.

Argument for Appellees.

The cause was heard upon the pleadings and proofs, and at the hearing the respondent introduced an exemplified copy of the will of Edward J. Wilson, deceased, the proceedings on its admission to probate, and the letters testamentary issued to his executors, May 19, 1876.

January 19, 1887, a decree was entered (by the district judge holding the Circuit Court) finding: "That the defendant J. C. Anderson, as the administrator of the estate of Edward J. Wilson, deceased, and in his capacity as such administrator, is justly indebted to the complainant as the sole acting executor of the last will and testament of James Symington, deceased, in the sum of thirteen thousand ($13,000.00) dollars principal, and ten thousand eight hundred and eighty-seven $\frac{13}{100}$ ($10,887.13) dollars, interest, making in all twenty-three thousand eight hundred eighty-seven $\frac{13}{100}$ ($23,887.13) dollars, and that said complainant holds a mortgage lien to secure the said principal and interest hereby adjudicated and declared in his favor upon an undivided one-half interest in and to the following lands:" [describing them;] and decreeing a sale in default of payment. Sale having been made and reported, exceptions were filed to its confirmation, and overruled. Thereupon an appeal was perfected from the main decree and the order confirming the sale.

Mr. J. Hubley Ashton, for appellants.

Mr. James Lowndes for appellees.

I. It is assigned for error that the record does not disclose a controversy within the jurisdiction of the Circuit Court.

The original bill set forth a controversy between citizens of New York on the one hand and citizens of the State of Florida on the other. Over such a controversy the Circuit Court had jurisdiction.

The bill was amended on February 20, 1886, by striking out the allegation that the complainant Watt was a citizen of New York, and by inserting the allegation that he was a subject of the Kingdom of Great Britain, and by striking out Gustavus

W. Faber as a complainant. These amendments were simultaneous. On the face of the amended bill the controversy was between a subject of a foreign State and citizens of a State. This was a controversy within the jurisdiction of the Circuit Court. So far, therefore, as the record is concerned, the Circuit Court appeared to have jurisdiction of the suit throughout its course.

But it is argued that in point of fact the Circuit Court had not jurisdiction of the cause. In support of this view it is urged that Mrs. Davis was not a citizen of Florida at the time the action was begun.

The answer to this is, 1st, that it is not averred in the record that she was not a citizen of Florida; 2d, that it is not proved that she was not a citizen of Florida; 3d, that if it had been shown that she was not a citizen of Florida but a citizen of New York, this fact would not have defeated the jurisdiction.

(1) It was alleged in the bill that Sarah J. Davis was a citizen of the State of Florida. It was open to her to deny this fact by plea, and if the plea was sustained, the Circuit Court was without jurisdiction as the record then stood. Instead of pleading that she was not a citizen of Florida, Mrs. Davis filed a plea that her husband is still living, to wit, in the city and State of New York.

This plea is both irregular and insufficient. It is not accompanied by the certificate of counsel or the affidavit of the defendant (that it was not interposed for delay) which are required by the 31st Rule in Equity. It speaks as of its date (December 7, 1885,) and not as of the commencement of the suit (August 25, 1885.) *Mullen* v. *Torrance*, 9 Wheat. 537. Assuming the citizenship of Mrs. Davis to be in law that of her husband, the citizenship of the latter is not averred. The allegation that he is living in New York is not equivalent to an allegation that she is a citizen of New York. Residence and citizenship are not synonymous. *Robertson* v. *Cease*, 97 U. S. 646; *Everhart* v. *Huntsville College*, 120 U. S. 223; *Menard* v. *Goggan*, 121 U. S. 253. The averment that a party has a "fixed and permanent domicil" in a State is not equivalent to an averment of his citizenship in that State.

Brown v. *Keene*, 8 Pet. 112. There is no difference in meaning between the words "to reside" and "to live" (*i.e.*, in a place). Webster's Dictionary, *s.v.* live; Worcester's Dictionary, *s.v.* live; Century Dictionary, *s.v.* live.

(2) Inasmuch as the plea did not aver that Mrs. Davis was a citizen of New York, or that her husband was a citizen of New York, those facts were not admitted by setting down the bill for hearing.

(3) But even if it had been shown that Mrs. Davis was a citizen of New York, the jurisdiction would not have been defeated. The court had jurisdiction of the controversy, and the supposed defects could have been cured by amendment. *Conolly* v. *Taylor*, 2 Pet. 556; *Carneal* v. *Banks*, 10 Wheat. 181. This has been done. The allegation in the amended bill that Watt was a citizen of Great Britain, not having been denied, must be taken to be true.

II. It is argued that the husband of Mrs. Davis and D. Appleton & Co. are necessary parties.

(1) The 53d Rule in Equity is as follows: "If a defendant shall, at the hearing of a cause, object that the suit is defective for want of parties, not having by plea or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties." This is only the expression of the general rule of practice, that a defect for want of parties not absolutely necessary, must be expressly objected to. The non-joinder of Mr. Davis was not objected to in the pleadings and does not appear to have been objected to at the hearing. The objection comes too late.

(2) The persons named were not necessary or indispensable parties. Mr. Davis is said in argument to have a beneficial interest in the land. D. Appleton & Co. and Mary F. Wilson are said to have liens on the equity of redemption derived from Mrs. Davis. The interests so alleged are distinct and several and will not be affected by the decree.

The husband's *jus mariti* and courtesy seem to have been abolished in Florida. "Sec. 2. Hereafter, when any female, a

citizen of this State, shall marry, or when any female shall marry a citizen of this State, the female being seized or possessed of real or personal property, her title to the same shall continue separate, independent, and beyond the control of her husband notwithstanding her coverture, and shall not be taken in execution for his debts: *Provided, however*, That the property of the female shall remain in the care and management of her husband. Sec. 3. Married women may hereafter become seized or possessed of real and personal property during coverture, subject, however, to the restrictions, limitations and provisions contained in the foregoing section." Bush's Florida Digest, 1872, p. 580, act March 6, 1845. These laws destroy the husband's *estate* in the wife's land. Under the former act he was merely a bailiff, not an owner, and even this relationship to the land seems to have been abolished by the Constitution. If the husband had no interest in the land he was not a necessary, if indeed, a proper party.

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

Under the act of March 3, 1875, determining the jurisdiction of Circuit Courts of the United States (18 Stat. 470, 472) the objection to the jurisdiction upon a denial of the averment of citizenship is not confined to a plea in abatement or a demurrer, but may be taken in the answer, and the time at which it may be raised is not restricted. Although the averment as to citizenship may be sufficient, yet, if it appear that that averment is untrue, it is the duty of the Circuit Court to dismiss the suit; and this court, on appeal or writ of error, must see to it that the jurisdiction of the Circuit Court has in no respect been imposed upon. *Morris* v. *Gilmer*, 129 U. S. 315, 325; *Nashua Railroad* v. *Lowell Railroad*, 136 U. S. 356, 374; *Cameron* v. *Hodges*, 127 U. S. 322, 325.

As remarked in *Bernards Township* v. *Stebbins*, 109 U. S. 341, 353, it has been the constant effort of Congress and of this court to prevent the discrimination in respect to suits between citizens of the same State and suits between citizens

of different States, established by the Constitution and laws of the United States, from being evaded by bringing into the federal courts controversies between citizens of the same State. *Shreveport* v. *Cole*, 129 U. S. 36, 44.

Although the Fourteenth Amendment declares all citizens of the United States to be citizens "of the State where they reside," yet as the jurisdiction of the Circuit Court is limited in the sense that it has none except that conferred by the Constitution and laws of the United States, and the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears, it is essential that in cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctively and positively averred in the pleadings, or should appear affirmatively with equal distinctness in other parts of the record. It is not sufficient that jurisdiction may be inferred argumentatively from the averments. *Robertson* v. *Cease*, 97 U. S. 646, 649; *Brown* v. *Keene*, 8 Pet. 112, 115. It was therefore held in *Robertson* v. *Cease*, *supra; Continental Insurance Co.* v. *Rhoads*, 119 U. S. 237; *Menard* v. *Goggan*, 121 U. S. 253, and other cases, that the averment that the parties to a cause were "residents" in different States, respectively, was not enough. And in *Brown* v. *Keene*, *supra*, which was an action in the United States Circuit Court for the Eastern District of Louisiana, where the plaintiff was a citizen of the State of Maryland, that the averment that the defendant was a citizen or resident, "holding his fixed and permanent domicil in the parish of St. Charles," there being no allegation that he was a citizen of the United States, was insufficient.

Since the act of 1875, if it appears from the pleadings and proofs taken together that the defendants are citizens of the United States and reside, in the sense of having their permanent domicil, in the State of which the complainants are citizens, (or that each of the indispensable adverse parties is not competent to sue or liable to be sued, therein,) the Circuit Court cannot maintain cognizance of the suit. And the inquiry is determined by the condition of the parties at the

commencement of the suit. *Mullen* v. *Torrance*, 9 Wheat. 537; *Conolly* v. *Taylor*, 2 Pet. 556; *Crehore* v. *Ohio & Mississippi Railway*, 131 U. S. 240; *Jackson* v. *Allen*, 132 U. S. 27.

The bill in this case was properly filed in the name of the two executors under the will of Symington, the mortgagee, to whom letters testamentary had issued; McClellan's Dig. Laws Florida, c. 2, § 73, p. 97; 3 Williams on Executors, (6th Am. ed. bottom paging,) 1867; 1 Williams on Executors, 267, 687 and notes; 1 Daniell Ch. Pr. (4th Am. ed.) 226; *Rubber Co.* v. *Goodyear*, 9 Wall. 788; *Hill* v. *Tucker*, 13 How. 458. Both qualified and acted, and the question of their authority to bring the suit as executors of Symington, raised by the demurrer, was determined in their favor.

Hugh C. Wilson and Edward C. Wilson were appointed executors of and trustees under the will of Edward J. Wilson, the mortgagor, and letters testamentary issued to them, describing them as "both of Peekskill, Westchester County, New York." By the will certain legacies were bequeathed, and all the rest, residue, and remainder of the estate, both real and personal, of whatsoever nature or kind, and wherever situated, was directed to be divided into five equal shares, one of which was bequeathed and devised to Edward C. Wilson and the other four shares to Hugh C. and Edward C. Wilson, to hold upon certain trusts therein described. Neither the executors and trustees, nor the devisees, nor the heirs at law were made parties defendant to this bill.

Under the statutes of Florida it was provided that "when any person shall die leaving property in this State, and for the space of six months thereafter no person shall be appointed administrator on the estate of such deceased person, it shall be the duty of the sheriff of the county *ex officio*, to take charge of such estate, and to administer on and settle said estate, in the same manner as directed for other administrators." (McClellan's Dig. c. 2, sec. 15, p. 81.)

It is indicated by the record that J. C. Anderson was sheriff of Orange County, and it was admitted that he was duly appointed by the county court of that county administrator of the estate of Edward J. Wilson, deceased, July 20, 1885, but

not with the will annexed, although Edward J. Wilson died testate in New York, where he resided, and where his will was admitted to probate, which will conformed to the laws of Florida in the form and manner of its execution, and might have been admitted to record in the county court. McClellan's Dig. c. 200, §§ 1, 8, pp. 985, 987; *Crolly* v. *Clark*, 20 Florida, 849. Thomas E. Wilson was a citizen of Orange County, Florida, and he and Anderson, as administrator, were made defendants, together with Sarah J. Davis, to whom the property had been conveyed by Thomas E., and who had occupied it from October, 1879, to September, 1885, when the process in this case was served upon her, and had paid all taxes and made large and valuable improvements thereon. George W. Davis, her husband, was not made a party, but on the 3d of May, 1886, an answer was filed in the case, entitled "the answer of Sarah J. Davis, and George W. Davis, her husband, two of the defendants above named, to the bill of complaint exhibited against them by the complainants;" signed by solicitors for defendants; and answering for those defendants. To this answer the complainants filed their replication, entitled "replication of said complainants to the answer of Sarah J. Davis and George W. Davis, defendants," and describing the answer as that of those two defendants. The names of all the parties defendant were not set forth in the titles of the decrees. The bond on appeal was signed by Anderson, administrator, Thomas E. Wilson, Sarah J. Davis and George W. Davis, as principals; recited that the appeal had been taken by them all; and was conditioned for the prosecution of the appeal by all.

Mr. Davis appears to have been a necessary party. McClellan's Dig. c. 150, p. 754; 1 Daniell Ch. Pr. (4 Am. ed.) 178; *Lignoski* v. *Bruce*, 8 Florida, 269; *Smith* v. *Smith*, 18 Florida, 789; *Dzialinski* v. *Bank of Jacksonville*, 23 Florida, 346; *McGill* v. *McGill*, 19 Florida, 341; *Staley* v. *Hamilton*, 19 Florida, 275; *Carn* v. *Haisley*, 22 Florida, 317. And although plaintiffs did not originally, or by amendment after answer, make him in terms a party to their bill, which would have disclosed that he was a citizen of New York, yet the effect of

what was done was such as bound him by the decree, and we think upon this record he must be held to have become such.

A person who has not been named as defendant to a bill may appear at the hearing, with the consent of all the parties to the cause, *Dyson* v. *Morris*, 1 Hare, 413, 419; *Bozon* v. *Bolland*, 1 Russ. & Myl. 69; and in this instance the objection of want of consent cannot be taken.

The plea which Mrs. Davis interposed under oath, December 7, 1885, stated that "before and at the time of the filing of the bill, she was, and now is, under the coverture of one George W. Davis, who is still living, to wit, in the city and State of New York." No replication was filed to the plea, but notice given by the plaintiffs, setting it down for hearing. No further action upon it is disclosed by the record. The answer of Mrs. Davis and her husband set forth "that in the winter of 1878 and spring of 1879 these defendants were residing in the city of New York, where they had been residing for some years; that the health of the defendant Sarah J. Davis not being good, she thought residing in Florida would benefit her, and that in the summer of 1879 she and her husband investigated the subject as well as they could by reading and talking with people from Florida, and from such investigation they concluded that if the climate should prove beneficial to the said Sarah J. Davis they would find it profitable to purchase an orange grove in South Florida, which the said Sarah J. Davis could take care of and manage, except in the summer months, while the said George W. Davis remained at his business in New York, the said Sarah J. Davis spending the the summer with him there;" and that after the purchase was consummated with the approval of Mr. Davis in New York in September, 1879, Mrs. Davis went to Florida in October and took actual possession of the property herself. The proofs showed that she continued personally in occupation of it from that time forward, and improved and cultivated it. Mrs. Davis was examined as a witness and testified that her husband was living in New York and was a party to the suit; and that she resided on the property and had occupied it ever

since she purchased it, except when she went "North in the summer for a few months."

The deed of Thomas E. Wilson to her of October 13, 1879, recorded November 24, 1879, described her as "Sarah J. Davis, wife of George W. Davis, of the city of New York," and the mortgage back was given by "Sarah J. Davis and George W. Davis, her husband, of the city of New York." On the 30th of March, 1884, Mr. and Mrs. Davis gave a mortgage to D. Appleton & Co., which was recorded in Orange County, Florida, February 12, 1884, and described the mortgagors as "George W. Davis, of the city of New York, and Sarah J. Davis, his wife."

We are satisfied the pleadings and proofs in the record, taken together, negative the averment of the bill as to the citizenship of Sarah J. Davis, and show that she and her husband were not citizens of Florida when the suit was commenced, and that it is fairly to be presumed that they were citizens of the State of New York.

The place where a person lives is taken to be his domicil until facts adduced establish the contrary, and a domicil when acquired is presumed to continue until it is shown to have been changed. *Mitchell* v. *United States*, 21 Wall. 350, 352; *Desmare* v. *United States*, 93 U. S. 605, 609; *Shelton* v. *Tiffin*, 6 How. 163; *Ennis* v. *Smith*, 14 How. 400. And although the wife may be residing in another place, the domicil of the husband is her domicil. Story Confl. Laws, § 46; Wharton Confl. Laws, § 43; and cases cited. Even where a wife is living apart from her husband, without sufficient cause, his domicil is in law her domicil. *Cheely* v. *Clayton*, 110 U. S. 701, 705.

The rule is, said Chief Justice Shaw in *Harteau* v. *Harteau*, 14 Pick. 181, 185, "founded upon the theoretic identity of person, and of interest, between husband and wife, as established by law, and the presumption that, from the nature of that relation, the home of the one is that of the other, and intended to promote, strengthen and secure their interests in this relation, as it ordinarily exists, where union and harmony prevail. But the law," he continued, "will recognize a wife as having a separate existence, and separate interests and sep-

arate rights, in those cases where the express object of all proceedings is to show, that the relation itself ought to be dissolved, or so modified as to establish separate interests."

Mrs. Davis was not separated from her husband, and no element of separate domicil, in any legal sense, existed.

It is clear that the Circuit Court, upon the development of the facts, should have proceeded no further, and dismissed the case.

But it is contended that the supposed defect was curable by amendment, and that this was actually done, and the court thereby justified in retaining jurisdiction. *Conolly* v. *Taylor*, 2 Pet. 556, is relied on. In that case a bill was filed in the United States court in Kentucky by aliens and a citizen of Pennsylvania. The defendants were citizens of Kentucky, except one who was a citizen of Ohio, on whom process was served in Ohio. The jurisdiction of the court was not questioned so far as respected the alien plaintiffs, but as between the citizen of Pennsylvania and the citizen of Ohio, the court could not exercise jurisdiction. Before the cause was brought on, however, the court permitted the complainants to amend their bill by striking out the citizen of Pennsylvania as complainant and making him a defendant, and the question was whether the original defect was cured by this circumstance, and whether the court, having jurisdiction over all the parties then in the cause, could make a decree. This court held that jurisdiction depended upon the state of the parties at the commencement of the suit, which no subsequent change could give or take away; that if an alien became a citizen pending the suit, the jurisdiction which was once vested would not be divested; and so if a citizen sued a citizen of the same State he could not give jurisdiction by removing and becoming a citizen of a different State, but that just as the omission to state the character of parties might be corrected at any time before hearing, so by an amendment made by striking out the person whose presence as a complainant prevented the exercise of the jurisdiction, the impediment could be properly removed. The case was one, however, where the remaining complainants might have originally instituted the suit without joining the

other unless as a defendant, and the other was retained as a party by the amendment.

In this case, on the 21st of December, 1886, after the proofs had been taken, but before the hearing, an amendment was permitted by the court by striking out the original averment as to the citizenship of the complainants Faber and Watt, executors, and inserting a new averment stating Faber's citizenship as before, but Watt to be "a subject of the kingdom of Great Britain, temporarily residing in the State of New York," and the cause was then directed, upon the ground that the letters to Faber had been revoked, to proceed in the name of James S. Watt, sole surviving executor of James Symington, and was discontinued as to Faber. But the difficulty with this attempt to obviate the fatal defect in jurisdiction was that the record showed that Watt was not the sole surviving executor of James Symington when the bill was filed, but on the contrary, when the application to amend was made, plaintiffs exhibited to the court and filed in the case exemplified copies of the records and files in the office of the surrogate of the county of New York in the matter of the application of Gustavus W. Faber for a revocation of the letters testamentary issued to him as one of the executors, by which it was shown that on the 4th of May, 1886, Faber filed his petition for the revocation of the letters as to him, and that the order of revocation was entered on that day. It therefore appeared that Watt could not have maintained the bill as amended, on the 25th day of August, 1885, when the bill as originally framed was filed, and jurisdiction could no more be given to the Circuit Court by the amendment than if a citizen of Florida had sued another in that court and subsequently sought to give it jurisdiction by removing from the State. *Clarke* v. *Mathewson*, 12 Pet. 164; *Morris* v. *Gilmer*, 129 U. S. 315.

The decree is reversed and the cause remanded with instructions to dismiss the bill for want of jurisdiction.

Mr. Justice Brewer dissented.

APPENDIX.

I.

AN ACT TO ESTABLISH CIRCUIT COURTS OF APPEALS AND TO DEFINE AND REGULATE IN CERTAIN CASES THE JURISDICTION OF THE COURTS OF THE UNITED STATES, AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be appointed by the President of the United States, by and with the advice and consent of the Senate, in each circuit an additional circuit judge, who shall have the same qualifications, and shall have the same power and jurisdiction therein that the circuit judges of the United States, within their respective circuits, now have under existing laws, and who shall be entitled to the same compensation as the circuit judges of the United States in their respective circuits now have.

SEC. 2. That there is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established. Such court shall prescribe the form and style of its seal and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law. It shall have the appointment of the marshal of the court with the same duties and powers under the regulations of the court as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. The court shall also appoint a clerk, who shall perform and exercise the same duties and powers in regard to all matters within its jurisdiction as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the marshal of the court shall be twenty-five hundred

dollars a year, and the salary of the clerk of the court shall be three thousand dollars a year, to be paid in equal proportions quarterly. The costs and fees in the Supreme Court now provided for by law shall be costs and fees in the circuit courts of appeals; and the same shall be expended, accounted for, and paid for, and paid over to the Treasury Department of the United States in the same manner as is provided in respect of the costs and fees in the Supreme Court.

The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.

SEC. 3. That the Chief Justice and the associate justices of the Supreme Court assigned to each circuit, and the circuit judges within each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits in the manner hereinafter provided. In case the Chief Justice or an associate justice of the Supreme Court should attend at any session of the circuit court of appeals he shall preside, and the circuit judges in attendance upon the court in the absence of the Chief Justice or associate justice of the Supreme Court shall preside in the order of the seniority of their respective commissions.

In case the full court at any time shall not be made up by the attendance of the Chief Justice or an associate justice of the Supreme Court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: *Provided*, That no justice or judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals. A term shall be held annually by the circuit court of appeals in the several judicial circuits at the following places: In the first circuit, in the city of Boston; in the second circuit, in the city of New York; in the third circuit, in the city of Philadelphia; in the fourth circuit, in the city of Richmond; in the fifth circuit, in the city of New Orleans; in the sixth circuit, in the city of Cincinnati; in the seventh circuit, in the city of Chicago; in the eighth circuit, in the city of Saint Louis; in the ninth circuit, in the city of San Francisco; and in such other places in each of the above circuits as said court may from time to time designate. The first terms of said courts shall

be held on the second Monday in January, eighteen hundred and ninety-one, and thereafter at such times as may be fixed by said courts.

SEC. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error [or] otherwise, from said district courts shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same.

SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

From the final sentences and decrees in prize causes.

In cases of conviction of a capital or otherwise infamous crime.

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases.

SEC. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all

cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

SEC. 7. That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: *Provided*, That the appeals must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal.

SEC. 8. That any justice or judge, who, in pursuance of the provisions of this act, shall attend the circuit court of appeals held at any place other than where he resides shall, upon his written certificate, be paid by the marshal of the district in which the court

shall be held his reasonable expenses for travel and attendance, not to exceed ten dollars per day, and such payments shall be allowed the marshal in the settlement of his accounts with the United States.

SEC. 9. That the marshals of the several districts in which said circuit court of appeals may be held shall, under the direction of the Attorney-General of the United States, and with his approval, provide such rooms in the public buildings of the United States as may be necessary, and pay all incidental expenses of said court, including criers, bailiffs, and messengers: *Provided, however,* That in case proper rooms can not be provided in such buildings, then the said marshals, with the approval of the Attorney-General of the United States, may, from time to time, lease such rooms as may be necessary for such courts. That the marshals, criers, clerks, bailiffs, and messengers shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit courts.

SEC. 10. That whenever on appeal or writ of error or otherwise a case coming directly from the district court or existing circuit court shall be reviewed and determined in the Supreme Court the cause shall be remanded to the proper district or circuit court for further proceedings to be taken in pursuance of such determination. And whenever on appeal or writ of error or otherwise a case coming from a circuit court of appeals shall be reviewed and determined in the Supreme Court the cause shall be remanded by the Supreme Court to the proper district or circuit court for further proceedings in pursuance of such determination. Whenever on appeal or writ or [of] error or otherwise a case coming from a district or circuit court shall be reviewed and determined in the circuit court of appeals in a case in which the decision in the circuit court of appeals is final such cause shall be remanded to the said district or circuit court for further proceedings to be there taken in pursuance of such determination.

SEC. 11. That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed: *Provided, however,* That in all cases in which a lesser time is now by law limited for appeals or writs of error such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit courts of appeals. And all provisions of law now in force regulating the methods and

system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively.

SEC. 12. That the circuit court of appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United States.

SEC. 13. Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, under this act.

SEC. 14. That section six hundred and ninety-one of the Revised Statutes of the United States and section three of an act entitled "An act to facilitate the disposition of cases in the Supreme Court, and for other purposes," approved February sixteenth, eighteen hundred and seventy-five, be, and the same are hereby repealed. And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed.

SEC. 15. That the circuit court of appeal in cases in which the judgments of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this act they may have to review the judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several Territories shall, by orders of the Supreme court, to be made from time to time, be assigned to particular circuits.

Approved, March 3, 1891.

II.

JOINT RESOLUTION TO PROVIDE FOR THE ORGANIZATION OF THE CIRCUIT COURTS OF APPEALS.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first meeting of the several circuit courts of appeals mentioned in the act of Congress passed at this present session, entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," shall be held on the third Tuesday in June, A.D. eighteen hundred and ninety-one; and if, from any casualty, the first meeting of any of said courts shall fail to be so held on that day, the first meeting of any such court so failing to be held, shall be held on such day subsequent thereto as the chief justice, or any justice of the Supreme Court of the United States assigned to such circuit, shall direct: *And be it further resolved*, That nothing in said act shall be held or construed in anywise to impair the jurisdiction of the Supreme Court or any circuit court of the United States in any case now pending before it, or in respect of any case wherein the writ of error or the appeal shall have been sued out or taken to any of said courts before the first day of July, anno Domini, eighteen hundred and ninety-one.

Approved, March 3, 1891.

INDEX.

CUSTOMS DUTIES.

DAMAGES.

See CONTRACT, 5.

DEATH OF A PARTY TO THE RECORD.

See EQUITY, 11, (6), (7).

DEPOSITION.

DOMICIL.

EASEMENT.

EQUITY.

possession, one against P. H. Monsseaux and others, and the other against P. F. Agnelly and others, (said suits being in the nature of ejectments,) decrees were obtained for the recovery of the lands held by the defendants respectively, and references were made to a master to ascertain the amounts of rents and revenues due. The total of these rents and revenues found and reported by the master in the two suits was $517,049.34, which, with interest, calculated up to January 10, 1881, amounted to the sum of $576,707.92. The further bill sought recovery for other and larger amounts; but it was decided that the recovery must be limited to the claims so reported on by the master, and the decree was reversed and the cause remanded for further proceedings in conformity with the opinion of the court. A decree was accordingly made and entered in the Circuit Court, by which it was referred to a master to take testimony and report as to whether the defendant (the city of New Orleans) was entitled to any, and if so, how much, reduction in the said decree of $576,707.92, by reason of any compromises and settlements of the judgments for rents in the said Agnelly and Monsseaux cases, made and entered into by the complainant and any of said defendants in said judgments for any less sums than the face thereof. The result of the inquiry was that settlements had been made, amounting to $220,213.16 which formed part of that gross amount, but that Mrs. Gaines had actually received only $15,394.50. The court below deducted this latter sum, and rendered a decree for $561,313.42. *Held:*

(1) That the right of Mrs. Gaines to pursue the city was an equitable right, arising and accruing to her on the basis of her own claims against the said defendants, and by subrogation to their equity to be protected and indemnified by the city;

(2) That the acts of settlement in this regard amounted to a declaration of the parties that Mrs. Gaines should exercise the equitable right which she possessed, and that the assignment was merely in aid of the equitable right, and might be available in a court of law;

(3) That the judgments were binding on the parties to them, and therefore were binding upon the city of New Orleans, which in most cases had assumed the defence of the suits, and had been represented by counsel therein; that it was right and proper to consider litigation as at an end in those suits; and that the judgments had passed into *res judicata;*

(4) That article 2452 of the Civil Code of Louisiana, which declares that "the sale of a thing belonging to another person is null; it may give rise to damages when the buyer knew not that the thing belonged to another person," does not affect the question here;

(5) That the grantees might be settled with so far as their personal liability was concerned, without discharging the city or other warrantors, provided it was stipulated, or shown to be the intention of the parties, that the city, or other warrantors, should not be discharged, it being

a general rule that discharge of a surety does not discharge a principal; and that rule being applicable here;

(6) That the death of a number of the defendants in the cases of Monsseaux and Agnelly, who died before the remand of this cause from this court to the Circuit Court, on occasion of the former appeal, and before the decree of reference by the Circuit Court upon the mandate from this court, without an attempt at revivor of the alleged decrees against the heirs or representatives of said deceased, cannot benefit the appellant;

(7) That the appellant cannot at this stage of the case raise the objection that one of the judgments for rent was obtained after the death of the defendant in the suit;

(8) That the claim for the price of the lands and the claim for the rents and revenues of them can be prosecuted separately;

(9) That the claimant should have been allowed the costs of the suits against Monsseaux and others and Agnelly and others. *New Orleans* v. *Gaines*, 595.

See Local Law, 1;
Railroad, 7, 12–15;
Res Judicata.

EVIDENCE.

1. In this case the plaintiff having accepted notes of a limited liability company in settlement, set up that the acceptance was made through a misunderstanding. *Held*, that evidence tending to show knowledge that the plaintiff at the time of the acceptance was a limited liability company was admissible. *Case Manufacturing Co.* v. *Soxman*, 431.
2. When in a case in which the facts are found by the court instead of a jury, there is any evidence tending to support the finding, this court will not review it. *Ib.*
3. It appearing from the evidence of one of the plaintiff's witnesses that during the dates of these transactions he was acting as its financial manager, his acts in that capacity cannot be repudiated. *Ib.*
4. The words "received on settlement to this date," where there was a partnership account running through years, may refer to a settlement for the year, or a settlement for the whole period of the partnership; and this ambiguity, being a latent one, may be explained by evidence *aliunde*. *Clay* v. *Field*, 464.
5. In an action brought by an executor to recover on a promissory note made by defendant to his testator, it is not error to exclude evidence offered by defendant to show that the notes were not inventoried by the executor as part of the testator's estate. *Gormley* v. *Bunyan*, 623.

See Court and Jury, 1, 2;
Criminal Law, 2, 3;
Customs Duties, 1, 2;
Deposition;
Local Law, 1;
Statute, C.

HUSBAND AND WIFE.

INDIAN TERRITORY.

2. The right of a sovereign to enforce all obligations due to it, without regard to statutes of limitations, or to the defence of laches, does not pass to its creditors; and its intervention and appearance in a suit, in the nature of a garnishee process, brought by one of its creditors as against its debtors, does not give to such creditor its sovereign exemptions from liability to such defences. *Cressey* v. *Meyer*, 525.

LIMITATION, STATUTES OF.

1. Without resting this case on the point, the court is of opinion that the claimant's claim was presented to the Secretary of the Treasury, and was finally passed upon and adjudicated by him twelve years before the commencement of this action, and that consequently it is barred by the statute of limitations. Rev. Stat. § 1069. *United States* v. *Connor*, 61.
2. The residence out of the State of New York which operated to suspend the running of the statute of limitations under section 100 of the Code of Civil Procedure of 1849, as originally framed, was a fixed abode, entered upon with the intention to remain permanently, at least for a time, for business or other purposes. *Barney* v. *Oelrichs*, 529.
3. The only way in which statutes of limitation are available as a defence is when they are, at the proper time, specially pleaded. *Gormley* v. *Bunyan*, 623.

See LACHES, 2.

LOCAL LAW.

1. A debtor in Texas mortgaged to a creditor real estate there to secure the payment of debts to various creditors, and on the same day by a separate instrument to the same mortgagee personal property for the same object. Other creditors commenced suit in the Circuit Court of the United States against the debtor and caused the property covered by the chattel mortgage to be seized under writs of attachment, and to be sold and the proceeds applied towards payment of their claims in suit. The grantees in the chattel mortgage sued the marshal and his official sureties at law in the state court to recover the value of the goods seized and sold. This action was removed into the Circuit Court, where the creditors then filed a bill in equity to restrain the further prosecution of the action at law. A temporary injunction was issued. The mortgaged real estate was then sold, and the proceeds applied to the payment of the debts secured thereby, leaving a balance still due. After dismissing the injunction suit, the action at law came on for trial. A motion by the defendant to transfer it to the equity docket was refused. The defendant contended that the chattel mortgage was, under the laws of Texas, an assignment for the benefit of creditors and not a chattel mortgage. The court instructed the jury that the validity of the instrument as a mortgage depended upon whether when it was made the maker was solvent or insolvent. One of the counsel

LONGEVITY PAY.

The plaintiff was a commander in the navy of the United States, with the following record of entry and promotion: in the volunteer service, acting master's mate, May 7, 1861; acting ensign, November 27, 1862; acting master, August 11, 1864:—in the regular service, master, March 12, 1868; lieutenant, December 18, 1868; lieutenant-commander, July 3, 1870; commander, March 6, 1887. He had never received any benefit of longevity pay under that clause in the act of March 3, 1883, 22 Stat. 473, c. 97, providing that "all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular navy in the lowest grade having graduated pay held by such officer since last entering the service. *Held*, That, as he was a lieutenant during some days succeeding June 30, 1870, when the act of July 15 took effect, the lowest grade he held having graduated pay was that of lieutenant. *United States* v. *Green*, 293.

MARINE CORPS.

A private in the Marine Corps of the United States, discharged from the service as a person of bad character and unfit for service by order of the Secretary of the Navy through the Commandant of the Corps, without court martial or other competent military proceeding, forfeits thereby his retained pay under the provisions of Rev. Stat. § 1281; but he may claim and recover his transportation and subsistence from the place of his discharge to the place of his enlistment, enrollment or original muster into the service, under the provisions contained in Rev. Stat. § 1290. *United States* v. *Kingsley*, 87.

MASTER AND SERVANT.

The owners of a mine are not liable to an action for the falling of the roof of a tunnel upon a miner who, knowing that the roof is shattered and dangerous, voluntarily assists in removing a supporting timber, and, before another has been put in its place, sits down to rest at that spot. *Bunt* v. *Sierra Butte Gold Mining Co.*, 483.

MORTGAGE.

See GUARDIAN AND WARD; HUSBAND AND WIFE; INTEREST, 1; LOCAL LAW, 7; RAILROAD, 11–15.

MUNICIPAL CORPORATION.

1. The implied power of a municipal corporation to borrow money to enable it to execute the powers expressly conferred upon it by law, if it exists at all, does not authorize it to create and issue negotiable securities, to be sold in the market and to be taken by a purchaser freed from equities that might be set up by the maker. *Merrill* v. *Monticello*, 673.
2. To borrow money, and to give a bond or obligation therefor which may circulate in the market as a negotiable security freed from any equities that may be set up by the maker of it are essentially different transactions in their nature and legal effect. *Ib.*
3. A municipal corporation in Indiana issued its negotiable bonds having ten years to run, to the amount of $20,000, the proceeds to be used to aid in the construction of a school house, and sold them in open market. When they matured, a new issue of like bonds to the amount of $21,000 was made, which were sold in open market, and a part of the proceeds converted by a trustee of the corporation to his own use. *Held*, That the new issue was void for want of authority, and that the municipality was not estopped from setting up that defence. *Ib.*

See CONSTITUTIONAL LAW, A, 4; CONTRACT, 1; JURISDICTION, B, 1.

NULLUM TEMPUS OCCURRIT REGI.

See LACHES, 2.

NO MAN'S LAND.

See CONSTITUTIONAL LAW, 6, 7, 8; INDIAN TERRITORY; JURISDICTION, B, 2.

PARTNERSHIP.

1. The surviving partner in the management of a plantation in Tennessee which belonged to the deceased partner, retained possession of it after his partner's death, and of the slaves upon it, and continued to operate the plantation in good faith, and for what he thought were the best interests of the estate of the deceased as well as his own. When the war came, the plantation was in the theatre of the conflict, and at at its close the slaves became free. *Held*, That, under the circumstances, the surviving partner in a general settlement was not accountable for the value of the slaves, but was accountable for the fair rental

PATENT FOR INVENTION.

PLEADING.

See LIMITATION, STATUTES OF, 3.

PRACTICE.

PRINCIPAL AND AGENT.

It is a condition precedent to the right of an agent to the compensation agreed to be paid to him that he shall faithfully perform the services he undertook to render; and if he abuses the confidence reposed in him, and withholds from his principal facts which ought, in good faith, to be communicated to the latter, he will lose his right to any compensation under the agreement; being no more entitled to it than a broker would be entitled to commissions who, having undertaken to sell a particular property for the best price that could be fairly obtained for it, becomes, without the knowledge of the principal, the agent for another, to get it for him at the lowest possible price. *Wadsworth* v. *Adams*, 380.

See COURT AND JURY, 1.

PRINCIPAL AND SURETY.

See EQUITY, 11, (5).

PROBATE COURTS.

See COURTS OF PROBATE.

PUBLIC LANDS.

The provision in the second section of the act of June 16, 1880, 21 Stat. 287, c. 245, requiring the approval of the Secretary of the Interior to the act of the state authorities of Nevada in selecting lands under the grant made by that act, while it did not vest in him an arbitrary authority, to be exercised at his discretion, empowered him to withhold his approval when it became necessary to do so, in order to pre-

PUEBLO LANDS OF SAN FRANCISCO.

QUIET TITLE.

RAILROAD.

RECEIPT.

REMOVAL OF CAUSES.

fact. *Held*, (1) That that court had no jurisdiction over that issue of fact; (2) But that, as the application for removal was made too late, its denial was right as matter of law, and the judgment of that court should be affirmed. *Ib.*

4. A large number of taxpayers in Muhlenburgh County, Kentucky, filed their bill against the officers of the county, and against two holders of bonds of the county, one holding "original" bonds issued to pay a county subscription to stock in a railway company, the other holding "compromise" bonds issued in lieu of some of the "original" bonds. The relief sought was to restrain the sheriff from levying a tax already ordered, and to restrain the county judge from making future levies, and to have both classes of bonds declared invalid, and the holders enjoined from collecting principal or interest, and that notice might be given to unknown bondholders, and for general relief. A large number of the bonds of each class were held by citizens of Kentucky. The two bondholders, defendants, (who were taxpayers in the county,) declined to make defence. Bondholders, citizens of Tennessee, then voluntarily appeared and asked to be made parties, and, their prayer being granted, petitioned in August, 1885, for the removal of the cause to the Circuit Court of the United States on the ground that there was a controversy that was wholly between citizens of different States, and which could be fully determined as between them, that the defendants, the ministerial officers of the county, had no interest in the controversy, that the two bondholders were acting in concert with the plaintiffs, and that the petitioners were the only parties that had a real interest in the controversy adverse to the plaintiffs. The cause was removed to the Circuit Court, and, a motion to remand having been denied, the bill was dismissed. *Held*, (1) That the amount involved was sufficient to give jurisdiction; (2) That the motion to remand should have been granted; (3) That the removal could not be sustained under the first clause of the act of March 3, 1875, 18 Stat. 470, then in force, because the controversy was not between citizens of different States, as the parties could not be so arranged on the opposite sides of the matter in dispute as to bring about that result; nor, under the second clause of the section, because there did not exist a separable controversy wholly between citizens of different States and which could be fully determined between them. *Brown* v. *Trousdale*, 389.

RES JUDICATA.

The decree in this case in the court below, founded on the report of a master, awarded to the complainant the recovery of rental for five months, separately stated. In this respect the decree was sustained here, (136 U. S. 89,) but it was reversed and the cause remanded, in order to have the computation made, after inquiry into special subjects indicated in the mandate. The Circuit Court, after determining the

special matters, regarded the matter of the time and amounts of the rental as settled by the former decree and as sustained by this court, and awarded interest on the amounts from the date of the former decree. *Held*, that there was no error in this; that the remanding of the cause did not reopen the whole subject of the accounts, but, on the contrary, contemplated no new investigation as to past matters. *Kneeland* v. *American Loan & Trust Co.*, 509.

RIPARIAN PROPRIETORS.

1. In this case certain land formed by accretion, on the Illinois side of the Mississippi River, in St. Clair County, Illinois, was held to belong to the plaintiff, as part of certain surveys in the common fields of Prairie du Pont, in Illinois, and not to belong to the city of St. Louis, Missouri, as an accretion to, and part of, an island in that city, called "Arsenal Island" or "Quarantine Island," on the Missouri side of the river, which island was originally more than a mile higher up the river than said surveys. *St Louis* v. *Rutz*, 226.
2. By the law of Illinois the title of the plaintiff extended to the middle of the main channel of the Mississippi River. *Ib.*
3. It is a rule of property in Illinois, that the fee of the riparian owner of lands in that State bordering on the Mississippi River extends to the middle line of the main channel of the river. *Ib.*
4. The terms of the deed which conveyed title to the plaintiff construed as not limiting him to the line of low water mark on the river. *Ib.*
5. The sudden and perceptible loss of land on the premises conveyed to the plaintiff, which was visible in its progress, did not deprive the grantor of the plaintiff of his fee in the submerged land, nor change the boundaries of the surveys on the river front, as they existed when the land commenced to be washed away. *Ib.*
6. If the bed of a stream changes imperceptibly by the gradual washing away of the banks, the line of the land bordering upon it changes with it; but, if the change is by reason of a freshet, and occurs suddenly, the line remains as it was originally. *Ib.*
7. If an island or dry land forms upon that part of the bed of a river which is owned in fee by the riparian proprietor, the same is his property. *Ib.*
8. The right of accretion to an island in the river cannot be so extended lengthwise of the river as to exclude riparian proprietors above or below such island from access to the river, as such riparian proprietors. *Ib.*
9. The law of title by accretion can have no application to a movable island, travelling for more than a mile, and from one State to another, for its progress is not imperceptible, in a legal sense. *Ib.*

SAN FRANCISCO.

See PUEBLO LANDS OF SAN FRANCISCO.

STATUTE.

A. Construction of Statutes.

In all cases of ambiguity the contemporaneous construction not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is controlling. *Schell's Executors* v. *Fauché*, 562.

B. Statutes of the United States.

See Bankrupt, 1, 3;
Central Pacific Railroad;
Constitutional Law, 6, 7, 8;
Indian Territory, 1, 3;
Informer;
Jurisdiction, A, 10, 18, 19; B, 1;
Limitation, Statutes of, 1;
Longevity Pay;
Marine Corps;
Public Land;
Swamp and Overflowed Land, 1, 2, 3, 6, 10, 11.

C. Statutes of States and Territories.

The courts of the United States take judicial notice of all the public statutes of the several States. *Gormley* v. *Bunyan*, 623.

California. *See* Swamp Land, 9.
Dacota. *See* Equity, 4.
Illinois. *See* Guardian and Ward, 1, 4; Interest.
Iowa. *See* Constitutional Law, A, 4, 5; Local Law, 4.
Louisiana. *See* Equity, 11, (4); Jurisdiction, C, 5; Local Law, 6.
New Mexico. *See* Local Law, 2, 3.
New York. *See* Interest, 1; Limitation, Statutes of, 2.
Ohio. *See* Constitutional Law, B, 1, 2.
Tennessee. *See* Removal of Causes, 3.
Texas. *See* Local Law, 1; Constitutional Law, A, 9.
Virginia. *See* Constitutional Law, A, 1, 2, 3, 11.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTES OF LIMITATION.

See Limitation, Statutes of.

SWAMP AND OVERFLOWED LAND.

1. The swamp land grant of September 28, 1850, to the several States was *in præsenti*, and upon identification of the lands thereunder in lawful

TRADEMARK.